1975

Kentucky Law Survey: Civil Procedure

William H. Fortune
University of Kentucky College of Law, fortunew@uky.edu

Civil Procedure

By William H. Fortune*

Introduction

The most significant civil procedure case decided by the Kentucky Court of Appeals during the period covered by this Survey is *Nazareth Literary and Benevolent Institution v. Stephenson.*[1] That case, which deals with discovery of privileged communications, may have created problems that will require legislative action. Other decisions by the Court during this period serve to illustrate and amplify existing procedural points. The more important of these decisions will be briefly discussed prior to the consideration of *Stephenson.*[2]

I. Default Judgments

Two decisions illustrate the point at which a trial court

---

* Associate Professor of Law, University of Kentucky. A.B. 1961, J.D. 1964, University of Kentucky.

[1] 503 S.W.2d 177 (Ky. 1973).

[2] A few cases deserve mention as illustrations of common procedural pitfalls. The facts of these cases are not important; they will be listed merely as a compendium of fatal procedural omissions by counsel. First Nat'l Bank v. Progressive Cas. Ins. Co., 517 S.W.2d 226 (Ky. 1974) (failure to plead the affirmative defense (*see* Ky. R. Civ. P. 8.03 [hereinafter CR]) under Ky. Rev. Stat. 355.3-419(3)(1970) of acting in good faith and in accord with reasonable commercial standards; no error in refusing to permit evidence on this issue); Fryar v. Stovall, 504 S.W.2d 701 (Ky. 1974) (plaintiff claimed error in the granting of a new trial but did not cross-appeal from the final judgment in his favor; held that the failure to cross-appeal precluded the appellate court from considering whether the trial court should have granted a retrial (*see* CR 59.01)); United States v. Central Bank and Trust Co., 511 S.W.2d 212 (Ky. 1974)(failure to file written objections to commissioner's report within ten days of its submission precluded the objecting party from challenging the report on appeal (*see* CR 53.04)); Blakeman v. Joyce, 511 S.W.2d 112 (Ky. 1974)(failure to object to evidence not within the scope of the issues framed by the pleadings precludes an attorney from objecting to the submission of the matter to the jury; the new matter will be deemed to have been tried by the implied consent of the parties (*see* CR 15.02)); Hall v. Commonwealth, 511 S.W.2d 204 (Ky. 1974)(plaintiffs failed to subpoena one of their witnesses for trial; on the morning of the trial it was learned that the witness would not be able to attend because of illness; plaintiffs moved for a continuance and the trial court overruled the motion; held that the failure to subpoena the witness precluded the submission of the witness' testimony in affidavit form (as is permitted by CR 43.03 when "due diligence" has been employed) and that the trial court did not abuse its discretion in denying the motion for continuance).

must set aside a default judgment. In *Educator and Executive Insurers, Inc. v. Moore*,[3] the Court held that it was error for the trial court to refuse to set aside a default judgment on the following facts: Suit was filed against the insurance company on July 30, 1971, with service of process apparently accomplished on August 3; on August 18, 1971, the defendant mailed the file from Columbus, Ohio, to its attorney in Pineville; the file arrived on August 24, some ten hours after the deadline for filing an answer; on calling plaintiff's attorney, defendant's counsel learned that a default judgment had been entered earlier that morning; on September 15, 1971, the defendant's attorney asked that the default judgment be set aside, presenting a prima facie defense and attaching an affidavit from the postmaster that the usual time for mail from Columbus to Pineville was two days. The trial court refused to set aside the judgment and the defendant appealed. The Court of Appeals reversed, holding that the trial court abused its discretion in refusing to set aside the default judgment.

Three weeks later, in *Vinson v. Chadwick*,[4] the Court affirmed a refusal to set aside a default judgment on these facts: Plaintiff was injured on July 17, 1969; suit was filed two days later with service effected the same day; on August 11, 1969, a default judgment was taken on the question of liability. It is not apparent from the opinion when the defendant moved to set aside the default; the Court merely noted that the contention of appellants was that the delay was caused by a lack of understanding between the insurance company and an adjuster in Somerset, Kentucky. Neither does the opinion expressly state that the defendants asserted a prima facie defense to the claim. However, the fact that the appeal was primarily on the alleged excessiveness of damages (the question of damages having been submitted to the jury in accord with CR 8.04) supports the inference that the defendants could not seriously question liability.

Although there are expressions in Kentucky cases to the effect that courts should be liberal in considering motions to set aside default judgments,[5] it is clear that the trial court has the

[3] 505 S.W.2d 176 (Ky. 1974).

[4] 507 S.W.2d 181 (Ky. 1974).

[5] Kidd v. B. Perini & Sons, 233 S.W.2d 255 (Ky. 1950); Liberty Nat'l Bank &

discretion to deny such a motion, even though the plaintiff has not changed his position and the defendant has acted in good faith and presents a prima facie defense.[6] In other words, trial judges, although instructed to be liberal, have the discretion not to be liberal. *Moore* and *Vinson* illustrate the point at which the trial judge *must* set aside the default judgment. If the failure to answer was caused by matters not within the control of the defendant or his attorney, and a prima facie defense is presented in the motion for relief, it is an abuse of discretion for the trial judge to refuse to set aside the default judgment. If, however, the failure to answer within 20 days of service of process can be attributed to the fault of the defendant or his attorney, the trial court's decision will not be reversed.

II. JURY INSTRUCTIONS IN NEGLIGENCE CASES

In *Cox v. Cooper*[7] Justice Palmore explained the philosophy of the Court regarding jury instructions in a negligence case. The plaintiff tendered instructions framed in terms of the rights and duties of motorists entering an intersection while the traffic signal was yellow. Justice Palmore commented that the "statements contained in these tendered instructions were, as the trial court remarked, valid legal propositions, and . . . well within counsel's province to argue to the jury, but . . . not appropriate for inclusion in the court's instructions to the jury."[8] He went on to say:

> It may sometimes be appropriate for instructions to define the rights of a litigant, as for example in the instance of a peace officer sued for assault incident to an arrest, but as a general proposition they should be couched in terms of duties only. Recovery hinges not on the question of who was within his rights, but who breached a duty. If the duty is simple enough to be stated without defining it in terms of the rights of one party or the other, that is all that is necessary, desirable, or proper. In this case the jury was instructed that each party had the duty of not entering on the red light, and

Trust Co. v. Kummert, 205 S.W.2d 342 (Ky. 1947).

[6] Richardson v. Brunner, 327 S.W.2d 572 (Ky. 1959).

[7] 510 S.W.2d 530 (Ky. 1974).

[8] *Id.* at 534.

> as to the light that was enough. Unmistakably it had to mean that they had the right to enter on any other color, and if counsel felt that the jury was too thick to get the point all he had to do was to explain it in his summation. Our approach to instructions is that they should provide only the bare bones, which can be fleshed out by counsel in their closing arguments if they so desire.[9]

It may be reversible error if the judge goes beyond the "bare bones" of the parties' duties and adds anything which the Court of Appeals might deem to be an undue emphasis on certain aspects of the duty to use ordinary care. In *Knight v. George Ryan Co., Inc.* [10] a "slip and fall action" against a contractor, the Court reversed for error in the instructions, finding that the trial court's description of the duty owed by the defendant, and the following instruction on the plaintiff's duty were defective:

> It was the duty of the plaintiff to exercise ordinary care generally while traversing the construction area and to make reasonable use of her own faculties to observe and avoid dangers upon the premises. If you shall believe from the evidence that she failed to observe and perform this duty, and that such failure, if any, contributed to cause or bring about the injuries complained of by her, then the law is for the defendant, and you shall so find.[11]

Although the Court agreed with the proposition that the duty to use ordinary care for one's own safety includes the duty to observe and discover conditions of danger, it felt that the inclusion of this requirement as a part of the instruction, in addition to being surplusage, tended to overemphasize the duty of observation. On remand the trial court was directed to instruct only in terms of ordinary care.

Barrett v. Stephany[12] illustrates the desirability of requiring the jury to specify the instruction on which they base their verdict. The trial court gave separately numbered instructions on negligence, contributory negligence, and last clear chance. The jury found for the plaintiff under the negligence instruc-

---

[9] *Id.* at 535.

[10] 516 S.W.2d 848 (Ky. 1974).

[11] *Id.* at 851.

[12] 510 S.W.2d 524 (Ky. 1974).

tion. The Court of Appeals held that it was error to give the last clear chance instruction but had no difficulty in affirming on the ground that the verdict on its face indicated that the jury did not find it necessary to reach the last clear chance instruction.[13] The Court of Appeals should, whenever the opportunity arises, point out to trial judges that requiring juries to be specific may render harmless an otherwise fatal error. Toward this end, the Court should encourage the use of special verdicts[14] and should, in any case where it is necessary to reverse for an error in the instructions, state specifically what instructions are to be given on retrial.

III. THE TIMELY OBJECTION DOCTRINE

Occasionally an appellate court is favorably inclined toward a legal proposition which was not properly presented to the trial court or was not argued on appeal. Under what circumstances can the appellate court overlook the failure of counsel to properly raise and argue the matter? The Rules of Civil Procedure contemplate that a litigant will make known to the trial court, in a timely fashion, what action he desires the court to take and his arguments in favor of such course of action.[15] This rule is often expressed as the obligation of counsel to make timely objection so that the trial court will have an effective opportunity to rule. Only when an error by the court can be described as "fundamental" can the failure of counsel to make timely objection be excused.[16]

---

[13] *Id.* at 527-28.

[14] The use of special verdicts, in lieu of a general verdict, is authorized by CR 49.01. A judge who uses special verdicts will require the jury to make findings of fact in response to questions on the ultimate issues in the case. The judge will then enter judgment on the basis of the jury's findings. Special verdicts should clearly reveal what the jury has actually found to be the facts; reversals for an error in the instructions will be necessary only when the jury's finding on that issue is essential to the judgment. For an excellent article describing the beneficial use of special verdicts, *see* Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338 (1968). The special verdicts used by Judge H. Church Ford of the Eastern District of Kentucky have been compiled by Joe Lee, formerly Judge Ford's law clerk and now the Referee in Bankruptcy for the Eastern District of Kentucky. They appear at 38 F.R.D. 199 (1966).

[15] CR 46.

[16] CR 61.02. *See* 5A J. MOORE, FEDERAL PRACTICE, ¶ 46.02, at 1904-1907 (2d ed. 1974). It may be that the fundamental error doctrine should be abrogated. In Dilliplaine v. Lehigh Valley Trust Co., 322 A.2d 114 (Pa. 1974) the Supreme Court of

The rationale behind this general obligation is obvious. The trial court should be presented with an effective opportunity to rule on the issues. Counsel must then make known to the court the ruling he desires and why he is entitled to it at a time when the ruling will be effective if granted. It does no good, for example, to rule that evidence is inadmissible *after* it is introduced. The Court has been relatively strict in enforcing the requirement of a timely request for a ruling as a prerequisite for claiming as error the denial of the desired ruling.[17] The Court is not as strict, however, in requiring a timely assignment of the supporting reasons for the desired ruling. The Court is willing to accept a legal proposition not raised by the parties as the basis for affirming or reversing a ruling.

The distinction between failing to ask for a ruling and failing to assign reasons for a ruling is well illustrated by *Cox v. Cooper*[18] and *First National Bank v. Progressive Casualty Insurance Co.*[19] *Cox* was a wrongful death action brought by the mother of an unborn child against the father, whose negligence allegedly caused the child's death. In accord with settled case law, the judge deducted from the total award that share which would have passed to the father. Plaintiff's attorney did not ask the trial court for any other ruling. On appeal, it was argued by plaintiff's attorney that the contingent fee should be com-

---

Pennsylvania concluded that the concept of "basic and fundamental error" had no place in a modern system of jurisprudence; that to consider matters not properly called to the trial courts' attention encourages ill-prepared advocacy, undermines the trial courts, and results in a rule which is basically without standards—whatever a majority of the appellate court considers "fundamental." Three months later the Supreme Court of Pennsylvania ended the practice of reversing for unobjected-to fundamental error in criminal cases. Commonwealth v. Clair, 326 A.2d 272 (Pa. 1974).

[17] In Collins v. Sparks, 310 S.W.2d 45 (Ky. 1958) counsel made no objection when the judge took over the questioning of the witness and asked questions in such a way as to indicate disbelief on the part of the judge. The attorney moved for a new trial on the basis of the prejudicial interjections; the trial court denied the motion and the Court of Appeals reversed. The Court stressed the dilemma in which the lawyer was placed when the judge began questioning the witness in an adversary manner. The Court held, in effect, that there was no need to make an objection in the presence of the jury to actions of the judge. This case seems to stand for the broad proposition that, in considering cases where timely objection was not made, the Court will consider the practical consequences of making or not making the objection. Inadvertence will not be excused, but a calculated decision not to make an objection may be deemed reasonable under the circumstances.

[18] 510 S.W.2d 530 (Ky. 1974).

[19] 517 S.W.2d 226 (Ky. 1974).

puted on the basis of the gross amount of the award rather than the amount to which the mother was adjudged entitled. In rejecting this contention the Court noted:

> As an original proposition, a good argument can be made to the effect that in such a case the recovery to the estate should not be diminished at all, because if it is, as in this very example, the wrongdoer gains back half of what he loses. A better policy would pass what would otherwise be his share of the recovery on to those who would take it if he were dead. In this case that would be Catherine, the mother. We might have given favorable consideration to adopting such a policy had the administratrix brought the question to us, but sadly she did not, so we must live for the time at least with the ruling in Bays v. Cox' Adm'r that the amount of the wrongdoer's beneficial interest is deducted from what he has to pay.[20]

While providing small solace to plaintiff and her attorney, who lacked the prescience to foresee that the Court might be willing to change the existing law, *Cox* is obviously correct. The trial court was never asked to rule that the entire award should be given to the mother, and the appellate court would have overstepped its bounds by ordering relief which had not been sought below.

In *Progressive Casualty*, an attorney forged his clients' endorsements to settlement checks made out jointly to the attorney and his clients. The collecting bank cashed the checks and the attorney absconded with the funds. In the ensuing civil action for conversion, the bank was held liable to the clients. On appeal, the bank argued that because the attorney forfeited his fee by his wrongful acts, the award should be reduced by the amount of the lawyer's contingent fee contract. The Court affirmed the holding of the trial court for reasons not raised by the parties. The Court found that there was no evidence of a contingent fee contract with one of the clients and, more fundamentally, that the attorney did not have any interest in the settlement drafts. Therefore, as between the bank and the clients, nothing could be deducted. These points were not raised before the trial court or in the briefs of the parties; the argument that the attorney had no interest in the check was

[20] 510 S.W.2d at 538 (citation omitted).

presented in an amicus curiae brief. The Court excused this omission by the plantiffs, and expressed its philosophy toward "overlooked arguments" as follows:

> There are two schools of thought as to what policy an appellate court should follow in such instances—which are, we might add, not at all rare. One view is that when a party fails to argue a theory on which he is entitled to win he should simply lose, the courts having enough to do without practicing lawyers' cases. On the other hand, much bad law will go into the books (more, that is, than is there already) if courts confine their analyses of cases to the theories presented in the brief. It is probable that in well over 50% of the cases coming before it an appellate court will size up the dispositive logic of a controversy differently from the way in which the opposing parties have conceived it. For the sake of the litigants, who have some right, it seems to us, to expect the courts to assume a full share of responsibility for seeing that the controversy is correctly determined, we are of the opinion that insofar as the pleadings, the evidence, the rules of procedure and the principles of law permit, an appellate court should resolve cases on their merits, aided by but not necessarily restricted to the arguments of counsel.[21]

The Court's open and forthright approach in this case is to be admired. An appellate court should not be restricted to the arguments of counsel, for the Court is responsible for reaching the right result on the basis of what a majority of the Court perceives to be the correct principles of law. The Court should not reach an incorrect result because the correct principles have not been argued by counsel. The technique of inviting supplemental brief on a particular proposition or, as in *Progressive Casualty*, of granting permission for the filing of an amicus brief gives the litigants an opportunity to react to the new proposition. This technique should be employed whenever the Court feels it should decide the case on principles unbriefed by the parties.

IV. DISCOVERY OF PRIVILEGED COMMUNICATIONS

Nazareth Literary and Benevolent Institution v.

[21] 517 S.W.2d at 230.

Stephenson[22] was a malpractice suit against a physician and a hospital in which the plaintiff sought and was granted, pursuant to Civil Rules 26 and 34, discovery of certain hospital staff reports. These reports, apparently containing both factual information and the opinions of staff physicians as to the competency of the defendant doctor, had been prepared in anticipation of a hearing granted the defendant physician after the hospital had denied him permanent staff privileges. The Court, in affirming, rejected the hospital's claim that the reports were part of a lawyer's file developed in anticipation of litigation. The Court then refused to create an independent privilege for the physicians' reports, rejecting the defendant's contention that the potential inhibiting effect on communications between physicians and hospital authorities warranted judicial limitation of the scope of discovery. The Court expressly rejected *Bredice v. Doctors' Hospital, Inc.*,[23] in which the District Court for the District of Columbia created a judicial privilege for hospital staff reports, and followed *Kenney v. Superior Court*,[24] in which a California appellate court ordered a hospital to release the record of a doctor's disciplinary hearing.

What is disturbing about *Stephenson* is not the result but the hostility of the Court toward the hospital's claim that ordering discovery would chill internal communications and have an adverse impact on the public.[25] In *Bredice* Judge Corcoran held that the reports of medical staff review committees were privileged from discovery in a suit against the hospital. Judge Corcoran articulated the underlying rationale as follows:

> Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a *sine qua non* of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in

---

[22] 503 S.W.2d 177 (Ky. 1973).

[23] 50 F.R.D. 249 (D.D.C. 1970).

[24] 63 Cal. Rptr. 84 (Ct. App. 1967).

[25] "The second proposition advanced by the hospital is addressed to considerations on public policy . . . . [O]n reflection, one might well debate wherein the public interest lies." 503 S.W.2d at 178-79.

> terminating such deliberations. Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit.
>
> The purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques. They are not a part of current patient care but are in the nature of a retrospective review of the effectiveness of certain medical procedures. The value of these discussions and reviews in the education of the doctors who participate, and the medical students who sit in, is undeniable. This value would be destroyed if the meetings and names of those participating were to be opened to the discovery process.[26]

In the later case of *Gillman v. United States*[27] (cited with approval by the Kentucky Court in *Stephenson*) Judge Gurfein, of the Southern District of New York, distinguished between those parts of an internal report which could be deemed factual (statements of witnesses) and those parts which were evaluative in nature (the summary and recommendation). He ordered discovery as to the former but not the latter. Judge Gurfein followed *Bredice* in holding that the report of the Board of Inquiry, which contained the findings of the Board and its recommendations, was not discoverable, but felt that *Bredice* was inapplicable to the question of discovery of statements. *Gillman* and *Bredice* are not inconsistent; in both cases the courts recognized the legitimacy of a plaintiff's need for information during the discovery stage of litigation, as well as the legitimacy of the defendant's interest in protecting the confidentiality of internal communications. Judge Corcoran and Judge Gurfein both balanced these interests. In *Gillman*, the defendant had in its possession statements made by witnesses soon after the incident, and Judge Gurfein felt these statements should be discoverable, expressing the view that "[s]tatements taken shortly after an occurrence are unique and can never be duplicated precisely."[28] In *Bredice* it appears that no one with firsthand knowledge of the incident gave a statement to the hospital review committee; the staff meeting

---

[26] 50 F.R.D. at 250.

[27] 53 F.R.D. 316 (S.D.N.Y. 1971).

[28] *Id.* at 319.

was apparently a collegial review in which there was frank discussion by the staff members but no testimony from actual witnesses to the events. Thus it was reasonable for Judge Corcoran to hold that even the names of those participating should be withheld.

Bredice and *Gillman* are cases in which the courts recognized the validity of the defendant's interest in confidentiality as well as the plaintiff's interest in discovering relevant factual information and saw the desirability of accommodating both interests by limiting discovery to that information for which the plaintiff had a legitimate need. *Frankenhauser v. Rizzo*[29] and *Gaison v. Scott*[30] were civil rights actions against municipal officials for alleged police brutality. In both cases the courts rejected the municipal officials' claims of executive privilege for the police investigative files but recognized the public policy in favor of confidentiality. Acknowledging the legitimacy of both the need for discovery and the need for confidentiality, the courts attempted to reconcile these conflicting interests by deciding, on an item by item basis, after consideration of a variety of factors, the information to which the plaintiff should be given access.[31]

Stephenson involved a private hospital rather than a municipal police department, and the hospital could obviously not claim that the reports were subject to executive privilege. However, the factors enumerated in *Frankenhauser*[32] are applicable

---

[29] 59 F.R.D. 339 (E.D. Pa. 1973).

[30] 59 F.R.D. 347 (D. Hawaii 1973).

[31] The district judge in *Frankenhauser* listed the factors he would consider as follows:

> (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case.

[32] *Id.*

to the internal communications of any institution which serves the public. The public has a strong interest in institutional self-improvement.[33] Institutions should be encouraged to review their past activities, to identify and correct defective processes and to reduce the instances of avoidable human error. It was assumed in *Bredice* and *Frankenhauser* that unrestricted discovery would have a chilling effect on internal communications, thereby diminishing the effectiveness of the internal review. While the Kentucky Court in *Stephenson* spoke disparagingly of the claim that the public would be harmed by discovery, the Court was not presented with a claim that discovery should be *limited* rather than denied altogether. The Court pointed out that no protective order had been sought by the defendant:

> It is interesting to note that we are not here dealing with the question of a request for a protective order. The hospital did not seek a protective order for control or limitation or deletion of portions of the written material. It espoused the argument that the written material was simply not discoverable. We, therefore, express no opinion on the availability of or the extent of limitations allowable by means of a protective order in the circumstances.[34]

Was the Court obliquely stating that discovery might be limited along the lines of *Gillman* on an application for a protective order?[35] In *Louisville General Hospital v. Hellman*[36] the plaintiff asked for the production of all emergency room records compiled for the 30 day period preceding the incident which led to his suit. The defendant resisted, claiming that the production of these records would constitute an undue burden. The

---

[33] In Banks v. Lockheed-Georgia Co., 53 F.R.D. 283 (N.D. Ga. 1971) the court followed *Bredice* and refused to order the defendant to produce an internal report which contained a candid self-analysis and evaluation of the company's actions to comply with Title VII. The self-evaluation had been undertaken to improve equal employment opportunities and the court felt that it would further the public interest to shield the report and thereby encourage candid criticism. The defendant was, however, ordered to provide the plaintiff with any factual or statistical information contained in the reports.

[34] 503 S.W.2d at 179.

[35] It is significant that in Kenney v. Superior Court, 63 Cal. Rptr. 84 (Ct. App. 1967), relied on by the Court in *Stephenson*, the names of the medical review committee members were not ordered to be given to the plaintiff.

[36] 500 S.W.2d 790 (Ky. 1973).

Court of Appeals resolved the issue by directing the entry of a protective order limiting the examination to 100 records selected at random, and, significantly, by directing the concealment of the name, address, and other personal information of the patients. The Court felt in *Hellman* that the plaintiff's legitimate interest in discovery could be accommodated without divulging the names of the patients, and it protected the defendant's legitimate interest in confidentiality by means of a protective order.

Hellman and *Stephenson* may, in effect, set up a three-step test to be utilized when there is an application for a protective order against the discovery of internal reports. First, the court should ascertain whether the disputed materials are within the scope of discovery and not otherwise privileged. Second, the court should make a determination of the legitimacy of the defendant's claim that there is an institutional need for confidentiality. Third, there should be a determination of whether the disputed materials are in fact needed by the plaintiff for an informed litigation of his claim. If they are so needed, discovery would be ordered; if they are not, discovery would be refused.

If this view of *Stephenson* and *Hellman* is correct, the Court is cognizant of the danger of unrestricted discovery. During the discovery stage of the proceeding the attorney seeking discovery initially defines what is relevant by the scope of his questions or requests. This poses a serious danger of frustrating a legitimate interest in confidentiality without a corresponding gain in relevant information. Therefore, courts should be willing to seriously consider applications for protective orders. Using such orders to limit discovery to the factual information for which the plaintiff has a need, it should be possible in most cases to accommodate the legitimate interests of both plaintiff and defendant.

The danger is that *Stephenson* will be read as a rejection of the claim that confidentiality for internal reports serves a legitimate interest which should be protected if possible. If attorneys advising institutional clients so read *Stephenson* there will be a chilling effect on communications and an adverse effect on the effectiveness of institutional review. Sensitive matters will be neglected in written reports and institu-

tional review will come to be based on unofficial oral reports. This would not be in the public interest for two reasons. First, such a process would diminish the integrity of the institutional evaluation. Second, the written report, which could be obtained through discovery, would be dangerously misleading. Thus, *Stephenson* may, depending upon how attorneys read the case, have created a problem of sufficient dimension that legislative action in the 1976 General Assembly will be necessary. The legislature could be expected to enact a limited privilege for internal communications, either of general applicability or, in direct response to *Stephenson*, applicable only to the internal communications of hospitals.