Kentucky Law Survey: Civil Procedure

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Civil Procedure

BY JOHN R. LEATHERS*

INTRODUCTION

During this past term, several decisions of the Kentucky appellate courts have dealt with civil procedure matters. Although this Survey will comment on those opinions I believe to be most significant, the practitioner should not rely on this Survey as exhaustive of recent developments.¹

As was noted in the last Survey of civil procedure published in the Kentucky Law Journal,² one of the most troubling aspects of research involving Kentucky procedural law is a lack of extensive precedents or a detailed treatise. This Survey will attempt to demonstrate that a framework developed in the prior Survey³ continues to be a helpful tool for Kentucky research—that Kentucky appellate cases rely heavily on federal precedents and the major treatises on federal law in interpreting the Kentucky civil rules.

I. INTERVENTION

During the past term, Kentucky’s appellate courts decided two cases involving intervention under Kentucky Rules of Civil Procedure (CR) 24.⁴ Gayner v. Packaging Service Corp.⁵ involved a denial of the right to intervene; Ambassador College v.

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¹ Professor of Law, University of Kentucky. J.D. 1971, University of New Mexico; LL.M. 1973, Columbia University.


³ Id. at 551-52.

⁴ CR 24 is divided into three subsections relative to intervention; CR 24.01 Intervention of Right, CR 24.02 Permissive Intervention and CR 24.03 Procedure. For the complete text of the rule, see Kentucky Rules of Court (West 1982).

⁵ 636 S.W.2d 658 (Ky. Ct. App. 1982).
Combs ordered that intervention be allowed in a case remanded earlier for a trial. Although the rule is divided into permissive intervention and intervention as of right, both cases involved intervention as of right and fit well within the framework of federal authority.

In *Gayner*, a suit had been filed by Packaging Service against Chapnick. Chapnick claimed that he had an exclusive right of first refusal to purchase some stock owned by Packaging Service. Packing was concerned about what rights, if any, Chapnick had to purchase. In the course of the suit it was discovered that Chapnick had insufficient funds to make the purchase himself but had secured the financial backing of Gayner. Gayner sought to intervene under CR 24.01(b), which provides that a person may intervene as of right

when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The court held that Gayner's interest was too remote for such intervention since his interest only arose if Chapnick prevailed; in the suit at hand his interest was only contingent. In support of its decision, the court of appeals cited as authority the federal counterpart of CR 24, with specific citation to a federal district court case and two federal circuit court cases. In looking to Kentucky authority, the court noted the similarity between determining a person's status for intervention and a person's status as a real party in interest under CR 17.01.

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6 636 S.W.2d 305 (Ky. 1982).
7 636 S.W.2d at 658.
8 Id. at 659.
9 Id.
10 Id. at 659-60.
11 FED. R. CIV. P. 24 [hereinafter cited as FRCP].
13 Rosebud Coal Sales Co. v. Andrus, 644 F.2d 849 (10th Cir. 1981); United States v. 936.71 Acres of Land, 418 F.2d 551 (5th Cir. 1969).
14 636 S.W.2d at 660. The rule states:
A close relationship exists among CR 17 (real party in interest), CR 19 (indispensable party), CR 23 (class action members) and CR 24 (intervention);\(^{15}\) thus, precedents under the various rules are mutually helpful.\(^{16}\)

In *Ambassador College*,\(^{17}\) the Kentucky Supreme Court ordered the trial court to allow Ambassador College to intervene in a case which had previously been heard on appeal.\(^{18}\) Ordinarily, intervention is not considered timely if it is sought after appeal, although it may be allowed in unusual circumstances;\(^{19}\) the Ambassador College intervention does not really fall within the cat-

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Every action shall be prosecuted in the name of the real party in interest, but a personal representative, guardian, curator, committee of a person of unsound mind, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, a county, municipal corporation, public board or other such body, a receiver appointed by a court, the assignee for the benefit of creditors, or a person expressly authorized by statute to do so, may bring an action without joining the party or parties for whose benefit it is prosecuted. Nothing herein, however, shall abrogate or take away an individual's right to sue.

CR 17.01 Real Party in Interest (1982).

For the complete text of CR 17, Real Party in Interest, see *supra* note 14. Rule 19, Joinder of Persons Needed for Just Adjudication, defines "indispensable party" in CR 19.01, sets forth the procedure for the court to determine whether the action may continue without such party in CR 19.02 and requires a claimant to set forth any such parties known to him and the reasons why they are not joined in CR 19.03. Rule 23 sets forth the prerequisites for a class action (CR 23.01), situations necessitating the class action form (23.02), requirements for maintenance of the action (23.03) and additional provisions for orders (23.04) and dismissal or compromise (23.05). For an outline of CR 24 Intervention, see *supra* note 4.

The court can find agreement about that interrelationship in *J. Moore, Moore's Federal Practice* (2d Ed. 1948). Moore states:

In keeping with the theory underlying revision of Rules 19, 23, and 24, the revision defined a party needed for just adjudication in Rule 19 and used comparable language to describe a member of a class under Rule 23 and a person entitled to intervention as of right under Rule 24.

*Id.* at ¶ 24.09-1(3) [footnote omitted]. *Accord* Atlantis Development Corp. v. United States, 379 F.2d 818 (5th Cir. 1967). See discussion of *J. Moore, Moore's Federal Practice* (2d Ed. 1948), on the consistency designed into Rule 24 with the revisions of Rules 19 and 23, at paragraph 24.07[1].

636 S.W.2d 305 (Ky. 1982).

*Id.* at 305-06.

See Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) which involved highly unusual circumstances. In that case, parents of schoolchildren in the District of Columbia were permitted to intervene to prosecute an appeal after the local board of education decided not to challenge a district court's ruling that it had violated the United States Constitution in its administration of the school system.
egory of post-appeal intervention. Thus, to read it as allowing intervention after appeal would be erroneous.

In *Ambassador College*, the decedent left a 1974 will. After his death, his heirs tried to set it aside as invalid because of undue influence. The trial court found the decedent had been competent at the execution of the will but made no finding on undue influence. The case was remanded by the court of appeals for a trial on the issue of undue influence. Before a retrial occurred, Ambassador College sought to intervene on the grounds that it had a right to the property under a 1963 will of the decedent. Its argument was that the 1974 will was invalid either due to the grounds asserted by the heirs or due to an inability of the decedent to change his 1963 will because of a contract between the decedent and his wife in favor of Ambassador College. The position of Ambassador College, then, was independent of the grounds of either the plaintiffs or the defendants in the action.

The Court ordered the intervention of Ambassador for reasons that seem obvious. Ambassador had an interest that would be adversely affected should the property pass as directed under the 1974 will or under intestacy. Neither of the parties to the action had a position favorable to Ambassador and thus its interests were not represented. The intervention allowed here is consistent with federal authority that a delay of years in seeking intervention will not by itself disqualify a party from intervention. In addition, federal decisions imply that intervention by a new party on remand is allowable, and that intervention may be permitted upon the reopening of a case even by parties earlier denied intervention after the case had closed.

One significant difference between state intervention problems and federal intervention problems should be noted so that inapplicable federal case law can be avoided. One common federal intervention problem arises from the desire of an intervenor

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20 636 S.W.2d at 305.
21 *Id.*
22 *Id.* at 306.
23 *Id.* at 306-07.
25 *See* McKenna *v.* Pan American Petroleum Corp., 303 F.2d 778 (5th Cir. 1962).
to assert a ground or argument totally different from the grounds being asserted by existing parties. In federal court, the additional claims often encounter problems with subject matter jurisdiction and a good bit of federal case law concerns those jurisdictional problems. This kind of intervention problem results from the position of federal courts as courts of limited jurisdiction and does not apply in state courts that have general jurisdiction. Aside from this area, federal authority on intervention is helpful in deciding Kentucky cases and seems to have been followed in these two recent Kentucky cases.

II. TRIAL BY DEPOSITION

The last civil procedure Survey criticized the decision of the court of appeals in *Stafford v. Stafford*. In that decision, the court stated that review of trial court fact findings in trials by deposition was not governed by the "clearly erroneous" standard of CR 52.01. The *Stafford* court contended that since it was as qualified as a trial court to review such evidence, the normal rule of deference to the fact finder did not apply. That holding was criticized as being unwise policy and as being unjustified by the two Kentucky precedents cited by the court. In *Largent v. Largent*, the court of appeals retracted its position in *Stafford* and adhered to the "clearly erroneous" standard normally applied to fact review by appellate courts. The Supreme Court of Kentucky granted discretionary review of the case and affirmed application of the "clearly erroneous" standard to trials by deposition.

The court of appeals opinion in *Largent* implies that the *Stafford* language resulted from an erroneous application of prior

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28 Leathers, Tomasi & Hunt, supra note 2, at 551.
30 Id. at 580. CR 52.01 states that the "[f]indings of fact shall not be set aside unless clearly erroneous."
31 618 S.W.2d at 580.
32 Leathers, Tomasi & Hunt, supra note 2, at 560-61.
34 643 S.W.2d at 261. The Supreme Court decision was rendered after this Survey article was written; hence, the textual discussion focuses on the court of appeals opinion. See note 43 infra for a reference to the Supreme Court opinion.
Kentucky case law. In both *Burchett v. Jones* and *Bush v. Putty*, the Kentucky appellate courts indicated that the "clearly erroneous" standard did not apply to review of trials by deposition. These cases created an exception to the plain language of CR 52.01, which contains no hint that its standard does not apply to all cases. In *Largent*, the court found, as the previous Survey article posited, that both *Burchett* and *Bush* were cases in which reversals were justified based on the "clearly erroneous" standard. Although the court does not comment at length on *Stafford*, the same finding would be true for that case. Thus, anything that was said in *Burchett*, *Bush* and *Stafford* about the broader standard of review was dicta; it had never been *held* that a broader review standard applied since a narrower test covered all three cases. *Largent* was the first fact pattern to put the court to the test of whether it would actually deviate from the normal review standard and make a special rule for trials by deposition. For sound policy reasons, the court of appeals refused to make such an exception.

The effect of deviation from the "clearly erroneous" standard would be a disaster for appellate courts. There is no reason to suppose that such *de novo* review of these cases would end with the court of appeals; under the reasoning of *Stafford*, fact findings might even get such review again in the Kentucky Supreme Court. The obvious theory behind appellate practice is that fact findings are left to the trial level so that appellate courts can grapple with difficult issues of law; only when a finding is so unsupported as to be erroneous as a matter of law will an appeals court concern itself with fact disputes. A special rule such as that indicated by *Stafford* would work a fundamental change in that basic appellate focus.

In *Largent*, the court of appeals indicated that the normal review standard of "clearly erroneous" should apply in all cases for two reasons. First, the court recognized the immense burden

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35 291 S.W.2d 32 (Ky. 1956).
36 566 S.W.2d 819 (Ky. Ct. App. 1978).
37 28 KLS 16 at 4.
38 Concerning the applicability of CR 52.01, the court of appeals in *Largent* acknowledged that the court in *Stafford* said the Rule was not on point. The court characterized that aspect of *Stafford* as dictum. 28 KLS 16 at 3.
placed upon it by giving *de novo* review to trials by deposition; the court simply did not want the additional burden.\(^\text{39}\) Secondly, the court recognized that a trial judge did in fact have opportunities to arrive at a judgment of the credibility of the parties despite the fact that the trial was by deposition.\(^\text{40}\) In *Largent*, which involved a request for a change of child custody, that opportunity came from having presided over the divorce of the parties. In other cases, such opportunity could come from many places, including knowing parties or witnesses, having had the same parties in other cases, or from the extensive motion practice which is now so common in our courts.\(^\text{41}\)

The facts in *Largent* show that the court adhered to the "clearly erroneous" standard. Despite the court's previous conclusion that the trial court finding was unjustified,\(^\text{42}\) on rehearing the court upheld the trial court. This means that despite its own opinion of the facts, the court deferred to the trial judge since there was support in the record to keep his conclusions from being totally erroneous. Faced for the first time with a fact situation in which a different review standard could have been formulated, the court upon reflection refused to abandon the "clearly erroneous" standard. The court commendably retreated from its prior statements to reach a necessary conclusion. The Supreme Court on review has affirmed this result.\(^\text{43}\)

### III. SUPREMACY OF THE RULES OF PROCEDURE

It is not uncommon in any procedural system for the rules applicable to litigation to conflict with rules of law enacted by the legislative branch of government.\(^\text{44}\) The problem is difficult enough in a jurisdiction in which both the procedural rules and

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\(^{39}\) 28 KLS 16, at 4.

\(^{40}\) Id.

\(^{41}\) Id.


\(^{43}\) The Kentucky Supreme Court did affirm, stating that the clearly erroneous standard applies to cases tried solely by deposition. *Largent v. Largent*, 643 S.W.2d at 261. The Court held that to the extent *Bush* and *Stafford* held otherwise, they were in error. Id.

the substantive rules are legislative; the problem is still more complicated in a jurisdiction like Kentucky where the formation of procedural rules is constitutionally delegated to the judicial branch.\[^4\] Such a conflict is, in addition to the ordinary conflict between the litigants, between two branches of the same sovereign government. The Kentucky Court of Appeals faced exactly this type of clash in *Perry v. Commonwealth.*\[^5\] The Supreme Court has granted discretionary review of the case so a final disposition is yet forthcoming.

*Perry* involved an action brought on behalf of the mother of a child against the putative father to determine paternity, an action now clearly held in Kentucky to be civil in nature.\[^4\] The plaintiff moved pursuant to CR 35.01\[^4\] that the defendant be ordered to submit to a blood test to determine paternity. The defendant-father objected to the test on the grounds that under Kentucky Revised Statutes (KRS) section 406.081\[^4\] only he could request such a test and that the plaintiff had no right to ask for such a test.\[^5\] The district court denied the motion to compel the examination. On appeal, the Jefferson Circuit Court ruled that such examinations must be available to both parties.\[^5\] The reason for this decision was that the statute limiting such availability to defendants was unconstitutionally discriminatory as to sex-testing would always be available to defendants (all male) and unavailable to plaintiffs (all female).\[^5\]

While upholding the right of the mother to demand that the defendant submit to a physical examination, the court of appeals

\[^4\] See Ky. Const. § 116.
\[^4\] CR 35.01 states: "When the mental or physical condition (including the blood group) of a party... is in controversy, the court... may order the party to submit to a physical or mental examination..." The terms of the Rule would make such examination available at the request of either party.
\[^4\] Ky. Rev. Stat. § 406.081 (Bobbs-Merrill 1972) [hereinafter cited as KRS] provides in part: "The court, upon timely motion of the defendant, shall order the mother, child and alleged father to submit to blood tests." (emphasis added).
\[^5\] 29 KLS 3, at 1-2.
\[^1\] Id. at 1.
\[^2\] Id. at 2.
in *Perry* did not rule that the statute in question was unconstitutional. Rather the court chose to rule that the constitutionality of the statute was saved by the fact that, when read in conjunction with CR 35.01, examinations were available upon the request of either party.\(^{53}\) It would appear that the court read the statute as granting the right to demand an examination to the father, but *not* as denying such a right to the mother. Thus, the right of the mother to demand an examination was supplied by the rule since the statute was silent.\(^{54}\) In this fashion, the court avoided ruling on the constitutionality of the statute if given the reading urged by the father—that the statute was the exclusive source of the right to compel a blood test in these circumstances. The court expressed severe doubts about the constitutionality of the statute if such a contention had prevailed.\(^{55}\)

The opinion of the court of appeals in *Perry* contains a lengthy and somewhat confusing discussion of the status of CR 35.01.\(^{56}\) The discussion in itself is not confusing. What is unclear is why the discussion is included at all. The court concludes the discussion with the observation that "the citizens of this Commonwealth have directed that the Supreme Court shall have the power to prescribe rules of practice and procedure for the Court of Justice."\(^{57}\) Apparently, the court meant that even had the statute been construed to constitutionally preclude an examination at the request of the mother, then CR 35.01 allowing such right to either party would have prevailed over the statute.

The court's implicit notion that a rule of civil procedure would prevail over a contrary statute is evidenced by the federal precedents it cites. The court, in finding that the provisions of CR 35.01 were valid, cites *Sibbach v. Wilson & Co.*\(^{58}\) as one of two leading federal cases.\(^{59}\) *Sibbach* is a part of the famous line of

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\(^{53}\) Id. at 1-2.

\(^{54}\) Such a construction seems to ignore the statutory construction maxim *inclusio unius est exclusio alterius* (the inclusion of one thing is the exclusion of another). The maxim has been used in Kentucky in such cases as Burgin v. Forbes, 169 S.W.2d 321 (Ky. 1943).

\(^{55}\) 29 KLS 3, at 1.

\(^{56}\) Id. at 2.

\(^{57}\) Id.

\(^{58}\) 312 U.S. 1 (1941).

\(^{59}\) The other case cited was Schlagenhauf v. Holder, 379 U.S. 104 (1964); that case is not discussed in this analysis of *Perry*.
cases flowing from *Erie R.R. v. Tompkins* and was the first case to uphold the validity of a federal rule against a challenge based on the *Erie* doctrine and the Rules Enabling Act. At first glance the *Sibbach* holding (that a valid rule prevails over a contrary state law, statutory or decisional) seems to support the court's conclusions concerning the status of CR 35.01 and the doubtful constitutionality of a reading of the paternity statute adverse to mothers.

In reality, there is a significant difference between *Sibbach* and *Perry* which may cast great light on the doctrine of separation of powers in Kentucky. *Sibbach* allows a rule to prevail over contrary state law; but read closely it will be observed that *Sibbach* allows a federal rule to prevail over state decisional law. It had long been clear that a valid federal rule will prevail over contrary state statutory provisions. Of course, no other result would be possible under the supremacy clause of the United States Constitution. But apparently, no federal case holds that a federal rule would prevail over a contrary federal statute.

If the paternity statute in *Perry* did deny the mother the right to compel an examination, how could it be said that CR 35 would prevail over the statute? The answer might lie in fundamental differences between the rule-making authority of the federal and state judicial branches. In the federal system, authority to make procedural rules is granted to the Supreme Court by the Congress through the Rules Enabling Act. Prior to passage of that act, federal courts applied the procedural rules of the state in which they sat under the direction of the Conformity Act. In reality, then, the federal rules are statutes since the power to enact them came from Congress and since Congress has the final

60 304 U.S. 64 (1938).
62 312 U.S. at 16.
63 Id.
64 See Hanna v. Plumer, 380 U.S. at 460.
65 U.S. CONST. art. VI, § 2.
say on their becoming law.\textsuperscript{68} Thus, a federal rule could not prevail in the face of constitutionally valid congressional action.\textsuperscript{69}

In Kentucky, the source of authority for the Supreme Court to make procedural rules comes not from General Assembly action, but directly from the Kentucky Constitution.\textsuperscript{70} This means that a conflict between a valid rule and a statutory provision does not involve the sort of conflicts present in federal rule cases: conflict between state and federal law and conflict between a federal rule and a later act of Congress. The conflict in Kentucky is between two separate but equal branches of government—the judiciary and the legislature. The clear implication of the court of appeals opinion in Perry is that a judicial rule found to be within the category of "procedure" under the Sibbach test\textsuperscript{71} will prevail over any contrary legislative provision. This should not be surprising since the judiciary has the last word on the matter. Indeed, the legislature in Kentucky has in recent times lost a contest with another of the Supreme Court's creations, the Kentucky Bar Association.\textsuperscript{72}

All of this may appear inconsequential if one takes the simplistic view that, if the matter is "really procedural,"\textsuperscript{73} then of course it is within the legitimate control of the judiciary. The problem, as has been made clear in the federal system, is that some matters (both in statutes and in rules) cut across both substance and procedure because they actually involve both concepts.\textsuperscript{74} The federal position has been that, when the classification is ambiguous, a federal rule prevails over a contrary state provision;\textsuperscript{75} this is a reasonable position, given that federal con-

\textsuperscript{68} See the provision of 28 U.S.C. § 2072 (1976) that the rules do not become law until 90 days after the Chief Justice reports them to Congress.

\textsuperscript{69} Rules in conflict with preexisting statutes would prevail due to the terms of the Act. 28 U.S.C. § 2072 (1976). Statutes enacted subsequent to the rules would prevail as the normal result of handling conflicting statutes.

\textsuperscript{70} Ky. Const. § 116.

\textsuperscript{71} The test is less than clear. "The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." 312 U.S. at 14.

\textsuperscript{72} See Ex parte Auditor of Public Accounts, 609 S.W.2d 682 (Ky. 1980).

\textsuperscript{73} See note 71 supra for the test.

\textsuperscript{74} E.g., Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

\textsuperscript{75} Hanna v. Plumer, 380 U.S. at 360.
trol is supreme whatever label be attached to the area. But to im-
port that idea into Kentucky law is to give incredible power to
the judiciary. If that reasoning should prevail in Kentucky, then
the judiciary would be first among equals. The balance of power
between the branches of state government is delicate and the
rough tools used in the federal-state balancing may not be suit-
able to the wholly intra-state setting in cases like Perry. For the
moment, we might rest easily by remembering that this implic-
ation in Perry is dicta, given the construction of the paternity act
adopted by the court of appeals. But let us not rest too easily;
judicial intervention into defining the roles of the governmental
branches is on the upswing and the reasoning outlined here
makes the matter considerably dangerous. Practitioners should
be alert to the Kentucky Supreme Court’s upcoming decision of
the case.

IV. SUMMARY JUDGMENT FOR NON-MOVING PARTY

Courts in Kentucky are authorized to enter a summary judg-
ment for a moving party in appropriate circumstances under CR
56, whether the moving party is a claimant or a defending
party. Although the rule does not expressly address the situa-
tion, a court may believe summary judgment is improper for the
moving party, but should be granted to the non-moving party. In
this past term, the Kentucky Supreme Court again has indicated
that the Kentucky position is that a court may grant summary
judgment for the non-moving party without requiring a cross-
motion by such party.

In Green v. Bourbon County Joint Planning Commission, the Court indicated that the Bourbon Circuit Court did have the
authority to grant a summary judgment for the Planning Com-

77 See text accompanying notes 53-55 supra for an analysis of the court’s interpreta-
tion of the paternity statute.
78 See, e.g., Brown v. Barkley, 628 S.W.2d 616 (Ky. 1982).
79 CR 56.01 authorizes judgment for claimants; CR 56.02 allows the device to de-
defending parties.
80 Green v. Bourbon County Joint Planning Comm’n, 637 S.W.2d 628 (Ky. 1982).
81 Id.
mission upon the motion of Green, without the Commission hav- 
ing made a cross-motion for summary judgment.82 This state- 
ment appears to be dicta, however, since the lower court decision 
was actually reversed on the ground that the summary judgment 
should not have been granted due to the existence of material 
facts requiring a trial on the merits.83 In upholding in theory such 
practice by the trial judge, the Court followed its previous posi- 
tion in Collins v. Duff.84

In justifying its decision to allow summary judgment for a 
non-moving party, the Court quoted a passage from Collins,85 
which cited both federal trial court cases86 and Moore's Federal 
Practice.87 In so doing, the Court followed the federal position, in 
which "[t]he great weight of authority . . . dispenses with the 
formality of a cross-motion and supports the . . . position of the 
Treatise"88 that summary judgment should be available in favor 
of a non-moving party. Indeed, the number of federal cases up- 
holding such power cited by this section of Moore exceeds 
twenty-five.89 The position of Wright and Miller in Federal Prac- 
tice and Procedure also supports "the practice of allowing sum- 
mary judgment to be entered for the nonmoving party in the ab- 
sence of a formal cross-motion."90

The United States Supreme Court has not yet ruled on this 
power in the federal system. Although it has been proposed that 
Federal Rules of Civil Procedure (FRCP) 56 be amended to ex- 
pressly allow such practice,91 the Advisory Committee to the

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82 Id. at 629-30.
83 Id. at 630.
84 283 S.W.2d 179, 183 (Ky. 1955). Collins was the first case in which the Court 
recognized that a non-moving party may be granted a summary judgment.
85 637 S.W.2d at 629-30.
86 Hennessey v. Federal Sec. Adm'r, 88 F Supp. 664 (D. Conn. 1949); Hooker v. 
F.2d 852 (7th Cir. 1947).
87 The Court in Collins v. Duff, 283 S.W.2d at 179, cited 3 J. MOORE, Moore's Fed- 
eral Practice § 56.02 (1st ed. 1938). 6 J. MOORE, supra note 16, at ¶ 56.12, is the corre- 
sponding section in Moore's second edition.
88 6 J. MOORE, supra note 16, at ¶ 56.12.
89 Id. at ¶ 56.12 n.6.
90 10 C. WRIGHT & A. MILLER, supra note 27, at § 2720.
United States Supreme Court has refused to recommend such an amendment. Former United States Supreme Court Justice Tom Clark, a well-known and respected authority on the federal rules, has argued that the bulk of case law allowing such practice indicates that federal trial judges perceive the merit of the position even if the Advisory Committee does not. 92

All of this indicates a need for caution on the part of the practitioner. Although Kentucky law seems clear from Green and Collins, 93 and although the great weight of federal authority agrees, 94 the issue in some respects is still open. Until the United States Supreme Court rules on this or FRCP 56 is amended, parties who have a judgment entered against them after their own motion for summary judgment will be able to argue against such practice. Admittedly, the refusal of the Advisory Committee to recommend an amendment is significant in interpreting the rule.

Kentucky would not be obliged to follow any federal developments contrary to Green and Collins, but the state's close adherence to most federal positions might lead one to such a conclusion. For the practitioner in both federal and state courts in Kentucky, there is one obvious and easy way in which to avoid the problem: always move for summary judgment in response to an opponent's motion. Even an oral cross-motion would suffice to avoid having to argue the issue posed here concerning non-moving parties. 95

For the practitioner caught in the rather embarrassing position of suffering a loss based on his own motion, several options may be open. The most obvious is to question the availability of judgment to a non-moving party. This might not be a fruitful effort, but is worth putting in the record. The more likely escape is to argue to the court that material issues of fact remain to be decided. It is inconsistent to argue that fact issues exist when the practitioner has, by filing his or her own motion, just contended to the court that there are no fact issues. Nevertheless, nothing in

93 See text accompanying notes 79-88 supra for a discussion of the Kentucky position as indicated by Green and Collins.
94 See text accompanying notes 88-92 supra for an indication of the extent to which the weight of federal authority supports this proposition.
95 See Tripp v. May, 189 F.2d 198 (7th Cir. 1951).
the rules requires an advocate to be consistent; indeed, there is specific authority for the taking of alternate and inconsistent positions. As authority for such an argument, the practitioner should cite Green. The result in Green was to order the case back for trial on unresolved issues of fact, despite the fact that the losing party in the trial court had argued in his summary judgment motion that there were no issues of fact. This inconsistency seems not to have bothered the Kentucky Supreme Court.

V. CONTEMPT OF COURT

In yet another case potentially involving the separation of powers problem, the Kentucky Supreme Court in Hardin v. Summitt construed a state statute so as to avoid a conflict. In so doing, the Court gave some insight into the inherent contempt powers of the Kentucky courts.

Curtis Hardin was called by the Commonwealth as a witness in two criminal prosecutions pending in the Oldham Circuit Court. Hardin refused to testify upon two separate occasions and was held in contempt by the circuit court judge for this refusal. He was imprisoned pursuant to KRS section 421.140. Following the conviction of the defendants in both criminal cases and assessment of the death penalty against them, Hardin was kept in custody under the order of the circuit judge apparently under the theory that, within the meaning of KRS section 421.140, the criminal cases had as yet not reached "final disposition" since both cases were appealed.

96 CR 8.05(2) provides in part: "A party may also state as many separate claims or defenses as he has regardless of consistency."
97 637 S.W.2d at 626.
98 Id. at 630.
99 627 S.W.2d 550 (Ky. 1981).
100 Id. at 581.
101 KRS § 421.140 (Cum. Supp. 1982) provides:
If a witness refuses to testify, or to be sworn, or to give a deposition, he shall be imprisoned so long as he refuses, or until he testifies before an officer who is authorized to take his testimony. The final disposition of the case in which he so refuses shall discharge him from imprisonment.
102 627 S.W.2d at 581.
103 See id.
In reviewing the actions of the circuit judge, the Kentucky Supreme Court ruled that under the statute the power of imprisonment ended when the trial in circuit court ended, not following the disposition on appeal. The rationale of the Court was that the purpose of the statute was to secure testimony for the trial courts. Once the trial court proceeding was over, there was no longer any valid reason to attempt to coerce Hardin.

In so holding, the Court stated that it did “not reach the question of whether KRS section 421.140 unduly limits the inherent power of the courts to punish for contempt.” In an earlier case, Arnett v. Meade, the Court had held that the predecessor version of KRS section 421.140 unconstitutionally limited the courts’ power to punish for contempt.

Actually, the Court in Hardin was able to “avoid” the problem because no real issue was present; the statute, as interpreted, seems coextensive with the constitutional limits of court contempt authority imposed by the due process clause of the fourteenth amendment to the United States Constitution. This seems implicit from the federal cases chosen by the Court to support its conclusion that Hardin could no longer be confined.

The type of contempt punishment imposed upon Hardin was civil in nature because its purpose was to compel him to testify. Although coercive, such punishment was not criminal in nature. The United States Supreme Court in Shillitani v.

104 Id. at 582.
105 Id.
106 Id.
107 Id.
108 462 S.W.2d 940 (Ky. 1971).
109 Id. at 948. The version of KRS § 421.140 ruled unconstitutional in Arnett limited punishment for contempt to a fine of $30, imprisonment for 24 hours, and coercive imprisonment for continued refusal to testify not extending beyond final disposition of the case. The statute was amended by Act of Dec. 22, 1976, ch. 14, § 423, 1976 Ky. Acts (Ex. Sess.) 164, to delete the limits of $30 and 24 hours. See note 101 supra for the text of the statute as it now appears.
110 U.S. CONST. amend. XIV, § 1.
112 627 S.W.2d at 581.
113 Id. at 582.
United States set forth a functional test for classifying contempt sanctions. The test looked to the purpose of the contempt to determine whether it was civil or criminal in nature. Hardin, as in the typical civil contempt, had the “keys to the jail” in his own hands, meaning that he could have purged himself by testifying as directed. Once the trial was over, he could no longer so purge himself. To incarcerate him at that time would be punitive in nature. It should be noted that, except for fairly minor incidents of criminal contempt, a jury trial in criminal contempt proceedings is required by Bloom v. Illinois. If the Kentucky Supreme Court had indicated that Hardin was to be incarcerated during the pendency of the appeal when he had no practical means to purge himself, the contempt would have become criminal in nature and the imposition of such punishment without a jury trial would have violated the rule of Bloom. Thus, by its construction of KRS section 421.140, the Court saved itself a confrontation not only with the legislature but also with the requirements of federal law. The decision in Hardin appears then to be highly politic as well as based on sound legal reasoning.

Although the Court in Hardin did cite to federal case authority, the usage does not support the basic thesis of this Article and the previous Survey that Kentucky courts look to federal law for guidance in shaping Kentucky practice. In the normal instance, Kentucky is free to adopt whatever rule it sees fit, and federal law is used as a role model for determining Kentucky law. In cases like Hardin, federal law serves a different function. Federal law in such cases sets the outer dimensions of the choices open to the Kentucky courts. Under the supremacy clause, federal law will prevail in such cases. Thus, the discussion of federal law in Hardin was necessary in order to avoid the adoption of a

114 384 U.S. at 364.
115 Id. at 370.
116 627 S.W.2d at 582.
117 Id.
119 See note 111 supra for the federal cases cited by the Kentucky court.
120 See text accompanying note 3 supra and Leathers, Tomasi & Hunt, supra note 2, at 551-52 for a more thorough discussion of this thesis.
121 U.S. Const. art. VI, § 2.
122 627 S.W.2d at 581-82.
rule that would have exceeded the constitutional limits of state authority. This is an important distinction and should be kept firmly in mind by practitioners.

VI. ATTORNEY FEES IN SECTION 1983 SUITS

During the past term, the Kentucky Court of Appeals considered in *Scott v. Campbell County Board of Education* the question of availability of attorney's fees to the prevailing party in a suit brought under 42 U.S.C. section 1983. Such suits are familiar to most practitioners; their thrust is recovery of damages for a deprivation of federally guaranteed rights, either statutory or constitutional, by a person acting under color of state law. In addition to creating the basic cause of action, federal law creates the possibility of an award of counsel fees to the prevailing party.

In *Scott*, a teacher prevailed in his claim that the Campbell County Board of Education infringed his federally-created rights when the Board dismissed him from a teaching position. Judgment in the teacher's favor was entered by the Campbell Circuit Court on March 30, 1977; the judgment was affirmed on appeal and a mandate issued on March 16, 1979. More than one year later, on May 16, 1980, the plaintiff moved for an award of attorney's fees.

The question presented in *Scott* was whether the plaintiff's motion for an award of counsel fees came too late. The court of

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Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, or the District of Columbia, subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action in law, suit in equity, or other proper proceeding for redress.
125 42 U.S.C. § 1988 (Supp. IV 1980). Under § 1988, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *Id.*
126 618 S.W.2d at 590.
127 *Id.*
128 *Id.*
appeals noted that the issue of timely assertion of such claims had led to a split of authority in the federal appellate courts. The Fifth Circuit has ruled that such an award is not a part of the prior judgment and hence not subject to the time limitations for alteration of a judgment. The First and Fourth Circuits have held that such awards are ancillary to the underlying judgment and that claims of fees must be made as timely additions to the primary judgment. In Scott, the court of appeals agreed with the latter position and ruled that the plaintiff's attempt to secure fees was untimely.

The conflict among the circuits noted above has now been resolved by the United States Supreme Court. In White v. New Hampshire Department of Employment Security, the Court held that requests for counsel fees were not governed by the ten-day requirements of FRCP 59(e). As the basis for this holding, the Court stated that the procedural rule was designed to foreclose delayed challenges to the merits of a case. The Court reasoned that counsel fees did not fall within the rule because such fees were collateral to the merits of the case. The Kentucky Court of Appeals' reliance on contrary federal authority to support its decision in Scott thus cannot stand in view of this United States Supreme Court decision.

Even aside from the United States Supreme Court holding, the Scott court's use of the Fourth Circuit decision in Gary v. Spires seems misplaced. In Gary, the losing defendants had chosen not to appeal the adverse trial court judgment; then an
award of fees was made. As is noted in Gary, one factor which may have motivated the defendants not to appeal was the small size of the judgment against them. In the absence of fees, the judgment may not have seemed worth an appeal; with the addition of fees, such an appeal might have seemed more attractive. Given this factor, it only seemed fair not to increase the amount of the judgment when the time for appeal had passed. Factors such as this one might be relevant in cases like Gary but are not present in a case like Scott where an appeal was vigorously prosecuted by defendants.

As a further reason to disallow the late granting of fees, the Scott court cited a difference between FRCP 58 and CR 58 concerning the effective entry of judgments. The federal rule expressly states that "entry of the judgment shall not be delayed for the taxing of costs," while the Kentucky rule contains no such statement. Care must be taken in using this distinction to justify the disallowance of fees. The implication of the court's observation seems to be that a state procedural rule can prevent a plaintiff from securing a federally created right. Given the United States Supreme Court decision in White, such a reading is troubling should the Kentucky courts try to adhere to Scott on this ground.

The underlying cause of action in Scott is federally created. State courts have concurrent jurisdiction to enforce that federally-created right; indeed, it may well be that state courts are required to provide a forum for that federally-created right. The right of a prevailing party to recover fees also is federally created. With the federal position in White clearly supporting...

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137 Id. at 773.
138 Id.
139 Id.
140 618 S.W.2d at 591.
141 FRCP 58.
143 Martinez v. California, 444 U.S. 277, 283 n.7 (1980).
a fee award, the court of appeals' position relying on CR 58's difference from its federal counterpart sets the stage for a confrontation between a state procedural rule and the assertion of a federal right. There is some authority for the proposition that state procedural requirements, even in civil cases, cannot prevent a person from securing a federal right.\footnote{148} While there is some doubt about the exact meaning of that authority,\footnote{147} apparently a state could meet the federal requirements as to a challenged rule by showing that the rule served a legitimate state purpose and did not apply solely to federal cases.\footnote{148}

The question which remains in Scott after White is whether, based on the lack of a Kentucky rule similar to FRCP 58 and on a different Kentucky interpretation of CR 59.05, Kentucky can reach a different result than White on timeliness of applications for counsel fees in cases based on federal law. Although this is a close question, it seems that the state can adhere to Scott if it wishes. In White, the Supreme Court stated that this was an issue about which federal courts were free to adopt local rules on timeliness.\footnote{149} It seems that if the Court would allow such a practice, it should allow states to have different policies, so long as they are legitimate, fair, and not designed to thwart federal policies.

The rule which results from Scott seems to serve a legitimate state purpose. All litigation simply must be final at some point. If the position of the plaintiff in Scott were taken to its logical extreme, an attempt to recover fees would be timely twenty years after the entry of an underlying judgment. The recovery of fees is granted because a party has prevailed in his underlying cause of action; to separate that right from the underlying case seems ridiculous. The effect would be to create a separate cause of action for attorney's fees without any statute of limitations other than

\footnote{146} See Brown v. Western Ry., 338 U.S. 294 (1949).
\footnote{149} White v. New Hampshire Dep't of Employment Security, 102 S. Ct. at 1168.
the discretion of the court. It makes a good deal more sense to treat the claim as what it is—derivative from the underlying case and therefore attached to that case and subject to the same limitations as that case. States have a legitimate forum interest in protecting against tardy fee requests in state fact settings and, hence, Kentucky should be free to adopt its own rule.

CONCLUSION

The cases in this term continue the trends noted in the past Survey article. Kentucky is still considerably tied to interpretations identical to those involving the federal rules. The cases chosen this year do not demonstrate the preference noted in Kentucky decisions in previous years for Wright and Miller over Moore as authority, but the totality of cases indicates that the trend continues.

The Kentucky Supreme Court and the Kentucky Court of Appeals seem to be having some difficulty dealing with federalism problems. As discussed in this Survey, the courts find it difficult to articulate just exactly how state and federal law relate to each other.

Finally, I would note the tendency of the courts to be overly assertive of judicial power over other state government divisions. The use of the term “procedure” serves only to mask the issue and to invite bootstrapping by the judiciary. The court of appeals’ implicit assertion in Perry v. Commonwealth of the judiciary’s position as first among equals is alarming and warrants close observation in the future.

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150 See Leathers, Tomasi & Hunt, supra note 2, at 551-52.
151 Id. at 552.