Kentucky Law Journal

Volume 64 | Issue 2 Article 10

1975

# Kentucky Law Survey: Civil Procedure

Howard W. L'Enfant
*University of Kentucky*

# Civil Procedure

BY HOWARD W. L'ENFANT*

## I. JURISDICTION OVER NONRESIDENTS

In *Davis H. Elliot Co. v. Caribbean Utilities Co.*,[1] a Virginia corporation filed a diversity action in the United States District Court for the Eastern District of Kentucky against a British West Indies corporation and three Kentucky citizens who were shareholders and officers of the defendant corporation. The claim against Caribbean Utilities Co. arose out of its failure to reimburse the plaintiff for expenses incurred pursuant to a termination agreement, while the claim against the individual defendants was for inducing the corporation to breach its contract with the plaintiff. In 1970 the parties had entered into a contract calling for the plaintiff to construct electric transmission lines for the corporate defendant on Grand Cayman Island. The plaintiff sent the contract proposal to the defendant's managing director and general counsel at his Lexington, Kentucky address. The proposal was accepted in Lexington by the corporation's vice managing director. A dispute arose concerning the plaintiff's performance under this contract, and the officers of both companies met in Lexington to work out a termination agreement which ultimately formed the basis of the plaintiff's action. The defendant corporation was served under Kentucky's long arm statute,[2] and its motion to quash service of summons was granted on the ground that it did not transact sufficient business in Kentucky to make it amenable to service of process. The Sixth Circuit Court of Appeals reversed, rendering a decision that is worthy of comment

---

* Professor of Law, University of Kentucky. A.B. 1963, University of Notre Dame; LL.B. 1966, Louisiana State University.

[1] 513 F.2d 1176 (6th Cir. 1975).

[2] KY. REV. STAT. § 454.210 (Supp. 1974) [hereinafter cited as KRS]:

(1) As used inthis section, "person" includes . . . a corporation . . . who is a nonresident of this Commonwealth.

. . . .

(2)(a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:

1. Transacting any business in this Commonwealth . . . .

because it is the first case interpreting this provision of the long arm statute.

Since this was a diversity case, the federal court was required to construe the state statute as it thought the Kentucky Court of Appeals would.[3] In doing so the court observed that, ordinarily, questions of in personam jurisdiction involve a two step inquiry. First, did the state legislature authorize the courts to exercise jurisdiction under the facts of the particular case? (*i.e.*, does the statute apply to this particular nonresident?) Second, if so, does the exercise of jurisdiction violate due process?[4] These steps are merged, however, if the state legislature has authorized the courts to assert the fullest jurisdiction permitted by the due process clause of the fourteenth amendment. The Sixth Circuit concluded that the "transacting any business" provision of the Kentucky long arm statute was intended to confer such authority, thus giving Kentucky courts the broadest jurisdiction over nonresidents possible under the due process clause.[5] The court based this conclusion partially on the fact that one express purpose of the 1968 amendment to the long arm statute was to give Kentucky courts broader jurisdiction than was granted by the former statute, which had grounded jurisdiction on the "doing of business."[6] The court also noted that identical statutory language in other jurisdictions has been interpreted to extend jurisdic-

---

[3] FED. R. CIV. P. 4(e). *See, e.g.*, In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972); Velandra v. Regie Nationale Des Usines Renault, 336 F.2d 292 (6th Cir. 1964); Smartt v. Coca-Cola Bottling Corp., 318 F.2d 447 (6th Cir. 1963).

[4] 513 F.2d at 1179.

[5] *Id.* at 1180-81. *See* note 2 *supra* setting forth the relevant portion of KRS § 454.210, the Kentucky long arm statute.

[6] KY. ACTS ch. 141, § 1 (1946), *as amended* KRS § 271.610(2), provided, in part: "Any foreign corporation that *does business* in this state . . . shall by such *doing of business* be deemed to have made the secretary of state its agent for the service of process . . . ." (emphasis added). The preamble to KRS § 454.210 (Supp. 1974) states, in part: "WHEREAS, remedy cannot presently be had against those persons in our Courts due to their non-residence within the Commonwealth." KY. ACTS ch. 46 at 152 (1968). KRS § 454.210 was interpreted as being broader than the previous statute in Etheridge v. Grove Mfg. Co., 415 F.2d 1338 (6th Cir. 1969) but was not applied to the facts in that case because the court did not find any intent on the part of the Kentucky General Assembly to make it retroactive. The statute became effective June 13, 1968, while in *Etheridge* the accident occurred on September 20, 1966, and the suit was filed on September 19, 1967.

tion to the fullest extent permitted by the due process clause.[7]

Having made this determination, the court found that the due process clause imposes three requirements on the exercise of jurisdiction: (1) The defendant must purposefully avail himself of the privilege of acting or causing a consequence in the forum state; (2) the cause of action must arise from the defendant's activities in the state;[8] and (3) the defendant's acts or their consequences must have such a substantial connection with the forum state as to make the exercise of jurisdiction reasonable.[9] The defendant corporation argued that the first requirement had not been met because the transactions relating to the termination agreement had no realistic impact on Kentucky commerce, and furthermore, it was not reasonably foreseeable that Kentucky would be affected when the agreement was made. The court rejected this argument, characterizing it as artificial and narrow in that it equated "commercial impact" with the narrower concept of financial gain or loss.[10] The judges reasoned that failure to honor a contractual obligation incurred in Kentucky had effects on the general conduct of business within the state which were real, although not readily quantifiable. The court also concluded that a significant portion of the corporation's affairs, including routine transactions, contract negotiations, and corporate decision making were carried on in Kentucky. Even though these corporate activities were intended to produce benefits in the British West Indies, this did not mean "in logic or law . . . that they had

[7] *See* OHIO REV. CODE ANN. § 2307.382(A)(1): "Transacting any business in this state" was interpreted as extending jurisdiction to the full constitutional limits in In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972); ILL. REV. STAT. ch. 110, § 17(1)(a)(1971): "The transaction of any business within this State" was interpreted, along with the other provisions of that section, as extending jurisdiction to the full extent permitted by the due process clause in Nelson v. Miller, 143 N.E.2d 673 (Ill. 1957). This interpretation was dictum because jurisdiction was based on the "tortious act" provision of that statute. ILL. REV. STAT. ch. 110, § 17(1)(b)(1971).

Of course, the interpretations of similar statutes by other states are treated as persuasive authority by Kentucky courts. *See* Conner v. Parsley, 234 S.W. 972 (Ky. 1921).

[8] This limitation is also found in the Kentucky statute. KRS § 454.210(2)(b) states: "When jurisdiction over a person is based solely upon this section, only a claim arising from acts enumerated in this section may be asserted against him."

[9] 513 F.2d at 1181.

[10] *Id.* at 1181-82.

no impact on the commerce of the Commonwealth of Kentucky."[11] As to the remaining two requirements, the appellate court found that the cause of action arose out of the defendant's activity in Kentucky, and that the defendant had failed to demonstrate that maintaining the action in Kentucky would "offend 'traditional notions of fair play and substantial justice.'"[12]

*Elliot* is an important case not simply because it is the first interpretation of the "transacting any business" provision of Kentucky's long arm statute, but more importantly because the court chose to equate the scope of the statute with the constitutional boundaries set by the due process clause. This is a proper interpretation which hopefully will be adopted by the Kentucky Court of Appeals. Had the court attempted to define what "transacting any business" means apart from the requirements of due process it would have faced a difficult, if not impossible task. A liberal construction of the "any business" language could have resulted in granting the statute a broader reach than the fourteenth amendment permits. For example, literal application of "transacting any business" could extend jurisdiction to a claim arising out of a transaction involving a single business letter mailed to or from Kentucky. Alternatively, a conservative interpretation of the statutory language could have limited jurisdiction more narrowly than the due process clause demands. The court's only interpretive guide, apart from the statutory language itself, was that the long arm statute was obviously intended to permit Kentucky courts greater jurisdiction over nonresidents than was possible under the earlier "doing business" statute.[13] Although less business activity is required to establish in personam jurisdiction, the long arm statute does not indicate how much less. Thus, consistent with the statutory language, the court could have conservatively construed the statute as granting less jurisdiction than the due process clause permits. By interpreting

[11] *Id.* at 1182.

[12] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). The Supreme Court in *International Shoe* was quoting from Milliken v. Meyer, 311 U.S. 457, 463 (1941).

[13] *See* notes 6 and 7 *supra*.

the statute in terms of the due process requirements, Kentucky courts are granted the fullest permissible jurisdiction, which is clearly what the General Assembly intended by the broad statutory language.[14] The due process clause demands that a defendant's contacts with a state be such as to make the exercise of jurisdiction fair and reasonable, and while deciding what is fair in a given case is not easy, it is at least an attempt to answer the right question.[15]

A word of caution must be voiced with respect to the due process analysis used in *Elliot*. An earlier Sixth Circuit case, *Southern Machine Co. v. Mohasco Industries, Inc.*,[16] had stated:

> [B]usiness is transacted in a state when obligations created by the defendant or business operations set in motion by the defendant have a realistic impact on the commerce of that state; and the defendant has purposefully availed himself of the opportunity of acting there if he should have reasonably foreseen that the transaction would have consequences in that state.[17]

This was the basis for the defendant's arguments in *Elliot* that it could not be subjected to jurisdiction in Kentucky because its activity had no impact in the state, and it was not foreseeable that it would have any impact at the time it entered into the agreement. As was noted earlier, the court rejected the argument because it erroneously equated commercial impact with economic gain, finding that there had been a real, although not readily quantifiable impact on Kentucky commerce. What the court should have done, however, is reject the test stated in *Southern Machine* for when a nonresident has transacted business or availed himself of the opportunity of acting in a state, as an unnecessary narrowing of the due process test. There is a danger that courts in other cases might use the "commercial impact" test of *Southern Machine* as modified by *Elliot*, in place of the broader standard for due process laid down by the United States Supreme Court. In *Hanson v.*

---

[14] *See id.*

[15] *See* Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930).

[16] 401 F.2d 374 (6th Cir. 1968).

[17] *Id.* at 382-83.

*Denckla,*[18] the Supreme Court articulated the requirement of "purposeful activity" in order to correct the tendency of some courts to equate the "minimum contacts" test of *International Shoe Co. v. Washington*[19] with the test for determining if suit had been filed in a convenient forum. In *Hanson* the Court stated that the due process requirements "are more than a guarantee of immunity from inconvenient or distant litigation."[20] Regardless of how minimal the burdens of litigating in a particular forum may be, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[21]

Applying this standard to the facts in *Elliot*, it seems clear that the defendant corporation freely availed itself of the opportunity of acting in Kentucky: Three of its principal officers were located in Lexington; Lexington was given as its mailing address; the original contract proposal was accepted in Lexington and the termination agreement which was the basis for the suit was negotiated in Lexington. The corporation freely chose to conduct its affairs in Lexington, and it seems fair to require it to litigate in Kentucky when a claim results from those activities. By contrast, under the "economic impact" test of *Southern Machine,* it is more difficult to assert jurisdiction. The court is reduced to saying that the breach of an obligation incurred in a state has an impact on that state which is real but not measurable. It is understandable that in wrestling with the uncertainties of the due process limitations on in personam jurisdiction, courts will attempt to give it more precision, hence the appeal of a "commercial impact" standard. But in doing so, they can easily lose sight of the Supreme Court's standard for due process with respect to in personam jurisdiction:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does

[18] 357 U.S. 235 (1958).
[19] 326 U.S. 310, 316 (1945).
[20] 357 U.S. at 251.
[21] *Id.* at 253.

not offend 'traditional notions of fair play and substantial justice.'[22]

## II. VENUE

In *Ford Motor Credit Co. v. Nantz*,[23] the plaintiff recovered damages from the assignee of a conditional sales contract for the wrongful repossession and invalid sale of a truck purchased under the sales contract. On appeal the defendant argued that the trial court erred in overruling its motion to dismiss the action for lack of proper venue. The defendant, a Delaware corporation which regularly conducts business in Kentucky and which had appointed a resident agent for service of process,[24] contended that venue was proper in Jefferson County where its process agent resided or in Laurel County where the contract was made and where the repossession and sale took place.[25] However, the plaintiff had acquired jurisdiction over the defendant under the Kentucky long arm statute,[26] which permitted him to file suit in Leslie County where he resided.[27]

The Court of Appeals held that venue under the long arm statute was proper whenever the statutory requirements were met, even though other methods of obtaining jurisdiction were available.[28] Thus, long arm jurisdiction may be obtained over

---

[22] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[23] 516 S.W.2d 840 (Ky. 1974).

[24] The defendant corporation had appointed the agent pursuant to KRS § 271.385 (1971) which was repealed and replaced by KRS § 271A.540, .555, .565 (Supp. 1974).

[25] The defendant argued that KRS § 452.450 controlled venue. That statute provides in part:

> [A]n action against a corporation which has an office or place of business in this state, or a chief officer or agent residing in this state, *must* be brought in the county in which such office or place of business is situated or in which such officer or agent resides; or, if it be upon a contract, in the above-named county, or in the county in which the contract is made or to be performed; or if it be for a tort, in the first-named county, or the county in which the tort is committed. (emphasis added).

[26] KRS § 454.210.

[27] KRS § 454.210(4) provides: "When the exercise of personal jurisdiction is authorized by this section, any action or suit may be brought in the county wherein the plaintiff resides or where the cause of action or any part thereof arose."

[28] 516 S.W.2d at 842. *See* KRS § 454.210(5), which provides: "A court of this Commonwealth may exercise jurisdiction on any other basis authorized in the Kentucky Revised Statutes or by the Rules of Civil Procedure, notwithstanding this section."

any foreign corporation, regardless of whether the corporation has a resident agent for service of process, so long as it is a nonresident of the Commonwealth within the meaning of the statute.

Although the statutory language is certainly susceptible of such a construction, the Court's interpretation seems contrary to both the legislative intent and traditional notions of venue. It is fundamental that the residence of the defendant determines venue;[29] this principle has been expanded to provide for venue where the claim arose because the latter location is usually convenient for trial. This pattern is reflected in Kentucky Revised Statutes § 452.450 [hereinafter cited as KRS] which provides that venue for resident corporations must be where the corporate office or agent is located or where the claim arose. When the defendant is a nonresident, the traditional basis for venue (his residence) is obviously inapplicable, but venue is still proper where the claim arose, and the residence of the plaintiff also becomes a proper place for trial.[30] A foreign corporation with a resident agent should be treated as a resident, not a nonresident; jurisdiction should be based on where the resident agent is served, and pursuant to KRS § 452.450, venue should be in the county in which the resident agent resides or in which the claim arose.[31] Only where such service is not possible should the long arm statute and its venue provisions be applied.

## III. AMENDMENT OF PLEADINGS

Can a plaintiff who has brought a timely action against a defendant amend his complaint, after the statute of limitations has run, to assert a claim against the same defendant in a different capacity? When presented with this question in *Smiley v. Hart County Board of Education,*[32] a divided Court of Appeals held that such an amended complaint was proper.

The plaintiff's son had died after falling into an excavation

[29] *See* Stevens, *Venue Statutes: Diagnosis and Proposed Cure,* 49 MICH. L. REV. 307, 315 (1951).

[30] KRS § 452.450.

[31] *See* note 25 *supra.*

[32] 518 S.W.2d 785 (Ky. 1975).

pit while on his way to a high school football game.[33] The plaintiff brought a wrongful death action against Branstetter Hardware, Inc., which in turn filed a third party claim for indemnity or contribution against the Hart County Board of Education and the board members in their capacities as board members. The plaintiff filed an amended complaint against the third party defendants, naming the board members in their capacities as board members and then, after the statute of limitations had run,[34] tried to file an amended complaint against them in their individual capacities. The trial court refused to allow the second amended complaint and granted summary judgment in favor of the board and the board members. The Court of Appeals upheld the entry of summary judgment on the grounds of sovereign immunity but ruled that it was error not to allow the second amended complaint.

Kentucky Rule of Civil Procedure 15.03 [hereinafter cited as CR] provides that a claim asserted in an amended complaint will relate back to the date of the original filing if it arose out of the conduct, transaction or occurrence set forth in the original pleading. The rule further provides that an amendment changing a party against whom a claim is asserted will relate back only if: (1) The claim arises out of the conduct, transaction or occurrence originally set forth; (2) the party to be brought in knew about the action within the statutory period for bringing the action and would therefore not be prejudiced in maintaining his defenses on the merits; and (3) he also knew or should have known that he would have been named originally except for a mistake concerning the identity of the proper party.

In *Smiley* the amendment could not have related back and would have been untimely under the statute of limitations if it had been treated as changing the party against whom the claim was asserted, because the board members had no reason to believe that the original complaint had omitted them in their individual capacities due to a mistake on the plaintiff's part as to the identity of the proper parties. It is clear that the plaintiff

[33] The accident occurred on November 14, 1969.

[34] The second amended complaint naming the board members individually was filed in January, 1972.

sought to amend to keep the defendants in the suit in their individual capacities only after the defendants had filed a motion for summary judgment on the grounds of the sovereign immunity of boards of education and their members. If, on the other hand, the amended complaint in *Smiley* is considered to be simply the addition of a claim, then it should relate back, because it arises out of the same occurrence which was set forth in the original pleading. The purpose of the relation back provision is to defeat any defense based on the statute of limitations when the court is satisfied that the defendant was given adequate notice of the claim through the original complaint.[35] The rationale for relation back is that the original complaint informs the defendant of the transaction, conduct or occurrence which is the basis for the plaintiff's action, and accordingly, puts him on notice as to all potential claims arising out of the transaction, conduct or occurrence in question. It seems reasonable to conclude, as the Court of Appeals did, that the defendants, having been sued as board members, received sufficient notice of potential claims against them in their individual capacities arising out of the same occurrence to allow the amended complaint to relate back and thereby escape the statute of limitations.[36]

## IV. SUMMARY JUDGMENT

A recent decision by the Court of Appeals could create uncertainty as to the proper standard to be used in ruling on a motion for summary judgment. In *Roberson v. Lampton*[37] the plaintiff-passenger brought an action to recover for personal

[35] *See* Tiller v. Atlantic Coast Line R.R., 323 U.S. 574 (1945); Welch v. Louisiana Power & Light Co., 466 F.2d 1344 (5th Cir. 1972); Barthel v. Stamm, 145 F.2d 487 (5th Cir. 1944), *cert. denied*, 324 U.S. 878 (1945); Green v. Wolf Corp., 50 F.R.D. 220 (S.D.N.Y. 1970); Meltzer v. Hotel Corp. of America, 25 F.R.D. 62 (N.D. Ohio 1960).

[36] This result finds support in Taormina Corp. v. Escobedo, 254 F.2d 171 (5th Cir.), *cert. denied*, 358 U.S. 827 (1958), in which the plaintiff was allowed to amend his complaint to name the partnership as defendant after having brought suit against the individual partners. The Court permitted the amendment to relate back. In Smith v. Guaranty Serv. Corp., 51 F.R.D. 289 (N.D. Cal. 1970), the plaintiff was allowed to amend his complaint to name one defendant as an active wrongdoer after originally naming him only as a passive stakeholder. Again, the amendment was deemed to relate back.

[37] 516 S.W.2d 838 (Ky. 1974).

injuries against the owners and drivers of three vehicles that had been involved in the multi-vehicle accident in which she was injured. After some discovery had been completed, the trial court granted summary judgment in favor of two of the defendants. The Court of Appeals reversed, noting that no testimony had been obtained through discovery from one of the defendants or from the plaintiff's husband, who had driven the car in which she was a passenger. Therefore, the Court reasoned that it was premature to conclude, as the trial court had, that the plaintiff could not produce the evidence necessary to prove causation at trial. The Court held: "The true purpose of a summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant."[38]

The precise nature of the Court's ruling in *Roberson* is not altogether clear. If it is a case in which the plaintiff was unable to offer evidence to oppose the defendants' motions because she had not completed her discovery, then the trial court should have either denied the motions or delayed ruling on them until the plaintiff had completed her discovery.[39] If this was the basis for the Court's decision, then the case is correctly decided and not particularly noteworthy. However, the Court's failure to refer to CR 56.06,[40] in conjunction with the general language used in the opinion, allows the conclusion that the Court decided the case by applying the general standards for granting a summary judgment. If this interpretation of the decision is correct, then the Court's opinion merits some comment.

If, indeed, *Roberson* does involve the application of a general standard for summary judgment, the Court seems to be saying that a motion for summary judgment shall not be granted unless the movant convinces the trial court that it is

[38] *Id.* at 840.

[39] KY. R. CIV. P. [hereinafter cited as CR] 56.06 provides:

> [S]hould it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[40] *See id.*

impossible for the opponent of the motion to produce evidence at trial sufficient to support a judgment in his favor.[41] This, however, is not the proper standard for ruling on a motion for a summary judgment. The motion is designed to look beyond the issues as framed by the pleadings to determine whether there is sufficient evidence to justify a trial on those issues.[42] There is no need for a trial if one party lacks the evidence to support his allegations.[43] The movant supports his motion with evidence tending to show that there is no genuine issue of fact, and that he is entitled to a judgment as a matter of law.[44] His opponent must oppose the motion with enough evidence to establish that a genuine issue of fact exists.[45] The movant does not bear the responsibility for proving that it is impossible for the opponent to produce sufficient evidence at trial; rather, the opponent bears the responsibility of coming forward with his own evidence to defeat the motion.[46] On this point Federal Rule of Civil Procedure 56(e) [hereinafter cited as Federal Rule] provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.[47]

As stated earlier, if *Roberson* is read narrowly as an application of CR 56.06, then there is no problem. But if it is read more broadly as establishing a new and much more stringent

---

[41] On this point the Court cited Conley v. Hall, 395 S.W.2d 575 (Ky. 1965).

[42] *See, e.g.*, Tuley v. Heyd, 482 F.2d 590 (5th Cir. 1973); Ando v. Great W. Sugar Co., 475 F.2d 531 (10th Cir. 1973); Gevedon v. Grigsby, 303 S.W.2d 282 (Ky. 1957).

[43] *See, e.g.*, Rowland v. Miller's Adm'r, 307 S.W.2d 3 (Ky. 1957).

[44] *See, e.g.*, New Amsterdam Cas. Co. v. Allen Co., 446 S.W. 2d 278 (Ky. 1969); Roberts v. Davis, 422 S.W.2d 890 (Ky. 1968); Gevedon v. Grisby, 303 S.W.2d 282 (Ky. 1957).

[45] *See, e.g.*, Gullett v. McCormick, 421 S.W.2d 352 (Ky. 1967); Tarter v. Arnold, 343 S.W.2d 377 (Ky. 1960); Townsend v. Gulf Interstate Gas Co., 308 S.W.2d 793 (Ky. 1957); Continental Cas. Co. v. Belknap Hardware & Mfg. Co., 281 S.W.2d 914 (Ky. 1955).

[46] *See* cases cited at note 45 *supra*.

[47] Although Kentucky does not have a similar provision there is authority for this position in Kentucky cases. *See* cases cited at note 45 *supra*.

test for granting a summary judgment, then the results will be unfortunate, because the motion for summary judgment will no longer be able to play its useful role of eliminating cases in which the opponent has insufficient evidence to create a genuine issue of material fact. One solution might be to adopt Federal Rule 56(e) in order to clarify the burdens that rest on both the movant and the opponent of a motion for summary judgment.

## V. DIRECTED VERDICT AND INVOLUNTARY DISMISSAL

Civil Rule 41.02(2) provides that at the close of the plaintiff's case the defendant "may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." This motion serves a function in a nonjury case similar to that of a motion for directed verdict in a jury trial, in that it allows the defendant to attack the plaintiff's case before putting on his own.[48] Because of this similarity it is easy to assume that both motions are decided by the same standard. This was the position asserted by the plaintiff in *Morrison v. Trailmobile Trailers, Inc.*,[49] a nonjury case in which the trial court granted the defendant's motion for a directed verdict at the conclusion of the plaintiff's presentation of evidence, based on its findings of fact and conclusions of law. On appeal, the plaintiff argued that the trial court was in error, since he had presented sufficient evidence to create an issue of fact. The Court of Appeals noted the confusion, first on the part of the defendant in filing a motion for directed verdict, and then on the part of the plaintiff in arguing that all he had to do was present sufficient evidence to create an issue of fact.[50]

In a jury case the jury is the trier of fact, and the motion for directed verdict tests whether the evidence is sufficient to allow a jury composed of reasonable people to find the facts in favor of the opponent of the motion.[51] In ruling on the motion, the opponent is given the benefit of every reasonable infer-

[48] *See* United States v. United States Gypsum Co., 67 F. Supp. 397 (D.D.C. 1946), *rev'd on other grounds*, 333 U.S. 364 (1948).

[49] 526 S.W.2d 822 (Ky. 1975).

[50] *Id.* at 824.

[51] *See* CR 50.01; Lee v. Tucker, 365 S.W.2d 849 (Ky. 1963); James v. England, 349 S.W.2d 359 (Ky. 1961).

ence.[52] But in a nonjury case the judge is the trier of fact, and the motion for dismissal at the close of plaintiff's case tests whether the trial judge has been persuaded by the plaintiff's evidence. In reaching his decision the trial judge weighs the evidence,[53] resolves conflicts[54] in it and decides on the basis of the preponderance of the evidence.[55] The plaintiff is not entitled to any special inferences.[56] If the judge is convinced that the defendant is entitled to a judgment on the evidence presented, he then makes the appropriate findings of fact and enters judgment accordingly.[57] If the motion is denied, the defendant puts on his evidence.[58] Additionally, if the motion is granted and the plaintiff appeals, the standard of review is not whether the evidence was sufficient to support a finding of fact in favor of the plaintiff-appellant, but whether the findings of fact by the trial judge were "clearly erroneous" in view of the evidence presented.[59] Hopefully, the very careful opinion by the Court of Appeals in *Morrison* will prevent any future confusion between the motion for a directed verdict and the motion for an involuntary dismissal in a nonjury case.

---

[52] *See, e.g.*, Campbell v. Olive, 424 F.2d 1244 (6th Cir. 1970); Alden v. Providence Hosp., 382 F.2d 163 (D.C. Cir. 1967).

[53] *See* Weissinger v. United States, 423 F.2d 795 (5th Cir. 1970).

[54] *See* United States v. Bartholomew, 137 F. Supp. 700 (W.D. Ark. 1956).

[55] *See* Emerson Elec. Co. v. Farmer, 427 F.2d 1082 (5th Cir. 1970); Ellis v. Carter, 328 F.2d 573 (9th Cir. 1964).

[56] *See* Emerson Elec. Co. v. Farmer, 427 F.2d 1082 (5th Cir. 1970).

[57] *See, e.g.*, Trask v. Susskind, 376 F.2d 17 (5th Cir. 1967).

[58] CR 41.02(2) expressly provides that the defendant makes the motion to dismiss "without waiving his right to offer evidence in the event the motion is not granted."

[59] CR 52.01. *See* Morrison v. Trailmobile Trailers, Inc., 526 S.W.2d 822, 824 (Ky. 1975). *See also* Woods v. North Am. Rockwell Corp., 480 F.2d 644 (10th Cir. 1973); Robinson v. M/V Merc Trader, 477 F.2d 1331 (5th Cir. 1973); Klein v. District of Columbia, 409 F.2d 164 (D.C. Cir. 1969); B's Co. v. B.P. Barber & Associates, Inc., 391 F.2d 130 (4th Cir. 1968).