RENDERED: December 24, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-2311-MR

RENEE BOWMAN AND
MARIA CRISTINA MARTIN APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE WILLIAM E. McANULTY, JR., JUDGE
ACTION NOS. 96-CI-1923 & 96-CI-1929

CERAMICHROME, INC. APPELLEE

OPINION
REVERSING AND REMANDING

* * * * * * *

BEFORE: ABRAMSON, BUCKINGHAM, and EMBERTON, Judges.

ABRAMSON, JUDGE: Renee Bowman and Maria Martin appeal from a July 23, 1996, order of Jefferson Circuit Court dismissing without prejudice their employment discrimination action against the Appellee, Ceramichrome, Inc. ("Ceramichrome"). The trial judge dismissed with leave to refile in Lincoln County, the forum which he deemed "most convenient and appropriate." Bowman and Martin contend that the trial court misconstrued its authority to decline jurisdiction. We agree and so reverse and remand.

Ceramichrome is a Kentucky corporation with its principal place of business in Stanford, Lincoln County, Kentucky. Ceramichrome's registered agent for service of process

is located in Jefferson County, Kentucky. Bowman and Martin are residents of Boyle County, Kentucky, who worked for Ceramichrome in Stanford during several months of 1995 and who claim to have been discharged from their jobs in violation of KRS Chapter 344. Both women filed complaints in Jefferson Circuit Court in March 1996 alleging discrimination based on race, color, and national origin. Their complaints were consolidated in April 1996, and three months later the consolidated action was dismissed without prejudice upon the trial court's finding that "the most convenient and appropriate forum" for the litigation was Lincoln County.

It is undisputed that Jefferson Circuit Court has jurisdiction of the claims asserted by Bowman and Martin and that Jefferson County is a proper venue for their discrimination suit. KRS 344.450; KRS 452.450; KEM Mfg. Corp. v. Kentucky Gem Coal Co., Inc., Ky. App., 610 S.W.2d 913 (1981) (venue established by "the mere presence of a registered office and agent" of the defendant-corporation). The question before us is whether the circuit court erred by refusing to exercise its jurisdiction.

We begin with the basic principle that "absent compelling or unusual circumstances, a court is duty bound to hear cases within its vested jurisdiction." Roos v. Ky. Education Ass'n, Ky. App., 580 S.W.2d 508, 509 (1979). See also 20 Am. Jur. 2d Courts § 61, pp 377-78 (1995) ("Generally, a court with jurisdiction over a case has not only the right, but also the duty, to exercise that jurisdiction, and to render a decision on a case before it.") There are exceptions to this general

rule, however, among which is the court's authority, in certain situations, to decline jurisdiction in favor of an alternative venue. This authority is delineated in the statutes regarding change of venue and in the doctrine of forum non conveniens.

In its motion to dismiss, Ceramichrome relied upon this latter doctrine, which arose within the common law. Ceramichrome argued that because the discrimination is alleged to have occurred in Lincoln County, and because the witnesses and company records apt to be introduced as evidence are located in Boyle and Lincoln Counties, a trial in Jefferson County, which has no significant connection with the events underlying the claims, would be so inconvenient as to justify dismissal.

The doctrine of forum non conveniens is not well-developed in Kentucky. Noting that fact and noting in particular that our appellate courts have never upheld its intrastate application, the trial court relied instead, or perhaps additionally, upon the following language of KRS 452.030: "The granting of a change of venue shall be within the sound discretion of the court, and shall be granted [sic] by the court when justice so requires." The trial court may have construed this language as a statutory adoption of forum non conveniens, for the relief it granted--dismissal rather than transfer--is the form of relief typically associated with the common law doctrine. We believe the trial court's reliance on KRS 452.030 as grounds for a forum non conveniens dismissal was misplaced.

KRS 452.010 through KRS 452.110 provide for the transfer of civil actions from one trial court within the state

to another. KRS 452.010, entitled "Grounds for change of venue," limits such transfers to situations wherein the parties have either consented to the change or

> it appears that, because of the undue influence of his adversary or the odium that attends the party applying or his cause of action or defense, or because of the circumstances or nature of the case he cannot have a fair and impartial trial in the county.

Ceramichrome has not alleged that Jefferson County would be an inappropriate venue based on these factors identified in KRS 452.010(2). Additionally, inconvenience has been held an insufficient ground to invoke the statutory change of venue provisions. In Blankenship v. Watson, Ky. App., 672 S.W.2d 941, 944 (1984), this Court held that transfer of a wrongful death action from Webster County to Caldwell County on grounds of convenience was improper and "void ab initio." Admittedly, Blankenship construed KRS 452.010, rather than KRS 452.030, the section relied on by the trial court in this case. This latter section, however, cannot be viewed differently because it clearly concerns only the procedural aspects of a change of venue once the grounds for a change, identified in KRS 452.010, are present. Under the doctrine of in pari materia, the courts are required to construe together those statutes having a common purpose or subject matter. Dieruf v. Louisville & Jefferson Co. Bd. of Health, 304 Ky. 207, 200 S.W.2d 300, 302 (1947); Hardin Co. Fiscal Ct. v. Hardin Co. Bd. of Health, Ky.App., 899 S.W.2d 859, 862-63 (1995). Applying this fundamental principle of statutory construction, it is clear that the grounds for a change of venue

were stated by our legislature in KRS 452.010 and that the sections immediately following, including KRS 452.030, are statements of the process and procedure for implementing a change. There is no suggestion from the statute as a whole that the General Assembly ever intended KRS 452.030 to add grounds to those specified in KRS 452.010 for granting a change of venue motion. The trial court, therefore, did not have authority under the statute to decline jurisdiction in favor of the more "convenient and appropriate" Lincoln County venue.

With the statute inapplicable, the next inquiry is whether the same result can be achieved under the common law pursuant to the forum non conveniens doctrine. That doctrine

> recognizes that there are certain instances in which a court properly vested with jurisdiction and venue may, nonetheless, dismiss an action if it determines that it is more convenient for the litigants and witnesses that the action be tried in a different forum.

Roos v. Kentucky Ed. Ass'n, supra, 580 S.W.2d at 508. Application of this doctrine by Kentucky courts has been limited to interstate situations where doubts about the enforceability of the Kentucky judgment bear heavily on the decision whether to decline jurisdiction. See e.g., Williams v. Williams, Ky. App., 611 S.W.2d 807 (1981). In addition to the enforceability concern, other considerations important to a forum non conveniens decision include:

> the relative ease of access to 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 trial of a case easy, expeditious, and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh the relative advantages and obstacles to a fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed.2d 1055 (1947) (quoted in part in the Kentucky Court of Appeals decision in Roos).

Several states have incorporated forum non conveniens considerations into their intrastate change of venue statutes, and at least one state has ruled that the common law doctrine applies, independently of statutory rules, to intrastate as well as interstate situations. The Supreme Court of Illinois has held:

> If the reasons for applying the doctrine in certain interstate situations are good ones and in the best interest of justice, and we believe they are, then such reasoning is also persuasive where a comparable situation exists within the boundaries of this state.

Torres v. Walsh, 456 N.E.2d 601, 607 (Ill. 1983) (listing states whose change of venue statutes incorporate the common law rule).

Kentucky's change of venue statutes do not incorporate forum non conveniens, however, and otherwise the doctrine has been applied intrastate infrequently and uncertainly. In Skidmore By And Through Skidmore v. Meade, Ky., 676 S.W.2d 793 (1984), our Supreme Court neither affirmed nor foreclosed

intrastate application of forum non conveniens, ruling simply that the invocation of the doctrine by a trial court should not be disturbed through issuance of a writ of mandamus. In the Court's words, "[I]f that determination was erroneous as a matter of law or as an abuse of discretion, the question may be reviewed on appeal. . . ." 696 S.W.2d at 794. Justice Leibson, in dissent, stated:

> This is an entirely unique application of the doctrine of forum non conveniens. There is no precedent for intrastate transfer of a damage suit from one county to another on grounds of forum non conveniens. A plaintiff is entitled to select and file in any county in this state where venue lies.

Id. In Roos v. Ky. Ed. Ass'n, supra, this Court held that the doctrine had been misapplied to an intrastate situation where the competing venues were Jefferson Circuit Court and the Louisville Division of the United States District Court for the Western District of Kentucky. The Roos Court did not address the general scope or validity of an intrastate transfer. In Evans v. Commonwealth, Ky., 645 S.W.2d 346, 347 (1982), however, the Supreme Court, rejecting the intrastate application of forum non conveniens in a criminal case, said, "the fact is that there is no existing authority for it [the forum non conveniens dismissal]. It amounts to a change of venue upon a ground and to counties of destination not embraced within the applicable statutes." Thus, although we are unwilling to say that the doctrine of forum non conveniens can never be invoked by a Kentucky court in favor of another Kentucky venue, we must

acknowledge that the doctrine's status in our Commonwealth is, at best, unsettled.

Moreover, even were the doctrine better established, its use would be restricted to situations so burdensome to the defendant as to overcome a pronounced deference to the plaintiff's choice of forum. As Kentucky's highest court stated in Carter v. Netherton, Ky., 302 S.W.2d 382, 384 (1957): "Since it is for the parties seeking relief to choose the place of suit, the choice of a forum should not be disturbed except for weighty reasons . . ." The Supreme Court of Utah has expressed this point as follows:

> the general policy of the law is that when a plaintiff has commenced a lawsuit and acquired jurisdiction over the defendant, he should be allowed to pursue his remedy; and that such a motion to dismiss should be granted only with great caution and under compelling circumstances. That is, where it appears either that the plaintiff has selected an inconvenient forum for the purpose of harassing or annoying the defendant, or where upon an analysis of the factors hereinabove set out, they preponderate so strongly against trying the case here, and in favor of the greater convenience of trying it somewhere else, that to deny the motion would work a great hardship upon the defendant.

Summa Corporation v. Lancer Industries, Inc., 559 P.2d 544, 546 (Utah 1977). See also Torres v. Walsh, supra 456 N.E.2d at 607 (adopting the intrastate applicability of forum non conveniens: "We also caution our trial courts that unless those factors [the factors to be considered in deciding whether to dismiss] strongly favor the defendant, then the plaintiff should be allowed to exercise his choice in deciding in what forum to bring the case when venue is proper.") In Norwood v. Kirkpatrick, 349 U.S. 29,

75 S.Ct. 544, 99 L.Ed. 789 (1955), the United States Supreme Court, construing 28 U.S.C. § 1404, the federal transfer of venue statute, quoted with approval this passage from All States Freight v. Modarelli, 196 F.2d 1010 (3rd Cir. 1952):

> "The forum non conveniens doctrine is quite different from Section 1404(a). That doctrine involves the dismissal of a case because the forum chosen by the plaintiff 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. It is quite naturally subject to careful limitation for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate."

349 U.S. at 31. Earlier, as noted above, in Gulf Oil Corporation v. Gilbert, the Supreme Court had cautioned that "unless the balance [of forum non conveniens factors] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." 330 U.S. at 508. Admittedly, in interstate and international situations, where the chosen venue has tenuous connections to the plaintiff and his cause of action, the courts may grant less deference to the plaintiff's choice, but even then the plaintiff's chosen venue is preferred absent serious inconvenience. See, e.g., Wieser v. Missouri Pacific Railroad Co., 456 N.E.2d 98 (Ill. 1983) (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 1021 S. Ct. 252, 70 L. Ed. 2d 419 (1981).

In light of this authority, we believe the trial court misapplied the forum non conveniens doctrine in this case. For although it may be conceded that Ceramichrome will find Jefferson

County a less convenient venue than its home county, Lincoln, there is no suggestion that its participation in a trial in Jefferson County will impair its defense, subject it to an inconvenience so great as to amount to "harassment" or "oppression," or otherwise render the proceedings unfair.

Practically speaking, Jefferson County is not geographically distant, being located approximately 85 miles from Lincoln County. Ceramichrome's likely witnesses are within Jefferson Circuit Court's subpoena power under CR 45 and CR 32.01(c); the case is not apt to require a view of Ceramichrome's premises; and the other likely evidence, such as employee files and other company documents, is readily portable. Ceramichrome has not indicated that the cost of attending trial in Jefferson County will so exceed the cost of a local trial as to compromise its strategy or raise a question of vexation or harassment. Nor has Ceramichrome substantiated its suggestion that, because many corporations employ process agents in Jefferson County, Jefferson Circuit Court has been or is apt to become inundated with inconvenient suits against distant corporations. Even if that potentiality could be substantiated it is a factor more properly addressed to our General Assembly.

Notably, Ceramichrome's motion and proof focus on the admitted lack of any real connection between Jefferson County and the subject matter of the lawsuit rather than the extreme inconvenience of the venue. In essence, Ceramichrome seeks reversal of the KEM Mfg. holding that the mere presence of a process agent provides proper venue. This is a step we are not

prepared to take. The reasoned conclusion in KEM Mfg. often assures a plaintiff the choice of more than one venue, a not insignificant concern. Moreover, in the seventeen years since KEM Mfg. was decided, corporations doing business in Kentucky have had the option of avoiding its impact by designating a process agent in a county where the corporation is willing to litigate. Certainly Ceramichrome could have appointed a process agent located in Lincoln County. Finally, with respect to a statutory claim such as the discrimination action presented here, the legislature may adopt a specific venue statute assuring that a lawsuit will be brought where the challenged conduct occurred. The Kentucky employment discrimination statute, for whatever reason, has no such venue provision and the general rules must apply.

In conclusion, while Congress and several state legislatures have adopted liberal intra-jurisdictional change of venue statutes incorporating and expanding on the common law doctrine of forum non conveniens, Kentucky's General Assembly has not done so. Whether that doctrine itself applies within Kentucky to permit dismissal of suits in favor of another Kentucky venue is unclear, but even if the trial court did not err by invoking forum non conveniens to effect an intrastate transfer of venue, we believe application of that doctrine to these facts was an abuse of discretion. Any inconvenience to Ceramichrome which may result from having the trial in Jefferson County, as opposed to Lincoln County, simply does not appear and has not been shown to be so substantial that Bowman and Martin

should be denied their chosen forum and compelled to reinstitute suit in Lincoln County.

We therefore reverse the July 23, 1996, order of Jefferson Circuit Court dismissing the actions brought by Bowman and Martin and remand for reinstatement thereof.

BUCKINGHAM, JUDGE, CONCURS.

EMBERTON, JUDGE, DISSENTS BY SEPARATE OPINION.

EMBERTON, JUDGE, DISSENTING. Although in reading Ky. Rev. Stat. (KRS) 452.450, I am not convinced that in KEM Mfg. Corp. v. Kentucky Gem Coal Co., Inc., Ky. App., 610 S.W.2d 913 (1981), we gave the legislature's intended meaning to "agent," my disagreement with the majority lies more with its finding of abuse of discretion by the trial court than with its refusal to revisit KEM. The trial court expressly rejects use of the doctrine of forum non conveniens on the grounds that the Kentucky Supreme Court has established no precedent for its use in intrastate matters. However, equally obvious, neither has it established precedent rejecting such application. I agree with the result reached by the trial court; however, I believe that result should be supported expressly by the doctrine of forum non conveniens.

With respect to my associates, I would hold that the trial court did not abuse its discretion in reaching its result, and therefore, I would affirm.

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