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Evidence--Prior Inconsistent Statements--Court Reverses Long Line of Decisions

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who are within the compensation system immune from any suits for injuries or death, with, of course, the exception of a deliberate act on the part of the employer or willful misconduct on the part of the employee.[36] Where the third party tortfeasor is not within the compensation system, common law indemnity should be modified to the extent that recovery-over against a negligent employer would be restricted to that amount for which the employer would be liable under the compensation act. A legislative amendment or judicial declaration carrying forth these views would not result in compulsory compensation coverage. While the system would remain elective, there would be an added incentive for all employers to come under the coverage of the act. At the same time, it would put new vitality into an act which must be adaptable to the changing times of our society.

At present, three states have adopted a boundary line of compensation system immunity around the entire membership of the state's compensation family.[37] It remains to be seen whether Kentucky will join the progressive minority and adopt what appears to be the better view.

Donald K. James

EVIDENCE—PRIOR INCONSISTENT STATEMENTS—COURT REVERSES LONG LINE OF DECISIONS.—Tex Jett was charged with detaining his sister-in-law with intent to have carnal knowledge of her.[1] On the night in question, Jett, his wife and his sister-in-law were together at the Jett home. At trial Mrs. Jett testified that she called the police and summoned them to her home because Mr. Jett was drunk and out of control. The commonwealth's attorney was permitted to call as a witness the police officer who received Mrs. Jett's phone call. He testified that Mrs. Jett said her husband was drunk and molesting her sister. Mr. Jett appealed, objecting to this latter testimony on the ground that it was hearsay.[2] *Held:* Reversed. When both the

[36] *See* KRS § 342.015(2) & (3).

[37] Alabama Workmen's Compensation Act, Tit. 26, § 312 (formerly § 7587) (1947); ILL. ANNO. ST., Ch. 48, §§ 139, 166 (Smith-Hurd 1935); REV. CODE OF WASH. § 7675 (1951); *See also* 2 LARSON § 72.40 for further comment on the effect of these statutes.

[1] Kentucky's statute defining the crime of having carnal knowledge of a female is found in KY. REV. STAT. [hereinafter cited as KRS] § 435.110 (1942).

[2] The trial judge had instructed the jury to use the out-of-court statement by Mrs. Jett only as affecting the witness' credibility, not substantively for the truthfulness of its content.

person who allegedly made the out-of-court statement and the person asserting that he made it appear as witnesses under oath and subject to the rigor of cross-examination, there is no reason the jury should not be permitted to hear as substantive evidence all they both have to say on the subject in order to determine where the truth lies. *Jett v. Commonwealth,* 436 S.W.2d 788 (Ky. 1969).

The above ruling vitiates two generally accepted rules of evidence that had been consistently adhered to in Kentucky courts for over a hundred years. First, prior inconsistent statements of a witness had previously been admissible only for the purpose of impeaching that particular witness. These prior inconsistent statements were *not* hearsay if limited in purpose to *discrediting* the witness. They *were* hearsay if employed *substantively* to prove the truthfulness of their content.[3] Second, if an examiner received what the court generically refers to as a negative response from a witness, he was precluded from impeaching that witness by his or her own prior inconsistent statements.[4] This latter rule originated in the case of *Champ v. Commonwealth.*[5] There an examiner was confronted by a turncoat witness who denied any knowledge concerning the facts the examiner expected to illicit from him. The examiner was not permitted to use a prior out-of-court statement of the witness in which the witness had claimed knowledge with regard to these facts.[6] The rationale of preventing an examiner from impeaching a witness when that witness merely fails to respond in the manner desired by the examiner

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[3] Brown v. Commonwealth, 188 Ky. 814, 224 S.W. 362 (1920); Whitt v. Commonwealth, 27 Ky. L. Rptr. 50, 84 S.W. 340 (1905). The generally accepted rule is as follows:

> When a witness has changed sides and altered his story or forgets or claims to forget some fact, and his previous statement is received for impeachment purposes, what effect shall be given to the statement as evidence? Under the generally accepted doctrine the statement is not usable as substantive evidence of the facts stated. The adversary if he so requests is entitled to an instruction to that effect, and, more important, if the only evidence of some essential fact is such a previous statement, the party's case fails. C. MCCORMICK, LAW OF EVIDENCE [hereinafter cited as MCCORMICK] § 39, at 73 (1954).

[4] McQueen v. Commonwealth, 393 S.W.2d 787 (Ky. 1965); Champ v. Commonwealth, 59 Ky. (2 Metc.) 17 (1859).

[5] 59 Ky. (2 Metc.) 17 (1859).

[6] *Id.* at 24, where the court states the following:

> . . . [W]here a witness states a fact prejudicial to the party calling him, the latter may be allowed to show that such fact does not exist, by proving that the witness had made statements to others inconsistent with his present testimony. But a case like the present, where the witness does not state any fact prejudicial to the party calling him, but only fails to prove facts supposed to be beneficial to the party, is not within the reason of policy of the rule, and the witness can not be contradicted in such a case by evidence that he had previously stated the same facts to others. . . .

is that the jury will necessarily use these out-of-court statements substantively, instead of for their proper purpose of affecting the witness' credibility. This follows when the witness responds only negatively, for example, "I don't know," or "I don't remember," because there is no literal inconsistency in his statements. Therefore, there is nothing to impeach. As a result, the traditional Kentucky rule has been to exclude evidence of this nature because its only possible use is a substantive one, a use prohibited by the hearsay rule.[7]

The above limitation on use of out-of-court statements has been criticized on the basis of the false distinction it draws between positive and negative responses on the part of a witness.[8] A response such as, "I don't know," although negative in a very technical sense, is usually positive or affirmative in effect. The witness is now saying he doesn't know anything about the existence of a particular fact, while on a previous occasion he stated he did know something about the existence of that fact. Adherence to this false distinction obviously tends to exclude potentially relevant evidence. A very typical example demonstrating this is seen in *Miller v. Commonwealth*.[9] There the defendant was on trial for murder. The commonwealth's attorney asked a witness if she had not told the police prior to trial that the defendant had threatened the deceased. The witness responded, "No," to the examiner's question. The examiner then called police officers who testified that the witness had made such statements in their presence. This was held reversible error because the witness merely gave a negative response and could not be impeached on that basis. Another similar example of the strict application of this rule can be seen in the case of *McQueen v. Commonwealth*.[10] There

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[7] This limitation on impeachment of witnesses, *i.e.*, limiting the use of prior inconsistent statements to situations where the witness responds in a positive manner, has existed in Kentucky despite the presence of KY. R. CIV. P. 43.7 (1963), which states:

> A witness may be impeached by any party, without regard to which party produced him, by contradictory evidence, [and] by showing that he had made statements different from his present testimony. . . .

[8] 47 KY. L.J. 253 (1959). The author advocates that an examiner should at least be permitted to use the prior inconsistent statements of a turncoat or negatively responding witness where he is genuinely surprised by the witness' answer.

[9] 241 Ky. 818, 45 S.W.2d 461 (1932).

[10] 393 S.W.2d 787 (Ky. 1965).

> . . . [T]his court recognized the rule that a party may impeach its own witness, by proof of contradictory statements, only where the witness testifies positively to the existence of a fact prejudicial to the party, and not where the witness merely fails or refuses to testify as to the existence of a fact that would be favorable to the party. . . . The rule has been followed consistently. *Id.* at 791

the defendant was charged with manslaughter. The prosecution called a witness and asked if the witness had seen a weapon in the possession of the defendant. The witness responded he had not. The prosecution then brought in prior statements made by the witness to the police in which he said he had seen such a weapon in the possession of the defendant. Again the Court of Appeals held this to be reversible error because the prosecutor could not impeach a witness where the witness gave only a negative response. Since the out-of-court statement could not be used for impeachment, its only possible use was substantive. If used substantively, it violated the hearsay rule and hence should be excluded.[11]

The fear that impeachment testimony will be used in a substantive manner is justified. It does seem that the average juror would have difficulty in drawing the fine distinction between the use of out-of-court statements to affect a witness' credibility and the use of such statements substantively. As the court pointed out in *Jett,* many attorneys no doubt have recognized the artificiality of this distinction.[12] They have, under the guise of impeaching a witness' credibility, succeeded in having out-of-court statements admitted into evidence, knowing full well the jury would use these statements in a substantive manner. A number of distinguished jurists have advocated that this artificial distinction be abandoned.[13] Professor Wigmore in his treatise says the purpose of the hearsay rule is not to exclude all out-of-court statements by a witness, but merely to exclude such statements when the witness may not be cross-examined concerning them.[14] As a result, he proposes that where a witness is in court and the statement is written, substantive use should be permitted. He also proposes that such statements be used substantively where both the witness and the person who heard the statement are in court. The policy of the hearsay rule is not violated in these two instances because the statements in both can readily be subjected to cross-examination.[15] The

[11] MCCORMICK § 39; 3 J. WIGMORE, WIGMORE ON EVIDENCE [hereinafter cited as WIGMORE] § 1018, at 687, 690 (3rd ed. 1940).

[12] 436 S.W.2d at 791 (Ky. 1969).

[13] A list of scholars advocating abolishment of this distinction is found at 5 WIGMORE § 1362, at 3-8.

[14] 3 WIGMORE § 1018, at 687-90.

[15] As Professor Wigmore explains:

> It does not follow, however, that Prior-Self-Contradictions, when admitted, are to be treated as having no *affirmative testimonial* value, and that any such credit is to be strictly denied them in the mind of the tribunal. The only ground for doing so would be the Hearsay Rule. But the theory of the Hearsay Rule is that an extra-judicial statement is rejected because it was not subject to cross-examination. Here, however, by hypothesis the witness is present and subject to cross-examination.

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Model Code of Evidence[16] and the *Uniform Rules of Evidence*[17] have both adopted this view on the use of out-of-court statements. This more liberal view has also been substantially adhered to by the draftsmen of the *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates.*[18]

The Kentucky Court of Appeals in the *Jett* case has substantially adopted what appears to be the better view on the use of out-of-court statements. The decision in *Jett* has two meaningful ramifications. First, the semantic distinction between a negative and positive response on the part of a witness is abolished. As a result, an examiner may readily impeach a turncoat or recalcitrant witness with his prior statements. Second, and most significantly, the decision permits the use of out-of-court statements in a substantive manner when the witness who made or heard the statements is in court as a witness, thus subject to cross-examination. The *Jett* decision recognizes that the hearsay rule excludes out-of-court statements only because they cannot be subjected to the rigor of cross-examination. Where there

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There is ample opportunity to test him as to the basis of his former statement. The whole purpose of the Hearsay Rule has already been satisfied. . . . The contrary view, however, is the orthodox one. It is universally maintained by the courts that Prior-Self-Contradictions are not to be treated as having any *substantive or independent testimonial value.* (Emphasis added.) *Id.*

[16] MODEL CODE OF EVIDENCE rule 503 (1942):

Evidence of a hearsay declaration is admissible if the judge finds that the declarant:

* * * *

(b) is present and subject to cross-examination.

[17] UNIFORM RULES OF EVIDENCE rule 63 (1953):

Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

* * * *

(1) Previous statements of persons present and subject to cross-examination. A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness. . . .

[18] PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES rule 8.01 (C)(2)

Hearsay. "Hearsay" is a statement offered in evidence to prove the truth of the matter asserted unless:

* * * *

(2) Prior Statement by Witness. The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement (i) is inconsistent with his testimony. . . .

It should be noted that the above rule defines hearsay in such a manner so as to exclude prior inconsistent statements when the witness is subject to cross-examination. The other liberal views as mentioned previously accomplished the same effect by "excepting" these statements from the operation of the hearsay rule.

is opportunity to cross-examine these statements, there is simply no purpose in excluding them as substantive proof provided they meet the other criteria for admissibility.

Joel V. Williamson

TORTS—NEGLIGENCE—DUTY TO WARN IN PRODUCT LIABILITY CASES—Wilbur Post was injured when the fan of an industrial vacuum cleaner, designed for 115 AC voltage, disintegrated as the result of his plugging it into an outlet supplying 220 DC voltage. The equipment was furnished to Post's employer by an out of state corporation[1] through a local distributor. Written instructions accompanying the machine warned the user that serious damage to both machine and operator might result from use of the wrong voltage. The manufacturer had included a 2½" x 1½" decal bearing the inscription "ONLY USE ON 115 VOLTS AC OR DC" for attachment to the equipment. In addition, it had affixed a metal plate to the vacuum bearing the serial number of the machine and the words "VOLTS 115." The plate had been mentioned in the written instructions.

Under an instruction which made no reference to a duty to warn and contained no definition of an adequate warning, the jury found in favor of the manufacturer. Post appealed. *Held:* Reversed. The judge should have instructed the jury that there was a duty to give an adequate warning to all foreseeable users. *Post v. American Cleaning Equipment Corporation,* 437 S.W.2d 516 (Ky. 1968).

Manufacturer's liability for product-caused injuries may be based on contract or tort law. In the latter, actions are predicated on either negligence or strict liability. Within specific areas of product liability such as product design and the duty to warn, negligence still remains the prevalent theory of liability.[2] Recently, however, there have been a few cases applying strict liability for a failure to provide an adequate warning to the user.[3]

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[1] The Court discusses the jurisdiction question and Kentucky's "doing business" statute, KY. REV. STAT. § 271.610(2) (1946), and rules that the concept of "doing business," as discussed in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), is no longer applicable in product liability cases where the doctrine of strict liability has been adopted. The Court cites Annot., 19 A.L.R. 3d 13 as authority. Note that the Court is implying that *Post* is a strict liability case.

[2] Note, *Foreseeability in Product Design & Duty to Warn Cases—Distinctions & Misconceptions,* 68 WIS. L. REV. 228 (1968).

[3] *See e.g.,* Canifax v. Hercules Power Co., 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965).