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Kentucky Law Survey: Civil Procedure

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Civil Procedure

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INTRODUCTION

A basic problem facing Kentucky practitioners when dealing with civil procedure matters is the scarcity of state cases and materials interpreting the Kentucky Rules of Civil Procedure. Aside from Kentucky cases, *Clay's Kentucky Practice*[1] is the only state source to help interpret the rules. This source, however, may not be as detailed as necessary in order to solve a problem of first impression in Kentucky.

An obvious guide for interpreting the Kentucky Rules is interpretations of the Federal Rules of Civil Procedure [FRCP].[2] Kentucky cases often cite as authority federal rules decisions by the federal courts.[3] Although some Kentucky cases depart from the federal construction of the rules,[4] the Kentucky courts will normally seek parity between the state and the federal rules. The rationale for this uniformity is to "promote ease of practice in the federal and state courts of Kentucky,"[5] and to avoid "the creation

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[1] 6 & 7 W. CLAY, KENTUCKY PRACTICE (3d ed. 1974 & Supp. 1980).

[2] The similarity between the federal and state rules decisions have led Clay to include federal decisional law in his work as a guide to construing the Kentucky rules. For the most part, the wording of the Kentucky and federal rules is identical. 6 W. CLAY, *supra* note 1, at Rule 1, § 3.

[3] *E.g.*, Scudamore v. Horton, 426 S.W.2d 142, 144 (Ky. 1968) (citing federal court of appeals); Jackson & Church Div., York-Shipley, Inc. v. Miller, 414 S.W.2d 893, 894 (Ky. 1967) (citing federal district court decisions); Jackson v. Metcalf, 404 S.W.2d 793, 794 (Ky. 1966) (citing United States Supreme Court).

[4] *See, e.g.*, Pearman v. Schlaak, 575 S.W.2d 462 (Ky. 1978). Justice Reed, dissenting in *Pearman*, argues that the real issue is intervention of right after judgment for purposes of appeal. There is considerable federal authority in support of the dissenting opinion and in all probability the result is based on the facts of the case rather than a departure from the federal standard. *Id.* at 466 (Reed, J., dissenting).

[5] *Id.*

of a trap for the unwary lawyer who attempts to practice in both the state and federal courts in Kentucky."[6]

With this parity between state and federal interpretations comes the availability of the comprehensive treatises and articles on the federal rules, including the major treatises by Charles Wright and Arthur Miller[7] and by J. W. Moore.[8] Despite Professor Moore's prominence in drafting the original federal rules, there is a discernible preference in recent Kentucky cases for the Wright and Miller work (hereinafter referred to as *Wright and Miller*), over the Moore treatise (hereinafter referred to as *Moore*),[9] probably because *Wright and Miller* is easier to read and use.

This Survey of important Kentucky civil procedure cases emphasizes the instances in which Kentucky courts rely on federal authority. Further, this Survey develops a general analytical framework helpful to practitioners confronted with civil procedure problems. Practitioners should be aware that Kentucky courts demand strict adherence to the rules, thus departing from the substantial compliance theory espoused by the federal courts in interpreting the federal rules.[10]

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[6] *Id.*

[7] 8 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE (1969-80) [hereinafter cited as WRIGHT & MILLER]. This West publication is the current successor to earlier editions by W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE (1950) and C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE (1958-61). The work is updated with pocket parts.

[8] J. MOORE, MOORE'S FEDERAL PRACTICE (2d ed. 1948) [hereinafter cited as MOORE]. This multi-volume set is updated with loose-leaf inserts and periodic rewriting of sections.

[9] *See, e.g.*, Ashland Pub. Library Bd. of Trustees v. Scott, 610 S.W.2d 895 (Ky. 1981). In that case, the Court "adopt[ed] the simple and sensible rules advocated in 7A WRIGHT AND MILLER . . . ." *Id.* at 896.

[10] FED. R. CIV. P. 1 [hereinafter cited as FRCP] allows trial courts wide discretion in application of the rules. It states that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." *Id.* KY. R. CIV. P. 1 [hereinafter cited as CR] has no equivalent wording. The lack of this "liberal" ideal in the Kentucky rules is a partial explanation for the strict compliance theory of the Kentucky courts. On the other hand, the liberality in FRCP 1 which gives rise to the substantial compliance concept, applies throughout the federal rules. *See, e.g.*, Herbert v. Lando, 441 U.S. 153 (1979) (discovery rules to be interpreted in light of the discretion afforded the trial court in FRCP 1); Davis v. Piper Aircraft Corp., 615 F.2d 606 (4th Cir. 1980) (trial courts rely on FRCP 1 to apply all the rules through substance over form). *See also* 4 WRIGHT & MILLER, *supra* note 7, at § 1029; 2 MOORE, *supra* note 8, at ¶ 1.13[1].

I. WANT OF PROSECUTION

In 1978, Kentucky Rule of Civil Procedure (CR) 77.02(2),[11] requiring periodic review of the civil docket, was added to the rules to give the courts more control over their own dockets. The rule has no counterpart in the federal rules, and has therefore been strictly construed. The Kentucky Supreme Court granted discretionary review of *Bohannon v. Rutland*,[12] to consider the scope of CR 77.02(2). In *Bohannon*, Phillip Bohannon filed a complaint on August 25, 1978. Rutland tried to negotiate with Bohannon and presented several out-of-court settlement offers which were refused.

Nearly a year later, Rutland moved for, and the trial court granted a dismissal of the suit under CR 77.02(2). Rutland alleged that Bohannon had taken "no further affirmative steps" to advance the suit after filing the complaint.[13] The court of appeals affirmed the dismissal, holding that CR 77.02(2) applies when the plaintiff fails to advance the suit toward a decision.[14]

The Supreme Court reversed, construing the phrase "no pretrial steps"[15] to mean no activity by *either party*. The Court further stated that the purpose of CR 77.02(2) was to give trial court judges a "means by which they may periodically review their dockets and purge them of cases which have lapsed into inactivity."[16] The Court held that Rutland's depositions, interrogatories and settlement negotiations were sufficient activity by a party to the suit to prevent dismissal by the trial court under CR 77.02(2).

In dicta, the Court pointed out that the involuntary dismissal rule of CR 41.02(1)[17] would have been the proper mode of dismis-

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[11] CR 77.02(2) requires that the trial courts review their dockets a minimum of once a year and to dismiss those cases in which "no pretrial steps has been taken" and good cause cannot be shown within thirty days of the trial court's decision to dismiss.

[12] 616 S.W.2d 46 (Ky. 1981).

[13] *Id.*

[14] *Id.* at 47.

[15] See note 11 *supra* for the text of CR 77.02(2).

[16] 616 S.W.2d at 47. *Accord* W. CLAY, *supra* note 1, at Rule 77.02(2) comment (Supp. 1980).

[17] CR 41.02(1) provides: "For failure of the plaintiff of 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."

sal because of the plaintiff's failure to prosecute. A defendant who has attempted to advance the case while the plaintiff has been inactive may request a dismissal under CR 41.02(1), but not under CR 77.02(2).[18] As a result, CR 77.02(2) is to be utilized either by the court *sua sponte* or by the plaintiff or defendant when *neither* party has attempted to advance the case beyond the "pleading stage," while CR 41.02(1) serves as a remedy for the defendant when the plaintiff fails to prosecute.[19]

II. SERVICE OF PROCESS

Many state courts have difficulty distinguishing the due process requirements of notice of a suit against nonresident defendants from the requirements of *in personam* jurisdiction. That confusion is well illustrated by the court of appeals' decision in *Cox v. Rueff Lighting Co.*[20] In *Cox*, the court of appeals upheld the trial court's refusal to set aside a default judgment in favor of the plaintiff despite the defendant's claim that he was not properly served with process. The out-of-state defendant was served in accordance with the long-arm statute, Kentucky Revised Statutes (KRS) section 454.210.[21] The process agent for the defendant testified that he had received a registered letter sent by the plaintiff but had thrown it away believing it to be junk mail.[22]

The court of appeals ruled that although actual notice is generally not required by due process to effectuate proper service under the long-arm statute,[23] a showing of no actual notice may,

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[18] 616 S.W.2d at 47.

[19] *Id.*

[20] 589 S.W.2d 606 (Ky. Ct. App. 1979).

[21] KY. REV. STAT. ANN. § 454.210(3)(b) (Bobbs-Merrill Cum. Supp. 1980) [hereinafter cited as KRS] provides that the secretary of state is to send the letter "by certified mail, return receipt requested and shall bear the return address of the secretary of state."

[22] 589 S.W.2d at 607.

[23] *Id.* No Kentucky cases are directly on point, but the *Cox* court found that dicta in White v. Jayne, 230 S.W.2d 429 (Ky. 1950), supported its view that actual notice was not required to obtain personal jurisdiction under the Kentucky long-arm statute. *White* involved service of process under the nonresident motorist statute, and held that service of process was not properly achieved. The *Cox* court relied on dicta in *White* to the effect that if the registered letter had in fact been delivered as addressed, the defendant could not complain of improper service, even though the receipt may have been signed by another person residing at that residence. 589 S.W.2d at 607.

in some circumstances, constitute sufficient cause to set aside a default judgment. If the movant shows that notice in fact was not received and demonstrates a meritorious defense, then the default judgment should be set aside.[24] In *Cox*, however, the court of appeals affirmed the trial court's order refusing to set aside the default judgment because it believed that:

> [T]here was sufficient evidence to establish to a reasonable probability that appellant did have notice or, at the very least, was furnished sufficient information to place him on a kind of inquiry notice to find out about the letter and its contents. Having failed to take available steps which could have protected his interests, appellant cannot be heard now to complain that the trial court abused its discretion in refusing to grant him postjudgment relief.[25]

The decision in *Cox* would have confronted the problem more clearly if the court had discussed the matter in terms of notice and eliminated the references to personal jurisdiction. The nonresident defendant in *Cox* was obviously subject to *in personam* jurisdiction in Kentucky under the long-arm statute.[26] The question which the court was trying to address was whether actual notice is required in order to satisfy procedural due process or whether some lesser showing suffices. Under *Mullane v. Central Hanover Trust*,[27] the requirement of notice is as clearly a requirement of due process as is the existence of jurisdiction, but notice may be satisfied by the implementation of a scheme "reasonably calculated to inform"[28] the defendant of the suit.

The *Cox* case illustrates Kentucky courts' reliance on federal authority. The court cited both *West's Federal Practice* and a no-

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[24] 589 S.W.2d at 607.

[25] *Id.*

[26] For *in personam* jurisdiction, the court apparently relied on KRS § 454.210(2)(a) (Cum. Supp. 1980) which, in part, authorizes courts to exercise jurisdiction over persons: "Contracting to supply services of goods in this Commonwealth." See note 23 *supra* for *Cox's* jurisdictional discussion.

[27] 339 U.S. 306 (1950). This is the due process standard for notice in civil actions. The United States Supreme Court said "the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315.

[28] *Id.* at 314.

tice decision by the federal court in Indiana.[29] Indeed, the *Cox* holding had to conform to federal standards since the due process notice requirements of *Mullane* apply to both state and federal cases.[30] This connection, however, is not intimated by the court in *Cox*. Although the result in *Cox* is correct, the court could have more correctly identified the basis for the holding.

III. IN PERSONAM JURISDICTION—WAIVER OF DEFECT

The court of appeals' decision in *Williams v. Indiana Refrigerator Lines, Inc.*[31] illustrates a result which is in accord with federal law and at the same time demonstrates strict adherence to the letter of the rules. The nonresident defendant answered the original complaint without raising the defense of lack of *in personam* jurisdiction in the answer or through prior motions. The defendant subsequently engaged in various discovery procedures and even attempted to remove the case to the federal courts. After the plaintiff filed an amended complaint which added a party, but which did not alter the substance of the action, the defendant then moved to dismiss for lack of *in personam* jurisdiction.[32] Under the rules, lack of personal jurisdiction must be raised as a defense by motion prior to answer,[33] or raised in the answer. The rules clearly indicate that lack of personal jurisdiction is a disfavored defense and that a failure to raise such a defense in a pre-answer motion or in the answer will result in a waiver of the defense.[34]

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[29] 589 S.W.2d at 607 (citing Milosavljevic v. Brooks, 55 F.R.D. 543 (N.D. Ind. 1972)).

[30] 339 U.S. at 314-15.

[31] 612 S.W.2d 350 (Ky. Ct. App. 1981).

[32] *Id.* at 351.

[33] CR 12.02 provides in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (b) lack of jurisdiction over the person.

[34] CR 12.08(1) states:

> A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (a) if omitted from a motion in the circumstances described in Rule 12.07, or (b) if

In *Williams*, the court held that the engagement of the defendant in the various activities, when coupled with the failure to raise the jurisdictional defect in a timely fashion, resulted in a waiver of the issue.[35] Although the decision lacks citations to federal cases or treatises, it is in line with both.[36] Furthermore, the decision is a strict application of the waiver terms of CR 12.08(1).

In a somewhat related case, the court of appeals held that a dismissal for lack of personal jurisdiction has no *res judicata* effects on the merits of the dismissed action. The effect of this ruling in *Mitchell v. Money*[37] was to allow the plaintiff to instigate a second action following dismissal of the first because of the lack of personal jurisdiction. The case is somewhat unusual in that the court lacked jurisdiction because the defendant in the first action was dead; the second action thus had to be brought against the decedent's administrator. The holding is correct in view of the clear language of CR 41.02(3) that a jurisdictional dismissal is not a dismissal on the merits, and is in line with federal authorities, even though the court failed to cite the authorities most clearly on point.[38]

IV. AMENDED PLEADINGS—RELATION BACK

The Kentucky Supreme Court considered the amendment of complaints in *Perkins v. Read*.[39] In 1973, Geneva Perkins filed a wrongful death action for the death of her husband resulting from a 1972 automobile collision. In 1976, well beyond the one year statute of limitations for personal injury actions,[40] Perkins

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it is neither made by motion under Rule 12 nor included in a responsive pleading or an amendment thereof permitted by Rule 15.01 to be made as a matter of course.

[35] 612 S.W.2d at 351.

[36] *See, e.g.*, Graff v. Nieberg, 233 F.2d 860 (7th Cir. 1956); 5 WRIGHT & MILLER, *supra* note 7, at § 1351; MOORE, *supra* note 8, at ¶ 12.23.

[37] 602 S.W.2d 687 (Ky. Ct. App. 1980).

[38] *See, e.g.*, Costell v. United States, 365 U.S. 265 (1961); Martinez v. Richardson, 472 F.2d 1121 (10th Cir. 1973); Miller v. Saxbe, 396 F. Supp. 1260 (D.C.D.C. 1975); 9 WRIGHT & MILLER, *supra* note 7, at § 2373; 5 MOORE, *supra* note 8, at ¶ 41.14[1].

[39] 616 S.W.2d 495 (Ky. 1981).

[40] *See* KRS § 413.140 (Cum. Supp. 1980).

amended the complaint alleging damages for her personal injuries stemming from the same accident. The court of appeals affirmed the circuit's court denial of the amendment which had been based on the statute of limitations.[41]

The Supreme Court reversed, allowing the amendment of Perkins' personal injury to relate back to the original complaint under CR 15.03's test of matters arising from the same "conduct, transaction, or occurrence."[42] Since pleadings serve a notice function,[43] any claim arising out of the factual situation of the original complaint properly tolls the statute of limitations. The Court differentiated this from an amendment following the running of the limitations period in which a new party or unrelated cause of action is added to the original factual situation.[44] Where the claims that are the subject of the amendment arise from the transaction already the subject of the complaint, a defendant is not burdened.[45]

Although the Kentucky Supreme Court failed to cite either federal cases or treatises, the result is justified by both. Basing the decision on a rationale of notice to the defendant is the approach of both *Wright and Miller*[46] and is also in accord with *Moore*[47] as well as several federal cases.[48]

V. APPELLATE REVIEW OF TRIALS BY DEPOSITION

In *Stafford v. Stafford*,[49] the court of appeals reviewed a child custody case tried by deposition under CR 43.04.[50] The trial

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[41] 616 S.W.2d at 495.

[42] CR 15.03(1) states: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

[43] Perkins v. Read, 616 S.W.2d at 496. *See also* Wimsatt v. Haydon Oil Co., 414 S.W.2d 908, 911 (Ky. 1967); 6 W. CLAY, *supra* note 1, at Rule 15.03 comment 3.

[44] 616 S.W.2d at 496.

[45] *Id.*

[46] WRIGHT & MILLER, *supra* note 7, at § 1497.

[47] MOORE, *supra* note 8, at ¶ 15.15[3].

[48] *See, e.g.*, Williams v. United States, 405 F.2d 234 (5th Cir. 1968); Hockett v. American Airlines, Inc., 357 F. Supp. 1343 (N.D. Ill. 1973).

[49] 618 S.W.2d 578 (Ky. Ct. App. 1981).

[50] CR 43.04(1) provides in part: "In all trials concerning alimony or divorce . . . the

judge awarded custody of the two children to Etta Stafford. Her ex-husband appealed, alleging that the overwhelming weight of the evidence did not support the custody award.

The decision of the trial court sitting as a fact-finder under CR 52.01 will not be overturned unless the appellate court views the findings to be "clearly erroneous."[51] The court of appeals noted the policies in support of the rule: the opportunity for the trial court judge to scrutinize both the demeanor of the witnesses and the evidence, and the avoidance of duplicating the trial court's function.[52]

The court of appeals then held that the clearly erroneous standard is inapplicable to cases tried solely by deposition under CR 43.04.[53] The court relied on *Burchett v. Jones*,[54] an earlier case tried entirely on depositions, in which the Court of Appeals (then Kentucky's highest court) stated:

> While CR 52.01 requires that due regard be given the opportunity of the trial court to judge the credibility of the witnesses, the form of the evidence is significant . . . . [T]he trial court did not have an opportunity to observe the demeanor of the witnesses who gave oral testimony. Under the circumstances, we believe we are in as advantageous a position to pass upon credibility as was the trial court and may properly evaluate the evidence.[55]

Applying the *Burchett* rule in *Stafford*, the court concluded that under CR 52.01, the factual record did not support the trial judge's findings.[56] The court of appeals in effect granted a new

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testimony shall be taken by deposition, unless the court by order . . . requires the testimony to be heard under oath and orally in open court." The court of appeals questioned the appropriateness of trial by deposition in a child custody case; however, it did not address this issue, leaving it open for future consideration. 618 S.W.2d at 578 n.1.

[51] CR 52.01 requires that the factfindings of a judge with either no jury or an advisory jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses . . . ."

[52] 618 S.W.2d at 579.

[53] *Id. See also* Taylor v. Taylor, 591 S.W.2d 369 (Ky. 1979); Stephanski v. Stephanski, 473 S.W.2d 806 (Ky. 1971); Barnes v. Barnes, 458 S.W.2d 772 (Ky. 1970).

[54] 291 S.W.2d 32 (Ky. 1956). *See also* Bush v. Putty, 566 S.W.2d 819, 821 (Ky. Ct. App. 1978).

[55] 291 S.W.2d at 34 (*quoted in* Stafford v. Stafford, 618 S.W.2d at 580).

[56] 618 S.W.2d at 580-81. The court noted that the trial judge's findings under CR

trial or retrial with itself acting as a fact-finder on the depositions. The *Stafford* court said that *Burchett* places it on "an equal footing with the trial court."[57]

Although the court does cite the federal case of *United States v. Merz*,[58] that decision is not on point for the holding that the appellate court may substitute its own view of the facts in cases tried by deposition. Given the facts in *Stafford*, it is doubtful that such a "rule" is the real basis of the result. The citation to *Merz* indicates that there was *no* factual support in the record for the trial judge's opinion.[59] This is further indicated by the court of appeals' observation that the trial judge's decision to give custody to the mother was based on a preference for maternal custody.[60] That preference, the court noted, has been eliminated by the 1980 amendments to the relevant statute.[61] It thus appears that there was simply no support for the trial court's result, and overruling the result would be correct even under the "clearly erroneous" standard.

The court's position in *Stafford* concerning review of trial by depositions should not be taken at face value.[62] While it is correct

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52.01 (set out in part in note 51 *supra*) did not support the court's custody award. Citing United States v. Merz, 376 U.S. 192 (1964), the court of appeals further discussed the importance of the specificity of the trial court judge's factfindings and concluded that the trial court's findings stated only bare conclusions and not the means of reaching those conclusions. 618 S.W.2d at 580.

The court stated that the trial court must "consider all relevant factors including those specifically enumerated in the statute [KRS § 403.270(1) (Cum. Supp. 1980), the child custody statute]." *Id.* at 580. *See also* Kentucky Mountain Coal Co. v. Hacker, 412 S.W.2d 581 (Ky. 1967); Standard Farm Stores v. Dixon, 339 S.W.2d 440 (Ky. 1960); Fleming v. Rife, 328 S.W.2d 151 (Ky. 1959).

[57] 618 S.W.2d at 581. The combination of lack of specificity in the trial court's factfindings and the *Burchett* rule gives the court of appeals the same authority to consider depositions as if it were another trial court.

[58] 376 U.S. 192 (1964) (*cited in* Stafford v. Stafford, 618 S.W.2d at 580).

[59] *See* United States v. Merz, 376 U.S. at 192.

[60] 618 S.W.2d at 581. *See* Casale v. Casale, 549 S.W.2d 805 (Ky. 1977); McLemore v. McLemore, 346 S.W.2d 722 (Ky. 1961).

[61] KRS § 403.270(1) (Cum. Supp. 1980).

[62] In fact, it appears that *Burchett* does not support the proposition that the "clearly erroroneous" standard is inapplicable to cases tried solely by depositions under CR 43.04. The Court in *Burchett* stated that they found the trial court's decision to be "clearly erroneous" and reversed for that reason. 291 S.W.2d at 34. Recently, the court of appeals recognized this language in *Burchett* in Largent v. Largent, 28 KY. L. SUMM. 16, at 3 (Ky.

to say that the normal deference given to a trial judge, grounded on the opportunity to judge witnesses' credibility, is not present in such a case, it is not necessarily true that there is no reason to defer to the trial judge's fact findings in a trial by deposition. It makes good practical sense to defer to a trial judge even in trials by deposition simply in order to avoid having every such case decided all over again by the appellate court.

VI. DESIGNATION OF RECORD

In *Seale v. Riley*,[63] the court of appeals gave "notice to the

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Ct. App. Dec. 11, 1981) (unpublished) [hereinafter cited as KLS]. In *Largent*, the court of appeals recognized the apparent problem they had created in *Stafford*. In *Largent*, the court of appeals stated that *Stafford's* holding that the "clearly erroneous" standard is inapplicable to trials by deposition was "dictum [and that . . . . c]ertainly, the panel of this court that decided *Stafford* feels differently." 28 KLS 16, at 3.

The court of appeals discussed CR 52.01 and admitted that the appellate court is on equal ground with the trial court when all the evidence is submitted through depositions; however, CR 52.01 also contains a statement that the appellate court is to defer "to the opportunity of the trial court to judge the credibility of the witnesses." In *Largent*, the court of appeals refused to disturb the trial court's ruling, even though the case was tried by depositions because: (1) the decision was not clearly erroneous; and (2) "the trial judge may . . . have [had] some advantage in judging credibility by either knowing the parties or witnesses or by having had the same parties before him in an earlier proceeding." 28 KLS 16, at 4.

The court of appeals noted in *Largent* that CR 52.01's "clearly erroneous" standard is uncertain as applied to trials by deposition under CR 43.04 due to the conflicting language of *Stafford* and *Largent*. The court of appeals called on the Kentucky Supreme Court to settle the issue:

> We are mindful of the confusion of the holdings in this case and *Stafford* may create with the bar and the trial bench with reference to our scope of review in cases of this type, but hope that one party here will seek discretionary review with the Kentucky Supreme Court who will then have the opportunity to clarify this area of the law for the trial court, bar and the Court of Appeals.

28 KLS 16, at 3-4 n.1.

The position in regard to factual review of trials before a judge on written evidence is also unclear in the federal system under FRCP 52(a) which is the "model" for CR 52.01. Such a power has been asserted in Orvis v. Higgins, 180 F.2d 537 (2d Cir.), *cert. denied* 340 U.S. 810 (1950), but the decision in that case was in fact based on the "clearly erroneous" standard as was *Burchett* in Kentucky. The power has been rejected in Pendergrass v. New York Life Ins. Co., 181 F.2d 136 (8th Cir. 1950). Such "retrial" on appeal of evidence by depositions or in other written form is criticized in Wright, *The Doubtful Omniscience of Appellate Courts*, 14 MINN. L. REV. 751, 782 (1957).

[63] 602 S.W.2d 441 (Ky. Ct. App. 1980).

bar of the standards against which minimum compliance with CR 75.01[64] will be measured."[65] Concerning the rule, the court held:

> [A]ny designation of evidence or proceedings stenographically reported filed in accordance with CR 75.01 after August 1, 1980, which designates only "the entire trial court record" shall be held improper and will be grounds for dismissal of the appeal as if no designation had been filed. Attorneys are hereby placed on notice that the designation filed pursuant to CR 75.01 should state with particularity those portions of the evidence or proceedings stenographically reported as the party wishes to be included in the record on appeal. A blanket designation of "the entire trial court record" is not acceptable.[66]

The majority opinion does not clearly identify the departures from the rules to which it objected. The court may have been objecting to the use of the "entire trial court record" as not distinguishing between the original record maintained by the clerk and the evidence or proceedings stenographically reported. On the other hand, it may have been objecting to the inclusion of all stenographically reported evidence in the record instead of just those portions necessary to the appeal.

The concurring opinion[67] in *Seale* interpreted the majority's

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[64] The court of appeals summarized CR 75.01 as follows:

> (1) Unless an agreed statement of the case is certified as provided in Rule 75.15, within 10 days after filing a notice of appeal the *appellant shall serve* upon the appellee *and file* in the trial court a *designation of such portions of the evidence of proceedings stenographically reported as he wishes to be included in the record on appeal*, unless the appellee has already served and filed a designation. Within 10 days after the service and filing of such designation, any other party to the appeal may serve and file a designation of additional portions of the evidence or proceedings stenographically reported as he wishes to be included. If the appellee files the original designation, the parties shall proceed under Rule 75.02 as if the appellee were the appellant.

(emphasis added by the court in Seale v. Riley, 602 S.W.2d at 442-43). It should be noted that the quoted text of CR 75.01—Designation of Evidence or Proceedings Stenographically Reported—differs from the current version, appearing in the KENTUCKY RULES OF COURT, DESK COPY (1981) (as amended July 1, 1981).

[65] 602 S.W.2d at 442.

[66] *Id.* at 443.

[67] Justice Wilhoit and Justice Howard concurred in the result in *Seale*. Justice Wilhoit stated "I concur in the majority opinion only because it does not dismiss the instant

opinion as objecting to the party's failure to distinguish between the clerk's record and the stenographically reported documents. It should be noted that the record maintained by the clerk is always included in the record on appeal,[68] while stenographically reported documents are included only when specifically designated by the parties.[69] Viewing the majority's interpretation of CR 75.01 as "hypertechnical,"[70] the *Seale* concurrence would have held a designation of the "entire trial court record" to be sufficient, stating: "Inasmuch as CR 75.07(1) requires the clerk to certify the entire *record* anyway, it seems to me that a designation such as we have here[71] obviously means that the entire *transcript of evidence* is designated."[72] The concurrence felt that its interpretation of the designation issue was supported by the number of appeals before them where all the stenographically reported documents had been included on the basis of a designation of the "entire trial court record."[73]

If the *Seale* majority was in fact objecting to the use of the term "entire trial court record" on this ground, then it has indeed given a "hypertechnical" interpretation to CR 75.01. A designation of "all transcripts of evidence or proceedings stenographically reported" should then be sufficient to comply with the rule. The court, however, may have been objecting to the nature of the designation, not the form. That is, the court may not have been objecting to the use of "the entire court record" instead of "all stenographically reported documents," but rather, it may have been objecting to the inclusion of all stenographically reported evidence in the record instead of just those portions necessary to the appeal. This interpretation is supported by the court's declaration that the purpose of CR 75.01 is to "require the appellant in each case *to define those portions* of the stenographically

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appeal and because we are giving the bar this notice of the hypertechnical interpretation we plan to give CR 75.01." 602 S.W.2d at 443 (Wilhoit, J., concurring).

[68] CR 75.07(1).

[69] CR 75.07(2).

[70] 602 S.W.2d at 443 (Wilhoit, J., concurring).

[71] The "Designation of Record on Appeal" before the court read: "Pursuant to Rule 75.01 of the Kentucky Rules of Civil Procedures [sic] the plaintiff/appellant designates the entire trial court record to be included in the record on appeal." *Id.* at 442.

[72] *Id.* at 443 (emphasis in original).

[73] *Id.* at 443-44.

recorded proceedings in the circuit court which the appellant wishes to add to the clerk's original record in support of his position on his appeal."[74] Further support for this interpretation of the court's reasoning is its statement that "[t]he designation which the appellant is required to file by CR 75.01 is intended *to define those parts of the transcript* which the appellant wishes included in the record on appeal under CR 75.07(2)."[75]

If the court's objective was to ensure designation of specific portions of stenographically recorded evidence, then its position is consistent with CR 75.05 which provides that:

> No party shall designate any matter not essential to the decision of the questions presented by the appeal. For any infraction of this Rule . . . the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require; and costs may be imposed upon offending attorneys or parties.

Application of the sanctions in CR 75.05, however, would appear to be a more appropriate remedy than dismissal of the appeal. Use of these sanctions would meet the objectives of the majority in *Seale* to force attorneys to be explicit in their designations, while making it less likely that litigants' appeals would be settled by procedural issues rather than on the merits.

The designation of record issue is one where no help or guidance can be found in federal materials, as there is no requirement in the federal rules analogous to CR 75.01. While it may make sense on the surface to require an exact listing of the portions of the stenographically reported evidence which will be contested on appeal, that is a position which can work only in a perfect world. In the imperfect world in which Kentucky practitioners must work, it is not unusual to encounter delays of six months or more in receiving transcripts of civil trials, long after the time has run for the designation of the record. The future reading which will be given to *Seale* should be to allow a general description of the portions of the transcript relevant to the appeal; any rule requiring a more definite statement will be unworkable and can only have disastrous consequences.

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[74] *Id.* at 443 (emphasis added).
[75] *Id.* (emphasis added).

CONCLUSION

It should be noted that the cases discussed in this Survey are not all the cases involving procedural issues to come before the Kentucky appellate courts during the Survey period. The cases discussed were chosen because they represent the most important and commonly encountered issues. It is hoped that these discussions serve to keep the practitioner informed of developments and that the framework of federal decisional law and federal treatises can provide guidelines for problems not yet encountered in Kentucky.