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Kentucky Law Survey: Civil Procedure

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Civil Procedure

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During the 1975-1976 term of the Kentucky Supreme Court over 70 decisions, both memoranda and formal opinions, were handed down which involved procedural matters. This proliferation of appeals on procedural matters indicates that they are among the more common problems faced by the Court and the practicing bar. Although no major developments were apparent, a significant pattern emerges from a number of the cases in separate procedural areas—effects of failures of parties to testify, judicial supervision of discovery, powers of courts to set aside judgments, and problems of multi-party litigation. The results in the cases do not depart significantly from past case law, nor do they represent deviations from decisions in other states or the federal system. However, it is the emerging pattern that is important. Also, it should be noted how strictly the Court requires adherence to procedural rules and how much deference it extends to trial court actions.[1]

I. FAILURE OF PARTIES TO TESTIFY

In two cases during the past term, the Supreme Court affirmed decisions as a matter of law for failure of the parties to testify to matters on which they had direct knowledge. In *Hall v. Westbrook*[2] the trial court directed a verdict against the

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[1] It should be noted at the outset that despite the rather large number of cases in the area, a reading of them on an individual basis is not terribly enlightening. The reason for this is the regrettable habit of the Court of rendering a large number of decisions which lack a sufficient recounting of the material facts to allow a critical evaluation of the results. Too many of the decisions simply state general conclusions of law and then order a given result. Of course there is usually no way to quarrel with the generalities. They could only be criticized if applied to inappropriate fact patterns, and the facts are not usually stated with sufficient clarity to allow analysis. It is presumed that this pattern is the result of too great a caseload in the Court rather than some other factor. If that is so, perhaps the recent judicial reorganization will allow the new Supreme Court time to do a better job of writing opinions. Since the holding in a case is the result on the material facts, the cases decided by the Court would be more useful if they contained a sufficient description of the fact patterns to allow comparison with other cases.

[2] No. 75-553 (Ky. May 28, 1976) (per curiam).

defendant, who had failed to testify or offer evidence to controvert the plaintiff's testimony concerning a partnership arrangement between them. In *Chaffin v. Security Central National Bank,*[3] the Greenup Circuit Court had granted a summary judgment for the plaintiffs in an action to set aside certain conveyances by the defendant to his son and daughter which were alleged to have been made to defraud creditors. Upon the advice of counsel, the defendant refused to answer any questions concerning the transfers. Depositions were taken from the son and daughter, who also refused upon advice of counsel to answer any questions concerning the transfers.[4] The Court held that the failure of the defendant to testify was the equivalent of an admission that the transfers had been made to defraud creditors, therefore the summary judgment entered against him was proper.

The failure of a party to testify is a matter of serious proportion in civil cases. However, it should be noted that dismissal as a matter of law would not be appropriate in all cases simply involving the failure of a party to testify. For instance, in *Hall,* had the defendant introduced other credible evidence to controvert the contentions of the plaintiff as to the relationship between the parties, the directed verdict should have been overruled. At most, the jury could be advised that they might draw unfavorable inferences from the party's failure to testify. In considering a motion for summary judgment or directed verdict the issue should be whether the party failing to testify had managed to offset the prima facie case of the opposing party. If he has not, that failure consists not only of his failure to testify but also of his failure to introduce other credible evidence on the point. But under no circumstance can a party who has not made out a prima facie case be held to have done so simply due to the failure of the opposing party to testify. A defendant is under no duty to defend at all unless the plaintiff has met his burden of production.[5] These ideas are well illustrated in *Chaffin,* where the plaintiff pleaded a sufficient case,

[3] No. 75-876 (Ky. June 25, 1976) (per curiam).

[4] It cannot be determined from the opinion whether the advice to the children came from their father's counsel or from their own.

[5] *See, e.g.,* Stimpson v. Hunter, 125 N.E. 155 (Mass. 1919).

moved for summary judgment and was controverted solely by the pleading allegations of the defendant's answer. In that circumstance, Kentucky Rule of Civil Procedure [hereinafter cited as CR] 56.03 requires the entry of judgment for the moving party.[6]

II. SUPERVISION OF DISCOVERY

Four cases from the last term involved court supervision of discovery procedures. Two cases involved appeals from trial court dismissals of parties who hampered the discovery processes, while two other appeals were from dismissals of cases for failure of the plaintiffs to prosecute their claims. The four cases resulted in the application of drastic sanctions by the respective trial courts during the pretrial stages of an action. The common thread in the cases is that in each the Supreme Court affirmed the dismissals and left the trial court wide discretion in supervising pretrial discovery procedures.

In *Jackson v. Davis*,[7] Dr. Jackson had decided to handle his own defense in a malpractice action brought against him. As the case progressed, he consistently refused to answer an interrogatory propounded to him by the plaintiff.[8] The trial court and plaintiff's counsel voluntarily extended the time for Jackson to answer but his refusal continued. The trial court then struck all of Jackson's pleadings and found against him on the merits of the claim for damages in a total amount of $325,000, as permitted under CR 37.03 which governs violations of the discovery process.[9] Dr. Jackson died following the

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[6] KY. R. CIV. P. [hereinafter cited as CR] 56.03 provides:
The motion (for summary judgment) shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

[7] No. 75-1111 (Ky. July 2, 1976) (per curiam).

[8] Interrogatories may be issued to parties pursuant to CR 33.

[9] CR 37.03 provides:
(2) Other Consequences. If any party or an officer or managing agent of a party refuses to obey an order made under Rule 37.01 requiring him to

verdict and the appeal from the case was handled *pro se* by his wife. She proved no more adept as a lawyer than did her husband, and the trial court decision was affirmed. It is difficult to question the sanction in view of the intentional refusal of the plaintiff to answer the interrogatory. However, such a drastic sanction ought not to be used where the failure comes from excusable neglect.

In *Benjamin v. Near East Rug Co., & Tadross Brothers,*[10] the Supreme Court affirmed the entry of a default judgment against the defendant for his failure to answer interrogatories during the allotted time period. After the passage of over a year from the service of the interrogatories, judgment was entered in the portion of the debt action belonging to Near East. At no time did Benjamin or his counsel ask for an extension of time to answer the interrogatories, although his counsel informed the court that he had been unable to get answers from Benjamin due to Benjamin's illness. That statement was made to the court 5 months after the service of the first interrogatories and more than 7 months prior to the entry of judgment. Given the length of time involved and the failure of Benjamin to request an extension or give a satisfactory explanation for his failure to

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answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among other the following:

(a) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(d) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

[10] 535 S.W.2d 848 (Ky. 1976).

answer, the entry of judgment against him seems reasonable.

The ability of a trial court to dismiss an action for failure to prosecute is an important tool for clearing clogged dockets. Use of that tool was approved by the Supreme Court during the last term in *Jenkins v. City of Lexington*[11] and *Whitlock v. Edwards*.[12] In *Jenkins* the plaintiffs had sought to enjoin the city from demolishing a building which had been condemned by the Lexington Housing Board of Appeals. Two years after the complaint and answer had been filed the city moved to dismiss the action on the grounds that the plaintiff had failed to prosecute the case adequately. When the plaintiffs failed to appear at the hearing on the motion, the trial court dismissed the suit pursuant to CR 41.02(1).[13]

In the *Whitlock* case the plaintiffs sought to have a deed cancelled. The defendants pleaded that the claim was barred by res judicata on the grounds that the plaintiffs, with others, had brought a previous action to cancel the same deed which had been dismissed for failure to prosecute. Since the dismissal of the previous action for failure to prosecute was a decision on the merits, the Court held that the second suit was barred. This is the correct conclusion based on the status of the first decision, which had been on the docket for over 3 years without any action having been taken by the plaintiffs, and is directly supported by CR 41.02(3).[14] Any other result would not be tolerable since the effect of such a dismissal would then be so slight that there would be absolutely no incentive for the plaintiff to fear a dismissal for failure to prosecute.

III. SETTING ASIDE JUDGMENTS

The power of a trial court to set aside a judgment is pro-

[11] 528 S.W.2d 729 (Ky. 1976).

[12] No. 75-671 (Ky. April 30, 1976) (per curiam).

[13] CR 41.102(1) provides:
For failure of the plaintiff to prosecute or to comply with these Rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him.

[14] CR 41.102(3) provides:
Unless the court in its order for dismissal otherwise specifies, a dismissal under this Rule, and any dismissal not provided for in Rule 41, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

vided by CR 60, and is utilized to prevent injustice in individual cases. However, it should be used only in very clear cases because of the value in promoting the notion that judgments are dispositive of litigation. This has been the approach taken by the Supreme Court in reviewing trial court proceedings under CR 60.

Pedro v. Pedro[15] involved an action by a woman to set aside the property settlement which was a portion of the judgment entered in a divorce action against her ex-husband. She contended that the judgment had been procured by fraud and should be set aside under CR 60.02.[16] The trial court received evidence on the issue of fraud in securing her approval to the property settlement. Although there was conflicting evidence, the court chose not to believe the wife. The trial court concluded that she had not met her burden of persuasion and thus was unable to overcome the presumption of the validity of the divorce decree which included the settlement. The Supreme Court reviewed the evidence and, after finding some evidence to support the decision of the trial court, concluded that the trial court's finding was not clearly erroneous.

The very sketchy opinion in *Alexander v. Streeter Moving & Storage Co.*[17] indicates that a plaintiff had sought to set aside a default judgment entered against him due to his counsel's failure to handle the case. Service was made outside Kentucky on plaintiff's non-resident lawyer, who did not notify him nor take any steps to defend the action. Based on normal notions

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[15] No. 75-718 (Ky. June 11, 1976) (per curiam).

[16] CR 60.02 provides:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (3) perjury or falsified evidence; (4) fraud affecting the proceedings, other than perjury or falsified evidence; (5) 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 (6) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this Rule does not affect the finality of a judgment or suspend its operation.

[17] No. 73-583 (Ky. October 31, 1975) (per curiam).

of the relationship between lawyer and client, this would not appear to be sufficient to justify setting the judgment aside. It certainly is not among the reasons to set aside listed in CR 60.02,[18] and the Court gave no hint as to other possible problems in the case. Of course, the plaintiff could collaterally attack the judgment as violative of procedural due process if service on the lawyer did not meet constitutional standards of notice.[19] He also could collaterally attack if the state lacked the requisite power to satisfy constitutional standards of substantive due process in its exercise of in personam jurisdiction.[20] If either set of facts sufficient to justify collateral attack did exist, the judgment rendered was void. This is clearly provided by CR 60.02(5) as a ground to set aside a judgment, and there is no time period limiting the time in which such a void judgment can be set aside. But the facts in *Alexander* are so sparse that it is impossible to tell if the relationship between lawyer and client was sufficient to make the notice effective. It is also impossible to tell whether the relationship of the defendant to Kentucky was sufficient to allow an exercise of jurisdiction. If those problems were actually present, the Court should have noted that one of the grounds for setting aside under CR 60.02 had been raised and therefore should have considered the allegations more closely.

A similar objection was raised in *Sun Oil Co. v. Kentucky,*[21] but the problems in *Alexander* in regard to due process and unclear facts are not present here. Sun Oil sought to set aside the default judgment entered against it on grounds that although it had been notified of the action and had taken some steps to defend, a mixup occurred and no defense was made. Sun Oil claimed that a portion of the material relating to the case had been lost in interoffice mail and that they were deprived of a fair opportunity to defend the action. This case clearly lacks the potential merits present in *Alexander,* and the judgment was not set aside since the mistake by Sun Oil did not meet the standard of excusable neglect required to satisfy CR 60.02.

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[18] CR 60.02, *supra* note 16.

[19] *See* Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950).

[20] *See* Pennoyer v. Neff, 95 U.S. 714 (1877).

[21] No. 75-1112 (Ky. June 25, 1976) (per curiam).

In *Gabbard v. Boyd County*[22] a plaintiff sought to set aside a judgment entered pursuant to an agreed settlement between the parties. The settlement had been negotiated by counsel for the plaintiff and had been authorized by the plaintiff. After the entry of judgment, the plaintiff changed his mind about the settlement and secured other counsel to seek the setting aside of the judgment. The Supreme Court correctly held that a change of heart is not a ground sufficient to set aside a judgment. A judgment which is the result of a settlement should have the same presumption of validity as other judgments. To hold otherwise would certainly weaken the entire settlement process, which is essential in view of the crowded state of most court dockets.

IV. MULTIPLE PARTY LITIGATION

With the joinder of parties and claims allowed and encouraged by procedural rules based on the Federal Rules of Civil Procedure, the Supreme Court should be faced with an increasing number of appeals from complex litigation. During the last term, four cases arose from such a setting, and none of the results represent departures from accepted practice.

In *Mattingly v. Baker*[23] and *Ramsey v. Furniture Rentals,*[24] the Court was faced with appeals from portions of cases still pending in the respective trial courts, both of which involved multiple parties. In *Ramsey* and *Mattingly* default judgments had been entered in favor of the respective plaintiffs. In neither case had the trial judge found that there was just reason for delay in the taking of the appeal or that the judgment entered was final as required by CR 54.02.[25] One of these factors must

[22] No. 75-196 (Ky. April 16, 1976) (per curiam).

[23] No. 75-603 (Ky. June 25, 1976) (per curiam).

[24] No. 75-823 (Ky. June 11, 1976) (per curiam).

[25] CR 54.02 provides:

(1) When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the

be present before an appeal from a partial adjudication in multiple party litigation is allowed. Absent such finding, the order is interlocutory and hence not subject to appeal until the entire case is adjudicated. This is a well settled rule in the federal system,[26] and in any jurisdiction it seems the only way to prevent piecemeal appeal of matters that may not be ripe for appellate adjudication.

One of the most complex problems in multiple party litigation is determining when litigation can proceed without the presence of a given party. The problem of the indispensable party, which is controlled by CR 19.02,[27] arose in a very traditional setting in *A&H Truck Line v. Kentucky Occupational Safety and Health Review Commission.*[28] The Commission had upheld a citation against A&H for violation of safety standards at a truck terminal in Owensboro. A&H appealed the holding to the Franklin Circuit Court naming the Kentucky Occupational Safety and Health Review Commission as the only party defendant. The Supreme Court held that their failure to name the Kentucky Department of Labor as a party defendant made it necessary to dismiss the case for failure to join an indispensable party. Such dismissal does not operate on the merits[29] and was necessary because without the presence of the Department of Labor no effective action could have been taken by the trial court. The Department of Labor is empowered by statute to enforce the orders of the Commission,[30] and until so enforced the orders are without effect. It should then be clear that any

order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims.

[26] *See* Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956).

[27] CR 19.02 provides:

If a person as described in Rule 19.01 cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

[28] 536 S.W.2d 315 (Ky. 1976).

[29] *See* CR 41.102(3), *supra* note 14.

[30] KY. REV. STAT. § 338.181 (1972).

court action in the absence of the Department of Labor would be a wasted effort, because until they are bound, A&H would not be protected. It may seem strange to dismiss a plaintiff's action because he has not chosen to protect himself adequately, but the interest of the judiciary in preventing such a waste of time and effort is also important.[31]

The indispensable party problem confronted the Court in a slightly different context in *Levin v. Ferrer*.[32] In an action to set aside a conveyance, the defendant sought to set aside the judgment invalidating the conveyance. The defendant had received land from her adoptive mother in a deed which was set aside by the trial court due to overreaching by the defendant. While the action was pending, the mother had died. In an attempt under CR 60.02 to set aside the judgment, the defendant alleged that the conveyance had been invalidated due to the perjured testimony of several persons, one of whom was the decedent mother. The trial court refused to set aside the judgment on the grounds that the attempt was not timely within the one year restriction of CR 60.02. On appeal, the defendant named the administrator of her mother's estate as the only appellee. The Supreme Court held that the basic philosophy of CR 19.02 applied to appeals just as it did to trial court proceedings. This meant that an appeal could not proceed in the absence of parties necessary to dispose of the case adequately. In the fact pattern in *Levin*, the appeal was dismissed for failure to name as parties the persons who had succeeded to the property of the decedent mother. As noted, the presence of the administrator was meaningless in the action to set aside the judgment in favor of the successors in interest to the mother. No effective relief for the defendant could be granted against any but the successors, who would not be bound by a judgment against the administrator. If the action had been one to try title to the real estate, there would not be any doubt that the successors would have to be named at the trial level as parties defen-

[31] Of course, it would be simple for A&H to join the Department since the sort of jurisdictional problems often seen in federal dismissals, where the joinder of the party might destroy subject matter jurisdiction, will not be present in that case. *See e.g.*, Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).

[32] 535 S.W.2d 79 (Ky. 1976).

dant. Thus the successors were necessary parties to the appeal, and without them, a decision would have been a waste of court time.

V. PATTERNS IN THE DECISIONS

If nothing else emerges from the decisions, it is clear that the Supreme Court has allowed trial courts wide discretion and has been willing to overturn only those decisions which meet the high standard of being clearly erroneous. Every case discussed from the past term resulted in affirmance of the trial court's actions. This indicates that the Court is indulging in a presumption of regularity and validity in trial court actions. This may be desirable to prevent frivolous appeals and to prevent parties from litigating matters *ad nauseum*, but it is a presumption that can be carried too far. The Court ought not to indulge in the presumption so freely that no case can be overturned on appeal. Taken to that extreme, the presumption eliminates the need for a system of appeals.

The other fact that emerges from the cases is that the Court adheres strictly to the letter of procedural rules. Lawyers in the state are charged with a knowledge of the Rules and the Court obviously expects them to be used correctly. The strict application of the Rules may have drastic consequences on any piece of litigation. Given this pattern, it is going to be increasingly difficult for lawyers to argue that they did not appreciate the consequences of their failure to obey the Rules. The ramifications of this conclusion both in legal malpractice suits and Kentucky Bar Association disciplinary proceedings should be obvious. It would then seem to behoove the practicing bar to know the Rules well and follow them closely. Failure to do so may have severe consequences from which it appears that neither lawyer nor client can escape.