IN THE
SUPREME COURT OF KENTUCKY

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SUPREME COURT CLERK

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. — NO. 2006-SC-000142

MAXINE S. FELIX — APPELLEE

MAXINE S. FELIX — CROSS-APPELLANT

vs. — NO. 2006-SC-000624

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 — CROSS-APPELLEES

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

Combined Brief of Appellants/Cross-Appellees
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

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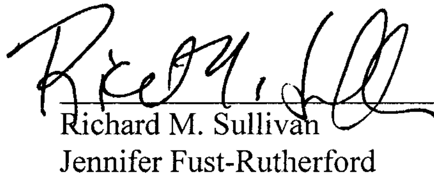
Inc; and William T. Esham*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy hereof was mailed this 2nd day of April, 2007, 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 ten copies of same and one original were sent by Federal Express this 2nd day of April, 2007 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 had a duty to dismiss a contract action *sua sponte* on the grounds of *forum non conveniens.* The issue was not raised or addressed at the trial court or Court of Appeals level by any party – either 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 ("Appellants") or by Appellee Maxine S. Felix – and the words first appeared in the Court of Appeals opinion vacating and remanding this matter.

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COUNTERSTATEMENT OF THE CASE

Underlying Facts

On May 1, 1988 Appellee Maxine S. Felix (lessor) entered into a lease with an option to purchase[1] ("Lease/Option") for real estate located in Aberdeen, Ohio, with Lykins Enterprises, Inc.[2] (lessee), a Kentucky corporation. Lykins Enterprises, Inc. and Fuel Stops, Inc. extended the original term of the lease through August 31, 1997. (Stipulations ¶1a.)

Prior to the execution of the Lease/Option, the property was in a state of disrepair. [Stipulations ¶3; ROA 455, Exhibit 1, Deposition of Terry Teegarden ("Teegarden depo."), at p.16.] During the course of the Lease/Option, Appellants made over $300,000.00 worth of improvements to the premises,[3] which Lykins operated as a truck stop. The improvements included tanks, pumps, exterior and interior renovations, blacktop, concrete and an additional building. (Stipulations ¶6; ROA 455, Exhibit 1, Teegarden depo. at p.21, lns.17-25; p.22, lns.1-6.) Photographs depicting the property at or about the time of purchase and after renovations

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[1] The Lease/Option provided:
¶16 Option to Purchase Lessee shall have an exclusive option at any time during the initial term of this Agreement, and during the extension term if exercised by Lessee, to purchase the Leased Premises, including real estate, fixtures, and all improvements thereon . . . for the purchase price of $200,000 cash payable in full. . . . In order to exercise its option to purchase under this paragraph, Lessee shall notify Lessor of Lessee's intention to purchase not less than thirty days prior to expiration of the initial term, or thirty days prior to expiration of the extension term of this Agreement. . . .
¶21 All notices, consents, waivers, and other communications shall be sent to the parties at their respective addresses below, subject to prior receipt of notice of change of address, and shall be effective when deposited in the United States mail, postage prepaid, return receipt requested. ("Memorandum in Support of Defendants' Motion for Summary Judgment," ROA 402, Exhibit 1, "Lease/Option.")

[2] Stipulation of Facts (hereinafter "Stipulations"), at ¶1, filed on July 21, 2003 and contained in the Record on Appeal as "filed under separate cover." A copy is provided as Exhibit 3 to Appellants' Brief to this Court, dated December 11, 2006. ("Appellants' Brief.")

[3] ROA 455, Exhibit 2, "Affidavit of David O. Lykins, Jr." dated May 4, 1998, at ¶3.

were performed by the Appellants are provided in Attachments 1 and 2 to the Stipulations.

Teegarden, Appellee's agent,[4] granted oral approval for Appellants to sublease a portion of the property and construct a building. [ROA 455, Exhibit 5, Deposition of David Lykins, Jr., taken October 14, 1998 ("Lykins depo."), at p.23, lns. 11-21.] Appellee placed two mobile home trailers on the leased premises without notification to or consent from Appellants. (ROA 455, Exhibit 1, Teegarden depo. at p.40, lns.10-20; p.41, lns.14-21.)

Lykins testified that ". . . yes, from day one, we told them we were going to buy [the property]. From the day we signed the lease, I told Terry [Teegarden] we were going to buy it. . . . I probably told Terry Teegarden 50 times and Sue Brammer 10 times, and anybody that wanted to listen, that we were always going to buy it. We were never going to just walk away after you spend as much money as we have over there." (ROA 455, Exhibit 5, Lykins depo. at p.45, lns.1-17.) Susan Brammer, a Kentucky lawyer, acted as attorney for Appellee. (Stipulations ¶10.)

On October 26, 1996, Fuel Stops Real Estate Company entered into an agreement with Mid-Ohio Petroleum ("Mid-Ohio") for the purchase and sale of the assets of the truck stop.[5] Mid-Ohio represented it had obtained financing and was ready to close on the transaction as soon as title problems were resolved. (Letter to Charles K. Stout, Exhibit 3 to Stipulations.)

On November 20, 1996, pursuant to a request by Lykins, Brammer prepared a deed for the transfer of the fee-simple title of the lessee property to Fuel Stops Real Estate Company for

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[4] Terry Teegarden ("Teegarden") is Appellee's son-in-law and power of attorney. Teegarden was the principal contact with David Lykins ("Lykins"), who is president of Defendant Lykins Enterprises, Inc. and general partner of Appellant Fuel Stops Real Estate Company. (Stipulations ¶8.) Appellee relied solely on Teegarden to deal with Lykins in the lease and operation of the subject property. [ROA 455, Exhibit 4, Deposition of Maxine Felix taken February 27, 1998 ("Felix depo."), at p.13, lns. 1-5; Stipulations ¶7.]

[5] "Agreement for Purchase and Sale of Assets," Exhibit 2 to Stipulations.

the Felixes. (Stipulations ¶ 13.) Lykins requested that Brammer prepare a letter for Lykins to sign instructing her that the grantee on the deed was to be Fuel Stops Real Estate Company. Id. Brammer complied with Lykins' requests, as evidenced by her letter dated November 20, 1996, acknowledging the Lessees' expression of intent to exercise the option to purchase the property:

> We have prepared the deed to Fuel Stops Real Estate Company from Mr. and Mrs. Felix and have sent it to Florida for their signatures. Enclosed is a copy of the deed.
>
> The Option to Purchase which you have is an option for Lykins Enterprises, Inc. To keep the records of Mr. and Mrs. Felix up-to-date, I would appreciate it if you would sign the enclosed letter instructing that the deed is to be made to Fuel Stops Real Estate Company. . . .

(Letter from M. Susan Brammer to David Lykins, Exhibit 1 to Stipulations.) Said letter was signed by Lykins and returned to Brammer. (Stipulations ¶13.)

On November 25, 1996, the Felixes signed the deed transferring the property to Fuel Stops Real Estate Company for the option price of $200,000.00. ("General Warranty Deed" Exhibit 5 to Defendants' First Amended Counterclaim, and Stipulations ¶14.) The November 1996 closing on the property was cancelled because of an issue with ingress and egress. (Stipulations ¶16.)

The closing was rescheduled for January 17, 1997 (Stipulations ¶22), with Brammer representing Maxine Felix and the lender, a Kentucky bank. [ROA 455, Exhibit 7, Deposition of M. Susan Brammer, taken August 4, 1999 ("Brammer depo.") at p.5, lns.13-16; p.7, lns.7-10; p.9, lns. 6-8; p.27, ln.24 through p.28, ln2.] In furtherance of this transaction, Kentucky lawyer James L. Clarke ("Clarke"), Appellants' attorney during January 1997 (Stipulations ¶15), and Brammer communicated extensively via telephone, facsimile and letter, exchanging documents and, at Lykins' direction, supplying Clarke with a deed, the final form of which was supplied by

Brammer, to the property running from Fuel Stops to Mid-Ohio.[6] The January 1997 closing was canceled because Mid-Ohio backed out of the transaction. (Stipulations ¶¶21 and 22.)

Brammer testified that she remembers Lykins calling her sometime in February 1997, and saying that he would go ahead and purchase the property. (ROA 455, Exhibit 7, Brammer depo. at p.52, lns. 5-25; p. 53, lns.1-7; and p.69, ln.6 to p.70, ln.16, reprinted in Stipulations ¶23a.) Brammer understood that **had the Appellants not exercised the option** and **obtained a deed** from the Felixes the Mid-Ohio deal that was **scheduled for closing on two occasions could not have gone forward.** (Id. at p.54, lns.17-20.) Brammer testified she understood that Fuel Stops Real Estate Company was buying the property that was scheduled to close in November 1996 and January 1997 and that Lykins told her he was going to buy the property no matter what happened. (Id. at p.55, ln.17 to p.56, ln.1.)

Lykins advised Brammer "not to worry that the work she had done for this real estate was not wasted because we had too much money invested in this property, and I had to buy it. However, I would need time to arrange a separate loan due to the cancellation of the sale to Mid-Ohio Petroleum."(ROA 455, Exh. 8, "Affidavit of David O. Lykins, Jr."dated August 31, 1999.)

Lykins informed Teegarden "that we were shopping banks for the best interest rates and that we were still going to purchase this real estate because we had too much money invested; however, we would need time to arrange a separate loan." (Id. at ¶18.) The parties stipulate that Teegarden had a discussion with Lykins in January or February 1997 at Teegarden's place of business, during which Teegarden was told that the deed prepared by Brammer had to be

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[6] Letter to Brammer from Clarke dated January 9, 1997, Exh. 4 to Stipulations; ROA 455, Exh. 6, Letter to Clarke from Brammer; Letter to Clarke from Brammer dated January 17, 1997, Exh. 6 to Stipulations; Letter to Brammer from Clarke dated January 17, 1997, Exh. 7 to Stipulations.

changed so the property in question could be sold. Teegarden had the offending clause removed from the deed. (Stipulations ¶24.)

Stephanie Gillum, with Star Bank, testified that as of July 1997 the bank had committed to loan the necessary funds to Appellants for purchase of the property in issue, and that a loan closing was scheduled for August 19, 1997. (ROA 455, Exhibit 10, Deposition of Stephanie Gillum, taken August 4,1999, p.27; ROA 455, Exhibit 9, Letter "To Whom It May Concern" from Stephanie Gillum dated March 10, 1998.)

On or about August 11, 1997, Teegarden received the August 8, 1997 letter from Lykins to Brammer indicating that he would like to close on the property (Stipulations ¶25) "this week or no later than August 18." (ROA 455, Exhibit 11, Letter to M. Susan Brammer from David O. Lykins dated August 8, 1997.) Teegarden testified that he was notified of Lykins' intention to purchase the property: 1) in October 1996, and that a deed was drawn up to effectuate the sale; 2) in January or February 1997; and 3) by letter in August 1997. (ROA 455, Exhibit 1, Teegarden depo. at p.42, lns.1-17.)

By letter dated August 12, 1997, Appellee advised Appellants that Appellants had failed to provide timely notice of their intent to exercise their option to purchase (Stipulations ¶26). In response, by letter dated August 14, 1997, Appellants' counsel objected to the Felixes' refusal to close and stated Appellants were prepared to close on the property on or before August 20, 1997. (ROA 455, Exh. 12, Letter to Robert G. Zweigart from Robert E. Dever dated August 14, 1997.)

On October 8, 1997, Maxine Felix, by and through her attorney, advised she would consider selling the property [to Appellants] for the sum of $1,000,000.00; a sum she believed is representative of the current fair market value of the property." (ROA 455, Exhibit 13, Letter to Robert E. Dever from Edward S. Monohan IV dated October 8, 1997.) This sum is $800,000.00

greater than the $200,000.00 option purchase prices specified in the Lease/Option.

Subsequently, on December 29, 1997, Maxine Felix, by and through her attorney, offered Appellants a new ten year lease of the subject property at the rate of $5,000.00 per month. (ROA 455, Exhibit 14, Letter to Robin L. Webb from Edward S. Monohan IV dated December 29, 1997.) A lease at this offered rate would amount to $600,000.00 in rent over the ten year term of the proposed lease, a sum which is $400,000.00 greater than the $200,000.00 option purchase prices set out in the Lease/Option.

Underlying procedural history.

On December 1, 1997, Appellee Felix filed suit against Appellants in Mason Circuit Court. On December 23, 1997, Appellee urged the trial court to retain jurisdiction over the case, arguing that Kentucky's contacts with the subject matter of this action were greater than those of Ohio. (ROA 48, Response to Motion to Dismiss). Appellee stated:

- There is clearly sufficient contact with the state of Kentucky for Kentucky to hear this Case. (Id. p.2)

- This action does not concern title to the real estate located in Brown County, Ohio. The action concerns the validity of the option to purchase real estate and whether or not that option was properly exercised. (Id. ¶7.)

- While the courts of Ohio may have had sufficient contacts with the subject matter of this litigation to assert jurisdiction, Kentucky courts also have *in personam* jurisdiction over the corporate Defendants which are Kentucky corporations. The unknown entity, Fuel Stop Real Estate Company, lists Maysville, Kentucky as its address. Without question Kentucky has abundant contacts with the subject matter of this action for the reason that the business situated on the real estate is being operated from Maysville, Kentucky. For all these reasons, Plaintiff urges that the court retain jurisdiction of this action. (Id. ¶10.)

On September 9, 2003, Appellee filed a Motion for Summary Judgment, alleging Lykins did not properly exercise the option to purchase. (ROA 402.) That same day Appellants filed a Motion for Summary Judgment on the bases that Appellants exercised the option to purchase

according to the terms of the Lease/Option, that a requirement of the Lease/Option had been waived by the parties' course of performance, and that Appellee's actual knowledge of Appellants' exercise of the option obviated any argument concerning notice. (ROA 454, 455.) By Judgment and Order entered June 17, 2004, the Mason Circuit Court denied Appellee's Motion for Summary Judgment and granted Appellants' Motion for Summary Judgment ruling that Appellants properly exercised the option to purchase. (ROA 602.)

Upon discretionary review

Appellee's Combined Brief to this Court filed on January 31, 2007 ("Appellee's Combined Brief") and the Affidavit of Appellee's counsel attached thereto seek to create the impression that at oral argument of this matter before the Court of Appeals, improper venue or the doctrine of *forum non conveniens* was addressed. The impression is false. The record in this matter reveals **the first mention** of the doctrine of *forum non conveniens* occurred in the appellate court's October 14, 2005 "Opinion Vacating and Remanding" ("Opinion") the underlying trial court decision, thereby depriving the parties of any opportunity to be heard on the matter prior to the Court's decision. Further, the aforementioned Affidavit **does not** state that improper venue was addressed at oral argument, only that the court "announced that [it] was concerned with whether or not this matter should be remanded to the Courts of the State of Ohio." Appellee's Combined Brief, Exhibit B, ¶4.

ARGUMENT

Appellee is in the difficult position of defending an erroneous Court of Appeals decision in her favor based upon an issue that was never raised, discussed or briefed. Appellee attempts to eliminate the distinction between improper venue and the doctrine of *forum non conveniens*, and provides no justification for the Court of Appeals raising the doctrine *sua sponte* or for the heavy

burden created for all litigants and trial courts if this decision is allowed to stand. Appellee further requests this Court reconsider the substantive decision of the trial court.

A. The Court of Appeals is not the place to raise the doctrine of *forum non conveniens*.

There is before the Supreme Court a petition for discretionary review (2006-SC-775D) involving a second Kentucky Court of Appeals panel's decision in Elder v. Perry County Hospital which is directly in opposition to the actions of the panel in this matter. ---S.W.3d---, 2006 WL 2033763 (Ky. App.2006).(Exhibit 1 hereto.) Appellants cite the *Elder* case not as authority but to show that a second Court of Appeals panel reached conclusions in opposition to the actions of the panel below, and to request this court resolve the split of authority in favor of the *Elder* panel.

In *Elder*, two dismissals on *forum non conveniens* grounds in the same underlying case gave rise to two appeals, which were consolidated by the Court of Appeals. The underlying case involved a medical malpractice claim against two hospitals and one doctor's staffing provider. Both hospitals were dismissed on *forum non conveniens* grounds; one ("Hospital") on plaintiff's motion and the other ("Norton") upon the trial court's own motion. The Court of Appeals vacated and remanded both decisions.[7]

The panel found that **the proper court in which to address *forum non conveniens* is the trial court**, and that **even if the trial court declines to act** regarding the doctrine, the decision must be an abuse of discretion before the Court of Appeals will act:

> The decision of **whether to decline to act** in a case based on fnc is a matter left to a trial court's discretion, and an appellate court may disturb a trial court's decision only if the trial court's decision represents an abuse of discretion. . . . . The

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[7] The *Elder* panel found that a trial court cannot raise *forum non conveniens* on its own motion. Elder at p.4. Appellants herein make no argument either supporting or challenging this point.

> decision of whether to dismiss a party on fnc grounds is one **within the unique and sound discretion of the trial court as the trial court [sic], not this court, is in the best position to find and assess the pertinent facts** and to control its own docket.

Elder v. Perry County Hospital, –S.W.3d–, 2006 WL 2033763, p.2 (Ky.App.2006). Accordingly, the decision by a trial court **not** to take any action with respect to *forum non conveniens* issues would be unassailable absent an abuse of discretion in that decision. The Court of Appeals in this case did not address nor find that Mason Circuit Court abused its discretion in making no finding concerning *forum non conveniens*. Therefore, the Court of Appeals should not have *sua sponte* raised the doctrine or based its opinion thereon.

In the *Elder* case, as in this case, neither defendant raised the issue of forum non conveniens, and the *Elder* panel found it is within a defendant's power to waive the issue if the defendant does not object to the forum:

> It is important to remember that the Hospital did not seek to be dismissed on fnc grounds. Thus, the trial court acted entirely of its own volition when it raised fnc as grounds for dismissal. Although it has not been the subject of an opinion of the appellate courts of Kentucky, the general rule appears to be that a trial court lacks the power on its own motion to dismiss a case on fnc grounds. We believe that general rule to be sound because the convenience of a particular venue, which lies at the heart of the fnc doctrine, is a personal privilege of a defendant; and a defendant is free to waive that privilege. Thus it is up to each individual defendant to determine if it desires to seek a change of venue; and a trial court, acting on its own motion, errs by declaring a venue to be inconvenient.

Id. If a defendant's decision to acquiesce to a particular forum binds the trial court, certainly that decision should be upheld once the case has proceeded to final judgment and is in the Court of Appeals. To hold otherwise defeats the purpose of the doctrine of *forum non conveniens*.

Appellee, despite an entire section of her Combined Brief entitled "The Court of Appeals Had Power To Act *Sua Sponte* In This Matter" (Appellee's Combined Brief, p.9), offers no authority in support of that statement. Appellee links snippets of cases which are off-point, but

quoted or misquoted in a patchwork attempt to create the impression of support for the idea that it is appropriate for an appellate court to *sua sponte* raise the issue of *forum non conveniens* and dismiss or transfer an action therefor. Like Appellee, Appellants can find **no case anywhere that stands for that proposition.**

Appellee contends the doctrine of *forum non conveniens* and improper venue are virtually identical, a statement that is not only incorrect but not helpful to Appellee's point. First, equation of the two cannot provide a basis for *forum non conveniens* to be raised for the first time at the Court of Appeals level: improper venue, according to Kentucky Rule of Civil Procedure 12.02, is a defense which must be raised in or prior to a responsive pleading, necessarily, then, **at the trial court level**. Second, **no such issue was raised.**

Notwithstanding that fact, Appellee offers Seymour Charter Bus Lines, Inc. v. Hopper, 111 S.W.3d 387 (Ky.2003), misquoting the case as stating "any distinction between improper venue and *forum non conveniens* is 'merely illusory.'" (Appellee's Combined Brief, p.9) Those words do not appear in the opinion nor does the opinion address *forum non conveniens*. Like almost all the cases Appellee cites purportedly authorizing the *sua sponte* action of the Court of Appeals, the *Seymour* case actually discusses the powers of a **trial court**, specifically the trial court's role upon motion to transfer for improper venue.[8] The *Seymour* decision makes no argument regarding improper venue with respect to an appellate court.

Prevot v. Prevot, 59 F.3d 556, 565 (6th Cir.1995) offers nothing in aid of Appellee's

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[8] The only mention the opinion makes of *forum non conveniens* is in describing the case Beaven v. McAnulty, 980 S.W.2d 284 (Ky.1998) as a possible catalyst for a subsequently-enacted statute, KRS 452.105, addressing the ability of "the judge **in the court in which the case was filed**" to transfer a case based upon improper venue. Seymour at p.389.

argument, standing for the proposition that trial courts[9] may dismiss actions *sua sponte* for lack of jurisdiction or may dismiss actions based upon *forum non conveniens*. The *Prevot* court even collects such powers of the trial court under the heading "**The power of the district court**." Id. at p.565-566. [Emphasis added.] Whether a **trial court** has the power to do any of these things is not at issue in this case.

In light of the authority presented in Appellants' Brief on pages 9-11 regarding the impropriety of raising *forum non conveniens* at the Court of Appeals level and the lack of any contradicting authority presented by Appellee,[10] Appellants urge this Court to approve the reasoning of the *Elder* decision insofar as it holds: 1) where a trial court declines to act with respect to *forum non conveniens*, the Court of Appeals may not disturb that decision absent an abuse of discretion by the trial court; and 2) the Court of Appeals cannot *sua sponte* raise *forum non conveniens* where the issue was never raised, discussed or briefed below.

B. The issue of improper venue was not raised in these proceedings. Improper venue has no bearing on whether *forum non conveniens* must be addressed.

Appellee seeks in vain for some mention of *forum non conveniens* prior to issuance of the Opinion in order to justify the court's ruling. Unable to find what does not exist, Appellee links together three untenable suppositions to reach her desired conclusion: 1) two representations – one wrong and one vague – that the issue of improper venue was raised prior to the Opinion; 2) a

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[9] Appellee's misquote of this case, under the heading "The Court of Appeals Had Power to Act *Sua Sponte* In This Matter," is as follows: "A court has 'the inherent power to dismiss *sua sponte* for want of jurisdiction . . . ,'" substituting the word "a" for "district" before "court." Appellee's Combined Brief, p. 9.

[10] Appellee's other cases are similarly off-point. Carver v. Knox County, 887 F.2d 1287 (6th Cir.1989) does involve certain portions of a claim being transferred to another court, and Skil Corp. v. Millers Fall Co., 541 F.2d 554 (6th Cir.1976) involves the transfer of a case, though it is unclear for what proposition it is cited. The pinpoint cite given for Chambers v. Nasco, Inc., 502 U.S. 32, 45 (1991) is concerned with the power of a district court to award sanctions.

wholly original equation of "improper venue" and the doctrine of *forum non conveniens*; and 3) the unsupportable idea that if improper venue is addressed, *forum non conveniens* will be deemed addressed, as well. Appellee's suppositions lack foundation entirely.

1. At no point in this action was the issue of improper venue raised and at no point prior to issuance of the Opinion was *forum non conveniens* raised.

Appellee cannot cite an instance in which the doctrine of *forum non conveniens* was raised or addressed in this action by anyone prior to the Opinion because it was **never** raised. Seeking to bootstrap discussion of *forum non conveniens* into a mention of improper venue, Appellee makes two allegations that improper venue was addressed. Appellee contends "venue issues" and "improper venue" were arose prior to the Opinion 1) in Appellants' motion to dismiss the action and 2) in a comment by the Court of Appeals at oral argument.

Appellee's claim that Appellants' motion of December 17, 1997 was the "very first injection of this concept of 'improper venue' or *forum non conveniens* into this case" (Appellee's Combined Brief, p.10) is a complete fabrication. Appellants **never** moved for dismissal of this action based upon improper venue and Appellee is careful to skirt the edge of so saying.

Appellee states that a court can consider issues raised *sua sponte* by the court at oral argument[11] and attaches an affidavit of her counsel stating that at oral argument of this matter, the Court of Appeals "announced that [it] was concerned with whether or not this matter should

[11] Appellee cites Elk Horn Coal Corp. v. Cheyenne Resources, Inc., 163 S.W.3d 408 (Ky.2005) for the point that an appellate court may properly consider issues raised *sua sponte* in oral argument. While the issue in *Elk Horn* did arise in that manner, this Court was careful not to run afoul of due process concerns or any applicable rule, noting that the issue was raised *sua sponte* at oral argument but that "[t]he parties addressed the issue and we have confined ourselves to the record. Thus we are not precluded by any rule or constitutional provision from addressing this issue." Id. at p.424. As discussed herein, the Court of Appeals provided no such opportunity to be heard and engaged in an analysis that, properly performed, would **require** the court to consider facts outside the record.

be remanded to the Courts of the State of Ohio which the Appeals panel considered to be an issue in the case." (Exhibit B to Appellee's Combined Brief.) While it is impossible to know exactly what the court said at oral argument (see Exhibit A to Appellee's Combined Brief), even if counsel's affidavit accurately reflects the discourse, there is no indication of the grounds upon which the court's comment was based. It seems unlikely, however, that the court was concerned with the issue of improper venue, which is a defense that must be raised at the commencement of an action, and here was not. We are left with merely with Appellee's conjecture regarding the Court of Appeals' thought process behind an alleged comment at oral argument.

2. Venue and *forum non conveniens* are distinct legal concepts; discussion of improper venue does not require discussion of *forum non conveniens*.

Despite Appellee's misquote of Seymour Charter Busline, Inc. v. Hopper, *supra*, as stating "any distinction between improper venue and *forum non conveniens* is 'merely illusory,'" and her contention that raising the issue of improper venue is somehow the same as raising the issue of *forum non conveniens* (Appellee's Combined Brief, p.10) the fact is that the two legal concepts are distinct.

Caselaw clearly defines each: "Venue is the county in which action may or must be brought . . . ," Britton v. Davis, 268 Ky.7, 103 S.W.2d 665, 667 (1937), while "[t]he doctrine of *forum non conveniens* 'involves the dismissal of a case because the forum chosen by the plaintiff [here Appellee] is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else.'" Norwood v. Kirkpatrick, 349 U.S. 29, 31, 75 S.Ct. 544, 546 (1955).(internal citation omitted.)

The relevant relationship between the concepts is twofold: 1) at least two courts having proper venue for an action is the prerequisite for a motion to dismiss based upon the doctrine of *forum non conveniens*, and 2) a motion to dismiss based upon *forum non conveniens* is a **remedy**

for misuse of venue. The Supreme Court, in the seminal case concerning the doctrine of *forum non conveniens*, Gulf Oil Corporation v. Gilbert, addresses both of these points. 330 U.S. 501, 67 S.Ct. 839, (1947). Regarding the necessity of proper venue, the *Gulf* Court states:

> Indeed the doctrine of forum non conveniens can never apply if there is absence of jurisdiction or mistake of venue. . . . In all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them.

330 U.S. 501, 504, 506-507, 67 S.Ct. 839, 841, 842 (1947).

In describing the use of the doctrine of *forum non conveniens* when a forum is chosen solely to harass a defendant, the *Gulf* court explained "the open door" given plaintiffs to choose the court in which to file action,

> may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself. **Many of the states have met misuse of venue by investing courts with a discretion to change the place of trial on various grounds, such as the convenience of witnesses and the ends of justice**.

Gulf Oil Corp. at p.842. [Emphasis added.] Certainly were improper venue and *forum non conveniens* the same creature, one could not be the remedy for misuse of the other.

Motions to dismiss an action may be made based upon either improper venue or *forum non conveniens,* but the procedure and substance of said motions are entirely different. A motion to dismiss based upon improper venue must be made pursuant to Civil Rule 12.02.[12] This defense must be plainly stated at the outset of litigation or be waived. Shiferaw v. Mills, 2005 WL 32809, p.2 (Ky.App.2005)(Attached as Exhibit 2).

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[12] CR 12.02 provides: Every defense, in law or fact, to a claim for relief in any pleading thereto . . . except the following defenses may at the option of the pleader be made by motion: . . . (c) improper venue . A motion making any of these defenses shall be made before pleading . . "

Motions to dismiss based upon *forum non conveniens* are not governed by any specific rule of procedure and, while they must be made timely, may be made within a reasonable time after the defendant has become aware of the facts that form the basis of the motion. Rustal Trading US, Inc. v. Makki, 17 Fed. Appx. 331, 339 (6th Cir. 2001). *See also* Lony v. E.I. Du Pont de Nemours & Co., 935 F.2d 604, 614 (3rd Cir.1991). Such a motion is not bound by a set scenario into which the facts must fall, but is centered on the convenience of the defendant, and requires a thorough review of evidence concerning a lengthy list of private and public interests. (Appellants' Brief, pp. 9-11.) As the *Gulf* court stated: "Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of [a motion to dismiss based upon *forum non conveniens*]. The doctrine leaves much to the discretion of the court to which plaintiff resorts . . . ." Gulf Oil Corp. at p.843, 508.

Finally, Appellee can offer no legal authority for its contention that discussion of improper venue, which was never raised in this action, somehow provides ample opportunity for, and preclusive effect of, discussion of *forum non conveniens*. (Appellee's Combined Brief, p.10.) Given the distinct differences between the two concepts the Court should reject Appellee's attempt to equate them.

C. Not only was the *forum non conveniens* "analysis" performed *sua sponte* by the Court of Appeals improper, it was incomplete, without supporting evidence, and blurred the concept with other legal doctrines.

The Court of Appeals devotes substantial attention to the factors pertinent to the "most significant relationship" test employed in conflict of laws analyses, but then unquestionably bases its Opinion on the doctrine of *forum non conveniens*, in a sentence that suggests perhaps the

court intended to employ the doctrine of abatement.[13] First, the Opinion holds:

> We believe that the trial court should have dismissed Felix's action under the doctrine of *forum non conveniens* after it became aware that Ohio had already assumed jurisdiction of this matter.

p.8. The sentence plainly states that *forum non conveniens* is the basis of the decision. Mention of the court's belief that a prior action was filed in Ohio[14] is relevant to a *forum non conveniens* determination only to the extent that it makes plain that there was an alternate available venue in which to proceed. Whether an action had actually been filed in the alternate venue is irrelevant.

It would, though, be relevant to the "most significant relationship" test necessary for a conflict of laws analysis. The fact that an action existed in the state whose laws Appellee urged be employed, would be a "contact" worthy of inclusion in the consideration of the states' relationship "to the parties or occurrence."[15] However, since the court made no holding with regard to which state's law applies, its discussion of the most significant relationship is dicta.

The concern of the Court of Appeals majority that the Ohio action was first in time, which it was not, suggests, as it did to the dissenting judge, that the court in fact meant to invoke the rule of abatement, though its analysis of this point would have been flawed, as well. That rule provides "that a second action based on the same cause will generally be abated where there is a prior action pending between the same parties involving substantially the same subject matter and in which prior action the rights of the parties may be adjudged." Annie Gardner Foundation v. Gardner, 375 S.W.2d 705, 707 (Ky.1964). There is no duty to abate an action where a second

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[13] Neither *forum non conveniens* nor abatement were raised at the trial level by either party or the trial court. To remand the case for such analysis would render useless the doctrine of "abuse of discretion" by the trial court since no party asked the court to use its discretion.

[14] The court clearly implies with the word "already" that it finds its mistaken belief that the Ohio action preceeded the Kentucky action to be of importance.

[15] Breeding v. Massachusetts Indemnity Life Ins. Co., 633 S.W.2d 717, 719 (Ky.1982).

action has been filed in another state; that decision is discretionary. Brooks Erection Co. v. William R. Montgomery & Assoc., 576 S.W.2d 273 (Ky.App.1979).

Senior Judge Miller wrote the dissenting opinion below, stating that a court may abate and action as a matter of comity but may never dismiss an action as barred by litigation pending in another state. The fact that the Court of Appeals found the Mason Circuit Court had a **duty** to **dismiss** the present action, then, shows any application of the doctrine of abatement would have been flawed, as well.

Apparently as evidence of its *forum non conveniens* analysis, the Court of Appeals states:

> While the court may well have had proper jurisdiction of the case, it had both a right and a duty to consider the doctrine of *forum non conveniens* and to decline jurisdiction if appropriate. [citation omitted.] Kentucky has no interest in this action. It bears no significant relationship to the parties, to the transaction, or to the *res*. There is no possibility that any public policy important to Kentucky will be articulated or subverted. Finally, the Ohio courts provide an adequate alternate forum for the resolution of the dispute. We are confident that the parties will receive a fair hearing before the courts of Ohio where the case in counterpart is being litigated.

Opinion, p. 8. This is a mish-mash of "most significant relationship" factors and a statement of the prerequisite for conducting a *forum non conveniens* analysis, but is not a proper analysis of the doctrine.

As shown above, finding there is "an adequate alternate forum" only allows the court to proceed with the analysis necessary to make a *forum non conveniens* choice between the forums. As the court in Rustal Trading US, Inc. v. Makki stated: "Once the court has decided that an adequate alternative forum is available, it must proceed to balance the public and private interests to determine wither the convenience of the parties and the ends of justice would be served by dismissing the action." 17 Fed.Appx. 331, 336 (6th Cir.2001).

This analysis encompasses consideration of evidence regarding the lengthy list of private

and public interests set out in detail in Appellants' Brief. (pp.9-12.) It is fact-intensive, requiring evidence on each point, and failure to base determinations of each point on convincing evidence presented to the court is an abuse of discretion. For instance, the *Rustal* court determined that the trial court did not abuse its discretion in granting defendant's motion to dismiss based upon *forum non conveniens* where the defendant provided numerous affidavits regarding the alternate forum, the system of compulsory process, and alternate forum's law. Plaintiff's competing evidence, impliedly in the form of newspaper articles and "other, less credible evidence"did not convince the court the alternate forum was inadequate. Rustal at pp.336-337 and footnote 5.

The *Elder* Court of Appeals panel believed that mere lip service to consideration of the *forum non conveniens* interests, as was given by the Court of Appeals in this case, will not do:

> [W]e note that the trial court also failed to consider other factors necessary to a proper resolution of a fnc motion. Although no one factor is determinative and the resolution of a fnc motion depends upon the entire circumstances surrounding a case, a trial court must consider things such as the availability and convenience of witnesses and parties, "the relative ease of access to witnesses and sources of proof; availability of compulsory process for attendance of unwilling, and 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 [the] trial of [a] case easy, expeditious, and inexpensive." There is no indication that the trial court fully considered those factors. Instead, the trial court opined that maintaining an action in Indiana would be more convenient to the plaintiffs because it is nearer their home than is Jefferson County. . . . Furthermore, the trial court did not take into account the length of time the case had been pending before the doctrine of fnc was invoked.

Elder at p.3.

The panel below does not allege that it evaluated such evidence because it could not so allege: the opportunity to present such evidence was never provided. Even of the evidence before the court that would have been pertinent to a *forum non conveniens* analysis, the court failed to take notice. For instance, where the *Elder* panel considered it important that the action had been active for 4 years prior to dismissal, with mediation having occurred, a summary

judgment motion pending, and a trial date scheduled, the panel below took no note that present action was filed **9 years** prior to the Court of Appeals finding it should be dismissed, and had completed discovery and proceeded to a final judgment. This fact falls under the private interests of "all other practical problems that make trial of case easy, expeditious, and inexpensive" and the public interests concerning congested dockets and the burden of jury duty. This type of analysis simply was not performed by the Court of Appeals below.

To deflect attention from the real issues in the case, Appellee focuses on muddled elements of the "most significant relationship" test and select *forum non conveniens* interests. Despite having entered into joint stipulations of fact admitting the improvements Appellants made to the property, photos of the property attached thereto, and her own insistence that

> [t]his action does not concern title to the real estate located in Brown County, Ohio. The action concerns the validity of the option to purchase real estate and whether or not that option was properly exercised . . . .

(ROA 48, ¶7), Appellee now contends the location of the property is of paramount importance (Appellee's Combined Brief, p.6). While location of the property is clearly one factor in the conflict of law analysis focused on a state's relationship "to the transaction and the parties,"[16] it plays only a minor role in the *forum non conveniens* analysis, which considers the "possibility of view of premises if view would be appropriate to the action."[17] Given the stipulated facts and Appellee's prior statements, however, a view of the Aberdeen property is wholly unnecessary.

Suffice it to say, Appellee has not in the least shown that "the doctrine of *forum non conveniens* was properly applied.' (Heading in Appellee's Combined Brief, p.5.)

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[16] Lewis v. American Family Insurance Group, 555 S.W.2d 579, 581 (Ky.1977).

[17] Beaven v. McAnulty, 980 S.W.2d 284, 285-286 (Ky.1998), Appellants' Brief, p.9.

D. Appellee offers no justification for the deprivation of Appellants' right to due process nor for the burden the Court of Appeals opinion would create.

In her Combined Brief, Appellee offers nothing for this Court's consideration regarding the burden that the Court of Appeals decision would create on all litigants and trial courts or the deprivation of Appellant's due process rights. While due process certainly means different things depending upon what "a particular situation demands" (Appellee's Combined Brief, p.10), the Supreme Court is clear that "some form of hearing is required before an individual is finally deprived of a property interest." Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 902. (1976). Appellee offers no justification why the 'particular situation' in this case warranted depriving Appellants of **any** hearing at all prior to affecting Appellants' rights. Especially in light of the evidence-intensive analysis required in a *forum non conveniens* consideration, it is impossible to defend the Court of Appeals' action.

If this Court allows the Opinion to stand, in every Kentucky action where more than one venue is appropriate, the parties would be required to undergo an evidentiary hearing of *forum non conveniens* interests and every trial court would be required to make findings regarding whether or not the doctrine applies, in order to protect the right to due process and to prevent taking an action through completion only to be required to begin anew when an appellate court *sua sponte* dismisses the action based upon *forum non conveniens* grounds. This would be a tremendous new burden on all parties and trial courts.

In Roman v. Ashcroft, 340 F.3d 314 (6th Cir.2003), when faced with increasing the *forum non conveniens* burden on federal courts by increasing the number of forums in which habeas corpus actions could be filed, the court declined to do so, recognizing that the analysis required is fact-intensive, lengthy and complicated. The *Roman* court found the increase in potential forums would require courts "in many cases to undertake fact-intensive analyses of venue and forum non

conveniens issues . . . .Thus, in this respect, adopting a broader definition of custodian would complicate and extend the duration of habeas corpus proceedings." Id. at 322. Appellants urge this Court to likewise refuse to create a new, lengthy, tedious, and expensive burden on Kentucky litigants and trial courts.

E. Appellee's argument that the Mason Circuit Court was estopped from hearing the parties' motions for summary judgment lacks any support in the record and omits key procedural facts in this action.

Appellee's Combined Brief marks the first time Appellee has advanced this argument. Appellants respectfully request that section IV of her brief be stricken. Appellee's cite to the record on appeal is confusing and adds nothing to her argument. Appellee also omits the key procedural facts that make her contention moot: After the Brown County, Ohio action languished for years, Appellee's counsel contacted Appellants' counsel and asked that the parties proceed in the Kentucky action to achieve some resolution. Appellants agreed. Thereafter, the parties entered into the aforementioned Stipulation of Facts in order that the case could be submitted to the Mason Circuit Court on motions for summary judgment. See Affidavit of Richard M. Sullivan, attached hereto as Exhibit 3.

Therefore, any issues of fact the Ohio court may have found was resolved for the Mason Circuit Court by the parties undisputed Stipulations of Fact.

F. Summary judgment for Appellants is warranted under Kentucky or Ohio law[18] and should be affirmed.

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[18] Appellants believe Kentucky laws should be applied based upon the "most significant relationship" test weighing the relationship of each state to the transaction and the parties. Lewis v. American Family Insurance Group, 555 S.W.2d 579, 581 (Ky.1977). Here, no party is an Ohio resident or domiciliary, the majority of the evidence and witnesses are in Kentucky, and **Appellee chose Kentucky** in which to file this case. Regardless, Appellants believe they would prevail under either state's laws, a conclusion shared by the dissenting opinion below: "Felix has not persuaded me that Ohio law differs from Kentucky. This is a simple contract action pertaining to the waiver of a notice provision contained therein. The law throughout the various jurisdictions is rather uniform on the issue presented." Opinion at pp.13-14.

Appellants provided **written notice** to Brammer of their intent to purchase the Aberdeen property by signing and returning the November 20, 1996 letter Lykins requested she draft, confirming the property was to be transferred by the Felixes to Fuel Stops Real Estate Company. (Stipulations ¶13.) Brammer and Teegarden, Appellee's agents,[19] **admit** they were informed Appellants were purchasing the property: Brammer recalls speaking with Lykins after the second closing was cancelled and recalls Lykins specifically telling her he would purchase the property anyway (ROA 455, Exhibit 7, Brammer depo. at pp.52-53, 69-70; Exhibit 8, "Affidavit of David O. Lykins, Jr."), and Teegarden admits to being informed **three times** that Lykins intended to purchase the property, specifically citing a conversation with Lykins in January or February of 1997. (ROA 455, Exhibit 1, Teegarden depo. at p.42, lns. 1-17; Stipulations ¶24.)

Further, Lykins discussed and corresponded with Brammer in November, 1996 regarding the November closing on the property and Lykins' attorney discussed and corresponded with Brammer in January 1997 regarding the re-scheduled closing. And, after the first two closings failed through no fault of Appellants, Appellants notified Appellee of their intent to close in August 1997. (ROA 455, Exhibit 11, Letter to Brammer from Lykins dated August 8, 1997.) Such communications were clear enough for Appellee to act upon them, instructing her attorney to prepare a deed transferring the Aberdeen property to Appellants in preparation for closing.

The option clause of the Lease/Option, ¶16, does not specify the manner in which the option is to be exercised. Ignoring the aforementioned November 20, 1996 and August 8, 1997 letters, which clearly fulfill ¶16,[20] Appellee contends Appellants did not provide the written

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[19] Appellee is bound by the knowledge of her agents, Brammer and Teegarden. Brown v. Physicians Mutual Insurance Co., 679 S.W.2d 836, 838 (Ky.App.1984)(the principal is chargeable with and bound by the knowledge of his agent).

[20] Appellee cites 715 Spencer Corporation v. City Environmental Services, Inc., et al., 80 F.Supp.2d 755 (N.D.Ohio 1999), and Anglin v. Burger Chef Systems, Inc., 2001 WL 122109

notice required by ¶21.[21] How that would be possible is puzzling, but of no consequence: the written notice provision was waived.

That a written notice provision of a signed lease can be waived is well-settled. KRS 355.2A-208. The purpose of such a section is to prevent a contractual provision from limiting the legal effect of the parties' conduct. Official Comment 4 to UCC §2-209. The waiver may arise from the parties' actions.[22] In Specht v. Stoker, 237 S.W.2d 78 (Ky.1951), the requirement of written consent for subletting was waived by the lessor's oral consent and subsequent acceptance of rental payments.

In the present case, the parties waived the "written notice" requirement by repeatedly ignoring it. [i.e. Teegarden gave oral approval of Appellants' sublease and of construction of a building; Appellee twice provided **no notice** when locating two mobile home trailers on the property. (ROA 455, Exhibit 5, Lykins depo. pp.23; Exhibit 1 Teegarden depo. pp.40-41.)] The dissent below agrees:

> Under Kentucky law, I am of the opinion that the written notice provision in the exercise of the option was waived. The common definition of a legal waiver is that it is a voluntary and intentional surrender or relinquishment of a known right,

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(Ohio App.12 Dist., Feb.5, 2001) as examples of unacceptable attempts to exercise options, but those cases involve optionees that are trying to exercise options with terms more favorable than the lease. Both cases are inapplicable to this matter.

[21] Ohio law would provide a remedy even if Appellants' exercise was flawed, preventing Appellee from obtaining the windfall of undisputed improvements to the property by Appellants. Where **"the lessee makes valuable improvements . . . the lessee should not be denied equitable relief** from his own neglect or inadvertence if a forfeiture would result. In Ward v. Washington Distributors, Inc., 67 Ohio App.2d 49, 425 N.E.2d 420, 424 (1980).

[22] Ohio courts, like Kentucky courts, recognize that contract terms can be waived or modified by virtue of course of performance of the contract. *See* Canfic Resources Ltd. v. Dal-Ken Corporation, et al., 1990 WL 34771, at p. 4 (Ohio App. 10 Dist., Mar. 29, 1990)(Waiver by course of performance recognized in non-sale of goods situations and specifically in leases); Schmidt v. Texans Meridian Resources, Ltd., et al., 1994 WL 728059 (Ohio App. 4 Dist., Dec. 30, 1994)(lease provision modified by course of behavior).

> or an election to forego and advantage which the party at his option might have demanded or insisted upon. Waiver may be expressed or inferred from a failure to insist upon recognition of the right or conformance with the condition. (citation omitted.) Upon the whole of this case, I think waiver clear as a matter of law.

Opinion, p.14.

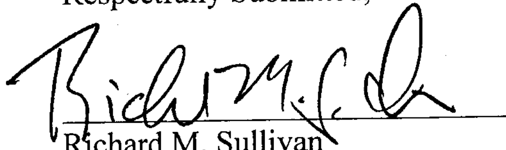
Any argument regarding notice, however, is obviated by the fact that Appellee had actual knowledge that Appellants were exercising the option to purchase the Aberdeen property. If a party has actual knowledge of another's intent, giving notice of intent is immaterial. *See* Sentry Safety C. Corp. v. Broadway & 4th Ave. R. Co., Ky., 276 Ky. 648, 124 S.W.2d 1051, 1055 (1939). (It is enough if there is knowledge of essential facts, acquired in whatever manner and for whatever purpose, that would operate him a rational person act with reference to the knowledge.); In re: Hamlin's Estate, 87 N.E.2d 691, 693 (Ohio Prob.1949)(When a party is shown to have obtained an actual knowledge, there is no necessity to resort to the artificial conception of notice.); Rhoden v. City of Akron, 61 Ohio App.3d 725, 728, 573 N.E.2d 1131, 1132 (1988)(A person has no right to shut his eyes or his ears to avoid information, and then say that he has not been given notice.).

Appellee not only knew Appellants were purchasing the Aberdeen property, she participated twice in scheduled closings conveying the property to Appellants by signing deeds on the property to Fuel Stops Real Estate Company. Appellee's agents engaged in discussions and correspondence with Appellants regarding Appellants' intent to purchase the property, drafting key documents and arranging closing dates. Appellee should now be allowed to 'shut her eyes' in her attempt to raise the price of the property.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals and reinstate that of the trial court.

Respectfully Submitted,



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