Supreme Court of Kentucky

IN RE:
ORDER AMENDING
KENTUCKY RULES OF EVIDENCE (KRE)

2006-06

In accord with KRE 1102(a), and the Chief Justice having reported to the Kentucky General Assembly proposed changes to KRE 406, KRE 407, and KRE 504, and the General Assembly not having disapproved amendment to the Rules of Evidence by resolution during the 2006 Regular Session, the Kentucky Rules of Evidence are hereby amended, effective July 1, 2006, as follows:

A. KRE 406 Habit; Routine Practice

New rule KRE 406 shall read:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

COMMENT

Most jurisdictions (perhaps all but Kentucky and one other) recognize the propriety of proving that a person acted in a particular way on a given occasion by showing that he had a "habit" of so acting. At the same time, most if not all jurisdictions refuse to allow litigants to prove that a person acted in a particular way on a given occasion by showing that he had a particular trait of character (except in criminal cases pursuant to KRE 404). Evidence that a person habitually stops at a railroad crossing before moving across, offered to show that he stopped on a given occasion, is a classic illustration of the former; evidence that a person has a general disposition toward carefulness, offered to prove that he stopped at a crossing on a given occasion, is an illustration of the latter.

Rule 406 authorizes the introduction of evidence of a person's habit (and the routine practice of an organization) without opening the gates to the introduction of evidence of character or generalized disposition. The provision contains no

definition of "habit" or "routine practice" but the following definition from the Advisory Committee Notes on Federal Rule 406 is both helpful and typical:

> "Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. 'Habit,' in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic." Fed.R.Evid. 406, Advisory Committee's Note.

It is contemplated that testimony about a driver's specific behavior (such as activating turn signals) would be admissible under the provision but that testimony about a driver's general behavior (such as always driving carefully) would be inadmissible.

The provision does not attempt to address the following questions: (1) How many times does a response to a specific stimulus have to occur in order to constitute a habit for purposes of the rule? (2) How much behavioral uniformity is required for multiple repetitive responses to qualify as habitual under the rule? With respect to these questions, drafters of the Federal Rules made the following points:

> ". . . The extent to which instances must be multiplied and consistency of behavior maintained in order to rise to the status of habit inevitably gives rise to differences of opinion. . . . While adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated." Fed.R.Evid. 406, Advisory Committee's Note.

Evidence authorities believe that the lack of certainty on these points is insufficient reason for an exclusion of all habit evidence and that these are matters that can be resolved by the trial judge (as he/she resolves other matters of relevance) on a case-by-case basis. The same is true with respect to matters involving the methods by which habit can be proved (a single witness who has seen 50 responses or 50 witnesses who have seen 1 response). With respect to all such matters, the trial judge is well-suited to resolve issues bearing on admissibility and, of course, the trial judge has the discretion under Rule 403 to exclude such evidence when its probative value is substantially outweighed by such undesirable effects as undue delay, waste of time, confusion of the jury, and others.

Rule 406 is borrowed from the Federal Rules without modification.

Rule 406 changes Kentucky law. The Supreme Court ruled repeatedly during the last century that evidence of habit could not be used to prove conduct in conformity with habit. *See e.g.,* Lexington R. Co. v. Herring, 96 S.W. 558 (Ky. 1906); Cincinnati, N.O. & T.P. Ry. Co. v. Hare's Adm'x, 178 S.W.2d 835 (Ky. 1944). Recently, however, a majority of the Court expressed the view that habit evidence should be admissible to prove conduct in conformity with habit, although a majority held that such evidence could not be admitted without explicit authorization for such in the Rules of Evidence. See Burchett v. Commonwealth, 98 S.W.3d 492 (Ky.

2003). Rule 406 adopts the view of the Court's majority and brings Kentucky law into line with that of nearly all other states and the Federal Rules.

B. KRE 407 Subsequent remedial measures

KRE 407 shall read:

When, after an event, measures are taken which, if taken previously, would have made an injury or harm allegedly caused by the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

EVIDENCE RULES REVIEW COMMISSION NOTES (2006)

The objective of the amendment is to modify the existing law to prohibit the introduction of evidence of subsequent remedial measures in products liability litigation (what some think of as strict liability litigation). The original federal rule was silent with respect to whether evidence of subsequent remedial measures was admissible or inadmissible in strict liability litigation and federal courts split over the issue, with a strong majority holding the prohibition applicable in such cases. In 1997, the federal counterpart to Rule 407 was amended to make this majority holding a part of the rule. The amendment of Kentucky's Rule 407 brings the Kentucky law into conformity with the federal law.

The following statement from a federal case decided before amendment of the federal provision describes well the rationale for the amendment:

> "The rationale behind Rule 407 is that people in general would be less likely to take subsequent remedial measures if these repairs or improvements would be used against them in a lawsuit arising out of a prior accident. By excluding this evidence defendants are encouraged to make such improvements. It is difficult to understand why this policy should apply any differently where the complaint is based on strict liability as well as negligence. From a defendant's point of view it is the fact that the evidence may be used against him which will inhibit subsequent repairs or improvements. It makes no difference to the defendant on what theory the evidence is admitted; his inclination to make subsequent improvements will be similarly repressed. The reasoning behind the asserted distinction we believe to be hypertechnical, for the suit is against the manufacturer, not against the product." Werner v. Upjohn Co., Inc., 628 F.2d 848, 857 (4th Cir. 1980).

The argument against this position is that a mass producer of goods will not be deterred from taking subsequent remedial measures by the thought that its actions might be used against it in litigation, thereby leaving the prohibition without a rationale and having the effect of excluding relevant evidence. The difficulty of confirming or denying this claim and the very high probability of prejudice from the introduction of this kind of evidence tilts the scales in favor of exclusion of the evidence without regard to whether the case is based on a theory of negligence or a theory of strict liability.

C. KRE 504 Husband-wife privilege

KRE 504 shall read:

(a) Spousal testimony. The spouse of a party has a privilege to refuse to testify against the party as to events occurring after the date of their marriage. A party has a privilege to prevent his or her spouse from testifying against the party as to events occurring after the date of their marriage.

(b) Marital communications. An individual has a privilege to refuse to testify and to prevent another from testifying to any confidential communication made by the individual to his or her spouse during their marriage. The privilege may be asserted only by the individual holding the privilege or by the holder's guardian, conservator, or personal representative. A communication is confidential if it is made privately by an individual to his or her spouse and is not intended for disclosure to any other person.

(c) Exceptions. There is no privilege under this rule:

(1) In any criminal proceeding in which the court determines that the spouses conspired or acted jointly in the commission of the crime charged;

(2) In any proceeding in which one (1) spouse is charged with wrongful conduct against the person or property of:

(A) The other;

(B) A minor child of either;

(C) An individual residing in the household of either; or

(D) A third person if the wrongful conduct is committed in the course of wrongful conduct against any of the individuals previously named in this sentence; or

(3) In any proceeding in which the spouses are adverse parties.

(d) Minor Child. The court may refuse to allow the privilege in any proceeding if the interests of a minor child of either spouse may be adversely affected.

EVIDENCE RULES REVIEW COMMISSION NOTES (2006)

The 2006 amendment to this provision of the Rules makes two modifications in the 1992 provision on husband-wife privilege. The first is substantive; the second merely clarifies part of the original provision in order to eliminate ambiguity concerning one of the exceptions to the privilege.

KRE 504(c)(1) denies claims of spousal privileges in criminal proceedings when it is established that the spouses were jointly involved in the commission of crimes. (It should be noted that this exception is similar to the crime/fraud exception to the lawyer-client privilege.) The original provision of this rule provided for loss of the privilege when there was "evidence sufficient to support a finding" of joint criminal activity by the spouses. This yardstick is normally used in the evidence rules for deciding preliminary questions involving what is called "conditional relevance" (in KRE 104(b)). A greater proof requirement (preponderance of the evidence) is used for determining all other preliminary questions upon which admissibility of evidence

depends (in KRE 104(a)). The preliminary question upon which loss of the spousal privilege depends under KRE 504(c)(1) is not a conditional relevance question but is instead a so-called "competency" question that needs to be resolved by the standard set forth in KRE 104(a). The proposed amendment would make this change with respect to the "joint crime" exception to spousal privileges. It should be noted that the Supreme Court adopted this same position with respect to the crime/fraud exception to the lawyer-client privilege in Stidham v. Clark, 74 S.W.3d 719 (Ky. 2002).

KRE 504(c)(2), as originally adopted, was ambiguous, as indicated in the following statement: "The last sentence of KRE 504(c)(2)(D) is ambiguous (perhaps partly because it seems to be out of place in the provision) but seems to create an entirely separate exception to spousal privileges that would require a trial judge to deny any and all spousal privilege claims determined to be adverse 'to the interests of a minor child of either spouse.'" Lawson, The Kentucky Evidence Law Handbook 376 (4th ed. 2003). The drafters of the original provision clearly indicated in their Commentary that the intent was to create a separate exception when spousal testimony was needed for determination of matters involving "the best interests of a minor child":

> "The final sentence of the rule [KRE 504(c)(2)] provides that a judge may refuse to recognize the privilege in any kind of action if convinced that spousal testimony is needed to decide what is in the best interests of a minor child of either spouse." Evidence Rules Study Committee, Kentucky Rules of Evidence—Final Draft, p. 45 (November 1989).

The proposed amendment eliminates this ambiguity in the original provision by separating the last sentence of KRE 504(c)(2) from that provision and moving it to a new subsection of the rule, thereby clearly indicating that there is a separate exception to spousal privileges for testimony needed to determine matters involving "the best interests of a minor child." The new separate exception is now numbered KRE 504(d).

All concur.

ENTERED: May 31, 2006

CHIEF JUSTICE