COURT OF APPEALS OF KENTUCKY

NO. 1999-CA-000944

JUDY TAYLOR **APPELLANT**

v.

JAMES RYAN, et al **APPELLEES**

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RESPONSE OF APPELLANT, JUDY TAYLOR TO APPELLEE EUGENE JACKSON'S BRIEF

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the Honorable John M. Bush, Suite 201, 9000 Wessex Place, Louisville, Kentucky 40222, Counsel for James and Jason Ryan; Honorable Eric G. Farris, Honorable Jack E. Ruck, Honorable Walter Sholar, P. O. Box 460, Shepherdsville, Kentucky 40165, Counsel for Eugene Jackson; Honorable Denise M. Helline, Suite A, 6008 Brownsboro Park Blvd., Louisville, Kentucky 40207, Counsel for Kenny Randolph; Honorable Armer H. Mahan, Jr., 500 Meidinger Tower, Louisville, Kentucky 40202, Counsel for Ryan Horse Company; to Judge Ken Corey, Judge Earl O'Bannon, Judge Judy McDonald, Eleventh Division, Jefferson Circuit Court, 700 W. Jefferson, Louisville, Kentucky 40202 and the Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, on this the 28th day of December, 1999 and I hereby certify that the Record on Appeal was not withdrawn by the undersigned.

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STATEMENT OF POINTS AND AUTHORITIES

APPELLANT'S RESPONSE TO APPELLEE, JACKSON'S COUNTER-STATEMENT OF THE CASE AND FACTS

RESPONSE TO COUNTER-STATEMENT OF FACTS

Eugene Jackson's factual rendition contains several gaping omissions. Noteworthy in paragraph 2, page 1, Jackson states his Answer to the Complaint asserted improper venue and that he 'then' submitted a Motion for Summary Judgment on the basis of improper venue. Lacking in this rendition are the following: (1) the Complaint was filed on August 23, 1995 (R.A. 1-6) and Jackson's Answer on October 2, 1995 (R.A. 16); (2) the initial Motion to Dismiss re: venue, was not filed until October 8, 1998 (R.A. 567); (3) prior to Jackson filing the venue-based Motion to Dismiss on October 8, 1998 (R.A. 567[1] he filed a Motion for Summary Judgment on February 13, 1998, wherein he failed to make any venue defense (R.A. 216-291); and finally, between the date his Answer was filed and the date of the venue-based Motion to Dismiss - a period of approximately **3 years**, Jackson fully participated in the ongoing litigation by taking depositions, filing interrogatories[2], attending depositions, filing

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[1]Although the initial Motion to Dismiss re: venue was denied after a hearing 10/30/98 (R.A. 643), Jackson re-filed the identical Motion less than 1 month before Trial (R.A. 1132-1175) which the new trial Judge granted.

[2]Pursuant to CR 5.06, various discovery documents are not filed in the record. Therefore, Appellant contemporaniously with the filing of this Response, will tender a Motion seeking to include in the Record on Appeal by way of example to the Court, of Jackson's involvement, the following:

1. Jackson's undated 11/95 Notice to take Deposition of Appellant Judy Taylor;
2. Jackson's 11/3/95 Interrogatories to Appellant;
3. Jackson's 11/3/95 Request for Production of Documents to Appellant;
4. Jackson's undated 5/96 Notice to Take Deposition of Sharon Mayes;
5. Jackson's 6/25/96 Notice to Take Deposition of Judy Taylor;
6. Jackson's 9/13/96 Notice to Take Deposition of Sharon Mayes;
7. Jackson's 10/28/96 Subpoena Duces Tecum to Sharon Mayes;
8. Jackson's 10/30/96 Notice to Take Deposition of Sharon Mayes; and
9. Jackson's 11/12/96 Amended Notice to take Deposition of Sharon Mayes.

Noteworthy is the fact that none of these pre-trial discovery devices was orchestrated to resolve any 'venue' issue.

discovery motions and questioning witnesses during depositions, etc., etc. (e.g., R.A. 55-67, 89-90, 92).

Jackson's Brief then states, "[t]*he* [initial] *ruling* [denying his Motion to Dismiss re: venue] *was a mere paragraph ruling that determined venue had been waived on the basis of Civil Rule 12.02.*" (Jackson's Brief, p. 1, para. 2.) Jackson neglects to advise this Court that the 'mere paragraph' was issued following a lengthy hearing held on October 30, 1998 (R.A. 643).

I.
APPELLANT'S REPLY TO JACKSON'S CLAIM THAT VENUE WAS NOT WAIVED AT ANY TIME DURING THE PROCEEDINGS

Appellee Jackson seeks to contort and destroy the obvious and simple meaning of the Civil Rules of Procedure. In summary, he believes his failure to bring his venue defense to the Court's attention for 3 years, despite his extensive litigation involvement and his prior Summary Judgment Motion (R.A. 216-291) should be of no import. His theory is in direct contravention of the language and intent of CR 12.07, as well as the significant weight of appellate authority.

Jackson pled improper venue in his original Answer (R.A. 16). However, Jackson's failure to bring the issue to the Court's attention until after numerous litigation maneuvers and the filing of a Motion for Summary Judgment indicates a clear waiver of the venue issue. Jackson's Motion for Summary Judgment (R.A. 216-291) was based upon his claimed defenses as a matter of law, i.e., good faith purchases, common law bona fide purchaser for value and estoppel. Had he at that time believed he had a venue defense, he should be required to assert it then or consider it waived.

CR 12.02 and 12.03 clearly contemplate courts may consider certain CR 12 motions under the same standard and *"as if, they were"* motions for summary judgment. When a trial court does so, the movant may not re-file a second CR 12 motion alleging other facts/circumstances/law justifying dismissal if the movant has failed to make those same arguments to the court during the first CR 12

motion. CR 12.08. It defies common sense, as well as, the purposes and intent of CR 12 to allow a litigant to participate in litigation for 3 years, file a Motion for Summary Judgment (R.A. 21) wherein he fails to mention any venue defense and then later file a CR 12 'improper venue' Motion to Dismiss (R.A. 561) only 1 month prior to trial.

Finally, as to this issue, Jackson attempts to dissuade this Court from consideration of various precedents in support of Appellant's position. Jackson does so by misleading this Court. For example, Jackson states the case of *Jaggers v. Martin, 490 S.W.2d 762 (1973)* cited in Appellant's Brief is *"easily distinguishable"*. In. *Jaggers*, Id., the court held *"that the defendant waived her defense of improper venue because she did not assert it in her initial response."* (Appellee's Brief, p. 6, para. 1.). Appellant attaches a copy of *Jaggers* as **Exhibit A** because Appellant cannot locate any such finding. The Court never mentions any *"initial response"*, but merely holds that a delay of 8 months before filing a CR 12 venue based motion acts as a waiver of the venue defense.

Likewise, Appellee claims *Licking River v. Hilton, 413 S.W.2d 61 (1967)* is distinguishable because the *"Defendant failed to assert the defense of improper venue in the original Answer"* (p. 6, para. 1). Again, a review of *Licking River* (**Exhibit B**) will demonstrate the defendant's 'Answer' was only part of the reason the court denied his venue defense. Interestingly, before the defendant filed its Answer, it filed a Motion to Dismiss, which did not raise venue (Id., p. 62) and filed/responded to various Motions for summary judgment which *"motions were not predicated upon alleged lack of jurisdiction or venue"* (Id. 62-63). Further, the court stated *"the issue of lack of venue was first raised...by the amended answer which was filed after* [defendant] *participated in taking depositions, answering interrogatories and moving for summary judgment. This was too late...CR 12.08."* (Emphasis added.)

Clearly, the *Licking River* court discerned the purpose of CR 12.08 is to bring litigation to a

prompt halt only if a legitimate venue issue is timely raised.

II.
APPELLANT'S RESPONSE TO JACKSON'S CLAIM THAT VENUE IS IMPROPER IN JEFFERSON COUNTY UNDER STATUTORY LAW

Appellee cites KRS 452.460 in support of his position that venue is improper in Jefferson County. That statute finds venue proper where the defendant resides or where the injury occurred. Clearly, the injury, i.e., conversion, occurred in Jefferson County and no other, for property once converted and not restored, logically cannot be converted repeatedly in each successive location where it may appear in the hands of each successive thief or tort feasor. (See Appellant's original Brief, pp. 11, 29.)

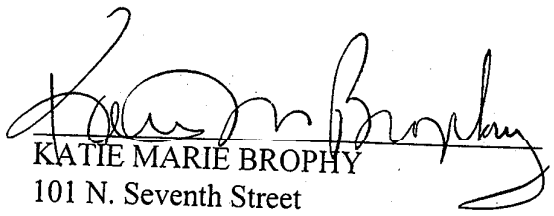
Furthermore, KRS 452.580 provides "[w]*here a person obtains property by...false pretenses...in one county and brings the property so obtained into or through any other county, he may be tried in the county in which he obtains the property or in any other county into or through which he brings it.*" (Emphasis added.) Burgess' of course, obtained the horses in Jefferson County, Kentucky. (R.A. 317-323.) In addition, their agent, Eugene Jackson (R.A. 321) (in their efforts to defraud the Appellant), transported the horses directly into and through Jefferson County, Kentucky (R.A. 570). Venue is thus, proper in Jefferson County because the injury occurred there, the property was converted there and one co-conspirator, Eugene Jackson, transported the horses through Jefferson County, Kentucky.[3]

CONCLUSION

Wherefore, Appellant respectfully requests this Court vacate the trial Court's Order dismissing her claim against Appellee, Eugene Jackson and find that venue of said claim is proper in Jefferson

[3]While it is true KRS 452.580 contains a hearing alluding to criminal proceedings and courts interpreting statutes must be sensitive to their context, the more fundamental rule is that courts give effect to the statute's plain meaning. Bailey v. Reeves, Ky., 662 S.W.2d 832 (1984) the codification of statutes by means and chapter headings does not alter that plain meaning. KRS 446.140.

County, Kentucky.



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