COURT OF APPEALS OF KENTUCKY

NO. 1999-CA-000944-MR

JUDY TAYLOR — **APPELLANT**

v.

JAMES RYAN, et al — **APPELLEES**

* * * * * * * * * * *

APPELLANT, JUDY TAYLOR'S PETITION FOR RE-HEARING

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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, 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., Suite 2200, 400 W. Market Street, 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 14th day of March, 2001.

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Attorney for Appellant

STATEMENT OF POINTS AND AUTHORITIES

Comes the Appellant, Judy Taylor, by Counsel, Katie M. Brophy and pursuant to **CR 76.32**, moves this Honorable Court for a rehearing on the Opinion rendered February 23, 2001 affirming the trial Court's dismissal of the five (5) Defendants in this action.

EUGENE JACKSON

Appellant respectfully requests this Court amend and vacate its decision with respect to Eugene Jackson[1] for the following reasons:

In considering Jackson's defense of improper venue raised in his Answer, the Court found the venue defense to have been timely asserted. Appellant does not contest such finding. However, this Court then finds, *"[t]he court initially didn't rule on the issue and Jackson proceeded to the discovery phase of the suit."* (Opinion of Court of Appeals, p. 8, para. 2.) It is to this finding that Appellant takes exception, because the trial Court was never requested by Jackson to rule on the venue issue and because it was Jackson who elected to pursue discovery without seeking a ruling on the venue issue. It is Appellant's contention Jackson waived the venue defense by not requesting a ruling as contemplated by **CR 12**.

Permitting a litigant to merely raise the issue in a Responsive pleading, but seek no ruling from the trial Court until the conclusion of all discovery and immediately prior to trial, completely defeats the purposes of **CR 12** and contributes greatly to the expense for all other litigants. Such action necessarily hinders trial courts from efficiently managing their dockets. The results for litigants are as occurred here, i.e., Appellant (and the other Defendants) spent substantial time and effort in discovery regarding the claim against Jackson, responding to Jackson's discovery requests

[1]Appellant also submits that the consideration of State law venue as set forth in this Section, also applies to the Ryan Defendants/Appellees.

and responding to Jackson's motion for summary judgment. Allowing Jackson at the last minute, to pursue a venue dismissal he failed to seek initially, only clouds and complicates litigation.

While it was not the case presently, one could easily imagine a case wherein extensive interstate or foreign travel is required of litigants for pre-trial discovery over periods of years, only to have the Defendant on the eve of trial, cry foul - or rather venue - and receive a dismissal. The wasted expense for such conduct could be enormous. Appellant asserts this is precisely the reason **CR 12.07** and **12.08** require **CR 12** defenses to be raised in a timely fashion and only on a *"one time basis"*. And certainly, raising such defense must require the Defendant to bring same to the trial Court's attention before three (3) years of pre-trial litigation occurs.

See e.g.:

> *"Lack of venue is a personal defense which is waived under CR 12 unless raised in a timely fashion. This rule is designed to forestall the dilatory practice of making a series of motions, delaying the final disposition of the case. If a Rule 12 motion is made, a party is required to join all defenses and objections available thereunder except as noted in CR 12.08(2)...practitioners should raise the defense of lack of venue in the first defensive move which they make."* **Kentucky Civil Practice Before Trial, Vol. I, 2nd Edition, Section 4.10.**

Appellant cited ***Licking River Limestone Co. v. Helton, 413 S.W.2d 61 (1967)*** in partial support of her position herein. ***Licking River*** differs somewhat factually from the present case as the Defendant failed to raise the venue defense until its Amended Answer was filed and then filed a motion to dismiss for improper venue. The Court in acknowledging the Defendant's Amended Answer, further found same to have been filed after defendant *"participated in taking depositions, answering interrogatories and moving for summary judgment. This was too late....(Citations omitted)"*. Id. at 63.

The theory espoused in ***Licking River*** and indeed the required practice, should apply to all

litigants. If judicial economy and efficiency (for the court's or the litigant's sake) are to have any meaning, surely it does not condone a litigant who 'sits on' his claimed defense for three (3) years before bringing it to the court's attention for a ruling. Appellant does not question the Court's finding that there is no rule which requires a person to waive a defense on the merits if a defense of improper venue is asserted, but argues that a party has an obligation to seek a ruling on **CR 12** procedural defenses before - or at least simultaneously with seeking a ruling on substantive defenses.

THE RYAN DEFENDANTS

Appellant respectfully requests this Court reconsider its finding that a federal RICO action against the Ryan Defendants could only be brought in United States District Court for the Western District, as opposed to State court. While exclusive federal jurisdiction was not a defense claimed by Ryan's and thus, perhaps the litigants did not specifically address same[2],, Appellant submits this issue was been resolved in her favor by the United States Supreme Court in ***Tafflin v. Levitt, 493 US 455 (1990)***.

> *"To resolve a conflict among the federal appellate courts and state supreme courts we granted criteria limited to the question whether state courts have concurrent jurisdiction over civil RICO claims. 490 U.S. 1089 (1989). We hold that they do and accordingly affirm the judgment of the Court of Appeals."* At p. 458.

In ***Tafflin***, the United States Supreme Court reviewed, as did this Court, the specific language of **18 USC §1964(c)**, (see Opinion of Court of Appeals, pp. 13-14), but held:

> *"This grant of federal jurisdiction is plainly permissive, not mandatory, for '[t]*he statute does not state nor even suggest that such jurisdiction shall be exclusive. It provides that suits of the kind described *'may'* be brought in federal district courts, not that they must be.' (Citation omitted.) *Indeed, '[i]*t is black letter law...that the mere grant of jurisdiction to a federal court does not operate to oust a state court from

[2]Appellant acknowledges subject matter jurisdiction can certainly be raised by any court sua sponte.

concurrent jurisdiction over a cause of action.'" (Citations omitted.) Id. At 460-461.

...

"...contrary to petitioners' fears, we have full faith in the ability of state courts to handle the complexities of civil RICO actions, particularly since many RICO cases involve asserted violations of state law, such as state fraud claims, over which state courts presumably have greater expertise. Id. at 465. (Emphasis added.)

The trial Court found the Ryan Horse Company had no connection with Jefferson County and this Court has agreed with that conclusion. Appellant respectfully asks this Court to reconsider the correctness of the trial Court's finding. Appellant concedes the principal place of business for Ryan Horse Company is Hardin County. However, Ryan Horse Company's agents travel throughout Kentucky (including Jefferson County, Kentucky), and other states, purchasing horses for slaughter. Ryan Horse Company has and does conduct business in Jefferson County as the citation to ***Cobble v. Miller and Ryan, et al, Jefferson Circuit Court, Number 92CI 00414***, demonstrates. The ***Cobble*** case resulted from the purchase by a Ryan Horse Company agent in Jefferson County, of a stolen horse belonging to the Cobble family as part of the regular course of business of Ryan Horse Company.[3] The Ryan's can and do purchase horses in any county within this State and so testified in the ***Cobble*** case.

Furthermore, as Appellant has argued previously, Jim Ryan's perjury occurring in Jefferson County on September 21, 1994, was the culmination of the fraud perpetrated on Appellant. That fraudulent scheme of course, began in Jefferson County, Kentucky when the Burgess' first obtained the horses under a fraudulent arrangement. Appellant respectfully requests this Court reconsider its

[3]As a result of said purchases, suit was brought against the Ryan's in 1992 in Jefferson County and concluded in Jefferson County. There was no issue of venue regarding the Ryan Defendants because the sale admittedly occurred in Jefferson County.

findings pursuant to **KRS 452.450** (Opinion of Court of Appeals, pp. 15-17), in that the wrongful *"taking"* of the horses and deprivation and injury occurring as a result occurred in Jefferson County. The mere fact that the horses were later sold in Indiana, then Bullitt County, Kentucky and finally, in Dallas-Ft. Worth, Texas, does not mean Appellant was injured in those locations or that the horses were taken from her in any of these locations. The horses were taken from her one time and she was injured as a result of that taking in Jefferson County, Kentucky. The fact that as a result of the fraudulent scheme instituted in Jefferson County, the horses were physically transferred to various locations, is not tantamount to an injury to Appellant in each of those locations.

KENNY RANDOLPH

In an elucidating discussion of the jurisdiction/venue as relates to conspiracy, the Kentucky Supreme Court in the criminal proceeding, ***Commonwealth v. Cheeks, Ky., 698 S.W.2d 832 (1985)*** reviewed **KRS 500.060**, which provides:

> *"...a person may be convicted under the law of this state of an offense committed by his own conduct or the conduct of another for which he is legally accountable when:*
>
> *(a) Either the conduct or the result which is an element of the offense occurs within this state; or*
>
> *(b) Conduct occurring outside the state is sufficient to constitute a conspiracy to commit an offense within the state; or*
>
> *(c) conduct occurring outside the state is sufficient to constitute a conspiracy to commit an offense within the state and an overt act in furtherance of the conspiracy occurs within the state;..."*

While this case is a civil matter, the above is instructional in that it is a clear delineation of the common law made applicable to personal jurisdiction in conspiracy matters. In other words, Appellant asserts the circuit courts of Kentucky may exercise jurisdiction in conspiracy matters when the conduct occurring outside the jurisdiction is sufficient to constitute a conspiracy and it causes

an injury within this state.

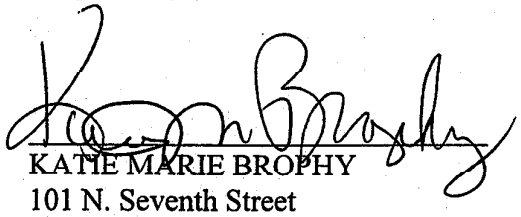
The actions of one in a conspiracy are imposed upon all other co-conspirators, even to the point of admitting into evidence as an admission against all other participants, a statement by one participant in a conspiracy if the statement is made in furtherance of the conspiracy. Lawson, The Kentucky Evidence Law Handbook, 3rd Edition, Section 8.30.

And, as this Court has previously recognized in ***Farmer v. City of Newport, 748 S.W.2d 162 (Ky. App., 1988)***, one may be held liable for the injury occurring to the Plaintiff from tortious conduct by another participant if (1) the one does a tortious act in concert with the other or pursuant to a common design with him, or (b) one knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct separately considered, constitutes a breach of duty to the plaintiff. Id. at 162, citing **Restatement (Second) of Torts, Section 876 (1979)**.

It is Appellant's position that Kenny Randolph, having acted as a co-conspirator with Lisa and Jeff Burgess and having substantially assisted/encouraged them in their breach of their duty, the trial Court has jurisdiction of all co-conspirators - the acts of one being interchangeable with and chargeable to the other. Thus, *"...where two or more persons enter into an agreement, tainted with conspiracy, any act done by either or anyone in furtherance of the design becomes the act of all and each participant is responsible for the result."* ***Hall's Adm'r. v. Hall, 285 Ky. 730, 7836, 149 S.W.2d 24 (1941)***. If these precepts have any meaning, it is that the acts of Lisa and Jeff Burgess here in Kentucky, are attributable to Kenny Randolph - their co-conspirator such that Kentucky has jurisdiction of all conspirators based on the actions of each within this forum and all committed

within this forum.

Respectfully submitted.



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