Civil Procedure

John H. Garvey

The Catholic University of America, Columbus School of Law

Bill Dorris

Follow this and additional works at: https://scholarship.law.edu/scholar

Part of the Civil Procedure Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at CUA Law Scholarship Repository. It has been accepted for inclusion in Scholarly Articles and Other Contributions by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
Civil Procedure

By John H. Garvey* and Bill Dorris**

I. Statute of Limitations

In Commonwealth v. All Points Construction Company,¹ the Home Insurance Company filed a claim for contribution against the Commonwealth with the Board of Claims in August 1976. The insurance company had settled personal injury and wrongful death claims on behalf of its insured on March 1, 1976. The claims arose from an automobile accident which had occurred in September 1974. The Commonwealth argued that a claim for contribution accrues at the time of the accident—rather than upon payment—for purposes of Kentucky Revised Statutes § 44.110,² which provides that all claims against the Commonwealth must be filed with the Board within one year from the time they accrue. The Court of Appeals disagreed.

Claims for contribution based on tort are generally held to accrue at the time of payment.³ Such an approach makes it more difficult for one who is sued for contribution, but who is not sued by the injured party in any primary action, to investigate and prepare a defense based on the transaction which gave rise to joint liability. To that extent one purpose of statutes of limitations—to guard against entertaining claims based on stale evidence—is frustrated. But the party whose action is begun after the expiration of the statute is at least able to benefit from the discovery, and often proof, made by the participants in the primary action. In any event, permitting the statute to run from the time of the accident would often result in foreclosure of the tortfeasor’s contribution claim, since the con-

* Author's Note

** Author's Note

¹ 566 S.W.2d 171 (Ky. App. 1977).
² Ky. Rev. Stat. § 44.110 (1972) (hereinafter cited as KRS) states: “A claim must be presented to the board within one (1) year from the time it has accrued.”
³ Consolidated Coach Corp. v. Burge, 54 S.W.2d 16 (Ky. 1932); City of Louisville v. O’Donaghue, 162 S.W. 1110 (Ky. 1914). See generally Annot., 57 A.L.R.3d 867, 875-80 (1974). See also Restatement of Restitution, § 82 (1936).
tribution claim cannot be brought until after the injured party decides to proceed.\textsuperscript{4}

The Commonwealth based its argument on \textit{Automobile Insurance Co. v. Commonwealth},\textsuperscript{5} which held that an insurer who had settled a wrongful death claim on behalf of its insured tortfeasor could maintain an action in the Board of Claims against the Commonwealth for contribution. The thrust of the Commonwealth's argument in \textit{Automobile Insurance} was that the insurer was not a "person" within the meaning of the statute\textsuperscript{6} authorizing the Board of Claims to compensate persons for damages sustained as a proximate result of the Commonwealth's negligence. The Court reasoned that because the insurer was subrogated to the rights of its insured after paying the claim, it stood in the same position as its insured would have if he had settled the claim and then asked for contribution. The Commonwealth's position in \textit{All Points} seemed to rest on the misapprehension that the insurer was subrogated to the rights of the injured party.

The Court of Appeals suggested in dictum that when an insurer makes payment to its insured for a loss caused by a third-party tortfeasor, the insurer has only one year from the date of the accident or injury to bring the claim before the Board.\textsuperscript{7} This is consistent with the thought that the insurer stands in the same position as its insured, whose claim accrued at the time of the accident. However, this view appears to be a significant departure from the law of several other jurisdictions.\textsuperscript{8}

---

\textsuperscript{4} Consolidated Coach Corp. v. Burge, 54 S.W.2d 16 (Ky. 1932); Roehrig v. City of Louisville, 454 S.W.2d 703 (Ky. 1970) (dictum). \textit{Cf.} Parker v. Redden, 421 S.W.2d 586 (Ky. 1967) (adjudication of liability for contribution, as distinguished from a right to contribution, can be made before the right to recover contribution has fully matured through payment).

\textsuperscript{5} 414 S.W.2d 578 (Ky. 1967).

\textsuperscript{6} KRS § 44.070(1) (1972).

\textsuperscript{7} 566 S.W.2d at 173.


The Court had held in Employers Mut. Liability Ins. Co. v. Brown Wood Preserving Co., 182 S.W.2d 30 (Ky. 1944), that since the Workmen's Compensation Act did not create a new right of action against a third party who injured the employee by an insurer who was obligated to compensate the employee, the applicable statute of limitations was that governing the right of action of the injured employee against the
II. PERSONAL JURISDICTION

In Tube Turns Division of Chemetron Corp. v. Patterson Co., Inc.\(^9\) suit was brought by Tube Turns against a Colorado corporation in state court for $9,608.80 alleged to be due under a contract. Tube Turns initiated the contact with Patterson in Colorado, offering to sell it bellows expansion joints. Patterson subsequently negotiated from Colorado by mail and telephone with Tube Turns' Louisville office. These negotiations culminated in Tube Turns' acceptance in Louisville of a single order placed by Patterson. Evidently, the negotiations and contract were the only contacts Patterson had with Kentucky.\(^10\) Patterson was served under Kentucky's long arm statute and its motion to quash service of process was granted. The Court of Appeals affirmed the circuit court's decision and rendered an opinion which contained the first interpretation by a Kentucky appellate court of KRS § 454.210 (2)(a)(1), the "transacting any business" subsection of the long-arm statute.\(^11\)

The Sixth Circuit, in Davis H. Elliot Co. v. Caribbean Utilities Co.,\(^12\) had previously interpreted that subsection as extending to the limits of due process, a reading which has been praised as effectuating the intention of the General Assembly while avoiding the difficult problem of defining what tortfeasor. The dictum in All Points seems to be the first indication that the courts will apply this holding to situations not involving the Workmen's Compensation Act.

\(^9\) 562 S.W.2d 99 (Ky. App. 1978).
\(^10\) The Court of Appeals went to great lengths to make this point:

Patterson has no certificate of authority to transact business in Kentucky. It has never maintained an office, a post office box, or telephone directory listing for the purpose of transacting business in Kentucky. Patterson has no employees or agents in Kentucky, and it owns no property in Kentucky. Its employees and agents never physically entered Kentucky for the purpose of negotiating contracts or soliciting any business.

The record does not indicate that the bellows expansion joints were specially manufactured for Patterson. In fact, the record does not even indicate that the goods were manufactured in Kentucky.

\(^11\) 562 S.W.2d at 99-100.

\(^12\) KRS § 454.210 (Supp. 1978):

(1) As used in this 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 the Commonwealth. . . .

\(^1\) 513 F.2d 1176 (6th Cir. 1975).
"transacting any business" means apart from the requirements of due process. The Court of Appeals, though not bound by the Sixth Circuit's interpretation, adopted the Caribbean Utilities interpretation of "transacting any business," and concluded that assuming jurisdiction over Patterson would violate the due process clause as well as the long-arm statute.

The court employed the tripartite due process analysis used by the Sixth Circuit in Southern Machine Co. v. Mohasco Indus., Inc. i.e., to justify personal jurisdiction over a nonresident on the basis of an isolated business transaction, (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 forum state; and, (3) the acts of the defendant must have sufficient connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. Yet, the court's application of this analysis in Tube Turns was so cursory that it is difficult to determine which of the criteria the court found decisive. At the close of its opinion the court stated:

In the absence of proof that Patterson should have anticipated that its order with Tube Turns could have a substantial impact on commerce within Kentucky, it would be

---

14 562 S.W.2d at 100.
15 Ordinarily, questions of in personam jurisdiction involve a two-step inquiry: (1) Did the state legislature authorize the courts to exercise jurisdiction under the facts of the particular case?, and (2) Does the exercise of jurisdiction violate due process? However, these steps are merged where the state legislature has authorized the courts to exercise the fullest jurisdiction permitted by the due process clause of the Fourteenth Amendment. See Davis H. Elliot Co. v. Caribbean Utilities Co., 513 F.2d 1176, 1179 (6th Cir. 1975).
16 401 F.2d 374 (6th Cir. 1968). See note 29 infra for a discussion of the utility of adopting this approach.
18 Where the defendant's connections with the state are more substantial, this requirement may not apply. See Perkins v. Benquet Consol. Mining Co., 342 U.S. 437 (1952). Nevertheless, this limitation is expressly made applicable in Kentucky by KRS § 454.210(b) (Supp. 1978): "When jurisdiction over a person is based solely on this section, only a claim arising from acts enumerated in this section may be asserted against him."
The decisive effect of the unforeseeability of Patterson's actions seems to implicate the "purposeful activity" requirement of the Southern Machine approach, but in a manner inconsistent with the Sixth Circuit's own understanding of the Southern Machine test. In In-Flight Devices Corp. v. Van Dusen Air, Inc. the Sixth Circuit stated that the purposeful action test was merely a "baseline requirement" which:

seeks to avoid the assertion of jurisdiction in a situation where all contacts result entirely from a decision made by plaintiff as was the case in Hanson v. Denckla. Certainly the intentional entering into a contractual relationship with a resident of the forum state is sufficient to protect against the Hanson v. Denckla problem and so to meet the purposeful action requirement.

There can be little doubt that Patterson's placing a single order with Tube Turns would satisfy such an interpretation of the first requirement of the Southern Machine approach. Moreover, the Sixth Circuit commented in In-Flight that the third part of the Southern Machine approach, which requires an investigation of the general fairness of the assertion of jurisdiction, would be decisive in a case like Tube Turns. In fact, a close reading of the Tube Turns opinion indicates that the decision may well have hinged on the absence of the third factor.

Three aspects of the opinion support this conclusion. First, immediately after stating the Southern Machine test, the court declared that:

---

20 562 S.W.2d at 101 (emphasis added).
21 466 F.2d 220, 227 (6th Cir. 1972).
22 Id. at 228.
23 Id.
24 The Sixth Circuit wrote:
The third part of the Southern Machine approach requires an investigation of the general fairness of the assertion of jurisdiction—and it is at this stage that the consumer—and perhaps the small businessman engaged in intra-state activities can expect to be protected against improper use of the longarm power.

Id. at 227, n. 13.
Applying these criteria to the facts of this case, we conclude that it would be unreasonable for Kentucky to exercise jurisdiction over Patterson solely on the basis of negotiations by telephone and mail which culminated in the acceptance of a single order in Louisville.\(^{25}\)

Second, the court noted in great detail that many of the indicators of a strong forum state interest in deciding the controversy were lacking in Tube Turns.\(^{26}\) Though the court did not expressly find Kentucky's forum interests inadequate, its extensive discussion of interests is indicative of the court's overriding concern with the fairness and reasonableness of jurisdiction.

Finally, the crucial nature of the third requirement is demonstrated by the court's attempt to distinguish between nonresident sellers and nonresident buyers: "Unlike the nonresident seller who seeks to distribute its products within the forum state, the nonresident buyer enjoys no particular privilege or protection in purchasing products from a resident seller."\(^{27}\) However, this distinction is more apparent than real.\(^{28}\) It is fairly clear that a nonresident buyer benefits from Kentucky law governing contract formation, the method of production, definition of breach, and method of payment in much the same way as a seller, and enjoys the incidental assistance which the seller's home state provides to all commercial transactions in the form of police and fire protection, highways, utilities regulation, and so on. If there is any sense in the

\(^{25}\) 562 S.W.2d at 100 (emphasis added). For an indication of the importance of a strong state interest to a fair and reasonable basis for jurisdiction see Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); In-Flight Devices Corp. v. Van Dusen Air, Inc., 446 F.2d 220 (6th Cir. 1972).

\(^{26}\) The court stated:

The record in this case does not indicate that the goods were specially manufactured or fabricated. Patterson's order with Tube Turns was not part of a series of transactions, and the record does not indicate that it was a particularly large order. There was no inspection of production facilities following substantial negotiations.

562 S.W.2d at 100.

\(^{27}\) 562 S.W.2d at 100. See also In-Flight Services Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 232 (6th Cir. 1972); Oswalt Indus., Inc. v. Gilmore, 297 F. Supp. 307, 312 (D. Kan. 1969); Fourth Northwestern Bank of Minneapolis v. Hilson Indus., Inc., 117 N.W.2d 732 (Minn. 1962).

buyer/seller distinction, it is rather that it operates as a shibboleth for recognizing a state of facts which may bear on fairness to the defendant.

To take an extreme case, consider the assertion of personal jurisdiction over a nonresident mail-order buyer by the seller’s home state. What makes that claim of jurisdiction unacceptable is in fact a combination of factors, none of which is necessarily keyed to the defendant’s status as buyer: the likelihood that the seller took the initiative in soliciting purchases, the improbability that the defendant carried out in person or through an agent any negotiations in the forum state, the likely financial hardship to a small-order buyer who would perhaps find it cheaper to default than to defend, the Unlikelihood that the buyer does any substantial volume of interstate commerce. If there is a thread which connects these elements, it is the defendant’s probable expectations—both psychological and financial—as to a proper forum for dispute resolution, rather than the fact that the defendant happened to be a purchaser instead of a seller. Nevertheless, the fact that the court considered the buyer-seller distinction suggests that it was attempting to determine whether personal jurisdiction in Tube Turns satisfied the third requirement of Southern Machine.

The decision in Tube Turns is significant for its acceptance of an expansive interpretation of the “transacting any business” subsection of the long-arm statute. But the court’s application of the due process clause to the facts of the case before it did little to further the clarity or development of the law of Kentucky in this important area.\(^{29}\)

\(^{29}\) Professor L’Enfant cautioned that the Sixth Circuit in reality applied a “commercial impact” test in Southern Machine. L’ENFANT, supra note 13, at 361. Such a test would unnecessarily narrow the due process test. However, the Kentucky Court of Appeals in no way utilized a “commercial impact” test. It simply did not base its decision on the lack of a substantial commercial impact.

The three-factor approach of Southern Machine has also been criticized as an unnecessary narrowing of the due process test because jurisdiction may exist even though all three factors are not present. See Comment, Long-Arm and Quasi In Rem Jurisdiction and the Fundamental Test of Fairness, 69 Mich. L.R. 300, 312 (1970). The only recognized instance of incongruity between due process and the Southern Machine test occurs where jurisdiction is constitutional despite non-existence of the second requirement, as in Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952). Yet this incongruity is statutorily mandated in Kentucky, since the second requirement is a statutory essential to jurisdiction. See note 18 supra for the relevant statute and a brief exposition of this constraint. Thus the Kentucky statute demands at least some unnecessary narrowing of the due process test.
III. Discovery

Pursuant to Kentucky Rule of Civil Procedure 26.05, a party has an affirmative duty seasonably to supplement responses to interrogatories addressed to the identity of each person it expects to call as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony. The Court of Appeals, in Hicks v. Cole, was confronted with a situation where the defendant desired to have an expert’s deposition read into evidence, even though the defendant had not supplemented his responses to such interrogatories after responding that he had no plans to use experts at that time. However, he did give notice that he would take the deposition of a particular physician. The plaintiff cross-examined the defendant’s expert at the deposition, while objecting to the taking of the deposition. At a pretrial hearing, unattended by the plaintiff, the court overruled his objections to the taking and use of the deposition. At trial, the deposition was read into evidence over the plaintiff’s objection.

On appeal from a jury verdict for the defendant, the plaintiff argued that (1) the taking of the deposition was improper.

As long as the court guards against the application of a “commercial impact” test, the three-factor approach outlined in Southern Machine and adopted in Tube Turns should provide a useful analytical framework for deciding future cases. This is especially true in light of the Sixth Circuit’s clarification of the Southern Machine approach:

As must be apparent, this approach simply applies in a specific fashion the broad rule requiring substantial minimum contacts as a basis for jurisdiction. The first and second elements of the method merely involve a search for specific types of contacts which have been held to be essential to the maintenance of jurisdiction in the McGee and Hanson v. Deencla decisions. It is imperative that it be understood that the flexibility, and therein the virtue, of the International Shoe test is retained in the third condition and no mechanical consideration of the first two elements of the test can eliminate the need for an appraisal of the overall circumstances of each case if jurisdiction is to be found.


CR 26.05 states, in part:
A party is under a duty seasonably to supplement his response with respect to any question directly addressed to . . . (ii) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

CR 30.02 requires that a party give notice to all other parties before taking a deposition by oral examination.
since the defendant had not supplemented his answers to the interrogatories, and (2) the deposition should have been excluded at trial since the defendant had not supplemented his answers to the interrogatories. Though the rules do not specifically authorize the imposition of sanctions for violations of the duty found in CR 26.05, it is generally assumed that the courts have the inherent power to impose penalties for noncompliance,\(^3\) including the exclusion of evidence.\(^4\)

The Court of Appeals found that the defendant had satisfied the purpose and spirit of the rules by giving notice of the deposition. This procedure had given the plaintiff notice that the deposition might be used at trial. As a result, the court held the trial court committed no error in allowing the deposition to be read into evidence. The soundness of this decision can only be evaluated in light of the purpose of the rule. The duty seasonably to supplement responses to interrogatories concerning experts expected to be used at trial exists because of the importance of expert witnesses and the need for discovery if the testimony of an expert is to be effectively cross-examined or rebutted.\(^5\)

The court did not fully state or expressly address the plaintiff's first argument—that the taking of the deposition was improper due to the defendant's failure seasonably to supplement the interrogatories. Evidently, the gist of this contention was that due to the defendant's failure to supplement the answers the plaintiff was unable to cross-examine the expert effectively. However, the court found that the rule was not intended to provide notice which would aid a party in preparing for a deposition: "This is designed to give the opposing party the chance to prepare for the trial itself."\(^6\) Yet, one of the purposes of discovering information concerning an oppo-

---

\(^3\) The general rule on sanctions, CR 37, does not apply to the failure to fulfill the duty to supplement answers to interrogatories. See Wright & Miller, Federal Practice & Procedure, § 2050.

\(^4\) See Federal Advisory Committee Note to Fed. R. Civ. P. 26(e).

The duty (to supplement answers to interrogatories) will normally be enforced where it is imposed, through sanctions imposed by the trial courts including the exclusion of evidence.

See also Davis v. Marathon Oil Co., 528 F.2d 395, 403 (6th Cir. 1975).

\(^5\) See Federal Advisory Committee Note to Fed. R. Civ. P. 26(e).

\(^6\) 566 S.W.2d at 171.
nent's expert witnesses and imposing a duty on the opponent seasonably to supplement its responses is to ensure that the party has adequate information for use in effectively cross-examining the expert. To the extent that the deposition itself is used at trial, a portion of the trial in essence takes place at the deposition. It would seem that a supplementary answer needs to be served approximately at the same time as the notice to take the deposition. Such notice must be given a reasonable time in advance in order to give the other party a chance to prepare, according to CR 30.03; information concerning an expert seems equally essential to adequate preparation.

However, the court was possibly justified in quickly disposing of plaintiff's first argument. The plaintiff failed to attend the pretrial hearing held to determine the propriety of the taking of the deposition. Moreover, he probably should have asked for an order that the interrogatories be answered prior to the deposition. In addition, since the power to exclude evidence as a sanction for violation of a discovery rule is part of a trial court's inherent power, the court necessarily has wide discretion in use of the sanction. Just because the court has the power to impose such a sanction does not necessarily mean that it must. Generally, in fashioning a remedy for failure to supplement answers to interrogatories, the court should consider the possibility of a continuance, the importance of the testimony of the witness, the explanation for the failure to supplement and the need for time to prepare to meet the testimony. By failing either to seek an advance order or to attend the pretrial hearing, the plaintiff foreclosed the circuit court from fully examining these considerations before choosing between exclusion and a less severe remedy, such as a continuance while the expert was re-deposited. Hence, the decision with regard to the plaintiff's first argument should have turned on the trial court's discretion to deny such a harsh remedy, not on a consideration of interrogatories as only a trial preparation device.

---

37 See note 35, supra.
38 CR 26.05 requires the interrogatories to be supplemented "seasonably," while CR 30.02 requires the notice to be given a "reasonable" time prior to the taking of the deposition.
39 See note 34 supra for an exposition of authority on this point.
40 WRIGHT & MILLER, supra note 33.
With respect to the plaintiff's second argument, the court held that the purpose and spirit of the rules had been satisfied. It stated that the defendant had put the plaintiff on notice that the deposition might be used by following the notice of deposition procedure. This result certainly vindicates one policy behind CR 26.05, i.e., to provide a party with information about the other party's experts. However, the *Hicks* court indicated in dictum that under the facts of that case the expert would have been permitted to testify in person:

Had plaintiff's attorneys appeared at this hearing and convinced the trial court that the deposition should not be used at trial, defendant would still have been able to secure Dr. Bloss at trial or whatever other testimony was needed by defendant.\(^1\)

This suggestion by the court seems to ignore the other purpose behind discovery of an expert witness—to enable a party to rebut the expert's testimony more effectively. The opponent would want to attack the credibility of the deponent and the substance of what the deponent said by the use of other witnesses. If the deponent were to testify at trial, it might well affect the presentation of the opponent's rebuttal evidence. For example, the opponent may have been planning to use depositions, rather than live witnesses. In such a case, a continuance may well be necessary to prevent the unfairness which would result from such a surprise.\(^2\)

### IV. Parties

#### A. Right to Sue

KRS § 271A.610\(^3\) provides that no foreign corporation transacting business in Kentucky without a certificate of authority shall be permitted to maintain an action in any Kentucky court. In *Southeastern Skate Supply, Inc. v. Layman*, \(4\)

\(^1\) 566 S.W.2d at 171.

\(^2\) See e.g., Washington Hosp. Cntr. v. Cheeks, 394 F.2d 964 (D.C. Cir. 1968) (expert allowed to testify after opposing party deposed him).

\(^3\) KRS § 271A.610 (Supp. 1978) states:

(1) No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state, until such corporation shall have obtained a certificate of authority. . . .

\(^4\) 562 S.W.2d 95 (Ky. App. 1978).
the Court of Appeals reversed a circuit court judgment, based on KRS § 271A.610, which dismissed a foreign corporation's complaint. Southeastern Skate Supply, a Virginia corporation, brought the suit to recover an amount allegedly owed for goods it had supplied to the defendant. The circuit court dismissed the complaint, assuming that the plaintiff was transacting business in the state without a certificate of authority.

The Court of Appeals noted that there was no evidence showing the corporation did, in fact, transact business in the state. The only activities in which the plaintiff was apparently engaged were excluded from the definition of "transacting business" by KRS § 271A.520. As a result, the court reversed the circuit court order dismissing the suit. The effect of the decision is to place the burden of proving that a foreign corporation is doing business without a certificate upon the defendant sued by such a corporation. This approach is consistent with the purpose of KRS § 271A.610 which, like its progenitor, Model Business Corporation Act § 124, seeks to ensure protection of local citizens who deal with or are affected by the activities of foreign corporations operating within the forum state. A defendant who raises failure to qualify as a defense does not assert any personal right, but acts as a sort of private attorney general on behalf of the Commonwealth. Since it will most often be a matter of indifference to the objecting party—at least prior to the initiation of suit—that the plaintiff has failed to qualify, there is little unfairness in the allocation of the burden of proof imposed by the Court of Appeals. Moreover, the constitutionally based concern for noninterference with in-

4 KRS § 271A.520 (Supp. 1978) states: (2) Without excluding other activities which may not constitute transacting business in this state, a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this chapter, by reason of carrying on in this state any one or more of the following activities: . . . . (i) Transacting any business in interstate commerce; (j) Conducting an isolated transaction completed within a period of thirty (30) days and not in the course of a number of repeated transactions of like nature.

4 MODEL BUS. CORP. ACT ANN. 2d §§ 110-12 (hereinafter cited as MBCA ANN.).

47 The best evidence of this is that KRS § 271A.610(2) permits qualification after suit has begun, with no effect on the claim which is the subject of the suit. See MBCA ANN. § 124.
terstate commerce, recognized by the exemption provided in KRS § 271A.520, warrants very careful use of an evidentiary rule which risks penalizing a company whose business is wholly interstate.

B. Unincorporated Associations

One of the most confused issues in the law dealing with parties concerns the capacity of unincorporated associations to act as plaintiffs or defendants. In American Collectors Exchange, Inc. v. Kentucky State Democratic Central Executive Committee the Court of Appeals attempted to summarize and apply the Kentucky law on this issue. American Collectors had appealed the dismissal by the circuit court of two third-party complaints. The first asked for contribution from the Executive Committee in its common name. The second, also for contribution, named as third-party defendants the Executive Committee and several persons individually and as representatives of the class composing the Executive Committee.

The Court of Appeals affirmed the dismissal of the first complaint, relying on the common-law rule that an unincorporated association cannot be sued solely in its own name. The court held that the circuit court had erred in dismissing the second complaint, given "a rather curious development" in Kentucky's case law:

While not subject to suit solely in its own name, it appears that an unincorporated association may be sued through the device of a class action. When such a suit is otherwise capable of being maintained, not only can the members of the class who compose the association be brought before the court, but

---

48 See MBCA Ann. § 106. See also Paul v. Virginia, 75 U.S. (8 Wall.) 168, 182-3 (1868).
51 566 S.W.2d 759 (Ky. App. 1978).
52 See Business Realty, Inc. v. Noah's Dove Lodge #20, 375 S.W.2d 389 (Ky. 1964); Diamond Block Coal Co. v. UMW, 222 S.W. 1079, 1085 (Ky. 1920). Cf. CR 4.04 which provides for service on unincorporated associations, but does not deal with the capacity of an association to sue or be sued.
the association itself can be made a party. The association is deemed to have "sufficient legal entity" [sic] to be sued in this fashion.53

Unfortunately, the court did not proceed to explain the rationale or implications of the "curious development" on which it relied, thereby leaving the law in a state of considerable uncertainty. Use of the class action against unincorporated associations in Kentucky is not a firmly established procedural device,54 especially in the absence of legislation permitting suit against the organization as an entity.55 Nevertheless, historical and contemporary precedent allow the use of the class suit in such cases,56 and it seems clear that in most cases such litiga-

53 566 S.W.2d at 761.
54 Though both of the cases the court cites for the "rather curious development" in Kentucky law, Lyons v. Bryan, 273 S.W.2d 838 (Ky. 1954), and Local Union No. 500 of Brotherhood of Painter’s, Decorators & Paper Hangers of America v. Wise, 269 S.W.2d 721 (Ky. 1954), contain language which supports the proposition that an association may be amenable to suit through the class action device, neither case explains the rationale for this development. Instead, both cases rely exclusively on Jackson v. International Union of Operating Eng., 211 S.W.2d 138 (Ky. 1948), in which the Court allowed a union to be sued by means of a class action. However, none of the grounds relied upon by the Jackson Court provides a firm foundation for the "rather curious development," much less justifies its extension to a case like American Collectors.

First, the Jackson Court relied on the predecessor to CR 23.01 and 23.02, Section 25 of the Civil Practice Act. This procedural rule did not authorize a suit against an unincorporated association, as the Jackson Court noted. 211 S.W.2d at 146. Second, Jackson relied on American Railway Express Co. v. Asher, 291 S.W. 21 (Ky. 1927). The Asher Court found in § 208 of the Kentucky Constitution and KRS § 446.010 authorization for allowing a suit to be maintained against a joint stock company, and possibly an unincorporated association. However, the statutory and constitutional provisions merely define the term "corporation" as it is used elsewhere in the Constitution or statutes. They hardly seem to authorize suit against an association in its common name or through a class action. If they do authorize such an action, then it is indeed "curious" that the action may be maintained only by means of a class action. Finally, Jackson relied on the United States Supreme Court’s decision in UMW v. Coronado Coal Co., 259 U.S. 344 (1922), that a union could maintain an action in its common name for the purpose of enforcing a substantive right existing under the Constitution or laws of the United States. While the Jackson Court may have been able to imply a right to sue an association by means of a class action from the fact that a union was involved, the Jackson opinion did not expressly rely on a federal statute. In any event, no federal statute was available in American Collectors. Indeed, had the Court of Appeals in American Collectors carefully analyzed this supposed development in the law, it would have realized that there has been little development in the law in this area which was applicable to American Collectors.

55 See CLAY, KENTUCKY PRACTICE, Civil Rule 4.04 (1974 ed.).
tion will fit comfortably within the requirements of CR 23.02(a) or (b).

More difficult to explain is the court's holding that the association itself can be treated as a member of the class. In an action where the association was a plaintiff, or was defending against a claim for equitable relief, little more than conceptual difficulty would result from binding the association as a party. Substantial additional difficulty arises in a suit for damages, such as *American Collectors*. The court seemed to recognize this difficulty by rejecting *American Collectors'* attempt to join the Committee in its own name. The court applied the common-law procedural rule based on the principle that "[t]here are no assets of the association as such (since there is no association 'as such') . . . ." Thus, no real interest is furthered by joinder of this "sufficient legal entity."

Even if the joinder of the unincorporated association in the class suit is a charade, designed to sneak it in without a ticket in the midst of a crowd, some rather perplexing issues remain to be confronted. For example, what showing must be made against the individual members in order to reach the association's assets? If execution against the association is insufficient, are individual members liable for the excess? If they are, are they liable apart from their interest in the common funds? These are certainly not problems which the Court of Appeals created; such problematic consequences result from any piece-meal, case-by-case solutions to the procedural quandary left us by the common law. The obvious, desirable, and much overdue solution is a statutory provision giving such associations entity status, permitting them to sue and be sued as corporations.

C. Intervention

In *Schlaak v. Pearman*, plaintiffs sought to compel a city and a planning commission to rezone property on which they desired to construct apartments. The city council had declined to rezone after conducting a trial type hearing. Nevertheless, on the basis of the record made at the hearing before the city

---

57 See also Fed. R. Civ. P. 23.2.
58 LOUISELL & HAZARD, supra note 50, at 779.
council, the circuit court directed the rezoning. Nine days after the judgment was entered and the city council had decided not to appeal, several homeowners, including one Bennett, moved to intervene for the purpose of instituting an appeal, basing their motion on CR 24.01, which permits a person to intervene as a matter of right upon timely application when the person claims an interest in the subject matter of the litigation and is so situated that the litigation may impair his ability to protect that interest.

The Court of Appeals rejected all three reasons given by the trial court for denying the motion to intervene. The court held that the homeowners satisfied the interest requirements of CR 24.01, that the motion was timely, and that the homeowners' interests were not adequately represented by the City. With regard to the timeliness of the motion, the court noted that it was made at a time when the judgment could have been modified or set aside. Because the intervenor would be restricted to the record in the case as it existed at the filing of the motion, the plaintiffs would not be prejudiced by Bennett, instead of the city, prosecuting the appeal. Consequently, the court found that the application was timely, even though it was filed nine days after judgment.

Courts have generally required a strong showing of timeliness by potential intervenors after judgment. The United States Court of Appeals for the Fifth Circuit has cited two

60 The three reasons the circuit court gave for denying the homeowners' motion to intervene were: (1) the homeowners were not proper parties; (2) the motion was not timely; and (3) the interests of the homeowners were adequately represented by the city's defense. Id. at 2-3.

61 Bennett clearly had an economic interest in maintaining the R-2 zoning for the plaintiff's property since he lived within 100 feet of the property and claimed that a flooding problem would be aggravated by the construction of the apartments. Though the court never stated that Bennett's ability to protect his interest would be impaired, it did indicate its agreement with the reasoning of Dillon Companies, Inc. v. City of Boulder, 515 P.2d 627 (Colo. 1973). The Colorado court under similar circumstances had found that the ability of landowners, living within one to one and one half blocks of property involved in the rezoning dispute, to protect their interests would be impaired.

62 CR 59.02 and 59.05 allow ten days after the entry of judgment for a motion for a new trial or a motion to alter or amend or vacate a judgment to be served. Bennett sought to intervene nine days after judgment was entered.

63 Monticello Elec. Plant Bd. v. Board of Ed. of Wayne County, 310 S.W.2d 272 (Ky. 1958). See Wright & Miller, supra note 33, at § 1916.
reasons for imposing this special burden on post-judgment applicants: (1) a fear the rights of the existing parties will be prejudiced, and (2) a concern that the orderly processes of the courts will be disturbed. But if neither of these results would occur, then the mere fact that judgment has been entered should not by itself require denial of a motion to intervene.

Though the Kentucky Court of Appeals did not articulate these concerns, its decision is consistent with the Fifth Circuit analysis. The restricted nature of the record means that the only "prejudice" suffered by the plaintiffs is the duty to defend an appeal which would not otherwise have been taken. No complication of issues and parties, such as ordinarily accompanies intervention at the trial stage, results from substitution of parties on appeal. Moreover, the promptness with which Bennett filed his motion after judgment meant that the appellees would not face the burden of refamiliarizing themselves with a stale record. The same considerations indicate that little marginal cost is imposed on the judicial process. Intervention for purposes of taking an appeal will not impose on the circuit or appellate court the task of reconsidering issues already decided; nor, if done with promptness, will it even require the relaxation of the time requirements for notice of appeal and for motions for reconsideration in the trial court.

The Court of Appeals did not expressly hold that the representation of Bennett's interests by the city and the planning commission was inadequate, although such a conclusion is a necessary prerequisite to permitting intervention. Although

---

44 McDonald v. E.J. Lavino Co., 430 F.2d 1065 (5th Cir. 1970).
45 Wright & Miller, supra note 33, at § 1916.
46 There is also a possibility that prejudice to the city and planning commission should be considered in ruling on the motion to intervene. Had the homeowners intervened before trial, they could have perhaps assumed some of the burden of defending the action. Should the fact that they instead chose to take a "free ride" preclude their intervention after trial? See McDonald v. E.J. Lavino Co., 430 F.2d 1065 n.7 (5th Cir. 1970). The nature of the parties indicates that preclusion should not occur. The role played by public entities in zoning determinations is the protection of members of the public other than those seeking the change; in that sense the homeowners' ride was not free—since they presumably paid taxes—and was one to which they were entitled as citizens. See also United Airlines, Inc. v. McDonald, 432 U.S. 385, 394-95 & n.16 (1977).
47 CR 24.01 provides that a party with a sufficient interest can intervene upon timely motion, "unless the applicant's interest is adequately represented by existing parties." Thus, in order to allow Bennett to intervene as a matter of right, the Court of Appeals had to find that his interests were not already adequately represented.
intervention after judgment is generally disapproved, the United States Supreme Court has recently recognized the permissibility of the practice where it is necessary to bring an appeal from the denial of class action status. The same considerations are implicated in Schlaak which, although not a class suit, is a representative action in the sense that the city represents the views of concerned citizens like Bennett.

This approach might at first blush seem inconsistent with an earlier Kentucky case, Murphy v. Lexington-Fayette County Airport Board, in which the Court interpreted CR 24.01 as follows:

We do not conceive that CR 24.01 intends that if a party who is representing the interests of a nonparty adequately represents those interests, but judgment nevertheless goes against those interests, the party must appeal else the nonparty may intervene as a matter of right. If that were the rule, a nonparty could simply lie back and await the result of the action in the circuit court and then, if not satisfied with the judgment, compel a retrial by the device of intervening after judgment.

Schlaak distinguished Murphy on the ground that in Murphy the applicant had not participated in the trial of the case, whereas the homeowners in Schlaak had taken part in the trial-type hearing before the city council, the only evidentiary hearing conducted in the case. Certainly, this alleviates the concern of the Murphy court that the intervenor would "lie back." Yet, the activity of the applicant—though it may be relevant to the issue of timeliness—has nothing to do with the adequacy of representation. A sounder basis for distinguishing the cases is suggested in the Murphy opinion itself and noted

---

68 See Wright & Miller, supra note 33, at § 1916.
70 See also Wolpe v. Poretsky, 144 F.2d 505 (D.C. Cir. 1944), where the court permitted adjoining property owners to intervene after judgment for purposes of appeal. The District of Columbia Court of Appeals found that the planning commission did not adequately represent the intervenors' interest when it refused to appeal.
71 472 S.W.2d 686 (Ky. 1971).
72 Id. at 690.
73 Pursuant to City of Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971), the circuit court was confined to the record made at the hearing before the city council.
74 See note 66 supra for a discussion of this point.
above: the city in Schlaak legally represented the homeowners, so that the judgment would bind the nonparties, while in Murphy the intervenor was not "represented" by a party "in the sense employed in the doctrine of res judicata."  

D. Use of Excess Peremptory Challenges

In Kentucky Farm Bureau Mutual Ins. Co. v. Cook, the Court of Appeals considered whether the erroneous granting of excess peremptory challenges in a civil trial constitutes reversible error. The plaintiff had instituted a declaratory judgment action against several defendants to determine the existence and extent of insurance coverage for claims arising out of a traffic accident involving some of the defendants. The circuit court granted the defendants additional peremptory challenges because of their positions as opponents in a related tort action. On appeal, the court agreed with the plaintiff that the circuit judge had erred in granting the additional challenges, since all the defendants had taken identical positions in the declaratory judgment action.

Nevertheless, the error did not require reversal, since it did not affect the "substantial rights" of the plaintiff, as required by CR 61.02. The court reasoned that although some qualified jurors were improperly rejected due to the excess challenges, they were replaced by equally qualified jurors. As long as the plaintiff had received a fair trial before an impartial jury, the court saw no reason to reverse. If any of the jurors who had

---

75 472 S.W.2d at 690.
77 Prior to repeal, KRS § 29.290 (1972) had provided "each party litigant" with three peremptory challenges, in addition to challenges for cause. KRS § 29A.290(2)(b) (Supp. 1978) now empowers the Supreme Court to prescribe the number of peremptory challenges.
78 Multiple plaintiffs and defendants are entitled to additional peremptory challenges only if their interests are antagonistic. Roberts v. Taylor, 339 S.W.2d 653 (Ky. 1960). It is error to grant additional peremptory challenges in the absence of a showing of antagonism between the parties' trial positions. R. E. Gaddie, Inc. v. Evans, 394 S.W.2d 118 (Ky. 1965); Pendly v. Illinois Cent. R.R., 92 S.W. 1 (Ky. 1906).
79 CR 61.02 states:
A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.
replaced the improperly rejected jurors were not impartial, then the plaintiff could have challenged them for cause.

Several jurisdictions have held that the exercise of excess peremptory challenges constitutes reversible error, regardless of the demonstrability of prejudice. The majority rule, however, seems to be that the exercise of excess peremptory challenges constitutes reversible error only if the complaining party shows prejudice. In support of its decision, the court cited two cases which have been interpreted as supporting the majority view, indicating that the court may allow reversal upon a showing of prejudice by complaining parties. However, the court’s opinion hinted that a party would not be able to show prejudice except by proving sufficient bias on the part of a juror to sustain a challenge for cause. Because the right protected in Kentucky Farm Bureau is a party’s right to a trial before a fair and impartial jury, reversal will not occur unless a biased juror is empaneled due to the exercise of excess peremptory challenges. Since the court indicates that this bias must be of the nature which would support a challenge for cause, the peremptory challenge issue is meaningless. Therefore, under the view apparently adopted by the court, any error resulting from the exercise of excess peremptory challenges is either harmless or unimportant.

---

80 See Annot., 95 A.L.R.2d 957, 971-75 (1964).
81 Id. at 963-70.
82 Fick v. Wolfinger, 198 N.W.2d 146 (Minn. 1972); Stevens v. Union R.R., 58 A. 492 (R.I. 1904).
83 Annot., supra note 80, at 964.
84 It is conceivable that the courts could find reversible error if excess peremptory challenges resulted in the empanelling of a juror who was biased to some degree, but not sufficiently prejudiced to have justified the grant of a challenge for cause. See Smith v. El Paso & N. E. Ry. Co., 67 S.W.2d 362 (Tex. Civ. App. 1933); and Rutland v. St. Louis, S.F. & T. Ry. Co., 274 S.W. 284 (Tex. Civ. App. 1925), aff’d on other grounds, 292 S.W. 182 (Tex. Com. App. 1927). The distinction is an elusive one, and in any event would require exhaustion of the complaining party’s peremptory challenges as a prerequisite. The failure of the Court of Appeals to allude to exhaustion by Kentucky Farm Bureau, as well as its reference to the possibility of challenge for cause as a cure for prejudice, indicate that it had no such distinction in mind.
85 One interesting issue which the case leaves open is whether an erroneous grant of excess peremptory challenges would justify reversal if such challenges were employed to carry out a party’s plan to exclude all jurors of a certain racial or religious group. The general rule, stated in Swain v. Alabama, 380 U.S. 202 (1965), is that a party may constitutionally use all of his peremptory strikes to eliminate all jurors who
V. Judgments

A. Default Judgments

In Roadrunner Mining, Engineering & Development Company, Inc. v. Bank Josephine, the plaintiff brought a foreclosure action on five promissory notes totalling approximately $340,000. The plaintiff amended its complaint twice, decreasing the amount sought by nearly $70,000. The first amended complaint explained that one of the notes had been satisfied through the sale of secured property. However, an increase of almost $1750 claimed on the other four notes was left unexplained. The plaintiff did not obtain leave of court or the defendants’ consent to file the second amended complaint, which corrected errors in the designation of personal property upon which plaintiff had a lien to secure the notes. After the plaintiff secured a default judgment on the basis of the second amended complaint, the defendants moved to have the judgment set aside. The circuit court denied the motion. The Court of Appeals and the Supreme Court affirmed, rejecting defendants’ arguments that the default judgment was void.

are members of the opposing party’s group. But there is at least some tension between that rule and the requirement that the right to a fair trial includes the right to a trial before a representative cross-section of the community. A California court recently held that use of a party’s allotment of peremptory challenges in situations of “group bias” violates the cross-section requirement of the state’s constitution. People v. Wheeler, 47 U.S.L.W. 2264, 2265 (Cal. Sup. Ct., Sept. 25, 1978). A grant of excess peremptory challenges used to further such systematic exclusion gives the appearance of judicial participation in a discriminatory scheme. In addition, the beneficiary of an erroneous grant of extra challenges has, as a matter of statutory definition, no need of extra peremptories to satisfy his right to a fair panel. Therefore, reversal should be required if the complaining party can establish that the challenges were made because of group association rather than because of any specific juror bias.

The Court summarized the amounts demanded by the complaints as follows:

<table>
<thead>
<tr>
<th>Complaint</th>
<th>Amended Complaint</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>$148,197.76</td>
<td>$148,482.76</td>
<td>$285.00</td>
</tr>
<tr>
<td>34,827.15</td>
<td>35,740.75</td>
<td>913.60</td>
</tr>
<tr>
<td>46,618.52</td>
<td>46,903.52</td>
<td>285.00</td>
</tr>
<tr>
<td>69,838.63</td>
<td>None</td>
<td>(69,838.63)</td>
</tr>
<tr>
<td>40,490.86</td>
<td>40,750.86</td>
<td>260.00</td>
</tr>
<tr>
<td>Totals</td>
<td>$127,877.89</td>
<td>$(68,095.03)</td>
</tr>
</tbody>
</table>

558 S.W.2d at 598.

"CR 55.02 authorizes the trial court to set aside a default judgment for 'good
First, the defendants argued the judgment was void since it had been granted on the basis of an unauthorized complaint. The Court agreed that the second amended complaint was technically unauthorized, due to the plaintiff's failure to obtain leave of court or consent of the defendants before filing the amended complaint. However, the Court held that entering judgment pursuant to the complaint constituted "leave of court." Though the reasoning of the Court seems to beg the question, the result is surely correct in light of the liberality with which a court should grant leave to amend.

Second, the defendants argued that the amended complaints asserted "new or additional claims for relief" and that no new summons was issued as required by CR 5.01. According to that rule, parties in default for failure to appear must be given notice by summons of pleadings asserting new or additional claims for relief against them. The rule is designed to ensure that a non-appearing defendant will not be held liable after default for a claim or amount of damages different from that set forth in the pleading he decided not to contest.

cause shown . . . in accordance with Rule 60.02.' Among the grounds enumerated in CR 60.02 the only one applicable in this instance would be that the judgment was void." Id. at 598.

CR 15.01 allows a party to amend its pleading once as a matter of course at any time before a responsive pleading is served. It further provides that a party may otherwise amend only by leave of court or by written consent of the adverse party.

The defendant was already in default before the plaintiff amended the complaint. It could be argued that no leave of court should be required when the party is in default for failure to appear. However, the Court correctly noted that CR 15.01 "does not expressly allow for such an exception." 558 S.W.2d at 598.

"The question was whether a judgment is void when based on an unauthorized complaint. The Court reasoned that the complaint was authorized by the judgment, despite the apparent problems inherent in permitting a judgment which is arguably void to constitute leave of court.

CR 15.01 states: "[L]eave shall be freely given when justice so requires."

CR 15.01 provides, in part: "Parties . . . in default [for failure to appear] shall be given notice of pleadings asserting new or additional claims for relief against them by summons or warning order issued thereon as provided in Rule 4."

See 2 Moore's Federal Practice ¶5.05 (2d ed. 1976).

See Adamsen Constr. Co. v. Altendorf, 152 N.W.2d 576 (N.D. 1967), where the court writes:

The courts generally seem to hold that a defendant has the right to allow a default to be taken against him for an amount specifically demanded by the plaintiff in the complaint. Where the defendant allows such default judgment to be entered, he should not be required to follow the proceedings further to make sure that the judgment actually entered against him does
As the Court recognized, a default judgment generally cannot be granted for an amount greater than that claimed in a pleading to which the defaulting party had an opportunity to respond. Indeed, in such a case a defendant might not have defaulted had the complaint with which he was served contained the claim for greater damages. However, Roadrunner Mining was an "unusual case," in that the total amount claimed was substantially lessened by the amended complaints. Undoubtedly, a decrease should not constitute a "new" claim for relief, since a defendant who had determined not to appear would not change his mind due to reduction in the amount sought.

Yet in Roadrunner Mining the large reduction in one note, which resulted in a lower net sum, was accompanied by increases in the other four notes. Under some circumstances, such increases would have constituted additional claims for relief, requiring the issuance of a new summons. For example, in a case like Roadrunner Mining a defendant might be willing to default on a note which could be satisfied out of secured property while contesting smaller increases on other unsecured notes which would jeopardize its liquid assets. Such a defendant must have notice of the amendment so that it can determine whether to appear and defend.

Nevertheless, the Court held that, on the facts before it, the $1750 increase did not constitute an additional claim for relief. The defendants conceded during oral argument that the increase represented recoverable costs incurred by the plaintiff in selling the secured property. That the plaintiff chose to spread the costs over the other four notes, instead of indicating the costs still due on the omitted note, was "more a matter of bookkeeping than legal substance."
B. Summary Judgment

CR 56.03 requires that any party moving for summary judgment must serve its motion at least ten days prior to the time fixed for the hearing on the motion. Most other motions need only be served "a reasonable time before the time specified for the hearing." This difference in treatment indicates that the rulemakers attached special importance to adequate preparation for summary judgment hearings. This concern is obviously well-founded, since a summary judgment disposes of the merits and purports to have a conclusive effect on the litigation. Also, it is often a difficult task to put together legal and factual arguments, as well as affidavits, in opposition to a motion for summary judgment.

Although CR 56.03 expressly provides that a motion for summary judgment may be made by any party, it does not address the circumstances under which a party who has not filed such a motion may be entitled to summary judgment.

Generally, a court may enter summary judgment on its own motion against a movant for summary judgment and in favor of a non-moving party. In light of the policy behind the notice

pleadings were not served on the defendants, an exact reading of CR 15.01 would require no answer and invalidate a default judgment based on either of the amended complaints.

The correct response to such a claim would be that CR 5.01 excuses service on any party "in default for failure to appear," thus rendering an answer to an amended complaint, which did not assert a new or additional claim for relief, superfluous. The crucial fact, which renders inoperative the portion of CR 15.01 quoted above, is the entry of the default judgment based on the bank's original complaint.

See generally, WRIGHT & MILLER, supra note 33, at § 2719.

CR 56.03 refers to the motions authorized in CR 56.01 and CR 56.02, which deal only with motions by parties.

See generally, WRIGHT & MILLER, supra note 33, § 2720 n.95; ANNOT., 49 A.L.R.2d 1188, 1191 (1956). Some states have provisions in their summary judgment rules which allow the court to grant summary judgment without waiting for a cross-motion. E.g., Md. R. Civ. P. 610(d). However, a few cases support the proposition that under Rule 56 a court, upon motion by one party for summary judgment, has no power to grant a judgment against the moving party and in favor of the non-moving party. See Pinkus v. Reilley, 71 F. Supp. 993 (N.J. 1947), aff'd on other grounds, 170 F.2d 786 (3d Cir. 1948), aff'd, 338 U.S. 269 (1949); Durham v. I.C.T. Inc. Co., 283 S.W.2d 413 (Tex. Ct. App. 1955).

A distinction should perhaps be drawn between a court granting summary judgment sua sponte and a court granting summary judgment against a moving party in
requirement of CR 56.03, then, must a court acting on its own authority give the movant ten days’ notice before entering summary judgment against him? The Kentucky Court of Appeals addressed this question in Hay v. Hayes.104

A transferor of land brought an action to have the transfer construed as either a constructive trust or a mortgage. He moved for summary judgment on the sole theory that a deposition of the defendants contained a judicial admission that the transfer was a mortgage. The defendants did not make a cross-motion for summary judgment. Nevertheless, the circuit court denied the plaintiff’s motion and granted the defendants summary judgment on its own motion without notice to the plaintiff. The Court of Appeals reversed and remanded, holding that the circuit court was required to give ten days’ notice to the plaintiff.

In reaching its conclusion, the court distinguished an earlier Kentucky case which held that the trial court was not required to give notice. In Collins v. Duff105 the sole issue was whether a decedent was a resident of Fayette or Perry County. The Court of Appeals, then Kentucky’s highest judicial tribunal, affirmed summary judgment granted by the trial court to the nonmoving party, reasoning that a cross-motion would have been a “useless formality” since the overruling of the defendant’s motion necessarily required a determination that the plaintiff was entitled to judgment.106 Such clearly was not favor of the opposing/nonmoving party. In the latter case, the court is already considering whether there is any genuine issue of material fact, whereas in the former the court acts as the original initiator of the motion. This distinction has provoked some criticism of sua sponte summary judgments. E.g., Choudhry v. Jenkins, 559 F.2d 1089 (7th Cir. 1977); 6 Moore’s FEDERAL PRACTICE ¶56.12 (2d ed. 1976). However there seems to be little reason for concern about abuse of sua sponte summary judgments as long as the trial court gives the opposing party an adequate opportunity to counter the assertion that there is no genuine issue of material fact. See Wright & Miller, supra note 33, at 2719.

104 564 S.W.2d 224 (Ky. App. 1978).

105 283 S.W.2d 179 (Ky. 1955).

106 Id. at 183. Other courts have also stated the rule in a manner which would allow the court to grant summary judgment to a nonmoving party in a limited number of cases without giving the moving party ten days’ notice. E.g., Purser v. Corpus Christi State Nat’l Bank, 552 S.W.2d 187 (Ark. 1975). See also Herzog & Straus v. GRT Corp., 553 F.2d 789, 793 (2d Cir. 1977) (Timbers, J., concurring specially). But compare Adams v. Campbell Cty. School Dist., 483 F.2d 1351 (10th Cir. 1973); Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 480 F.2d 607 (10th Cir. 1973).
the case in Hay: a finding that defendant’s deposition did not contain a judicial admission in favor of the plaintiff was not dispositive of the case, since there were many other issues of fact yet to be decided.\textsuperscript{107} The Court of Appeals in Hay limited Collins to the situation where the “determination of the sole issue necessarily requires a finding for one of the parties.”\textsuperscript{108} In all other cases, the court must give the party ten days’ notice prior to entering summary judgment against him.

This general rule is consistent with the view espoused by other jurisdictions which have considered the question.\textsuperscript{109} It also promotes the policy underlying the ten-day requirement of CR 56.03—assuaging the difficulty of preparing for summary judgment hearings in light of the crucial nature of the hearing. This policy applies equally whether the judge renders summary judgment with or without a request by a party. Since the Collins exception indicates that this policy can be overridden in certain circumstances, it is important to examine the precise scope of that exception.

It is clear from Hay that the Collins exception is applicable only in the rarest of cases. The mere fact that a party’s motion for summary judgment is denied does not entitle the opposing party to judgment. A denial of a summary judgment motion is simply an indication that the movant has failed to show that there is no genuine issue of material fact. It does not imply that the opposing party has shown that he is entitled to judgment as a matter of law. Thus, from a purely logical perspective, denial of summary judgment to a movant never “necessarily requires” a grant of summary judgment to a non-movant. Yet Collins mandates a more practical application of the “necessarily requires” standard. Perhaps the standard merely ensures that summary judgment will be granted without notice

\textsuperscript{107} For example, the question as to whether the transfer might be considered a constructive trust had apparently not even been addressed.

\textsuperscript{108} 564 S.W.2d at 225.

\textsuperscript{109} E.g., Winfrey v. Brewer, 570 F.2d 761 (8th Cir. 1978); Dolese v. United States, 541 F.2d 853 (10th Cir. 1976); Adams v. Campbell County School Dist., 483 F.2d 1351 (10th Cir. 1973); Purser v. Corpus Christi State Nat’l Bank, 522 S.W.2d 187 (Ark. 1975). See also Kistner v. Califano, 579 F.2d 1004, 1006 (6th Cir. 1978).

Though none of these courts places reliance on Rule 54, it does seem to be relevant: “[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled even if the party has not demanded such relief in his pleadings.” CR 54.03.
only when the issue is framed as an 'either-or' question, as in Collins.

Another aspect of Collins which may have an impact on the applicability of the exception is that the judge in Collins was also the trier of fact. It seems reasonable to grant a judge greater latitude in a nonjury case to dispose of the case where it is clear that no significant additional evidence will be offered by the parties. In a jury trial the judge should exercise greater caution in taking the case from the trier of fact by means of summary judgment.

C. Findings of Fact

In Quality Paving Co. v. Musselman,\textsuperscript{a} the Court held that any error committed by a trial court in failing to make findings of fact as required by CR 52.01 was not preserved for review because the appellant had made neither a written request for a finding as provided by CR 52.04\textsuperscript{b} nor a motion for additional findings as provided by CR 52.02.\textsuperscript{c} Originally, CR 52.01 contained the unqualified statement that "[r]equests for findings are not necessary for purposes of review." It thereby secured appellate review for all questions concerning the trial court's findings of fact. In 1973, amendments to CR 52, unparalleled in the Federal Rules, were adopted which completely reversed the law on the preservation for review of errors made by the trial court in its findings of fact.

CR 52.01 now states: "Requests for findings are not necessary for purposes of review except as provided in Rule 52.04."\textsuperscript{d} The entirely new section, CR 52.04, makes it clear that the

\textsuperscript{a} No. 76-448 (Ky. Nov. 18, 1977).

\textsuperscript{b} CR 52.01 states, in part:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment. . . . Requests for findings are not necessary for purposes of review except as provided in Rule 52.04 (emphasis added).

\textsuperscript{c} CR 52.02 states:

Not later than 10 days after entry of judgment the court of its own initiative, or on the motion of a party made not later than 10 days after entry of judgment, may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

\textsuperscript{d} CR 52.01 (emphasis added).
failure of the trial court to make a finding of fact on an issue essential to the judgment will not constitute reversible error unless the complaining party has brought it to the attention of the trial court. The complaining party may accomplish this in two ways: (1) by a written request for a finding on that issue as provided in CR 52.04, or (2) by a motion for additional findings pursuant to CR 52.02.

The reason for the amendments to CR 52 may be to align the rule with CR 51, which requires that objections to jury instructions be brought to the trial court's attention. Both rules now contribute to more effective trial administration by giving the trial judge an opportunity to correct a mistake and thereby obviate the need for an appeal. In addition, CR 51 is designed to eliminate the use of general objections to the giving of or failure to give an instruction. It is unclear whether this policy carries over to Rule 52 objections to findings of fact.

CR 51 requires that a party state the specific decision regarding instructions to which he objects as well as the grounds for the objection. The language of CR 52 suggests that a request for a finding on an issue must be specific, and while the rule does not expressly require that a motion for additional findings be specific, the nature of the motion makes it extremely likely to focus on particular elements of the judge's findings. However, the rules do not require a statement of the grounds (basis in the presented evidence) for the requested findings. This departure from the practice regarding jury instructions is explained to some extent by the fact that CR 52 deals with findings of fact and CR 51 with points of law. The judge is more likely to know already the evidentiary basis for a finding of fact than to know the legal basis for accepting, rejecting, or modifying a jury instruction. However, this distinction seems artificial in many instances, since it fails to recognize the effect on a judge's memory of a substantial time lapse and because it is

114 CR 51 (3).
115 See generally, Clay, 7 Kentucky Practice, 147-48 (3d ed. 1974); Wright & Miller, supra note 33, at § 2553.
116 E.g., City of Dawson Springs v. Reddish, 344 S.W.2d 826 (Ky. 1961). See also Investment Service Co. v. Allied Equities Corp., 519 F.2d 508 (9th Cir. 1975); Wright & Miller, supra note 33, at § 2554.
117 The omission parallels the practice under CR 46, which requires a statement of grounds for an exception to a ruling or order only upon request of the court.
118 For example, a judge's failure to make a finding concerning the defendant's
based on the often hazy line between questions of law and questions of fact.\textsuperscript{11}\textsuperscript{11} Thus, at least to some extent, the amended CR 52 does not operate to focus attention on the precise nature of the alleged error, and thereby fails to implement fully the sound policy reflected in CR 51.

D. Conclusiveness of Judgment

James and A. E. Lewis each owned interests in two tracts of land. James Lewis leased to Brushy Creek Coal Company the right to mine the coal on one of the tracts. All of the royalty checks were paid to him, but he made no attempt to pay to his co-owner the proportionate shares. In August, 1974, he brought suit against A. E. Lewis and his wife, Virginia, to quiet title to the land. James Lewis asserted that he had a "tax lien" on A. E. Lewis' interest in the property because he alone had paid the taxes on the land, and asked the court to foreclose the "lien" on the property. The complaint was dismissed for failure to state a claim upon which relief could be granted.

Subsequently, A. E. and Virginia Lewis brought suit against James Lewis and several mining companies, including Brushy Creek Coal, seeking an accounting for their proportionate share of the profits from the sale of the coal. The mining companies were also charged with willful trespass. The trial court dismissed, reasoning that the allegations in the complaint were defenses to the former action to quiet title and were waived under CR 12.02,\textsuperscript{12}\textsuperscript{12} since they were not asserted in that action.

On appeal, the Kentucky Supreme Court in Lewis v. Brushy Creek Coal Co.\textsuperscript{12}\textsuperscript{12} reversed the trial court's dismissal of A. E. Lewis' complaint. The claim for willful trespass, the Court held, could not have been raised as a defense in the state of mind in an action for conversion could rest on his conclusion that good faith was an insufficient defense as a matter of law, rather than on his perception of the persuasiveness of the proof.

\textsuperscript{11} For example, a judge's recollection of the elements of proof in a protracted construction case will often be far hazier than his memory of the rules regarding indemnity.

\textsuperscript{12} CR 12.02 states: "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim shall be asserted in the responsive pleading thereto if one is required . . . ."

\textsuperscript{13} No. 74-329 (Ky. Oct. 7, 1977).
initial action since the mining companies had not been parties to the action. The claim for an accounting, the Court held, would have been a permissive counterclaim, but not a defense, in the action to quiet title, and consequently need not have been asserted.

The trial court's application of CR 12.02 had been quite perplexing. CR 12.02 requires every defense to a claim for relief to be asserted in the responsive pleading. Its most obvious effect is to codify the general rule of merger by precluding the unsuccessful defendant from raising new defenses in an action on the judgment brought by a victorious plaintiff. It can also be invoked by way of collateral estoppel against a losing defendant whose subsequent suit upon a claim identical with the omitted defense would, if successful, undermine the judgment in the initial action. However, the trial court employed CR 12.02 to preclude a claim brought by one who had been a winning defendant in the first action. For even if the claim made in the second action had been put forth defensively in the original suit, the first court might still have decided the case on the basis that the plaintiff had failed to state a claim upon which relief could be granted and the defendant would have been unable to appeal. Certainly in that situation the defendant would not be precluded from later asserting the identical claim as a plaintiff, for the obvious reasons that the issue was not decided in the initial action, and that a later decision would have no effect on the prior judgment. It makes little sense to treat a victorious defendant who has omitted a defense differently.

Although not mentioned by the Court, the claim for trespass could not have been considered a compulsory counterclaim. CR 13.01 provides that "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party . . . ."

See also Powell v. Winchester Bank, 551 S.W.2d 820, 822 (Ky. 1977).

See also Powell v. Winchester Bank, 551 S.W.2d 820, 822 (Ky. 1977).
What makes the trial court's decision in *Brushy Creek Coal* even more perplexing is the fact that the claim for an accounting was not, properly speaking, a defense to the earlier action. Although the theory on which James Lewis—the plaintiff in that action—relied is somewhat obscure,\(^{128}\) it is at least clear that he sought relief because he had paid all the taxes on the land. It would be possible to grant him some remedy on that claim while acknowledging that he had wrongfully appropriated royalties from the sale of coal which were due A. E. and Virginia Lewis.

It is true that under James Lewis' view of the initial action, both his claim and the defendant's right to an accounting depended on who had title to the land. Even so the real problem which the case presented was whether the right to an accounting had to be presented in the first action as a compulsory counterclaim under CR 13.01 because it arose out of the same "transaction or occurrence" as the plaintiff's claim. Failure to do so, of course, would have precluded the later assertion of the claim for an accounting.\(^{127}\)

Drawing the distinction between permissive and compulsory counterclaims is often difficult. The "transaction or occurrence" test of CR 13.01 is broad and malleable. The most widely accepted test for compulsoriness focuses on the existence of "any logical relationship" between the claim and the counterclaim.\(^{128}\) This test has been applied with a great deal of flexibility and allows the court to apply Rule 13.01 with judicial economy in mind. Arguably, there was a logical relationship between the claim for an accounting and the claim to quiet title, since both depended partially on whether A. E. Lewis had an interest in the property. However, the overlap of one element of proof ought not be determinative. While overlap may suffice in a case where the counterclaim was actually pleaded in the initial action, and the question was whether it should be

---

\(^{128}\) KRS § 411.120 (1972) requires that in an action to quiet title the plaintiff must have both legal title and possession of the land. James Lewis' problem was that he would not have been able to show legal title without first demonstrating that he had secured his brother's and sister-in-law's interest through recognition and enforcement of a lien, or adverse possession, a claim for which payment of taxes alone would not suffice as proof.

\(^{127}\) See *Wright & Miller, supra* note 33, at § 1417.

\(^{128}\) No. 74-329 at 3.
considered compulsory or permissive for purposes of jurisdiction, venue, jury trial, right of removal, or appealability, the courts have read the rule more narrowly where the harsh consequence of preclusion will follow from the failure to raise the issues in an earlier action.\textsuperscript{129}

The Court of Appeals also considered the question of the conclusiveness of earlier adjudications in \textit{Norrell v. Electric & Water Plant Board of Frankfort},\textsuperscript{130} another in a long series of lawsuits concerning the Frankfort cable television system.\textsuperscript{131} The plaintiffs, competitors of the city's own CATV system, objected to the extension of city service into the eastern portion of Frankfort, claiming that the Plant Board had no authority to run a cable television system and, alternatively, seeking compliance with the antiduplication of utilities provisions of KRS § 96.045, which requires purchase or condemnation of an existing utility when a city constructs a similar facility. The circuit court found that both issues could have been presented in earlier cases involving the same parties, and hence precluded the plaintiffs from raising them. The Court of Appeals disagreed, though affirming as to the first claim on an alternative ground.

Apparently, none of the earlier actions in state court had involved the transaction which was the basis for the present case.\textsuperscript{132} Although a federal court suit involved precisely the same factual controversy, the Sixth Circuit expressly abstained from deciding any state law issues.\textsuperscript{133} Thus none of the issues in \textit{Norrell} could have been extinguished by the broad rules of

\textsuperscript{129} Wright & Miller, supra note 33, at §§ 1410, 1417. See, e.g., Hay v. Hayes, 546 S.W.2d 224 (Ky. App. 1978). One interesting question left open by the Supreme Court's opinion is whether the initial action to quiet title was dismissed on a motion under CR 12.02(f) before the defendants had to file an answer. In that case the difficult issue of how to classify the counter-claim would become irrelevant, since CR 13.01 is inoperative before a responsive pleading is filed. See Lawhorn v. Atlantic Refining Co., 299 F.2d 353 (5th Cir. 1962).

\textsuperscript{130} 557 S.W.2d 900 (Ky. App. 1977).

\textsuperscript{131} See Consolidated Television Cable Serv., Inc. v. City of Frankfort, 465 F.2d 1190 (6th Cir. 1972); Norrell v. Judd, 387 S.W.2d 7 (Ky. 1965); Consolidated Television Serv., Inc. v. Leary, 382 S.W.2d 78 (Ky. 1964); Norrell v. Judd, 374 S.W.2d 192 (Ky. 1963). See also Community Serv., Inc. v. United States, 418 F.2d 709 (6th Cir. 1969).

\textsuperscript{132} See, Norrell v. Judd, 387 S.W.2d 7 (Ky. 1965); Consolidated Television Serv., Inc. v. Leary, 382 S.W.2d 78 (Ky. 1964); Norrell v. Judd, 374 S.W.2d 192 (Ky. 1963).

\textsuperscript{133} Consolidated Television Cable Serv., Inc. v. City of Frankfort, 465 F.2d 1190 (6th Cir. 1972).
merger and bar. Therefore, the res judicata question was a more refined one: whether the rules of issue preclusion prevented the plaintiffs from asserting grounds for relief which might have been asserted in connection with the claims earlier presented.

The question of the duplication of utilities was not involved in any of the previous actions. However, the question of the city’s legal authority to run a cable TV system might well have been raised as a basis for relief in the earlier cases. Nevertheless, if any single principle lies at the heart of the doctrine of issue preclusion, it is that a question must be actually litigated and finally determined before it can provide the basis for collateral estoppel.\textsuperscript{134}

The Court of Appeals reached the same conclusion by a more roundabout route. Though it quite properly described the case as presenting a question of issue preclusion, it went on to say that that rule:

is subject to the limitation that only those issues which are germane to, implied in, or so essentially connected with the actual issues in a previous case as to be involved in the scope of the proceedings are precluded from being raised in a later case between the parties . . . .\textsuperscript{135}

The requirement of “essential connection” is an apt, though rather limited, description of the scope of claim preclusion,\textsuperscript{138} and while it operates \textit{a fortiori} to preserve issues raised for the first time in a subsequent action based on a different claim, it is a rather blunt instrument for performing that function when the requirement of actual litigation and determination will suffice.

Though the court refused to hold that the doctrine of res

\textsuperscript{134} \textsc{Restatement (Second) of Judgments} § 68 (Tent. Draft No. 1, 1973).

\textsuperscript{135} 557 S.W.2d at 902-03.

\textsuperscript{136} Contrast the greater breadth endorsed by the Kentucky Supreme Court only one month after the \textit{Norrell} case, in Stephens v. Goodenough, 560 S.W.2d 556 (Ky. 1977):

This Court has long followed the rule that the doctrine of res judicata, except in special cases, goes not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject litigation and which the parties, exercising reasonable diligence, might have brought forward.

560 S.W.2d at 558.
judicata barred the plaintiffs' claims, it concluded that judicial estoppel prevented the plaintiffs from asserting that the city did not have legal authority to run a cable TV system. In the hope of finding a more sympathetic ear in federal court on their antiduplication claim, the plaintiffs had deleted that issue from their state action and represented to the federal district court that it was no longer an issue. Thereafter, upon losing the federal antiduplication claim, the plaintiffs sought to reassert the authority issue in state court. To permit that, the court concluded, would be to allow Norrell and Consolidated to "play fast and loose with the courts."

137 See also Scarano v. Central Ry. Co., 203 F.2d 510 (3d Cir. 1953); Rowe v. Shepard, 283 S.W.2d 188 (Ky. 1955).