

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-000772-MR

STEVEN ENGLAND

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT  
HONORABLE DENNIS R. FOUST, SPECIAL JUDGE  
ACTION NO. 01-CI-00354

BARRY LAIRD

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MOORE AND WINE, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

WINE, JUDGE: Following a jury trial in 2002, Steven England was convicted of complicity to murder Lisa Halvorson. The jury sentenced him to life without parole.<sup>2</sup>

While the criminal matter was pending, Barry Laird, as executor of the estate of Lisa Halvorson, filed a wrongful-death action against England and his co-defendant, Samuel

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> The Kentucky Supreme Court affirmed England's conviction in an unpublished opinion. *England v. Commonwealth*, Nos. 2003-SC-0328-MR & 2004-SC-0506-TG (Rendered May 19, 2005).

Tyrone McCary. After England's conviction, the estate moved for summary judgment on the issue of liability.

To facilitate the motion for summary judgment, the estate also asked the court to appoint a guardian *ad litem* for England, who was incarcerated and had not filed an answer to the complaint. The trial court appointed Gary Lorenz as guardian *ad litem* to represent England's interest in this litigation. After filing a *pro se* answer, England filed a *pro se* motion to discharge Lorenz as guardian *ad litem*. In his motion, England alleged that Lorenz had failed to communicate with him about pending matters in the litigation. England asked that the court permit him to proceed in his own behalf. The trial court discharged Lorenz as guardian *ad litem* in an order entered on February 2, 2004.

The action then proceeded on the estate's motion for summary judgment.<sup>3</sup> After considering the parties' arguments, the trial court granted the motion, finding that England and McCary were collaterally estopped from denying liability based upon their criminal convictions. This Court dismissed England's initial appeal as it had been taken from a non-final judgment. After hearing evidence of the estate's damages, the trial court entered a judgment against England and McCary for damages totaling \$1,626,494.00. England now appeals from this judgment.

As an initial matter, we note that the estate has failed to file a brief in this case, as required by CR 76.12(1). Under CR 76.12(8), we may accept England's statement of the facts and issues as correct, reverse the judgment if we believe his brief

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<sup>3</sup> England filed a motion to disqualify the regular circuit judge on the grounds that he had represented the estate while in private practice. The motion was granted and a special judge was appointed to hear the case.

supports such a result, or treat the estate's failure to file a brief as a confession of error and reverse the judgment without reaching the merits of the case. However, the rule does not mandate a particular penalty; it merely provides penalty options which an appellate court, in its discretion, may impose for failure to file a brief. *Kupper v. Kentucky Board of Pharmacy*, 666 S.W.2d 729, 730 (Ky. 1983). While we do not approve of the estate's failure to file a brief, we decline to reverse solely on that basis. Moreover, after reviewing the record, we cannot find that England's brief supports reversal as a matter of law.

England first argues that the trial court erred in failing to reappoint a guardian *ad litem* for him. He correctly notes that CR 17.04 requires appointment of a guardian *ad litem* if a prisoner fails to defend a civil action brought against him. The trial court appointed a guardian *ad litem* for England as required by the rule, and then discharged the guardian at England's request.

However, CR 17.04 also provides "[a]ctions . . . may be brought by or defended by the prisoner." As previously noted, England did not request the appointment of a new guardian *ad litem* at the time the trial court discharged Lorenz. Rather, he specifically asked to represent himself in this matter. England maintains that he asked the trial court to appoint a new guardian *ad litem*. We are unable to find a written motion in the record, nor does England identify when or how he made such a request. Even in light of the estate's failure to file a brief and England's status as a *pro se* litigant, England has failed to show that the trial court did not comply with the requirements of CR 17.04.

England next argues that the trial court erred in granting partial summary judgment to the estate on the issue of liability. He contends that the trial court unfairly

deprived him of an opportunity to contest his responsibility for Lisa Halvorson's death in this civil action. We disagree. A criminal conviction can be used as collateral estoppel in a later civil action regardless of whether an appeal is taken. *Gossage v. Roberts*, 904 S.W.2d 246, 248 (Ky.App. 1995); *Roberts v. Wilcox*, 805 S.W.2d 152, 153 (Ky.App. 1991). The requirements for the offensive use of collateral estoppel are: (1) a final decision on the merits; (2) identity of issues; (3) issues actually litigated and determined; (4) a necessary issue; (5) a prior losing litigant; and (6) a full and fair opportunity to litigate. *May v. Oldfield*, 698 F. Supp. 124, 126 (E.D. Ky. 1988). "The general rule is that a judgment in a former action operates as an estoppel only as to matters which were necessarily involved and determined in the former action, and is not conclusive as to matters which were immaterial or unessential to the determination of the prior action or which were not necessary to uphold the judgment." *Sedley v. City of West Buechel*, 461 S.W.2d 556, 558 (Ky. 1970). The Court must inquire whether the judgment was rendered under such conditions that the party against whom collateral estoppel is pleaded had a realistically full and fair opportunity to present his case. *Id.* at 559.

KRS 411.130(1) provides that "[w]henver the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it . . . ." In this case, England was convicted of complicity to murder Lisa Halvorson. England's conviction for murder required the jury to find, beyond a reasonable doubt, that, with the intent to do so, he caused Halvorson's death. KRS 507.020(1)(a). Furthermore, one who is found guilty of complicity to a crime occupies the same status as one being guilty of the principal

offense. *Wilson v. Commonwealth*, 601 S.W.2d 280, 286 (Ky. 1980). *See also* KRS 502.020.

The issue of England's responsibility for the death of Lisa Halvorson was fully litigated in the criminal action and resolved against him. He does not allege that he was deprived of an opportunity to fully litigate this issue in the criminal action. Thus, we agree with the trial court that England's conviction for murder precludes him from re-litigating his liability for Halvorson's death in this civil action. As there was no genuine issue of material fact and the estate was entitled to judgment as a matter of law on this issue, CR 56.03, the trial court properly granted the estate's motion for summary judgment.

Accordingly, the judgment of the Graves Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FILED FOR APPELLEE.

Steven England, *pro se*  
Kentucky State Penitentiary  
Eddyville, Kentucky