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## Kentucky Law Survey: Civil Procedure

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# CIVIL PROCEDURE<sup>1</sup>

BY JOHN H. GARVEY\* AND BETH PEDERSON DOUTT\*\*

## I. SERVICE OF PROCESS

Two questions were presented to the court of appeals in *Allen v. O.K. Mobile Home Sales, Inc.*<sup>2</sup>: what behavior negates the good faith requirement imposed by Kentucky Rule of Civil Procedure (CR) 3<sup>3</sup> on issuance of a summons and whether counsel on appeal can “waive a question of fact not supported by the record.”<sup>4</sup> In *Allen*, the circuit court had granted O.K. Mobile Home a summary judgment on the ground that Allen’s complaint for negligence was barred by the one year statute of limitations. Although the complaint apparently was timely filed, the defendants were not served with summonses until after the statute of limitations had run. According to the admission of Allen’s counsel on appeal, the

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<sup>1</sup> Two court of appeals decisions discussed in last year’s Civil Procedure Survey have been overturned by the Kentucky Supreme Court.

In a 4-3 opinion the Kentucky Supreme Court reversed the court of appeals decision in *Pearman v. Schlaak*, No. CA-502-MR (Ky. Ct. App. Sept. 23, 1977), discussed in Garvey & Dorris, *Kentucky Law Survey-Civil Procedure*, 67 Ky. L.J. 489, 503-07 (1978-1979). *Pearman v. Schlaak*, 575 S.W.2d 462 (Ky. 1978). Adopting the interpretation of Ky. R. Civ. P. [hereinafter cited as CR] 24.01 given in *Murphy v. Lexington-Fayette County Airport Bd.*, 472 S.W.2d 689 (Ky. 1971), the Court held that since the respondents “had not sought intervention prior to judgment” they did not participate in the trial and thus were indistinguishable from those who were not permitted to intervene in *Murphy*. Justice Reed, joined by Justices Lukowsky and Clayton, dissented, citing the United States Supreme Court’s interpretation of the parallel Fed. R. Civ. P. 24(a) in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977). 575 S.W.2d at 464-66.

The Kentucky Supreme Court also reversed the court of appeals’s decision in *Kentucky Farm Bureau Mut. Ins. Co. v. Cook*, 590 S.W.2d 875 (Ky. Ct. App. 1979). The Court held that the proper allocation of peremptory challenges between litigants is a substantial right. A misallocation is, therefore, reversible error if the issue is properly preserved for appeal. No showing of prejudice by the opposing party is necessary. 590 S.W.2d at 877.

<sup>2</sup> 570 S.W.2d 660 (Ky. Ct. App. 1978).

<sup>3</sup> CR 3 provides: “A civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith.”

<sup>4</sup> 570 S.W.2d at 662.

summonses were given to Carlos Pope, Allen's trial attorney, when the complaint was filed.<sup>5</sup> Pope's affidavit stated that he mailed the summonses to the sheriff on the day he received them, twelve days before the statute of limitations ran. In his affidavit, however, the sheriff stated that he had no record of receipt of the summonses. The action finally was instituted a year and a half later by issuance and service of new summonses.

The court of appeals held that the presumption of an "intention to have the summons served in due course"<sup>6</sup> which attaches when a summons is obtained may be rebutted by a showing that the summons was issued conditionally—*i.e.*, that the clerk issued the summons to an attorney who did not intend unequivocally to have it served in due course.<sup>7</sup> The court departed from established precedent, however, in holding that such lack of intent could be established simply by showing that the summonses were handed to the plaintiff's attorney.<sup>8</sup> The cases make clear that even a demonstration of an attorney's lack of diligence will not suffice; what is required is evidence of bad faith.<sup>9</sup> The record, even as supplemented by the appellate counsel's admission, failed to demonstrate any bad faith by Pope. On the contrary, the issue framed by the conflict between Pope's and the sheriff's affidavits was simply whether process was dispatched promptly.<sup>10</sup> Even if an allega-

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<sup>5</sup> The admission by counsel on appeal was supported by the affidavit of Glenn Denham, an attorney who stated that he had heard the deputy clerk make a statement to the same effect. *Id.*

<sup>6</sup> 570 S.W.2d at 661.

<sup>7</sup> *Wittinghill v. Smith*, 562 S.W.2d 649 (Ky. Ct. App. 1977).

<sup>8</sup> *See, e.g., Rucker's Adm'r v. Roadway Express, Inc.*, 131 S.W.2d 840 (Ky. 1939); *Louisville & N.R.R. v. Little*, 95 S.W.2d 253 (Ky. 1936).

<sup>9</sup> *See, e.g., Roehing v. Merchants & Businessmen's Mut. Ins. Co.*, 391 S.W.2d 369 (Ky. 1965); *Rucker's Adm'r v. Roadway Express, Inc.*, 131 S.W.2d 840 (Ky. 1939)(plaintiff's attorney found negligent, yet the Court held that no bad faith had been proven).

<sup>10</sup> The law is clear that the service itself must be by the sheriff, KY. REV. STAT. § 70.070 (1970) [hereinafter cited as KRS]; a person empowered by the sheriff in writing to execute process, KRS § 70.050 (1979); the coroner, KRS § 454.140(1) (1975); the jailer, KRS 454.140(1) (1975); the constable, KRS § 454.140 (1) (1975), OAG 78-66; or a person appointed by the court to serve a particular process, KRS 454.145 (1975). No legal or logical reason exists, however, for not allowing the plaintiff's attorney to deliver the summonses to the sheriff for service. All CR 4.01(1)(b) requires is

tion of bad faith were read into the sheriff's affidavit, a genuine issue of material fact sufficient to defeat a motion for summary judgment still remained.<sup>11</sup>

The second question presented by the appeal was intertwined with the first. The court of appeals viewed the admission by Allen's counsel on appeal that Pope had received the summonses as fatal to the action.<sup>12</sup> Whether this factual issue, unsupported by the record, could be waived by admission was a question of first impression in Kentucky.<sup>13</sup> The court of appeals resolved the issue by adopting the rule of *Robinson v. Hill-Diesel Engine Co.*<sup>14</sup> that, even where it appears on the record that the trial court properly decided the factual issue before it, the appellate courts will accept a contradictory concession.<sup>15</sup>

Although the court of appeals adopted the *Robinson* rule without discussion, the court provided the correct standard for resolving the case. Since an attorney may waive an assignment of error or concede a point of law on appeal, the issue is whether factual admissions are somehow different. In their consequences they are not, since a concession of either sort may result in loss of the case. Arguably, however, while an attorney who concedes a factual issue unsupported in the record may do his client a disservice since the court would have no basis for an adverse determination absent the concession, it might be advantageous for him to concede a legal question and thereby favorably impress the court by saving it the trouble of deciding that issue. Such an argument is unpersuasive in *Allen*; reversal of the summary judgment would return the case for trial, at which point it would be possible to demonstrate that Pope had received the summonses from the clerk. By adopting the *Robinson* standard the court properly

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that the clerk "cause the summons and complaint . . . to be transferred for service to any person authorized . . . to deliver them . . ." Handing the summonses to an attorney for delivery to the sheriff for service meets this requirement.

<sup>11</sup> *Accord*, 6 W. CLAY, KENTUCKY PRACTICE, Civil Rule 3 Note (3d ed. Supp. 1979).

<sup>12</sup> 570 S.W.2d at 662.

<sup>13</sup> *Id.*

<sup>14</sup> 238 N.W. 277 (Mich. 1931).

<sup>15</sup> 570 S.W.2d at 662.

avoided a rule which would entail an unnecessary expenditure of resources by sending the case back for trial.

## II. PLEADINGS

In *Sheffer v. Chromalloy Mining and Mineral Division*,<sup>16</sup> the court of appeals took a step back toward the niceties of code and common law pleadings. In return for a loan of some \$750,000 the Sheffers gave Chromalloy a promissory note and several mortgages. The Sheffers' answer admitted their default on the loan but asserted that their inability to repay was a consequence of Chromalloy's negligence in performing a collateral agreement to assist in the construction of the mill. As a result the mill produced insufficient ore to generate the necessary revenues. The Sheffers also counterclaimed for breach of contract and negligence in connection with the construction. The court of appeals held that the Sheffers had failed to state an affirmative defense and affirmed a judgment on the pleadings for Chromalloy.<sup>17</sup>

The court of appeals felt that the defendants had failed to plead the affirmative defense of failure of consideration with the specificity required by CR 8.03.<sup>18</sup> It said that while Chromalloy's negligence in performing the collateral agreement could be employed to show failure of consideration,<sup>19</sup> the Sheffers had failed to make such an argument, since their "answer and counterclaim nowhere mention[ed] 'failure of consideration' as an affirmative defense."<sup>20</sup> To fault the Sheffers for their failure to label, rather than simply state, their defense is to ignore the command of CR 8.06: "All pleadings

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<sup>16</sup> 578 S.W.2d 594 (Ky. Ct. App. 1979).

<sup>17</sup> The circuit court judgment was apparently understood as a partial final judgment under CR 54.02(1).

<sup>18</sup> CR 8.03 provides in relevant part:

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

<sup>19</sup> 578 S.W.2d at 595 (citing KRS § 371.030 (1970)).

<sup>20</sup> 578 S.W.2d at 595.

shall be so construed as to do substantial justice." Affirmative pleading by a defendant is required to give the plaintiff notice that the defendant intends to rely on matter outside the scope of the plaintiff's complaint.<sup>21</sup> Thus an answer fails to give the necessary notice if, for example, it makes a general denial when the defendant intends to assert contributory negligence at trial. In contrast, the Sheffers' admission that they had defaulted was coupled with the assertion that

their failure to so pay was occasioned by the fact that the plaintiff negligently, carelessly and recklessly designed the mill site and supervised its construction in such a way that it could not produce the ore necessary for the fulfillment of the defendant's obligations under the various documents filed as exhibits with the complaint.<sup>22</sup>

Furthermore, the counterclaim stated that "*as a part of the consideration*, said plaintiff agreed to utilize professional expertise and skill in designing and supervising the construction of the said mill which plaintiff failed to do."<sup>23</sup> Introduction at trial of proof on the issue of plaintiff's negligent design and supervision would occasion no surprise to the plaintiff, even though it was not labelled an affirmative defense of failure of consideration.<sup>24</sup>

Moreover, the court's treatment of the answer overlooks the example of affirmative defense pleading provided by Form 15 of the Kentucky Rules of Civil Procedure, which according to CR 84 is "sufficient under the Rules and . . . [is] intended to indicate the simplicity and brevity of statement which the Rules contemplate."<sup>25</sup> In pertinent part Form 15 provides: "The right of action set forth in the complaint did not accrue within \_\_\_ years next before the commencement of this action." Although this section of Form 15 is plainly intended to

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<sup>21</sup> J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 8.27 (2d ed. 1979).

<sup>22</sup> 578 S.W. 2d at 595.

<sup>23</sup> Defendants' Answer and Counterclaim at 2 (emphasis added).

<sup>24</sup> For examples of more sympathetic treatment of answers failing to label affirmative defenses, see *Barnwell & Hays, Inc. v. Sloan*, 564 F.2d 254, 255 (8th Cir. 1977); *Overseas Motors, Inc. v. Import Motors Ltd.*, 375 F. Supp. 499, 514-15 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); *Bergren v. Davis*, 287 F. Supp. 52, 54 (D. Conn. 1968).

<sup>25</sup> CR 84.

raise statute of limitations as an affirmative defense, it nowhere mentions "affirmative defense" or "statute of limitations" as the court of appeals would require.

The proper resolution of *Sheffer* would have been to recognize that although the defendants had properly pleaded failure of consideration, their affirmative defense lacked merit as a matter of law. The parol evidence rule precluded any proof of Chromalloy's failure to perform the collateral oral agreement.<sup>26</sup>

### III. POST-JUDGMENT PROCEEDINGS

#### A. *Change in Legal Interest Rate*

In *Ridge v. Ridge*,<sup>27</sup> the Kentucky Supreme Court considered the effect of an increase in the statutorily required rate of interest on "prior unsatisfied judgments."<sup>28</sup> On June 9, 1975, the Jefferson Circuit Court ordered Donald Ridge, as part of a property settlement, to give his ex-wife a promissory note "payable on or before five years from the date of judgment and bearing an interest rate of 4%."<sup>29</sup> At the time the judgment was entered, KRS § 360.040 set the rate of interest payable on judgments at 6%.<sup>30</sup> Approximately a year later, KRS § 360.040 was amended to increase the rate to 8%.<sup>31</sup> The Supreme Court held that an "increase of the legal rate of interest applies prospectively to prior unsatisfied judgments, the new rate beginning with the effective date of the amendment."<sup>32</sup>

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<sup>26</sup> The loan agreement was in writing and contained an integration clause. KRS § 371.030 (1970), which the court of appeals said provided an exception to the parol evidence rule relevant to the case, 578 S.W.2d at 595, does no such thing. It only permits a showing that the consideration in writing is in fact illusory, a contention not advanced by the Sheffers. *Commonwealth v. Schmehr*, 388 S.W.2d 131, 133 (Ky. 1965).

<sup>27</sup> 572 S.W.2d 859 (Ky. 1978).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 860.

<sup>30</sup> A lesser rate could be imposed only after a hearing of which all parties must have been given notice. KRS § 630.040 (1970).

<sup>31</sup> 1976 Ky. Acts, ch. 59, § 2.

<sup>32</sup> 572 S.W.2d at 861. *Accord*, *Noe v. City of Chicago*, 307 N.E.2d 376 (Ill. 1974).

Because no hearing had been held when the 4% interest rate was entered, the Court directed "that the movant be granted interest of 6% from the date of the judg-

Courts considering this issue have taken two approaches: one suggests that the claimant's right is contractual and hence not subject to change by legislative action;<sup>33</sup> the majority approach—which the Supreme Court adopted for reasons it did not specify—holds that the right is based solely on the statute and may be changed prospectively by statutory amendment.<sup>34</sup> The courts which have adopted the former position are undoubtedly influenced by a reluctance to upset settled expectations and a desire to facilitate post-judgment planning by the parties. From the perspective of those concerns, interest on a judgment is indistinguishable from interest in an ordinary commercial transaction.

There are, however, several countervailing considerations. First, statutory changes in contractual interest rates for private transactions would act as a disincentive to commerce by frustrating one aspect of the profit motive. Commercial transactions would be discouraged where the payor enters the transaction because he expects that interest rates elsewhere will rise during the life of the transaction and the payee proceeds on a contrary hope. Society has no parallel concern in the case of unsatisfied judgments, since there is no private choice which can be affected.

Moreover, where interest is voluntarily fixed, as it is commercially, the creditor makes his own assessment of the value of the loss of the use of his money and the debtor makes a parallel judgment about the present value of the loan. Each is uniquely capable of gauging his own present condition. But when interest is granted on a judgment, the initial decision about the time value of money is necessarily made by the court, because the party paying the judgment lacks bargaining power. Thus, since the judicial system cannot afford the expense of trying to determine the inherently subjective issue of

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ment until [the date of the amendment]". 572 S.W.2d at 861.

<sup>33</sup> See, e.g., *Sammons Enterprises, Inc. v. Manley*, 554 S.W.2d 205 (Tex. Civ. App. 1977); *Butler v. Rockwell*, 29 P. 458, 460 (Colo. 1892).

*Sammons* recognized that a legislature could provide for prospective changes in the interest rate on prior unsatisfied judgments if it clearly spelled out its intent to do so; without clear intent, however, an amendment will not be read to apply to prior judgments.

<sup>34</sup> *Morley v. Lake Shore & M.S. Ry.*, 146 U.S. 162, 169 (1892).



the present value of the judgment to each party, it takes the more general solution of choosing the current time value of money for society at large as the statutory rate of interest. When that value changes, it follows that even the rate on prior unsatisfied judgments should change as well.<sup>35</sup>

### B. *Discovery*

In *E.I.C., Inc. v. Bank of Virginia*,<sup>36</sup> the court of appeals considered the propriety of an award of expenses under CR 37.02<sup>37</sup> for failure to provide post-judgment discovery. In aid of a judgment in its favor, Lincoln Savings Bank served a request for production of documents and a notice of deposition in California upon E.I.C. When E.I.C. proved unable to honor the scheduled dates, Lincoln secured a court order under CR 37.01 directing document production on July 24, 1978, and the taking of the deposition the following day. On July 20, E.I.C. asked Lincoln to reschedule both, explaining that its records were kept by a separate company which had overlooked its request for the relevant documents and that by the time the oversight was corrected it was too late to comply. Lincoln refused to honor the request. E.I.C. then filed a motion to reschedule and noticed it for hearing August 7, 1978.<sup>38</sup>

Lincoln's counsel flew to California as originally planned and both parties appeared on July 24 for the scheduled production of documents. E.I.C., however, was unable to produce the documents. When counsel for E.I.C. suggested that Lincoln depose E.I.C.'s president although no court reporter was present, Lincoln refused. The next day, following counsel's ad-

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<sup>35</sup> See *Missouri & Ark. Lumber & Mining Co. v. Greenwood Dist.*, 249 U.S. 170 (1919); *Morley v. Lake Shore & M.S. Ry.*, 146 U.S. 162 (1892). *Accord*, *Wyoming Nat'l Bank v. Brown*, 53 P. 291 (Wyo. 1898), *rehearing denied*, 61 P. 465 (Wyo. 1900). See also *Annot.*, 4 A.L.R. 2d 932 (1949).

<sup>36</sup> 582 S.W.2d 72 (Ky. Ct. App. 1979).

<sup>37</sup> CR 37.02(3) provides:

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

<sup>38</sup> 582 S.W.2d at 73-74.

vice, the president of E.I.C. failed to appear for his scheduled deposition. At the August 7 hearing on E.I.C.'s motion to reschedule, E.I.C. was ordered to pay Lincoln's expenses and attorney's fees for the trip to California.<sup>39</sup>

The court of appeals reversed, holding that the trial court abused its discretion in awarding Lincoln expenses under CR 37.02.<sup>40</sup> It noted that although CR 37.02 placed the burden of justifying noncompliance on the party failing to comply with the order, the burden could be satisfied by a showing of good faith.<sup>41</sup> Since Lincoln did not challenge E.I.C.'s contention that it was unable to comply because the company which kept its records overlooked its request for the documents, the court of appeals believed that the requisite showing of good faith had been made.<sup>42</sup> The court noted that even if bad faith had been demonstrated the award of expenses would have been unjustified since Lincoln's counsel had been warned that the documents could not be produced before he left for California.<sup>43</sup>

The court's assumption that a showing of good faith is sufficient to avoid the imposition of sanctions under CR 37.02 is plainly mistaken; CR 37.02 speaks of "failure" to comply with a discovery order, not of "refusal." Indeed, the consistent interpretation given it and the parallel federal rule<sup>44</sup> clearly indicates that the issue of intent is relevant only to the imposition of more severe sanctions, such as default and dismissal, which go beyond mere compensation.<sup>45</sup> Where, as in *E.I.C.*,

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<sup>39</sup> *Id.* at 74.

<sup>40</sup> *Id.* at 75.

<sup>41</sup> The court stated:

Although the record is silent, we believe the court must have concluded that the award of expenses and attorney's fees was proper because E.I.C.'s failure to comply with the order demonstrated a lack of good faith . . . [However,] [t]he trial court was not faced with a situation where compliance with its order compelling discovery was flatly refused. At each stage of Lincoln's efforts E.I.C. offered justification for a delay.

<sup>42</sup> 582 S.W.2d at 76.

<sup>43</sup> *Id.*

<sup>44</sup> FED. R. CIV. P. 37(b).

<sup>45</sup> In *Societe Internationale v. Rogers*, 357 U.S. 197, 208 (1958), the Supreme Court stated:

For purposes of subdivision (b)(2) of Rule 37, we think that a party "refuses to obey" simply by failing to comply with an order. So construed the

the question is simply the award of expenses incurred by the discovery party, the responding party should be required to demonstrate more than good faith to provide the substantial justification demanded by CR 37.02(3).<sup>46</sup>

A second problem arises in the court of appeals's conclusion that an award of expenses would not have been justified even if bad faith had been shown, since Lincoln's counsel could have cancelled his trip to California upon learning that the documents were not available.<sup>47</sup> While CR 37.02 was not intended to authorize the award of frivolous expenses, E.I.C. failed to offer any explanation for its president's failure to appear at his deposition scheduled for July 25, and Lincoln's counsel would have been justified in making the trip solely to take that deposition. E.I.C.'s offer to hold the deposition the preceding day, when no reporter was available and when Lincoln's counsel might have been unprepared, does not satisfy the substantial justification requirement of CR 37.02.<sup>48</sup>

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Rule allows a court all the flexibility it might need in framing an order appropriate to a particular situation. Whatever its reasons, petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of petitioner, can hardly affect the fact of noncompliance and are relevant only to the path which the District Court might follow in dealing with the petitioner's failure to comply.

This interpretation of former FED. R. Civ. P. 37(b) was explicitly incorporated in the 1970 revisions of the federal rules: 48 F.R.D. 487, 538-39 (1970). CR 37.02(2)(f), providing for the award of expenses on failure of a party to obey an order compelling discovery, is a verbatim reproduction of FED. R. Civ. P. 37(b)(Z).

The comment issued by the Kentucky Civil Code Committee regarding proposed CR 37 states: "It is unnecessary to show a willful failure or refusal to comply, willfulness being relevant only to the selection of sanctions." 1 RUSSELL'S KENTUCKY PRACTICE AND FORMS 94 (2d ed. 1964).

<sup>46</sup> Although affirming a default judgment granted under CR 37.02, *Nowicke v. Central Bank & Trust Co.*, 551 S.W.2d 809, 810 (Ky. Ct. App. 1977), indicated that only the severest penalties require a finding of willfulness or bad faith. See 6 W. CLAY, KENTUCKY PRACTICE 593 (3d ed. 1974); 4A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 37.01 (2d ed. 1978); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2283 (1970); Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033, 1049-50 & n.95 (1978).

<sup>47</sup> 582 S.W.2d at 76.

<sup>48</sup> Although the circuit court and the court of appeals looked to CR 37.02 because the deposition was to take place pursuant to a court order, identical sanctions, with the exception of contempt, are available under CR 37.04 for failure to appear for a deposition. If CR 37.04 had been used instead, E.I.C. probably would not have been able to satisfy its "substantial justification" exception either. See 6 W. CLAY, KEN-

The court of appeals might have believed that the deposition would have been fruitless if it depended to any great extent on documents which E.I.C. had been unable to produce the preceding day. But no evidence was offered for that hypothesis, and there is good reason for refusing to engage in such second-guessing in the context of post-judgment discovery. None of the sanctions provided in CR 37.02(2)(a)-(c)—all of which go to the merits of the controversy—has any deterrent effect on a party which already has lost the lawsuit. Thus the only effective methods of enforcing the discovery rules after judgment are contempt orders and the award of expenses. Given the reluctance of courts to employ contempt sanctions,<sup>49</sup> a miserly application of CR 37.02(3) could easily render discovery procedures useless in aid of execution.

### C. *Amendment of Judgment*

Settling a conflict between two court of appeals decisions<sup>50</sup> concerning the effect of CR 6.05 (Additional time after service by mail), the Supreme Court in *Arnett v. Kennard*<sup>51</sup> held that it did not apply to motions to vacate or amend judgments under CR 59.05. *Arnett* was an action to quiet title arising from a boundary dispute. Although the circuit court had difficulty reaching a decision, the relevant judgment was entered December 23, 1975, for Arnett. On January 5, 1976, Kennard moved under CR 59.05 to amend or vacate the judgment. Kennard's counsel had the motion ready to mail January 2 but for some reason failed to do so for three days. Kennard's motion eventually was granted by the circuit court, and the court of appeals affirmed in an opinion which rejected Arnett's argument that the CR 59 motion was untimely. The Supreme Court reversed.<sup>52</sup>

CR 59.05 plainly states that a motion to alter, amend or vacate "shall be served not later than 10 days after entry of

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TUCKY PRACTICE 600-01 (3d ed. 1974).

<sup>49</sup> See 4A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 37.03[2.-6] (2d ed. 1978).

<sup>50</sup> *Arnett v. Kennard*, No. CA-1991-MR (Ky. Ct. App. May 5, 1978); *Lockard v. Workmen's Compensation Bd.*, 554 S.W.2d 396 (Ky. Ct. App. 1977).

<sup>51</sup> 580 S.W.2d 495 (Ky. 1979).

<sup>52</sup> *Id.* at 496-97.

the final judgment," a requirement which Kennard failed by three days to satisfy. CR 77.04(1), however, states that when judgment is entered the clerk shall immediately "serve a notice of the entry by mail" upon the parties. CR 6.05 provides that "[w]henever a party . . . is required to do some act . . . within a prescribed period after the service of a notice . . . by mail, 3 days shall be added to the prescribed period." The Supreme Court suggested three reasons for rejecting Kennard's contention that CR 6.05 allowed her additional time.<sup>53</sup> First, CR 6.05 only extends time limits measured from the date of service, but the ten-day period for CR 59.05 motions is measured from the date of entry of the judgment, not from the date the clerk serves notice of the entry.<sup>54</sup> Second, CR 59.05 motions are specifically excluded from CR 6.02 (permitting discretionary extensions of time) and thus, it is logical that the automatic three-day extension provision should be inapplicable.<sup>55</sup> Third, in cases where the clerk omits to serve notice altogether, the time for appeal is not extended;<sup>56</sup> by analogy, a slight delay in receipt of notice should not extend the time for CR 59.05 motions.<sup>57</sup>

The Court's interpretation of CR 6.05 and CR 59.05 is plainly correct. The nagging question about this and similar cases is why the Rules do not start the ten-day period running from the time the parties receive notice of entry of judgment, since otherwise the attorney is forced to check constantly with the clerk.<sup>58</sup> One justification may be that since CR 59.05 stays the running of time for appeal,<sup>59</sup> motions of that nature should be confined to as brief a period as possible.<sup>60</sup> It is diffi-

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<sup>53</sup> A similar argument was made in *Lockard v. Workmen's Compensation Bd.*, 554 S.W.2d 396 (Ky. Ct. App. 1977), and quickly rejected by the court of appeals since the statute, KRS § 342.285 (1978), allowing for review of an order by the Workmen's Compensation Board, specifically provided that the appeal time would run from the date the order was rendered. 554 S.W.2d at 397.

<sup>54</sup> 580 S.W.2d at 496.

<sup>55</sup> *Id.*

<sup>56</sup> CR 77.04(4).

<sup>57</sup> 580 S.W.2d at 496.

<sup>58</sup> *Arnett* provides a good example: the motion for an amended judgment was made on January 5, 1976, but was not granted until August 30, 1977. *Id.*

<sup>59</sup> CR 73.02(1)(c).

<sup>60</sup> This would explain the requirement in CR 59.02 and other rules which have

cult to see, however, why entry of judgment is chosen to start the clock running on post-trial motions when the thirty-day period for notice of appeal begins only after the clerk has noted on the docket that the parties have been served with notice of the entry of judgment.<sup>61</sup> Also, it is hard to explain why allowing three days for service by mail would jeopardize the appellate docket, since all post-trial motions still would have to be filed seventeen days before notice of appeal was due.

One fact mitigating the occasional harshness of the ten-day rule is that many of the issues which may be raised under CR 50, CR 52, and CR 59 can still be put forward under CR 60 within a year or longer after judgment.<sup>62</sup> This provided little solace to Kennard since, as the Supreme Court pointed out, her failure to serve her motion by January 2, 1976, could not be characterized as excusable neglect or justified by any other of the limited grounds set out in CR 60.<sup>63</sup> That result is perhaps proper in a case where CR 59.05 could have been complied with but was not.

#### D. *Relief From Judgment*

In *Granville & Nutter Shoe Co. v. Florsheim Shoe Co.*,<sup>64</sup> the court of appeals held that a judicial error could be corrected within a year after judgment under CR 60.02.<sup>65</sup> The ap-

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the effect of extending the time for appeal that the motion be made within ten days of entry of judgment. See CR 50.02 (motion for judgment n.o.v.); CR 52.02 (amendment of findings of fact); CR 59.02 (motion for a new trial).

<sup>61</sup> CR 73.02(1)(a); 77.04(2).

<sup>62</sup> Grounds for relief from a judgment or order under CR 60 include clerical mistake (CR 60.01), mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, perjury, fraud, falsified evidence, judgment void, or judgment discharged (CR 60.02).

<sup>63</sup> 580 S.W.2d at 497.

<sup>64</sup> 569 S.W.2d 721 (Ky. Ct. App. 1978).

<sup>65</sup> 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: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied,

pellants were guarantors under a contract to obtain credit for their corporation from the appellee. The guarantee agreement, attached to the complaint, limited the appellants' liability to \$2,000 and bound them jointly and severally. When the corporation defaulted on its account, Florsheim sued the appellants and secured a default judgment for \$2,000 against each defendant, the relief requested in the complaint. Eleven months later appellants moved to amend the judgment to conform with the limitation on liability in the guarantee. The trial court denied relief, saying simply that "no reasonable excuse for default" had been shown.<sup>66</sup> The court of appeals reversed.

It is clear, as the court of appeals held, that the trial judge erred in his original entry of judgment, since the agreement attached as an exhibit must prevail over a conflicting statement in the pleadings.<sup>67</sup> What is not as certain is the procedure by which that mistake may be corrected eleven months after entry of judgment. The court of appeals's adoption of CR 60.02(a) as the proper approach<sup>68</sup> is surprising in light of the clear indications from the Kentucky Supreme Court that CR 60.02(a) may not be used to correct mistakes of law by the court.<sup>69</sup> There is considerable contrary authority, however, in

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released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) 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.

<sup>66</sup> 569 S.W.2d at 722.

<sup>67</sup> *Samuels v. Weikel*, 242 S.W. 836 (Ky. 1922).

<sup>68</sup> At two points the court stated that "the mistake was that of the court," 569 S.W.2d at 722, and that "[t]he court mistakenly entered a default judgment." *Id.* Moreover, the opinion contained no reference to newly discovered evidence, perjury, fraud, a void or a satisfied judgment, or the existence of extraordinary circumstances, which are the other grounds mentioned in CR 60.02.

<sup>69</sup> *City of Covington v. Sanitation Dist. No. 1*, 459 S.W.2d 85, 87 (Ky. 1970); *Wimsatt v. Haydon Oil Co.*, 414 S.W.2d 908, 910 (Ky. 1967); *James v. Hillerich & Bradshy Co.*, 299 S.W.2d 92, 93 (Ky. 1956).

If the circuit court's original error resulted from a simple failure to consider the exhibit, rather than an erroneous conclusion that the complaint prevailed in cases of conflict, it is conceivable that CR 60.01 could have been utilized to solve the problem. Although that Rule is entitled "Clerical Mistakes," its operation does not seem to be limited to errors by the clerk, but may extend to judicial errors as well. 7 W. CLAY,

the interpretation of the parallel federal rule, Fed. R. Civ. P. 60(b)(1).<sup>70</sup>

The major obstacles to using CR 60.02(a) to correct errors of law by the court are the existence of CR 59.05—which permits a motion to alter, amend, or vacate a judgment not later than ten days after entry of judgment—and the possibility of obtaining similar relief by appeal. The availability of the latter option alone should not be conclusive; correction in the trial court is a cheaper and likely quicker process, and any rational system of procedure would do well to include both methods. But if CR 59.05 and CR 60.02 can be used to perform identical tasks the former rule with its ten-day time limit becomes superfluous, because CR 60.02 permits a motion “within a reasonable time, and [in cases of mistake] not more than one year after the judgment.”

The coexistence of the two rules might be justified by limiting CR 60.02(a) to extraordinary cases, such as error apparent on the record or supervening change of precedent by the relevant appellate court. Such an approach is suggested by Moore's treatise for the federal courts<sup>71</sup> and is supported by the practice under former Fed. R. Civ. P. 60(b), which was supplemented by writs of *coram nobis*, *audita querela*, and bills of review even though at that time there was a ten-day limit on motions for new trial<sup>72</sup> and on motions for amendment of the judgment.<sup>73</sup> The difficulty with applying such an

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KENTUCKY PRACTICE 289 (3d ed. 1974). Under the federal rule, the act of entering judgment by default for a sum certain is in fact performed by the clerk, Fed. R. Civ. P. 55(b)(1), and CR 55.01 does not appear to contemplate that the judge will put much more thought into the matter unless there is some uncertainty as to the character of relief to be granted.

<sup>70</sup> See, e.g., *International Controls Corp. v. Vesco*, 556 F.2d 665 (2d Cir.), cert. denied, 434 U.S. 1014 (1977); *Hoffman v. Celebrezze*, 405 F.2d 833 (8th Cir. 1969); *Gila River Ranch, Inc. v. United States*, 368 F.2d 354 (9th Cir. 1966); *Schildhaus v. Moe*, 335 F.2d 529 (2d Cir. 1964). But see *Silk v. Sandoval*, 435 F.2d 1266 (1st Cir.), cert. denied, 402 U.S. 1012 (1971); *Swam v. United States*, 327 F.2d 431 (7th Cir.), cert. denied, 379 U.S. 852 (1964); *McDowell v. Celebrezze*, 310 F.2d 43 (5th Cir. 1962).

<sup>71</sup> 7 J. MOORE, *MOORE'S FEDERAL PRACTICE* ¶ 60.22[3] (2d ed. 1979).

<sup>72</sup> FED. R. CIV. P. 59(a), (b).

<sup>73</sup> FED. R. CIV. P. 52(b). FED. R. CIV. P. 59 was amended to add subdivision (e) in 1946, the same year FED. R. CIV. P. 60(b) was amended to abolish the use of common law writs of review, and arguably to include cases of judicial mistake. See 6A J.



explanation to the Kentucky Rules of Civil Procedure is that the employment of such common law procedures to obtain relief beyond the shorter period permitted by the rules seems to have been more limited in this state even before the adoption of the current rules.<sup>74</sup>

Even if the use of CR 60.02 is not generally permissible to correct errors of law by the court, the court of appeals posited that CR 59.05 is not "inconsistent with CR 60.02 pertaining to *default* judgments."<sup>75</sup> Although the court did not indicate why that should be so, some support may be found in CR 55.02, which provides that "[f]or good cause shown the court may set aside a judgment by default in accordance with Rule 60.02." Were the reference meant to define the exclusive procedure for relief, that provision might be conclusive; but it seems more likely that CR 55.02 is intended rather to emphasize the requisite formality for such a motion, together with the most common justifications for relief. In that case CR 60.02 is not the exclusive method for setting aside default judgments, but simply exists alongside CR 59.05 and CR 60.03,<sup>76</sup> and each may be used in those cases where it is substantively appropriate.

A final difficulty with the use of CR 60.02(a) in *Granville & Nutter* arises from the timing of the motion. The defendants moved to amend the judgment eleven months after entry, which is clearly within the one-year limit fixed generally by CR 60.02(a) for cases of mistake. However, a majority of the federal courts which have permitted use of Fed. R. Civ. P. 60(b) to correct judicial legal mistakes have contended that the "reasonable time" constraint imposed by that same section should be understood to forbid relief after the time for appeal has expired.<sup>77</sup> The thought is that, at least where the

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MOORE, MOORE'S FEDERAL PRACTICE ¶¶ 59.01, 60.01 (2d ed. 1979).

<sup>74</sup> See CODE OF CIVIL PRACTICE § 518, reprinted in CARROLL'S KENTUCKY CODES 237-38 (1948); *Combs v. Allen*, 271 S.W. 598 (Ky. 1925).

<sup>75</sup> 569 S.W.2d at 723 (emphasis in original).

<sup>76</sup> 7 W. CLAY, KENTUCKY PRACTICE 212 (3d ed. 1974).

<sup>77</sup> See, e.g., *International Controls Corp. v. Vesco*, 556 F.2d 665 (2d Cir.), cert. denied, 402 U.S. 1014 (1977); *Hoffman v. Celebrezze*, 405 F.2d 833 (8th Cir. 1969); *McDowell v. Celebrezze*, 310 F.2d 43 (5th Cir. 1962). But see *Caraway v. Sain*, 23 F.R.D. 657 (N.D. Fla. 1959); *Minneapolis Brewing Co. v. Merritt*, 143 F. Supp. 146

grounds for the Fed. R. Civ. P. 60(b) motion might as well have been argued on appeal, permitting correction any time during the full year otherwise allowed by the rule would have the effect of extending the time for appeal since an appeal will subsequently lie from denial of the motion for relief.<sup>78</sup> Even if CR 60.02(a) might be used to correct mistakes of law in Kentucky state courts, it is difficult to see why the same restriction should not apply.

#### IV. APPEALS

##### A. *Right of Appeal*

The court of appeals in *Cole v. Stephens*<sup>79</sup> declared KRS § 81.060 unconstitutional insofar as it denies the right to appeal from a judgment establishing a city. Appellants had sought to challenge the incorporation of the sixth-class city of Johnsonville, complaining that the area of the town, the signatures on the petition, and the notice provided did not comply with statutory requirements.<sup>80</sup> Section 115 of the new constitutional judicial article states that “[i]n all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court . . . .” KRS § 81.060 provides that in a hearing to incorporate a city “[t]he pleadings and practice . . . shall be the same as in equity *causes*, but no appeal shall lie from the judgment.”

If it is fair to assume that an action to incorporate a city is a “case” within the meaning of section 115, the statute is plainly unconstitutional. The difficulty with such an argument, which the court of appeals did not address, is that the jurisdiction of circuit courts is defined by the Kentucky Constitution to include “all justiciable *causes* not vested in some other court,”<sup>81</sup> that “*causes*” might mean something broader than “cases,” and that an incorporation proceeding—as KRS § 81.060 hints—might be a “cause” rather than “case” and

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(D.N.D. 1956).

<sup>78</sup> 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 60.22[3] (2d ed. 1979).

<sup>79</sup> 582 S.W.2d 657 (Ky. Ct. App. 1979).

<sup>80</sup> *Id.* at 658.

<sup>81</sup> KY. CONST. § 112(5) (emphasis added).

thus not necessarily within the contemplation of section 115 of the Constitution. The remainder of the judicial article provides some support for this suggestion. The word "case" is used three times, each time specifically referring to actions for which an appeal exists.<sup>82</sup> The term "cause," however, is used whenever the article discusses the general jurisdiction of a court: "determination of any cause,"<sup>83</sup> "trial of any cause,"<sup>84</sup> "prompt disposition of cause,"<sup>85</sup> "decide a cause,"<sup>86</sup> and "all justiciable causes."<sup>87</sup>

On the other hand, several passages make it difficult to avoid the conclusion that the words were intended to be equivalents. Section 111(2), for example, incorporates the phrase "the complete determination of any *cause* within [the Court of Appeals's] appellate jurisdiction." The section continues, stating that "[i]n all other cases it shall exercise appellate jurisdiction as provided by law." Section 110, setting out the jurisdiction of the Supreme Court, shows a similar tendency to treat the words fungibly.<sup>88</sup>

It might be said in defense of the drafters of the judicial article that the men who wrote Article III of the United States Constitution did not do much better. The judicial power of the United States is defined as extending to "cases" involving particular subject matter, and to "controversies" between par-

<sup>82</sup> KY. CONST. § 110(2)(b) states: "In all other *cases*, criminal and civil, the Supreme Court shall exercise appellate jurisdiction as provided by its rules." (Emphasis added). KY. CONST. § 111(2) states: "In all other *cases*, [the court of appeals] shall exercise appellate jurisdiction as provided by law." (emphasis added). KY. CONST. § 115 provides: "In all *cases*, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court. . . ." (emphasis added).

<sup>83</sup> KY. CONST. §§ 110(2)(a), 111(2).

<sup>84</sup> KY. CONST. § 110(3).

<sup>85</sup> KY. CONST. § 110(5)(b).

<sup>86</sup> KY. CONST. § 111(4).

<sup>87</sup> KY. CONST. § 112(5).

<sup>88</sup> "The Supreme Court . . . shall have the power to issue all writs necessary in aid of . . . the complete determination of any cause . . ." KY. CONST. § 110(2)(a). "In all other cases, . . . the Supreme Court shall exercise appellate jurisdiction . . ." KY. CONST. § 110(2)(b). "If as many as two justices decline or are unable to sit in trial of any cause . . ." KY. CONST. § 110(3). "He shall assign temporarily any justice or judge . . . necessary for prompt disposition of causes. KY. CONST. § 110(5)(b).

ties of a certain description.<sup>89</sup> The appellate jurisdiction of the Supreme Court, however, covers "all the other Cases before mentioned."<sup>90</sup> But it has never been suggested, for example, that the Court cannot grant certiorari in diversity actions because they are "controversies" rather than "cases." The conclusion which has been accepted in the federal courts from the beginning is that anything which is justiciable may be called a "case" for purposes of appeal. The court of appeals, probably correctly, seemed to assume the same thing in concluding that an incorporation action must be a "case" because it "was a judicial function and an exercise of judicial power."<sup>91</sup>

### B. *Record on Appeal*

Despite an early expression of hope that it might assume a more relaxed attitude than that of the Supreme Court,<sup>92</sup> the Kentucky Court of Appeals took a strict view of appellate time requirements in *Department of Transportation v. Kemper*.<sup>93</sup> The Department of Transportation filed a notice of appeal on August 15, 1978, followed by a timely designation of the record. The circuit court clerk certified the record on October 6, 1978, even though the transcript designated by the appellant had not yet been filed. On October 13, 1978, one day before the sixty day deadline for certification fixed by CR 73.08, the clerk of the circuit court "attempted to amend the certification . . . to show that the transcript of hearing had not yet been filed."<sup>94</sup> On October 25, 1978, the appellant moved in the court of appeals for an extension of time to remedy the omission. The appellee moved to dismiss for failure to certify the entire record. The court refused to dismiss since part of the record was properly certified within the CR 73.08 time limit. However, the court also denied appellant's motion for an extension of time, and the appeal had to be prosecuted

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<sup>89</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>90</sup> U.S. CONST. art. III, § 2, cl. 2.

<sup>91</sup> 582 S.W.2d at 659.

<sup>92</sup> See Murrell, *Justice for the Client and Lower Malpractice Rates for All*, 42 KY. BENCH & BAR 12, 13 (January 1978).

<sup>93</sup> 574 S.W.2d 932 (Ky. Ct. App. 1978).

<sup>94</sup> 574 S.W.2d at 932.

without the benefit of the transcript. The holding, denying addition of the transcript to the record on appeal, is fairly consistent with the approach taken by the court to failures to file a designation of record within the time requirements set by CR 75.01.<sup>95</sup>

At first glance, the denial of appellant's motion seems dictated by CR 73.08, which permits the appellate court to grant extensions for certification only upon motion filed before expiration of the time for certification—a requirement which the Department failed by eleven days to satisfy. Once that time has expired, it does not appear that the appellate court has any authority to grant an extension, and several cases have so held.<sup>96</sup>

As the court pointed out, however, CR 75.08 provides later relief in some circumstances. In relevant part it provides:

If anything material to either party is omitted from the record on appeal by error or accident . . . the trial court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission . . . shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the circuit court.<sup>97</sup>

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<sup>95</sup> See *Webb v. Webb*, 547 S.W.2d 448 (Ky. Ct. App. 1976), where the appeal was dismissed when the designation of record was filed four days late. The court did not even examine appellant's claim of excusable neglect since appellant had not moved for an extension of time under CR 6.02. *Id.* at 450. In a companion case, *Modine Mfg. Co. v. Thweatt*, 547 S.W.2d 448 (Ky. Ct. App. 1976), the court declined to dismiss for failure to designate the transcript when no transcript existed and none was needed for a full review on appeal. *Id.* However, in *Johnson v. Maloney's of Olive Hill*, 569 S.W.2d 704 (Ky. Ct. App. 1978), the court said that the circumstances existing in *Modine* provided the only excuse from the *Webb* rule requiring dismissal if the designation was not timely and no extension had been sought. In *Johnson*, the appeal was dismissed although the designation of the record was filed only one day late.

<sup>96</sup> See *Evans v. Commonwealth*, 450 S.W.2d 509 (Ky. 1968), where the Supreme Court gave a clear warning that it "will not grant extensions of time under CR 73.08, unless the movant makes it abundantly clear that his time for filing the record has not already expired when the motion under CR 73.08 is made." *Id.* at 510.

In *Williams v. Payne*, 515 S.W.2d 618 (Ky. 1974), the Court again espoused the need for strict compliance with time limits. The appeal was dismissed, at least assertedly, because the record on appeal was filed three days late, although the Court did address the issues raised on appeal and proclaim them to be without merit.

<sup>97</sup> CR 75.08.

Since it was perfectly clear what was absent from the record on appeal (the Department had already designated the transcript of the hearing; it had simply failed to file the transcript), it exalts form over substance to say, as the court of appeals did, that the motion failed because it was improperly labelled. CR 75.08 requires at most a "suggestion," and even permits the court to act on its own initiative.<sup>98</sup> The issue is really whether the Department's predicament falls within the contemplation of CR 75.08. On that subject several matters should have been considered.

The first obstacle to using CR 75.08 to afford relief to the Department would be to read the rule to restrict the application of the phrase "error or accident" to errors by the clerk, court reporter, or judge. There seems to be little justification for such an interpretation, however, especially in a situation where the court of appeals entertains part of the appeal notwithstanding the omission. The virtually identical Federal Rule of Appellate Procedure 10(e), whose predecessor is the source of CR 75.08, has not been so restricted.<sup>99</sup>

The more serious problem with affording relief to the Department using CR 75.08 is its failure to make such a request in the circuit court. Ordinarily, that approach should be tried before application is made to the appellate court.<sup>100</sup> But where the dispute does not concern what occurred in the trial court—a matter about which that court ought to have first-hand knowledge—requiring that first step does not seem necessary, and CR 75.08 does not require it. Thus, whenever the CR 75.08 request is made before the court of appeals has proceeded to the merits, there seems little reason to punish the

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<sup>98</sup> Compare the practice under FED. R. Civ. P. 12(h)(3), which allows jurisdictional dismissals "[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction." The suggestion may be made in a letter, *Puente v. Spanish Nat. State*, 116 F.2d 43, 44-45 (2d Cir. 1940), in a pretrial memorandum, *McGonigle v. Baxter*, 27 F.R.D. 502 (E.D. Pa. 1961), or otherwise, *Williams v. United States*, 42 F.R.D. 609, 612 (S.D.N.Y. 1967).

<sup>99</sup> See *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 638 (9th Cir. 1969). See also *Turk v. United States*, 429 F.2d 1325 (8th Cir. 1970); 9 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 210.08[2] (2d ed. 1975). FED. R. APP. P. 10(e) and CR 75.08 both parallel the former Federal Rule of Civil Procedure 75(h).

<sup>100</sup> 574 S.W.2d at 932.

public for the negligence of the Department's lawyer.<sup>101</sup>

### C. *Brief on Discretionary Review*

Although it does not often do so when interpreting rules governing appellate procedure, the Supreme Court tempered justice with mercy in excusing an appellant's failure to file a brief on time in *Louisville Memorial Gardens v. Department of Transportation*.<sup>102</sup> Louisville Memorial Gardens moved for discretionary review by the Court and its motion was granted on December 18, 1978. The thirty-day period for filing a brief<sup>103</sup> expired on January 17, 1979. Five days later the appellant requested an extension of time, claiming it had "relied upon CR 76.12(2)(a) and overlooked CR 76.20(9)(b)."<sup>104</sup>

Although the Court was correct when it said that a good deal of "confusion and disorientation"<sup>105</sup> has attended the recent reorganization of the rules and the court system, appellant's justification was unpersuasive. When instituting an appeal, CR 76.12 is a natural starting point since it concerns briefs and since section (2) is entitled "Time for Filing." It is clear from the language of CR 76.12(2)(a), however, that the question of a filing deadline is not answered for cases of discretionary review. That subsection only states that the brief must be filed within thirty days after the circuit court clerk notes the record has been certified. That act was performed

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<sup>101</sup> A far more desirable solution would be to impose sanctions on counsel for the omission, a solution which a recent study indicates a majority of the bar would favor. Murrell, *supra* note 92, at 31.

<sup>102</sup> 579 S.W.2d 618 (Ky. 1979).

<sup>103</sup> CR 76.12(2)(a).

<sup>104</sup> 579 S.W.2d at 618.

CR 76.12(2)(a) states: "In civil cases the appellant's brief shall be filed with the clerk of the appellate court within 30 days after the date of the notation on the docket of the notification required by Rule 75.07(5) . . . ."

CR 75.07(5) requires the circuit court clerk to notify the appellate court clerk when the original record in his office has been completed and certified and to enter the date of such notification in the docket of the case.

CR 76.20(9)(b) states: "If the motion is granted, the times prescribed in Rule 76.12(2) for the filing of briefs shall be computed from the date of the entry of the order granting the motion, the movant being regarded as the appellant and the respondent as the appellee." See note 108 *infra* for recent changes in CR 76.20(9)(b), which were effective July 1, 1979.

<sup>105</sup> 579 S.W.2d at 619.

before the case went to the court of appeals, whose decision Louisville Memorial Gardens sought to overturn. In addition, CR 76.20(4) states that the trial court's order or judgment, findings of fact, conclusions of law, and the opinions of both the trial and appellate courts must be filed along with the motion for discretionary review.<sup>106</sup> No further record is required except upon specific court order. If no other trial court record is left to be certified, CR 76.12(2)(a) does not spell out when the brief must be filed. It seems apparent that the next step would be to look at the section of the rules regarding discretionary review.

While the Supreme Court was correct in stating that CR 76.20(9) is inaccurately titled,<sup>107</sup> any attorney moving for discretionary review could reasonably be expected to read CR 76.20, which in two pages details the rules for such a motion. Indeed, CR 76.20(9)(b) clearly states that "[t]he times prescribed in Rule 76.12(2) for the filing of brief shall be computed from the date of the entry of the order granting the motion. . . ."

The Court has proceeded to correct this obscurity by rule amendments effective July 1, 1979. These changes should obviate further confusion.<sup>108</sup>

#### D. *Recall of Mandate*

The Supreme Court in *Yocum v. Bratcher*<sup>109</sup> reversed the court of appeals for recalling its mandate and issuing a new opinion upon its own motion. After the court of appeals rendered its original unpublished opinion, neither party moved

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<sup>106</sup> CR 76.20(4).

<sup>107</sup> 579 S.W.2d at 618.

<sup>108</sup> The last sentence of CR 76.12(2)(a) as amended provides: "When a discretionary review has been granted by the Supreme Court, the time in which the movant's brief must be filed shall be computed from the date of entry of the order granting review." CR 76.12(2)(a) (Banks-Baldwin 1979).

CR 76.20(9)(b) now spells out that old CR 76.20(9)(b), see note 104 *supra* for text, applies when the motion for discretionary review is in the Supreme Court. CR 76.20(9)(b) (Banks-Baldwin 1979). A new subsection CR 76.20(9)(c) has been added to detail the procedures relevant for discretionary review in the court of appeals. CR 76.20(9)(c) (Banks-Baldwin 1979).

<sup>109</sup> 578 S.W.2d 44 (Ky. 1979).



for rehearing or for discretionary review; in due course the mandate was issued to the circuit court. Fifteen days later, on its own motion, the court of appeals recalled the mandate, withdrew its opinion, and issued a revised opinion for an identical judgment.<sup>110</sup>

Much of the Supreme Court's concern related to the court of appeals's order that the new mandate would issue in ten days if neither party objected to the revised opinion. The ten day limitation shortened the time limits for petitions for rehearing and for discretionary review.<sup>111</sup> Rather than deciding the case on that narrow ground, however, the Court held that the recall of the original mandate was an abuse of discretion. That holding is consistent with the law in the majority of jurisdictions.<sup>112</sup>

Limitations on an appellate court's power to recall its mandate are often couched in terms of jurisdiction.<sup>113</sup> The thought is that the trial court regains jurisdiction once the mandate is issued, and since two courts cannot have jurisdiction at the same time, the appellate court lacks further authority to act.<sup>114</sup> Such an approach is silly for two reasons. First, recall of a mandate does not result in concurrent jurisdiction since the lower court must stay its hand once the mandate is recalled. Second, the prohibition against recall is rid-

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<sup>110</sup> 578 S.W.2d at 45.

<sup>111</sup> CR 76.32 gives the party adversely affected by an appellate opinion twenty days to petition for a rehearing and/or a modification or extension of the opinion. CR 76.20 allows twenty days from the expiration of time for petitions under CR 76.32 or from the denial of such a petition for the movant to file for discretionary review. The court of appeals's order that its second opinion be published also violated CR 76.23, which forbids publication when a motion for discretionary review is granted by the Supreme Court. The first opinion issued by the court of appeals was not to be published. Upon revision, the court ordered the new opinion published. It appears at 568 S.W.2d 54 (1978). The revised opinion was issued May 26, 1978. Discretionary review was granted October 3, 1978 upon a petition filed June 14, 1978. Pursuant to the Court's determination that the opinion was not validly granted, it ordered that the opinion not be cited or used as authority. 578 S.W.2d at 46, n.3.

<sup>112</sup> See Annot., 84 A.L.R. 579 (1933); 5B C.J.S. *Appeal & Error* §§ 1195-2003 (1958).

<sup>113</sup> See, e.g., *Curry v. Construction & Gen. Laborers Local 438*, 131 S.E.2d 559, 560 (Ga. 1963); *Rehn v. Bingham*, 40 N.W.2d 673, 675 (Neb. 1950); *Woodson v. Lee*, 392 P.2d 419, 420 (N.M. 1964).

<sup>114</sup> See, e.g., *State Bank v. Mackley*, 226 N.W. 318, 318 (Neb. 1929); *Thomas v. Thomas*, 113 P. 1048, 1059 (Okla. 1924).

dled with exceptions, such as the need to correct clerical error or redress fraud,<sup>115</sup> which are ordinarily not thought to provide an excuse for a court to act beyond its jurisdiction.

CR 76.30(1) takes the more sensible approach of leaving "recall of [a] mandate within the discretion of the court."<sup>116</sup> Limitations on that discretion, as the Court recognized in *Yocum*, are based on the "strong policy of repose"<sup>117</sup> which would be frustrated if recall were liberally allowed. The *Yocum* opinion fails to provide, however, a more precise explication of the circumstances in which recall should be permitted. The Court indicated that, apart from clerical mistakes and inconsistencies between the mandate and the opinion, "only the strongest equities will support the exercise of the power."<sup>118</sup>

In attempting to delineate the circumstances when recall should be permitted, it is necessary to note the strong similarity between the policies underlying recall of a mandate and those on which CR 60<sup>119</sup> is based. Both types of action are

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<sup>115</sup> *Lindus v. Northern Ins. Co.*, 438 P.2d 311, 313 (Ariz. 1968); *Oppenheimer v. Duetchman*, 326 P.2d 883, 885 (Cal. Dist. Ct. App. 1958)(quoting *Southwestern Inv. Corp. v. City of Los Angeles*, 241 P.2d 985, 988 (Cal. 1952)); *Simmons v. Harris*, 235 P. 508, 510 (Okla. 1924).

<sup>116</sup> CR 76.30(1). Prior to the 1977 Amendment, the rule read "within the inherent discretion of the court." Rules of the Appellate Court of Kentucky 1.340(a).

The Federal Rules of Appellate Procedure make no specific provision for the recall of a mandate. See 9 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 241.02 (2d ed. 1975). However, most circuits have accepted the power of appellate courts to recall mandates in limited cases. For a good discussion of the federal position see *American Iron & Steel Inst. v. E.P.A.*, 560 F.2d 589, 592-595 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978).

<sup>117</sup> 578 S.W.2d at 46.

<sup>118</sup> *Id.*

<sup>119</sup> The first three subdivisions of CR 60 provide for relief from a judgment or an order. CR 60.01 provides:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

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: (a) mistake, inadvertence, surprise or excusable neglect;

designed to provide relief from a judgment or order in a limited class of cases—those where the policy of finality is thought less important than the need for modifying an earlier decision. The same justifications should apply with equal force to final judgments or orders at the appellate and the original levels,<sup>120</sup> and generally the occasions for recalling a mandate parallel the provisions of CR 60: to correct clerical mistakes;<sup>121</sup> to revise a judgment secured through fraud;<sup>122</sup> to

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(b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) 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.

CR 60.03 provides:

Rule 60.02 shall not limit the power of any court to entertain an independent action to relieve a person from a judgment, order or proceeding on appropriate equitable grounds. Relief shall not be granted in an independent action if the ground of relief sought has been denied in a proceeding by motion under Rule 60.02, or would be barred because not brought in time under the provisions of that rule.

<sup>120</sup> Judgments which do not constitute final judgments are possible from the appellate courts and in those cases the analogy to CR 60 does not always meet the need. *See, e.g., Commonwealth v. Hinkle*, 197 S.W. 455 (Ky. 1917), wherein the Court correctly modified its opinion reversing and remanding the case for a new trial to a reversal with directions to dismiss plaintiff's petition. The basis for the modification was plaintiff's admission that he could produce no new evidence (needed to support trial to the jury) and his desire to appeal the Court's opinion without the expense and time necessitated by a new trial. Surely the modification in that case was appropriate to provide plaintiff with a final order, even though it would not fit a CR 60 justification.

<sup>121</sup> *Compare* CR 60.01 (clerical errors) *with* *Yocum v. Bratcher*, 578 S.W.2d 46 (Ky. 1979)(common reason for recall of mandate is to correct clerical errors); *Harris v. Ballantine*, 421 S.W.2d 847 (Ky. 1967)(mandate recalled where clerical error resulted in damages being mistakenly awarded); *and Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 296 F.2d 215 (5th Cir. 1961)(mandate recalled where clerical error produced an ambiguous judgment).

<sup>122</sup> *Compare* CR 60.02(c)-(d) (perjury, falsified evidence and fraud affecting the proceedings) *with* *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)(mandate recalled where judgment was based upon a fraudulently obtained patent); *and Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268, 278 (D.C.Cir. 1971), *cert. denied*, 406 U.S. 950 (1972)(mandate may be recalled where judgment

permit the trial court to take cognizance of newly discovered evidence;<sup>123</sup> to correct a decision which in light of intervening precedent is clearly wrong;<sup>124</sup> and, for “any other reason of an extraordinary nature justifying relief.”<sup>125</sup>

If *Yocum* is viewed in that light it becomes easier to ground the Court's ruling in explicit principles, rather than simply to assert abuse of discretion. From all that appears, the second opinion rendered by the court of appeals was issued simply for the purpose of stating a rule “governing the weight to be given to the testimony of treating physicians”;<sup>126</sup> there was no change in the effect of the judgment as it applied to the parties involved. Under those circumstances there is little reason for upsetting the expectations of the judgment-winner by extending the time for a rehearing or discretionary review which might overturn the judgment. An external benefit, such as assisting the resolution of future cases, is surely not the kind of excuse for relief contemplated by CR 60, and it should not justify recall of a mandate.

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was secured through fraud).

<sup>123</sup> Compare CR 60.02(b)(newly discovered evidence) with *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d at 279-80 (mandate may be recalled upon presentation of newly discovered evidence only in limited circumstances).

<sup>124</sup> Compare *American Iron & Steel Instit. v. E.P.A.*, 560 F.2d 589, 594-95 (3d Cir. 1977)(recall of mandate where later decisions by the Supreme Court and other courts of appeals were inconsistent with the position taken by the Fifth Circuit) and *Legate v. Maloney*, 348 F.2d 164, 166 (1st Cir. 1965) (in dictum, court stated that it might entertain motion to recall mandate if Supreme Court subsequently handed down a decision inconsistent with the court's opinion), with a case decided under FED. R. CIV. P. 60(b)(6), *Griffin v. State Bd. of Educ.*, 296 F. Supp. 1178 (E.D. Va. 1969)(judgment reopened under FED. R. CIV. P. 60(b)(6) because of intervening inconsistent Supreme Court decision). See also 11 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2964 at 233 (1973).

<sup>125</sup> CR 60.02(f). Cf. *Yocum v. Bratcher*, 578 S.W.2d 44, 46. The Court's stated in *Yocum*: “In other situations only the strongest equities will support the exercise of the power [to recall a mandate].” *Id.*

<sup>126</sup> 578 S.W.2d at 45.

