Kentucky Law Survey: Civil Procedure

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INTRODUCTION

The past Kentucky appellate court term, which is the subject of this Survey, was an unusually interesting one for several reasons. First, an unusually high number of cases fell within this subject matter area. Second, some of the cases concern subjects seldom addressed at the appellate level and thus furnish an unusual degree of guidance. Additionally, the Kentucky Supreme Court seems to have produced a higher volume of opinions than had been the case in the recent past. With all the changes recently in the membership of that Court, it can only be hoped that this is a trend that will continue.

As has been the case in past Surveys, the practitioner is cautioned not to rely upon this Survey as an exhaustive treatment of the appellate decisions of the past year. The sheer number of opinions rendered has necessitated a culling process to choose the cases described herein. This process will, of necessity, reflect my own personal judgment as to what is interesting and worthy of comment.

In the cases of the past term, Kentucky has remained very much in the mainstream with its interpretations of the Civil Rules, keeping close to interpretations made of the Federal Rules of Civil Procedure. The decisions continue to rely on federal authority...
and commentaries, although I have not observed in these cases the marked preference for Wright & Miller's Federal Practice and Procedure over Moore's Federal Practice, which I have previously described. Nevertheless, Wright & Miller remains my personal choice because of ease of use. With these caveats in mind, I will return to a discussion of the various noteworthy cases of this term.

I. DISCOVERY

While the discovery rules remain the central and most striking feature of the civil procedure system established by the Kentucky Rules of Civil Procedure (CR) and the Federal Rules, case law interpreting those rules in both the federal and state systems is relatively scarce. This is due to the existence of Rules requiring the existence of a "final judgment" as a predicate to ordinary appellate review in both the state system and the federal system. The requirement of a final judgment is, therefore, a major obstacle in the appellate review of discovery actions, since such decisions are interlocutory in nature. A further obstacle to review comes from the refusal of appellate courts to consider procedural matters which may constitute "harmless error." Given the dual hurdle of awaiting final judgment and then tracing harmful error back to some matter in the discovery process which may have occurred years before, it should not be surprising that published discovery opinions are scarce. In the federal system, the problem is not as difficult, since a fair number of federal district court opinions are published in the Federal Sup-

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3 CR 26.01-37.05 contain the Kentucky discovery rules.
4 In the federal system, the discovery rules may be found in Fed. R. Civ. P. 26-37 [hereinafter cited as FRCP].
5 See In re Gill, 17 S.W. 166 (Ky. 1891); Weddington v. Sloan, 54 Ky. (15 B. Mon.) 119 (1854). Both cases involved a writ of habeas corpus. In each case, the Kentucky Court of Appeals determined that its jurisdiction extended only to final orders and judgments of inferior courts, unless an appeal is expressly allowed by statute.
7 See Clausen v. Hosiery Co. v. Paducah, 120 S.W.2d 1039 (Ky. 1938) (issuance of a subpoena duces tecum was not a final order of the court, and hence not subject to appeal).
8 See Davidson v. Moore, 340 S.W.2d 227 (Ky. 1960); FRCP 61; CR 61.01.
Thus it is possible, in federal practice, to get a feel for the interpretation of discovery rules from trial level opinions. However, no such feature is available in Kentucky state practice. Due to the final judgment requirement, the harmless error rule and the lack of published trial court opinions—predicting discovery interpretations in Kentucky is almost impossible, other than by relying on personal experience and observation. In view of such scarcity, it is of great significance that this past term had three appellate cases dealing with the discovery process.

The practical bars to Kentucky appellate review show that appellate cases dealing with discovery must have arisen in some extraordinary procedural setting. Indeed, two of the cases during this Survey period arose from an attempt to secure a writ of prohibition preventing a circuit judge from allowing certain discovery. The discovery section of the third decision is a virtually gratuitous aside in an appeal in which an evidentiary point was pivotal. Although in theory extraordinary writs (prohibition and mandamus) exist to secure appellate directions either to stop or to compel discovery, reading too much into the two cases would be a mistake. I do not think either case signals that the appellate courts are ready to begin active supervision of discovery. Such would be too burdensome, given the obvious magnitude of discovery. Rather, both cases rise to the appellate level due to the compelling nature of the facts.

In *Triple Elkhorn Mining Co. v. Anderson*, a writ of prohibition was issued. Questions had been asked in the deposition of a coal company employee which would have required disclosure of the wheelage rate paid by the company under contracts with non-

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9 See note 5 supra and accompanying text.
10 See note 8 supra and accompanying text.
11 *Triple Elkhorn Mining Co. v. Anderson*, 646 S.W.2d 725 (Ky. 1983); *Alexander v. Swearer*, 642 S.W.2d 896 (Ky. 1983); *Big Sandy Wholesale, Inc. v. Conley*, 639 S.W.2d 778 (Ky. 1982).
12 See notes 5-8 supra and accompanying text.
13 See *Triple Elkhorn Mining Co. v. Anderson*, 646 S.W.2d at 725; *Big Sandy Wholesale, Inc. v. Conley*, 639 S.W.2d at 778.
14 See *Alexander v. Swearer*, 642 S.W.2d at 896.
15 Such relief is available at the appellate level under the provisions of CR 76.36.
16 646 S.W.2d 725 (Ky. 1983).
17 Id.
parties. Prior Kentucky cases had held, in actions against coal companies for damages caused by trespass, that the measure of such damages was controlled by diminution in rental or market value, rather than by wheelage or tonnage rates.\(^{18}\) Thus, the wheelage or tonnage rates of deponent’s employer were not relevant to the proceeding under Kentucky law.

Review of the decision ordering the deponent to answer by petition for a writ of prohibition is very much akin to an ordinary trial-level decision upon a motion for a protective order. Thus, case law interpreting the availability of a protective order for such information should be relevant in this decision. In portion, the rule relating to protective orders provides “commercial information not be disclosed or be disclosed only in a designated way”.\(^{19}\) Although a great deal has been written about how to apportion the burden of proof when one party desires access to another’s commercial information,\(^{20}\) “[n]o one would suggest that discovery should be allowed of information that has no conceivable bearing on the case.”\(^{21}\) The information sought in *Anderson* did not have any conceivable bearing on the case. Thus, it did not meet the threshold discovery requirement of relevance, and hence, was clearly subject to the protection ordered. The pressing importance of seeking immediate appellate review was the fact that the desired information, of obvious importance to competitors, would have become part of the public record once disclosed. Any damage caused by the disclosure would not have been remediable. That unique and compelling harm, coupled with the clear Kentucky position that discovery

\(^{18}\) *See* Texaco Inc. v. Melton, 463 S.W.2d 301 (Ky. 1971); Kentucky Mountain Coal Co. v. Hacker, 412 S.W.2d 581 (Ky. 1967).

\(^{19}\) *Id.* CR 26.03(1)(g).

\(^{20}\) *See, e.g.*, 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2043 (1970) [hereinafter cited as WRIGHT & MILLER]. This treatise states:

> It is for the party resisting discovery to establish, in the first instance, that the information sought is within this provision of the rule and that he might be harmed by its disclosure. . . .

> If it is established that confidential information is being sought, the burden is on the party seeking discovery to establish that the information is sufficiently relevant and necessary to his case to outweigh the harm disclosure would cause to the person from whom he is seeking the information.

*Id.*

\(^{21}\) *Id.* at § 2008.
ought not to have been ordered by the trial court explains the granting of the extraordinary relief by way of a writ of prohibition.

Similarly compelling facts were present in Big Sandy Wholesale, Inc. v. Conley, where the Kentucky Supreme Court refused to issue a writ of prohibition. In that case, the plaintiff attempted to get a copy of a written report prepared for the defendant by a company providing services as an expert in seeking the cause of an automobile accident. Since the work in question was done by an expert in anticipation of litigation, that expert’s work product fell within the qualified protections of CR 26.02. Since the defendant did not expect to call this expert as a witness at trial, facts or opinions known to that expert could only be discovered by a showing of "exceptional circumstances." In Big Sandy, the vehicle in question had been disassembled, and the part (left wheel assembly) suspected of causing the accident had been sent away for expert evaluation. The expert who examined the wheel assembly furnished a report to the defendant. The defendant wanted discovery of the report prohibited on the basis that the expert was readily available for deposition by the plaintiff at the expert’s place of business in Ohio at a cost of $1,000. The Supreme Court agreed with the trial judge that these facts constituted "exceptional circumstances" and ordered disclosure of the report.

Given the facts, the result in Big Sandy seems quite correct. Indeed, the result is quite similar to one reached in a Kentucky federal trial court, which ordered disclosure of a report containing information which could not then have been duplicated by the

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22 646 S.W.2d at 726.
23 639 S.W.2d at 778 (Ky. 1982).
24 Id. at 780.
25 Id. at 778-79.
26 CR 26.02(4)(b) provides:

A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35.02 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the subject by other means.

Rule 35.02, which applies only to reports of examining physicians, is not relevant here.
27 639 S.W.2d at 779.
28 Id. at 780.
29 Id. at 779-80.
party seeking discovery.\textsuperscript{30} In similar federal decisions from other states, discovery has been ordered when an item had been substantially altered and was no longer available for examination.\textsuperscript{31} In a case even more similar to \textit{Big Sandy}, discovery was ordered where an automobile had been disassembled.\textsuperscript{32} In view of these cases, situations where alternate sources are impossible to secure, or where the cost is prohibitive, disclosure is appropriate.

While the result in \textit{Big Sandy} is quite correct both the trial court and the Supreme Court apparently failed to notice that, "unless manifest injustice would result," the court "shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred . . . in obtaining facts and opinions from the expert."\textsuperscript{33} It appears, however, that the plaintiff secured the copy of the expert's report at no cost. Given that the defendant was not going to use the expert at trial,\textsuperscript{34} it seems only fair that the plaintiff pay some portion of the cost of securing that report, since plaintiff will be the one to benefit. Since the plaintiff in \textit{Big Sandy} would have had to pay $1,000 to get the information by deposition in Ohio,\textsuperscript{35} it does not seem unreasonable to ask that he bear some of the expense in getting the document. The order of discovery was correct, but allowing one party a free ride is a serious error. The possibility of a "free ride" in discovery has been a nagging problem since the Federal Rules were adopted, but the problem can be obviated in large part by a strict adherence to the rules concerning imposition of costs.

\textsuperscript{30} See Sanford Constr. Co. v. Kaiser Aluminum & Chem. Sales, Inc., 45 F.R.D. 465 (E.D. Ky. 1968). In Sanford, a construction firm brought a breach of warranty action against a manufacturer following the collapse of an aluminum sewer pipe. Since none of the defendant's agents were present at excavation of the pipe and backfill, information contained in plaintiff's expert's reports could not be obtained by defendant's independent investigation. The court required production of the expert's reports under FRCP 34 which covers the production of documents and things, and not FRCP 26, the federal counterpart of CR 26. \textit{Id.} at 466-67.

\textsuperscript{31} See, e.g., Walsh v. Reynolds Metals Co., 15 F.R.D. 376, 379 (D.N.J. 1954) (expert's report, compiled immediately after the explosion of a gas stove, was discoverable under FRCP 34 because the stove was subsequently dismantled and certain parts removed).

\textsuperscript{32} Colden v. R.J. Schofield Motors, 14 F.R.D. 521, 522 (N.D. Ohio 1952) (since the car had been dismantled, the court, relying on FRCP 34, concluded that the party seeking discovery could not obtain the information requested through independent investigation).

\textsuperscript{33} CR 26.04(4)(c).

\textsuperscript{34} 639 S.W.2d at 780.

\textsuperscript{35} \textit{Id.}
The problem of disclosure of reports during the discovery process was also addressed by the Kentucky Supreme Court in *Alexander v. Swearer.* In that case, the defendant was ordered to turn over a copy of a report of an investigator concerning the accident. Although the case does not explicitly say so, I assume that the report was done by an insurance claims adjuster, or an investigator for defendant's liability insurer. I base that assumption on the fact that the defendant rear-ended plaintiff's vehicle and the report in question contained such phrases as "this looks like an open and shut case," "several things bother me," "this is probably the reason," and "it is possible that the driver."

What troubled the Supreme Court about the disclosure of an investigative report containing phrases like those mentioned above is that they rather obviously represent the "mental impressions, conclusions, opinions or legal theories" of the person writing the report, disclosure of which is forbidden by the rules. Like the report of the expert witness in *Big Sandy*, the work in question here was trial preparation material and as such was within the qualified protection of CR 26.02(3). The difference between this case and *Big Sandy* is that *Alexander* did not involve preparation by an expert witness, which is subject to the separate protections of CR 26.02(4).

The protection of trial preparation materials has been an especially sensitive issue since the adoption of the current rules in the federal system. The so-called "work product" protection, now

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36 642 S.W.2d 896 (Ky. 1983).

37 *Id.* at 898.

38 *Id.*

39 CR 26.02(3)(a).

40 *Id.* CR 26.02(3)(a) states in part: "[A] party may obtain discovery . . . [of matters] prepared in anticipation of litigation . . . only upon a showing . . . [of] substantial need . . . and that he is unable without undue hardship" to secure the materials or their equivalent elsewhere.

41 642 S.W.2d at 898.

42 CR 26.02(3)(a) states:

[204x195]"[A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by some other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure."
codified in the rules, has its origin in the United States Supreme Court decision in *Hickman v. Taylor*. In that opinion, the Court paid special attention to inquiries into the mental state and thoughts of opposing counsel, worrying that discovery of such would thrust an attorney into the inappropriate role of a witness. A concurring opinion expressed doubts that such disclosures could ever be justified.

The debate surrounding this specialized area of "opinion work product" centers on two aspects: (1) whether the protection applies to non-attorneys (the focus of *Hickman*); and (2) whether the protection is absolute. As regards the breadth of work product, the question seems easily settled by the plain language of the current rule that includes "an attorney or other representative of a party concerning the litigation."

The case law indicates that "opinion work product immunity applies equally to lawyers and non-lawyers alike." Indeed, the breadth of the work product exception may be sufficient to allow a party to refuse to answer questions which might reflect the impressions of his attorney as to what are the strong and weak points of the case.

The harder question is determining whether such protection is absolute. As has been noted previously, the Supreme Court in *Hickman* seems to have believed that the immunity was qualified, while Justice Jackson found the protection absolute. Since that time, some federal case law has found the immunity absolute.

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43 FRCP 26.
44 329 U.S. 495 (1947).
45 Id. at 512-13.
46 Id. at 519 (Jackson, J., concurring). Justice Jackson noted that "nothing in the tradition or practice of discovery up to the time of these Rules would have suggested that they would authorize such a practice as here proposed." Id.
47 In *Hickman*, plaintiff requested from the defendants copies of any statements of crew members taken in connection with the accident. 329 U.S. at 495.
48 "In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." CR 26.02(3)(a).
49 See Duplan Corp. v. Deering Milliken Inc., 540 F.2d 1215, 1219 (4th Cir. 1976).
50 See 8 WRIGHT & MILLER, supra note 20, at § 2026.
52 Id. at 519 (Jackson, J., concurring).
but the United States Supreme Court has recently indicated that it was "not prepared at this juncture to say that such material is always protected." Some courts that normally consider work product to be protected seem to create exceptions for crime or fraud and when the mental impressions and theories of a party's attorney are at issue. There is no Kentucky case law to indicate whether we would adopt that qualified position, and I would not even venture a guess as to how that issue will go.

The Kentucky position appears to be that opinion work product is not absolutely protected. In *Alexander*, Chief Justice Stephens noted that the trial court had not required the party seeking discovery to demonstrate hardship, a requirement he characterized as "unambiguous and mandatory." In reaching its decision, the Court seems to imply that hardship might justify the disclosure of opinion work product. This may provide a clue that Kentucky courts will not adopt the position of absolute protection for opinion work product. If, indeed, only a qualified protection is to be adopted, then the courts must carefully proceed in determining what facts might justify such disclosure. The inherent abuse and harm of disclosure is always going to be present. As a protection, a strong "showing of necessity and unavailability by other means" should be required before disclosure is compelled. Thus, the showing of hardship necessary to pierce the normal work product protection would be increased substantially for opinion work product. This is the result which should eventually be reached.

II. LONG ARM JURISDICTION

Although Kentucky has a very broad long arm statute, and borders with several states at major metropolitan areas, the state has had surprisingly few long arm jurisdictional cases. As has been

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54 Upjohn Co. v. United States, 449 U.S. 383, 401 (1981) (The Court determined that the government's showing of substantial need and inability to obtain the equivalent information without undue hardship was not sufficient to require disclosure of notes and memoranda based on oral statements, but the Court declined to impose an absolute immunity). *Id.*


56 Alexander v. Swearer, 642 S.W.2d at 898.

57 *Id.*

58 Upjohn v. United States, 449 U.S. at 402.
stated in an earlier article, Kentucky has not rethought its jurisdictional and notice schemes in recent years despite major federal constitutional developments. In the recent case of First National Bank of Louisville v. Shore Tire Co., the court of appeals interpreted the Kentucky long arm statute in a very interesting fact pattern. In Shore Tire, the bank was the owner of some accounts receivable which had originally belonged to IRI, a corporation with its principal place of business in Kentucky. Defendants in the action were various account debtors of IRI, and all were non-resident corporations without certificates to do business in Kentucky. In a series of transactions over several years, the defendant debtors had purchased tires from IRI on credit, which resulted in the accounts which were the subject of the action.

In deciding whether the various defendants were subject to personal jurisdiction in Kentucky, the court of appeals noted that the orders with IRI were the result of IRI salesmen soliciting these non-resident defendants in their home states. The contracts of purchase arose either by mail or by phone. The points of origin of the negotiations were not clear, but the orders were accepted in Kentucky and tires were shipped from the state. Despite the orders being solicited out of state, the court of appeals found that the long course of dealing in which the defendants had engaged was sufficient to bring them within the "transacting business" portion of the long arm statute, and that those contacts were sufficient to satisfy the minimum contacts requirements of federal law. Prior

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60 651 S.W.2d 472 (Ky. Ct. App. 1983).
62 651 S.W.2d at 472-73.
63 Id. at 473.
64 Id. at 472.
65 Id. at 473.
67 651 S.W.2d at 474. The necessity of satisfying federal standards stems from the fact that impermissibly broad assertions of jurisdiction are violative of due process. Pennoyer v. Neff, 95 U.S. 714, 734-36 (1877). The due process determination is judged by the "minimum contacts" standard set forth in International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
to reaching its conclusion that the defendants fell within Kentucky’s jurisdiction, the court engaged in a very interesting discussion of the difference between asserting jurisdiction over a non-resident seller (the more common case) and a non-resident buyer (the facts in *Shore Tire*). 68

The dichotomy between non-resident sellers and non-resident buyers is illustrated by the United States Supreme Court decision in *McGee v. International Life Insurance Co.* 69 In *McGee*, California was allowed to exercise jurisdiction over a non-resident seller of life insurance for a claim arising from what seemingly was the only insurance contract issued by the company to a California resident. 70 Although one can find cases in which a non-resident seller was not subjected to jurisdiction, 71 it seems fairly clear that a non-resident seller has, in its decision to solicit business in the state, made more of a conscious undertaking to avail itself of that state’s law than a non-resident buyer. Attaching significance to that distinction, many courts have refused to uphold jurisdiction over non-resident buyers. 72

A prior Kentucky case, *Tube Turns Division of Chemtron Corp. v. Patterson Co.*, 73 seemed to indicate that Kentucky would take the position that non-resident buyers were not within the jurisdiction of the Kentucky courts. 74 *Tube Turns* was distinguished factually in *Shore Tire* by observing that in *Tube Turns* only a single purchase transaction was claimed as a basis for jurisdiction. 75 In *Shore Tire*, the long continuing course of dealing between the defendants and ICI was said to bring them clearly within the jurisdiction of the Kentucky courts. 76

The result in *Shore Tire* is certainly a possible interpretation. In the decision, the court of appeals continues to assert that the Kentucky long arm statute reaches the outer limits of due process. 77
an interpretation consistent with the declaration of a recent Sixth Circuit case. 78 I have disagreed previously with such an interpretation, 79 but such broad construction is unnecessary to reach the final conclusion of Shore Tire. Even under the strict line of due process interpretations favored by the United States Supreme Court, 80 there is no doubt that the long course of dealing engaged in by the defendants with a Kentucky manufacturing facility made it perfectly fair to subject them to a suit arising from those dealings in a Kentucky forum. Still, I would conclude from the opinion that more factual connections to the jurisdiction will be required to assert jurisdiction over a buyer than would be required for a seller.

III. FORUM NON CONVENIENS

It is quite interesting that, in a year when our appellate courts had one of their relatively infrequent examinations of long arm jurisdiction, there also arose a case invoking the somewhat related doctrine of forum non conveniens. This doctrine can only be invoked if a court determines it has jurisdiction, but should decline to hear the case on the basis of equitable factors, thus leaving the decision to be made in a "more convenient" forum. 81 The doctrine of long arm jurisdiction, rooted as it is in the concept of due process, also involves in part a weighing of the fairness and relative convenience of exercising jurisdiction.

In the case of Allen v. Appalachian Regional Hospitals Inc., 82 the court of appeals upheld a dismissal, by Judge Charles Tackett of the Fayette Circuit Court, of a medical malpractice action on the basis of forum non conveniens. That case presented no jurisdictional problems, and Fayette County was a proper venue because

78 Poyner v. Erma Werke GMBH, 618 F.2d 1186 (6th Cir. 1980). Poyner held that, under Kentucky's long arm statute, the trial court had personal jurisdiction over a German based manufacturer of firearms and a New York distributor of firearms, where, in a products liability action, a 16-year old Kentucky youth was injured by a bullet wound inflicted by a semi-automatic pistol. Id. at 1192.
79 See Leathers, supra note 59, at 772.
81 BLACK'S LAW DICTIONARY 589-90 (5th ed. 1979).
it was the site of the principal office of one of the defendants. Nevertheless, the action was dismissed due to the fact that the alleged malpractice occurred in Harlan County, and that county seemed to be the most convenient place of trial for securing witnesses and physical evidence.83

From the standpoint of the doctrine of forum non conveniens, the *Allen* decision is not particularly exciting. Harlan County was the situs of the alleged malpractice, the residence of the co-defendant doctor and the location of another co-defendant medical clinic.84 What is significant about the case is that it is the first time that a Kentucky court has applied the doctrine in a case involving two Kentucky counties, rather than Kentucky and a sister state. In two earlier cases, Kentucky courts had directed the dismissal of actions so that the cases might be tried in another state which was considered a more convenient forum.85 In a 1981 case, the court of appeals impliedly approved usage of the doctrine in the intrastate setting,86 but the holding in *Allen* clearly establishes applicability of the doctrine in the intrastate setting.

Although establishing the doctrine in an intrastate setting, the facts in *Allen* do not provide much practical guidance as to when a trial judge might exercise his discretion to invoke the concept. This is also an area in which federal case law will be of little aid to the practitioner. The last major federal forum non conveniens case was *Gulf Oil Corp. v. Gilbert*,87 which was decided more than thirty years ago. The doctrine now has almost no utility in the federal system due to the passage by Congress of the transfer statute,88 making it possible for a federal court having jurisdiction and venue to transfer the case to another federal district court

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83 Id. at 7.
84 Id. at 6.
86 Humeldorf v. Humeldorf, 616 S.W.2d 794 (Ky. Ct. App. 1981). In this case Kentucky's divorce venue statute, KRS 452.470 (1975) which fixes venue in the home county of the wife, was held unconstitutional. The court said the following factors are relevant in determining the county of venue in a divorce action: "(1) the county of the parties' marital residence prior to separation; (2) the usual residence of the children, if any; (3) accessibility of witnesses and the economy of offering proof." 616 S.W.2d at 798.
which can more conveniently try the action. Although the case law interpreting appropriate fact patterns for usage of transfer might seem applicable by analogy for forum non conveniens determinations under state law, caution is advised in making such analogy. The transfer statute is clearly not a precise codification of forum non conveniens.\(^9\) Hence, transfer may be granted in cases that would not justify a forum non conveniens dismissal.

Quite apart from the intrastate dimensions of the forum non conveniens doctrine as now interpreted in Kentucky, it is interesting to note that the doctrine is not nearly as ancient as one might suppose. The seminal discussion of forum non conveniens (indeed, some have thought that the article itself created the doctrine) is in a law review article written more than fifty years ago.\(^9\) In that article, Professor Blair noted that, at that time, the doctrine was applicable in less than half a dozen American jurisdictions.\(^9\) The concept itself comes from the philosophical position that “jurisdiction may be refused where there are good reasons against assuming it.”\(^9\) Those familiar with the doctrine may be surprised to learn that it engendered a good bit of criticism as it related to interstate cases. Some feared that the doctrine was being used to discriminate against nonresidents, a usage which would be violative of the privileges and immunities clause of Article IV of the United States Constitution.\(^9\) At the time of that critical appraisal, which was contemporaneous with \textit{Gulf Oil Corp. v. Gilbert},\(^9\) the doctrine was rejected by most states\(^9\) and accepted in only a half dozen,\(^9\) just

\(^9\) Among the possible differences which might be noted between the two concepts is that under 28 U.S.C. § 1404 transfer is available at the motion of either plaintiff or defendant. So far as can be determined, no action was ever dismissed upon forum non conveniens grounds at the request of a plaintiff. As has been observed in the leading treatise on federal practice, “transfers under the statute may be granted under circumstances that would not have justified a dismissal prior to the statute.” 5 \textit{Wright & Miller}, supra note 20, § 1352, at 574 (1972).


\(^{91}\) Cf. \textit{id}.

\(^{92}\) 21 C.J.S. \textit{Courts} § 90, at 140 (1940).


\(^{94}\) 330 U.S. at 501.

\(^{95}\) Barrett, \textit{supra} note 93, at 388 n.40.

\(^{96}\) \textit{Id.} at 389 n.41. Those states which apparently had accepted the doctrine generally at that time were: Florida, Louisiana, Massachusetts, New Hampshire, New Jersey, and New York. \textit{Id.}
as Professor Blair had observed twenty years earlier. The Supreme Court decision in *Gilbert* apparently triggered acceptance for the doctrine. By 1960, it was noted that "the modern trend is toward general acceptance of the rule of forum non conveniens in some form." By the time a further study was done of the acceptance of the doctrine in 1971, it had carried the day. It was then being applied in sixteen states, accepted in six others and seemingly approved in still five more (including Kentucky).

Whatever the merits of the history of the concept, it is now clearly established in Kentucky in both the interstate and intrastate settings. Kentucky's application of forum non conveniens brings the state into agreement with other jurisdictions.

**IV. STAYS PENDING APPELLATE REVIEW**

This past term included the case of *Bella Garden Apartments, Ltd. v. Johnson*, in which the judgment of the Bell Circuit Court included a mandatory injunction to plaintiff to vacate certain premises. Seeking to delay the injunction pending appeal, plaintiff sought and was granted a stay by the court of appeals, provided plaintiff would furnish bond in the trial court. The stay was granted ex parte, bond was furnished by plaintiff, and then defendant sought to have the court of appeals set aside its ex parte order. That court was willing to do so but thought it a fruitless action since plaintiff had by that time furnished bond in the trial court, which the court of appeals seems to have thought equivalent to a supersedeas bond.

All this activity centered upon a perception on the part of plaintiff's counsel, the trial judge and the court of appeals that the provisions of CR 62.03(1), which allows supersedeas in an action

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97 See note 91 supra and accompanying text.
100 *Id.* at 106 n.8.
101 *See* Allen v. Appalachian Regional Hosps. Inc., 30 KLS 7 at 6-7.
102 642 S.W.2d 898 (Ky. 1982).
103 *Id.* at 899-900.
104 *Id.* at 900.
105 The title of the rule is quite indicative of its substantive provisions: "Pending appeal of judgment other than injunction judgment." CR 62.03 (emphasis added).
if bond is posted pursuant to CR 73.04. The plain fact of the matter, as noted by the Kentucky Supreme Court in *Bella Gardens*, is that the rule upon which all those parties were relying has nothing whatsoever to do with securing interlocutory relief pending appeal of a case granting injunctive relief.

The availability of interlocutory relief pending appeal of cases involving *injunctive* relief is governed by CR 65.08. That this rule is the exclusive source of such interlocutory relief is made clear by CR 62.02. What this means, quite simply, is that a party seeking interlocutory relief pending appeal of a case involving an injunction, may obtain relief only from the court of appeals, which has the power to "grant, suspend or modify" the injunctive relief pending appeal. To put the matter another way, it is impossible to supersedeas an action involving an injunction.

The inapplicability of supersedeas relief to injunctions is something which has a long and clear history in Kentucky. Long before the adoption of the Civil Rules, the practice code provided that parties suffering from injunctive relief could seek relief from the Court of Appeals pending appeal. What this means, as a practical matter, is that relief from injunctions is not a matter of right (as would be the suspension of a money judgment by the furnishing of supersedeas bond), but rather is addressed to the equitable jurisdiction of the appellate court. At least four Kentucky appellate cases prior to *Bella Gardens* clearly state that supersedeas is inapplicable to cases of injunctive relief. In the face of the clari-

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106 See 642 S.W.2d at 900.
107 Id.
108 Again, the rule title gives indication of its contents: "Interlocutory relief pending appeal from final judgment." CR 65.08.
109 "When an appeal is taken from any final judgment granting or denying injunctive relief, the judgment may be stayed as provided in Rule 65.08." CR 62.02 (emphasis added).
110 "After the record on appeal has been filed in the Court of Appeals, ... any party may move the Court of Appeals to grant, suspend, or modify injunctive relief during the pendency of the appeal ...." CR 65.08(3).
111 "Either party, within twenty days after the entry of such an order, may ... move the Court of Appeals ... to revise the order of the lower court, and finally determine how far the injunction shall be suspended, modified or continued pending the appeal." KENTUCKY CIVIL CODE OF PRACTICE § 747 (Carroll 1919).
112 See Lexington Loose Leaf Tobacco Warehouse Co. v. Coleman, 158 S.W.2d 633 (Ky. 1942); Cox v. Jones, 235 S.W. 365 (Ky. 1921); Stratton & Terstegge v. Mosely, 144 S.W. 1083 (Ky. 1912); Borrone v. Mosely, 137 S.W. 531 (Ky. 1911).
ty of the rules and the cases interpreting the rules, one cannot but think the rule is well settled.

V. SETTING ASIDE JUDGMENTS

While one might wish that any trial court adjudication, after the expiration of the time for appeal, would be a final settlement of the controversy, such is obviously not the case. Some cases never seem to die no matter how many times they get decided. The process of allowing a trial court to set aside its former judgments is formalized in the current version of CR 60.02. While it may serve a salutary purpose to have such power available, policy demands that exercise of the power be infrequent.

In the case of Morgan v. O'Neil, the Kentucky Supreme Court had occasion to interpret the rule as applied to a default judgment obtained in Jefferson Circuit Court. Default judgments are clearly disfavored by the law. That is the reason that "cases calling for great liberality in granting Rule 60(b) motions [identical to Kentucky CR 60.02], for the most part, have involved default judgments." However, one should not forget that "[a] judgment of a court having jurisdiction of the parties and of the subject-matter operates as res judicata, in the absence of fraud or collusion, even if obtained upon a default." In attempting to balance those conflicting policies, the Kentucky Supreme Court has in Morgan rendered a decision which has far-reaching implications.

Morgan involved an attempt to enforce an Indiana judgment against a stockholder of a Kentucky corporation. Although the judgment was against the corporation, the plaintiff asserted that

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113 CR 60.02 states in part:

On motion, a court may . . . relieve a party . . . from its final judgment . . . upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

114 652 S.W.2d 83 (Ky. 1983).

115 11 WRIGHT & MILLER, supra note 20, § 2857, at 160.


117 652 S.W.2d at 85.
O’Neil (alleged to have been the sole stockholder of the corporation) was personally liable for the debt because he had allowed the corporation to proceed through dissolution procedures while having knowledge of the debt owed plaintiffs. O’Neil was named individually as a party defendant in an amended complaint, but he filed no answer and made no appearance. Judgment was entered against him by default, and he subsequently moved to set that aside under CR 60.02. The Kentucky Supreme Court held that the judgment should be set aside on the grounds that the complaint had failed to state a claim upon which relief might be granted. Thus, Kentucky’s position is that a default judgment must be supported by a complaint which states a claim upon which relief may be granted.

In reaching the conclusion that the judgment should be set aside for failure to state a claim, the Supreme Court has added a new ground to those normally utilized in practice under CR 60.02. Now, in addition to being an inquiry into such fundamental issues as jurisdiction, notice, fraud, mistake, and newly discovered evidence, the rule has been expanded to include a post-judgment inquiry into the sufficiency of the pleadings. The effect of this change is multiplied by the fact that the pleading standard to which the Court held the plaintiff for purposes of surviving a rule 60.02 motion clearly appears to be more stringent than would have been applied had the question arisen in the typical context of a motion to dismiss for failure to state a claim upon which relief may be granted. However, prior Kentucky case law indicates that it is more difficult to attack a judgment under CR 60.02 than to have an action dismissed for failure of the complaint to state a claim upon which relief may be granted. Thus, the Court’s conclusion in Morgan was incorrect.

119 Id. at 84.
118 Id. at 86 (Leibson, J., dissenting).
117 See CR 12.02(f).
120 To survive an attack under CR 60.02, a complaint “need not possess the qualities of immunity to attack by demurrer (or attack under CR 12.02(7) [sic].” Crowder v. American Mut. Liab. Ins. Co., 379 S.W.2d 236, 238 (Ky. 1964) (citing 30A Am. Jur. Judgments § 213).
Based upon my reading of the Kentucky case law relating to pleading standards, I believe the complaint in Morgan contained sufficient information to have survived a motion to dismiss for failure to state a claim. The plaintiff's complaint alleged that defendant let the corporation (of which he was alleged to be the sole stockholder) be dissolved despite knowledge of the debt to plaintiff and that the defendant was therefore personally liable. Under the current pleading rules in Kentucky, "a pleading should no longer be construed against the pleader." Not only should the pleader be given the benefit of the doubt, but "a complaint will not be dismissed for failure to state a claim unless it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claim."

Given the concession of the former Court of Appeals in judging the sufficiency of a complaint that "[i]t is conceivable that circumstances could arise under which an employer may become liable for the murder of an employee," the allegation in Morgan that a sole stockholder would be personally liable hardly seems beyond the realm of legal possibility. Indeed, Kentucky law has recognized various theories under which shareholders of a corporation may become personally responsible for corporate debts. Given that a "complaint need only give fair notice of a cause of action and the relief sought," the plaintiff's allegation that the defendant was personally liable for a specified amount would seem sufficient to survive a motion to dismiss for failure to state a claim. Plaintiff's complaint is at least as informative as those set forth as models in the forms accompanying the rules. Therefore, I conclude that, at least prior to Morgan, a complaint such as the one filed therein would have survived an attack at the pleading stage.

Two possible conclusions follow from Morgan: (1) the Supreme Court has obliged the Kentucky trial courts to apply a stricter

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126 Pierson Trapp Co. v. Peak, 340 S.W.2d 456, 460 (Ky. 1960). See also Ingram v. Ingram, 283 S.W.2d 210 (Ky. 1955); Spencer v. Woods, 282 S.W.2d 851 (Ky. 1955).

127 Johnson v. Thoni Oil Magic Benzel Gas Stations Inc., 467 S.W.2d 772, 775 (Ky. 1971).

128 See, e.g., Steele v. Stankey, 35 S.W.2d 867 (Ky. 1931).

standard for pleadings in ruling on a motion to set aside a judgment; or (2) the stricter pleading requirement found in Morgan is applicable both in reviewing a pleading in the initial stages of a suit and in reviewing a motion to set aside a judgment. It really makes no difference which is true because either one will have exactly the same negative effect on the pleading system.

Any procedural system must be internally consistent in order to function smoothly. No system can run faster than the speed which is available at its narrowest point. Detailed code pleading was abandoned long ago for policy reasons. Yet a possible effect of Morgan is to resurrect that old system. Having relaxed pleading rules is not helpful if judgments may be set aside for a failure to comply with strict pleading rules. No prudent attorney can now afford to be sparse with his pleading in the filing of a suit because he has no way of knowing at what long-advanced point that paucity of pleading may return to haunt him. Indeed, given that there is no indication that Morgan is limited to defaults, there is no reason to think it inapplicable to any judgment. Thus the prudent attorney should plead artfully, whether the test at motion to dismiss remains the same or is modified. Since the system will apparently narrow down to strict pleading at the time of motions under CR 60.02, that requirement will slow down the system all the way to the initial filing of a complaint and possibly alter behavior throughout. Perhaps, the point is most colorfully made in the dissent by Judge Leibson: "The majority opinion in this case is the tail wagging the dog. In my view neither the tail nor the dog will hunt. I predict much mischief will result from permitting this type of attack on the finality of judgments."130 I agree completely and think the majority has thrust upon us a great potential for problems. The Court has impaired the finality of judgments and undermined a pleading system which has been long and carefully developed.

CONCLUSION

In all of this, I have made some attempt to set forth what I view to be the most significant procedural developments during the past year. While I have disagreed in some respects with some

130 652 S.W.2d at 86-87 (Leibson, J., dissenting).
of the decisions, I suppose that is to be expected from an academic commentator. Despite that, I believe the year was unusually good in that case law was developed on matters previously unaddressed. While it may be a case of three steps forward and one step back, still I think, on the whole, that progress is being made in the right direction. A bit more attention to the letter of the rules and a bit more thought as to the consequences in areas that at first glance appear unrelated will bring further advance. I look forward hopefully to that time.