COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2006-SC-142-DG

LYKINS ENTERPRISES, INC.;
FUEL STOP REAL ESTATE COMPANY
A/K/A FUEL STOPS REAL ESTATE COMPANY;
DAVID O. LYKINS; FUEL STOPS, INC.;
AND WILLIAM T. ESHAM — APPELLANTS

vs.

APPELLANTS' BRIEF

MAXINE S. FELIX — APPELLEE

*** *** ***

(Court of Appeals No. 2004-CA-001305-MR)

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy hereof was mailed this 11th day of December, 2006, to Hon. Robert McGinnis, Special Judge, Mason Circuit Court, Court of Justice Building, 100 West 3rd Street, Maysville, KY 41056, Edward S. Monohan and N. Jeffrey Blankenship, Monohan & Blankenship, 7711 Ewing Boulevard, Suite 100, P.O. Box 157, Florence, KY 41022-0157, counsel for Appellee Maxine S. Felix, Sam Givens, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and that nine copies of same and one original were sent by Federal Express this 11th day of December 2006 to Hon. Susan Stokley Clary, Clerk, Supreme Court, 209 Capitol Building, 700 Capital Avenue, Frankfort, KY.

Richard M. Sullivan
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INTRODUCTION

This is an appeal from a decision by the Court of Appeals that the trial court should have dismissed a contract action sua sponte on the grounds of *forum non conveniens.* The issue was not raised or addressed at the trial or first appeal level by the parties.

STATEMENT CONCERNING ORAL ARGUMENT

This case involves an issue of first impression in Kentucky. The appellants believe that oral argument would assist the Court in addressing the issue.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On May 1, 1988 Appellee Maxine Felix and Appellant David O. Lykins signed a Lease/Option in which Ms. Felix granted to Lykins Enterprises, Inc.[1] an option to purchase certain real estate.[2] A dispute arose as to whether Lykins timely exercised that option. Lykins contends he properly exercised the option in the fall of 1996, while Felix denies same.

On December 1, 1997, Felix chose Mason Circuit Court Kentucky in which to bring suit against Lykins, seeking a declaration that Lykins failed to properly exercise the option and therefore was not entitled to the property. (Complaint, RA pp.1-13.) On December 4, 1997, Lykins brought a lawsuit suit against Felix in Ohio state court involving the same Lease/Option.[3] At Felix's request, the parties entered into a joint motion to stay the Ohio action, which was granted on October 6, 2003.

On June 17, 2004 - almost six and one half years after Felix filed suit in the Mason Circuit Court, the trial court ruled in favor of Lykins on cross motions for summary judgment holding that Lykins had properly exercised the option to purchase. (Judgment, RA pp.602-603, copy attached hereto as Exhibit 2.) At no time during the 6 ½ years while the case was pending did the trial court or any party raise the issue of *forum non conveniens*.

On December 9, 2004, Felix appealed the trial court's decision to the Court of Appeals,

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[1] Because the Appellants, with the exception of William Esham, are either David O. Lykins or companies bearing his name for which Mr. Lykins is the principal agent, "Lykins" will be used throughout this brief to refer to Mr. Lykins and the corporate appellants.

[2] Stipulation of Facts, (hereinafter "Stipulations"), at ¶1, noted in the Record on Appeal (RA) as "filed under separate cover." A copy is provided in the Appendix hereto at Exhibit 3.

[3] Evidentiary proof of the date the Ohio action was filed falls outside the record on appeal and consideration of such proof is precisely the action objected to by Lykins. A mistaken belief by the Court of Appeals as to which case was first in time forms the backbone of the appeals court's sua sponte *forum non conveniens* analysis. The Ohio "Verified Complaint for Temporary Restraining Order and Injunctive Relief," filed on December 4, 1997, is included in the record on appeal before this Court, however, because it is attached as Exhibit A2 to the "Petition for Rehearing" filed in the Court of Appeals by Lykins on November 3, 2005.

contending the trial court erred in its decision and should have ruled that Lykins failed to properly exercise the option. Felix also contended that in deciding the issues the trial court should have applied Ohio substantive law, rather than Kentucky law. (Id.) In response, Lykins contended that he had properly exercised the option and that the trial court's decision was correct under either Kentucky or Ohio law. During the appeal, neither party raised or briefed the issue of *forum non conveniens.* The Court of Appeals did not raise that issue at oral argument.

On October 14, 2005, the Court of Appeals issued a two to one Opinion Vacating and Remanding ("Opinion") the trial court decision, finding the trial court should have dismissed the action under the doctrine of *forum non conveniens*, **mentioning the doctrine for the first time** in the course of the litigation. (Opinion, attached hereto as Exhibit 1.) In its Opinion, the Court referred to and relied upon the mistaken belief that the action filed in Ohio by Lykins **was filed prior to the Kentucky action.** It is undisputed that the reverse is true.[4] The Court relied upon that mistaken belief to determine the trial court "had both a right and a duty to consider the doctrine of *forum non conveniens* . . . ." (Exhibit 1 at p.8.) The court further stated that Kentucky has no interest in nor any significant relationship to this action and concluded the parties will receive a fair hearing before the courts of Ohio "where the case in counterpart is being litigated." (Id.)

On November 3, 2005, Lykins filed a Petition for Rehearing with the Court of Appeals, noting that neither the parties nor the trial court ever raised or considered *forum non conveniens*, and that dismissing the case under the doctrine at this late date imposes the very cost, delay, and inconvenience the doctrine seeks to avoid. Lykins pointed out the irony of depriving Lykins of his appropriate victory in the trial court level under the theory of sparing him inconvenience, and the

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[4] Documentary support of this point falls outside the record on appeal before the Court of Appeals, but as noted in footnote 3 hereto, is properly before this Court.

Court's previous mistake with regard to the fact that the Ohio action was actually filed **subsequent** to the Kentucky action. Moreover, Lykins noted that consideration of the date the Ohio action was filed was not a proper factor to be included in the *forum non conveniens* analysis. Finally, Lykins explained that after extensive discovery, numerous depositions, and joint Stipulations of Fact filed by the parties -- all without Lykins, the defendant below, objecting to Felix's choice of forum -- requiring the parties to start an 8-year-old dispute anew in Ohio would impose significant cost and delay. The Court of Appeals denied Lykins' petition on January 18, 2006, with one judge dissenting.

ARGUMENT

The Court of Appeals erred in going outside the record on appeal to conduct an inappropriate and flawed *forum non conveniens* analysis and in so doing 1) created a new duty on the part of every litigant and every trial court in Kentucky to expend valuable time and resources examining whether the chosen forum is proper, even where no party nor the trial court object to the forum; and 2) deprived Lykins of his constitutional right to be heard. This Court's guidance is needed to clarify the duties of litigants and trial courts.

A. The Court should clarify that parties to an action for which more than one forum is appropriate do not have a duty to raise the doctrine of *forum non conveniens*.

The doctrine of *forum non conveniens* focuses on the convenience of the parties, with particular attention to any imposition upon the defending party:

> The doctrine that an appropriate forum – even though competent under the law – may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might originally have been brought. . . ."Forum non conveniens allows a court to exercise its discretion to avoid the oppression or vexation that might result from automatically honoring plaintiff's forum choice. Jack H. Friedenthal et al., *Civil Procedure* § 2.17, at 87-88 (2d ed. 1993).

Black's Law Dictionary (7th ed. 1999). *See* Beaven v. McAnulty, 980 S.W.2d 284, 285 (Ky. 1998) (court properly vested with jurisdiction and venue may dismiss an action if it "is more convenient for the litigants and witnesses that the action be tried in a different forum."); Skidmore By and Through Skidmore v. Meade, 676 S.W.2d 793, 794 (Ky.1984) (the doctrine "involves a question of expediency and convenience . . . ."). The United States Supreme Court stated that the goal of the doctrine was "**to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense.**" Van Dusen v. Barrack, 376 U.S. 612, 616, 84 S.Ct. 805, 809, 11 L.Ed.2d 945 (1964). [Emphasis added].

Here, the parties, notably the defending parties who were successful before the trial court, and who are now the Appellants, did not object to Felix's selection of Kentucky as the forum. Neither did the trial court find occasion to raise the doctrine of *forum non conveniens*. It is the ultimate irony that the party who chose the forum and lost in this case benefits from the Court of Appeals finding the forum was inconvenient.

A full examination of the facts herein would reveal that the majority of the parties, the witnesses, and the proof located in Kentucky.[5] Kentucky was and remains the most convenient and least expensive location in which to litigate this matter. Yet the Court of Appeals decision dismissing the action based upon the doctrine of *forum non conveniens* creates a duty upon all parties to every action for which multiple jurisdictions may be appropriate to require the trial court to explicitly consider and rule on the applicability of that doctrine, even if no party objects

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[5] While a proper examination of *forum non conveniens* factors, as discussed below, eclipses even the information available to the parties, a sampling of the information pertinent to such factors that **was not** before the Court of Appeals was provided in Lykins' "Motion for Rehearing." That information is attached hereto as Exhibit 4.

to the current forum.[6] Otherwise a party that fails to do so runs the risk of expending significant time and resources in litigation only to have the case unexpectedly dismissed on appeal.

No caselaw can be found presenting facts similar to those sub judice. Lykins therefore submits this is a matter of first impression which this Court should resolve.

B. Mason Circuit Court did not have a duty to consider whether the forum was convenient where all parties to the action consented to the forum.

The Court of Appeals determined that Mason Circuit Court should have dismissed the Kentucky action under *forum non conveniens* "after it became aware that Ohio had already assumed jurisdiction of this matter," (Exhibit 1 at p.8) and cited only Williams v. Williams, 611 S.W.2d 807 (Ky.App.1981) as authority for imposing such a duty. While the court in *Williams* did find the trial court had a duty to consider *forum non conveniens*, the critical fact creating that duty in *Williams* is absent here, i.e. **the defendant in *Williams* had explicitly moved the trial court** to dismiss the action on the grounds of *forum non conveniens*. Because here neither party raised the issue, *Williams* does not impose a duty upon the trial court to sua sponte consider the issue of *forum non conveniens*.

Senior Judge Miller's dissent ("Dissent") not only correctly found no *duty* for the trial court to defer jurisdiction to Ohio but also noted that the Judge was not even aware of any *authority* for such a decision: "I am unaware of any authority for dismissal of an action in one jurisdiction simply because the same litigation is pending in another jurisdiction which might be considered a more convenient forum. As I understand the law, a forum court may, in its discretion, abate an action as a matter of comity, but it may never dismiss an action as barred by

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[6] The premier legal research tool has seen fit to give the Court of Appeals opinion a Westlaw cite, 2005 WL 2573465, attached to Lykins' "Motion for Discretionary Review" as Exhibit 1.

litigation pending in another state." (Exhibit 1 at p.9.) More succinctly, the Dissent correctly stated ". . . **the circuit court had no obligation to defer to Ohio as a preferable forum . . . .**" and **"The doctrine of *forum non conveniens* has no application"** to the present action. (Id.)

Dismissing a case based upon *forum non conveniens* is the exception to rather than the rule of a trial court's responsibilities, for "absent compelling or unusual circumstances, a court is duty bound to hear cases within its vested jurisdiction." Roos v. Kentucky Education Association 580 S.W.2d 508, 509 (Ky.App.1979)(reversing a trial court's dismissal of an action based upon *forum non conveniens*.) Situations in which a trial court raises the doctrine sua sponte are uncommon and occur when the facts overwhelmingly favor an alternate forum. *See* Vogt-Nem, Inc. v. M/V Tramper, 263 F.Supp.2d 1226 (D.C. CA 2002)(forum selection clauses chose the Netherlands, only 2 of the 3 parties were before the court and the entire matter could be disposed of in the Netherlands.); Robinson v. Town of Madison, 752 F.Supp. 842 (N.D.Ill.1990)(all events transpired, all witnesses and sources of proof located in Wisconsin but the claimant subsequently moved to Illinois and filed suit there.)

Regardless, it is left to the **discretion of the trial court** whether to dismiss the action and appellate courts are generally deferential to the trial court on discretionary issues. The fact that the only Kentucky opinion addressing this principle is unpublished is the very reason this Court's guidance is needed. The unpublished decision Emery Worldwide v. AAF-McQuay, Inc., 2005 WL 2402544 (Ky.App.2005) states that "It is within the sound discretion of the trial court to dismiss an action upon the basis of *forum non conveniens*, and that discretion will not be disturbed on appeal absent a clear abuse." An "abuse of discretion" occurs when a decision is "arbitrary, unreasonable, unfair or unsupported by sound legal principles." [7]

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[7] Miller v. Eldridge, 146 S.W.3d 909, 914 (Ky.2004).

In this case, the entire matter was easily and correctly decided in Kentucky given that the vast majority of proof and witnesses are located in Kentucky, and the parties all consented to Kentucky as the forum.[8] Since the facts in this action did not require the trial court to consider the doctrine of *forum non conveniens* sua sponte, that court's decision not to do so was neither arbitrary, unreasonable, unfair nor unsupported by sound legal principles and thus not an abuse of discretion.

Finally, the Court of Appeals misunderstood a fact that was central to its holding, i.e. all three judges mistakenly believed that the Ohio action was filed prior to the Kentucky action when in fact the Kentucky suit was filed three days *before* the Ohio action. While which action is senior is irrelevant to the *forum non conveniens* analysis, the lower court relied upon this mistake as a driving factor in finding a duty to dismiss the action.

The Dissent, while also incorrectly assuming that the Ohio action was filed first, points out that the timing of the filings was irrelevant:

> . . . the pendency of another action in another jurisdiction, though between the same parties and upon the same cause of action as the one subsequently instituted at the forum, is not a bar or ground for abatement of the later action at the forum. This is true even though a foreign court in which the prior action was commenced had complete jurisdiction of the parties and of the action.

[Emphasis original]. (Exhibit 1 at p.10.) Even if the Court of Appeals were correct in stating that the Kentucky action was filed after the Ohio action, a earlier Ohio action would not have not barred the Kentucky action.

C. It is not appropriate for an appellate court to sua sponte raise the doctrine of *forum non conveniens* for the first time in a action that has proceeded to final judgment

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[8] As previously stated, information concerning the location of all proof and witnesses pertinent to a *forum non conveniens* analysis were not before the Court of Appeals. A sampling of the information that would be necessary to that analysis was outlined in Lykins' "Motion for Discretionary Review" and is provided as Exhibit 4 hereto.

and where the proof necessary for such an analysis is not before the court.

The Court of Appeals' role with respect to *forum non conveniens* is to examine a trial court's decision for clear abuse. Emery Worldwide, *supra.* Other jurisdictions have stated the court's function more explicitly: Aerolineas Argentinas, SA. v. Gimenez, 807 So.2d 111, 116 (Fl.App. 2002) ("[O]ur duty as an appellate court in reviewing forum non conveniens decision is to review the lower court's decisionmaking [sic] process and conclusion and determine if it is reasonable; our duty is not to perform a de novo analysis and make the initial determination for the district court."); Hotvedt v. Schlumberger Limited (N.V.), 942 F.2d 294, 297-298 (5th Cir. 1991)("Our duty . . . is not to make an initial *forum non conveniens* determination but to determine if the trial court abused its discretion.").

Generally, a court of review must limit its review only to those issues raised below and ruled on by the trial court. [9] The court in Mitchell, M.D. v. Hadl endorsed raising new issues at the appellate level only "on rare occasions" when "the facts reveal a fundamental basis for decision not presented by the parties" and deciding the new issues is necessary "to avoid a misleading application of the law." 816 S.W.2d 183, 185 (Ky.1991).

In the case *sub judice,* the determination of whether there was a more convenient forum was discretionary and thus not 'a fundamental basis for decision.' No issue of law was implicated and therefore no potential for a 'misleading application of the law' existed. Rather, consideration of *forum non conveniens* is a docket management issue never raised or briefed below.

While an appellate court may decide a case on an issue not raised on appeal, it may do so

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[9] Robinette v. Com., Dept. Of Highways, 380 S.W.2d 78, 81 (Ky.1964). *See also* Commonwealth v. Maricle, 15 S.W.3d 376, 380 (Ky.2000).

only "**[s]o long as an appellate court confines itself to the record.**" Priestly v. Priestly, 949 S.W.2d 594, 596 (Ky.1997). In deciding the applicability of *forum non conveniens* for the first time at the appellate level, the Court of Appeals necessarily had to violate this rule given that the factors pertinent to a *forum non conveniens* analysis required consideration of facts never presented below and thus were outside the record.

In Beaven v. McAnulty, this Court held that when determining whether to dismiss a case based on *forum non conveniens*, the trial court must consider the following factors:

- the relative ease of access to sources of proof;
- availability of compulsory process for attendance of unwilling witnesses;
- the cost of obtaining attendance of willing witnesses;
- possibility of view of premises if view would be appropriate to the action; and
- all other practical problems that make trial of case easy, expeditious, and inexpensive.

980 S.W.2d 284, 285-286 (Ky.1998). When assessing whether transfer is appropriate under *forum non conveniens,* the court must "consider the private interests of the litigants and factors of public interest in determining relative convenience of the forum." Stewart v. Dow Chemical Co., 865 F.2d 103, 106 (6th Cir. 1989).

The private interests to be considered are those listed by the *Beaven* court, recited above. With respect to the litigants' private interests, the *Stewart* court noted that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Id.

Relevant public interest factors include:

> administrative difficulties of courts with congested dockets; the burden of jury duty on people of a community having no connection with the litigation; desirability of holding a trial near those most affected by it, and appropriateness of holding a trial in a diversity case in a court which is familiar with governing law.

Id. The *Stewart Court* concluded: "[D]ismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the

plaintiff is unable to offer any specific reasons of convenience supporting his choice." Id.

Therefore, a proper *forum non conveniens* analysis would have required the trial court to consider the following factors:

1. Private interest factors.

In this case, discovery in the Kentucky case was completed and the action proceeded to a judgment disposing entirely of the matter. Had the Kentucky judgement had been permitted to stand, no burden would have been imposed on any private party with respect to location of witnesses and proof. If the matter now is required to go forward in Ohio, discovery would begin anew, with all attendant costs and inconvenience. It would then be relevant that key witnesses are located in Kentucky.[10] Evidence concerning the availability of compulsory process for willing witnesses or the cost of obtaining attendance of unwilling witnesses would have to be considered. No such evidence was before the Court of Appeals.

The parties stipulated that photographs "which accurately depict" the improvements made by David Lykins to the property in question were attached to the Stipulation of Facts filed with the Mason Circuit Court.[11] Consequently, there is no need to view the Ohio premises.

Further, the plaintiff's (Felix's) choice of forum is a weighty factor to consider, which in this case is Kentucky. No evidence was before the Court of Appeals that the forum imposes a heavy burden on the defending parties (Lykins) and in fact, the Lykins consented to Kentucky's jurisdiction and never raised the doctrine of *forum non conveniens*.

Extensive discovery having been completed and the case having been prosecuted to a

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[10] See "Sampling of Information Necessary for Forum Non Conveniens Analysis," Exhibit 4 hereto.

[11] See "Stipulations," Exhibit 3 hereto, at ¶6.

final judgment in Kentucky, the comparable potential inconvenience, cost and delay associated with starting an 8-year-old dispute anew in Ohio is significant.

2. Public interest factors.

There was no evidence before the Court of Appeals concerning the congestion and status of the Ohio and Kentucky court's dockets, which is a factor requiring consideration. It is certain that greater court resources would be required for a case in its infancy versus an action in which a final judgment has been rendered. Retaining this action in Mason Circuit Court would result in neither court system being further burdened with this matter. Similarly, while no evidence was presented to the Court of Appeals concerning whether a Kentucky or Ohio jury would be more appropriate to hear this action, this factor favored Lykins because no jury would be required in Kentucky given that the case here has proceeded to judgment.

Because the vast majority of communications, events, correspondence, and witnesses occurred or are located in Kentucky,[12] Kentucky has more of a "local" interest in deciding the controversy than Ohio, whose only claim to the underlying events is the location of the property and the residence of one of Felix's agents. [13]

Finally, the Mason Circuit Court considered the parties' arguments regarding choice of law and applied Kentucky law to this action. As was stated in the Dissent,

> In any event I am of the opinion that the circumstances are such that Kentucky is the state of most significant relationship to the transaction. The Lykins business operations have their origin and existence in Kentucky. A Kentucky law firm handled the transaction of behalf of the Felixes. Essentially the only connection with Ohio is the location of the premises. Perforce, I think Kentucky law applicable.

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[12] A sampling of which is provided in Exhibit 4.

[13] Id.

(Exhibit 1 at p.14.)

It should be established that when addressing the issue of *forum non conveniens*, the Court of Appeals may not, as it did here, go impermissibly outside the record on appeal to consider facts never presented at the trial court level. Further, this Court should clarify that the Court of Appeals may not raise and consider the doctrine where the parties never raised the issue below or on appeal or when the trial court never considered the issue.

D. The Court of Appeals may not deprive parties of notice and the right to be heard in contravention of their right to due process.

Where a party's rights are at issue, the party is entitled to notice that his rights may be affected and an opportunity to be heard:

> The Fourteenth Amendment[14] of the United States Constitution provides that no state shall deprive any person of life, liberty, or property without due process of law. . . . In *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1972), the United States Supreme Court stated, "For more than a century the central meaning of procedural due process has been clear. Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."

Harbin v. Commonwealth, 121 S.W.3d 191, 195 (Ky. 2003). The Court in Ohio River Pipeline Corporation v. Landrum, et al. reiterated this point in considering a court's amendment of its judgment to apportion liability. 580 S.W.2d 713 (Ky.App. 1979). The court stated:

> Due process dictates that a party be given notice and an opportunity to be heard, before the trial court on its own motion modifies the rights of the party under an existing judgment . . . . Ohio River Pipeline should have the opportunity to argue that the trial court should not apportion liability under KRS 454.040. It should also have the opportunity to question the percentage of liability imposed on each defendant . . . .

Id. at p.720.

In raising the doctrine of *forum non conveniens* sua sponte by the trial court, other

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[14] Section 2 of the Kentucky Constitution is the state counterpart to the 14th Amendment.

jurisdictions have been clear that the parties must be given notice that the issue is being considered and an opportunity to be heard. In Robinson v. Town of Madison, the court endorsed the trial court raising the doctrine sua sponte, but only "**[s]o long as the court affords the parties the opportunity to address issues relating to transfer.**" *supra*, at p.846. [emphasis added.] *See also* Government Employees Ins. Co. v. Burns, 672 So.2d 834 (Fl.App. 1996); Clisham Management, Inc. v. American Steel Bldg. Co., Inc., 792 F.Supp. 150 (D.Conn.1992). This Court should adopt the holdings and rationale of these jurisdictions, and adopt a rule holding that no appellate court may sua sponte raise the doctrine of *forum non conveniens* where no party raised the issue and the trial court did not address it.

In this case, the parties were never informed that the Court of Appeals was considering the issue of *forum non conveniens*. It was unanticipated and improper for the Court of Appeals to consider the issue where there was no evidence that the trial court abused its discretion in not addressing the doctrine. Consequently, dismissal based upon *forum non conveniens* was wrong and denied the parties their rights to due process.

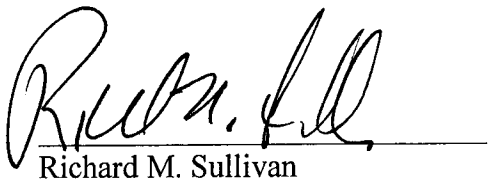
CONCLUSION

This is a simple case made complicated by the Court of Appeals' convoluted and incorrect opinion. The plaintiff in the trial court action, Felix, chose a forum which the defendants, Lykins, were agreeable to, and the trial court had no cause to examine *forum non conveniens* factors. Felix appealed the summary judgment in favor of Lykins, never raising *forum non conveniens* considerations. Going beyond its scope of authority and outside the record before it, the Court of Appeals then unexpectedly and without precedent interjected the doctrine and ruled that the trial court should have dismissed the case based thereon, depriving the prevailing, **defending** party, of his victory in the name of a doctrine designed to spare defending

parties unnecessary inconvenience. The Court of Appeals decision has created an unnecessary and burdensome duty on every trial court and litigant.[15]

For the reasons stated in this Brief, the appellants Lykins Enterprises, Inc., Fuel Stop Real Estate Company a/k/a Fuel Stops Real Estate Company, David O. Lykins, Fuel Stops, Inc. and William T. Esham respectfully request that this Court rule as follows: 1) the Court of Appeals "Opinion Vacating and Remanding" rendered October 14, 2005, is vacated; 2) there is no duty upon litigants and trial courts to raise or address the issue of *forum non conveniens* where the parties consent to the present jurisdiction and there are no extraordinary factors requiring the trial court to raise the issue sua sponte; 3) the Court of Appeals cannot dismiss a case based upon *forum non conveniens* where no party nor the trial court raised the issue and the trial court did not abuse its discretion in so doing; and 4) the Mason Circuit Court "Judgment and Order" entered in this matter on June 17, 2004 is reinstated.

Respectfully Submitted,



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[15] Because the 2006 Amendments to the Rules of Civil Procedure, to become effective January 1, 2007, allow unpublished decisions rendered after January 1, 2003 to be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court, the unpublished Court of Appeals opinion at issue here can be cited to Kentucky courts and is easily accessible via its Westlaw citation.

Fuel Stop Real Estate Company
a/k/a Fuel Stops Real Estate Company,
David O. Lykins; Fuel Stops, Inc.,
and William T. Esham