Kentucky's Convoluted Path to Fundamental Fairness for Defendants in Tort Actions

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Both Kentucky defendants and courts must navigate a convoluted procedural mechanism when seeking an apportionment instruction to include a non-party joint tortfeasor who is responsible for all or a part of the plaintiff's injuries. Until Kentucky's apportionment statute is updated, unsuspecting practitioners must beware.

I. Seeking apportionment from non-parties in Kentucky

The Kentucky Supreme Court's adoption of comparative negligence in *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984), "was premised upon the principle of fundamental fairness that liability should be assessed in relation to fault and that the extent of liability should be determined by the extent of the fault." *Dix & Assocs. Pipeline Contrs. v. Key*, 799 S.W.2d 24, 27 (Ky. 1990). As a result of Kentucky's adoption of comparative negligence, "when there are joint tortfeasors[,] the liability of either of them is limited by the extent of his fault." *Floyd v. Carlisle Const. Co., Inc.*, 758 S.W.2d 430, 432 (Ky. 1988). Therefore, in tort actions involving more than one tortfeasor, it is necessary to apportion a specific share of the total liability to each tortfeasor.

Kentucky's apportionment statute, KRS 411.182, which codified this common law practice for determining the respective liabilities of joint tortfeasors, provides in part that:

> (1) In all tort actions, including products liability actions, involving fault of more than one (1) party to the action, including third-party defendants and persons who have been released under subsection (4) of this section, the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories or, if there is no jury, shall make findings indicating:
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> > (a) The amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and
> >
> > (b) The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who

has been released from liability under subsection (4) of this section.

(2) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

KRS 411.182(1)-(2). The statute's direction that a trier-of-fact consider the conduct of "each party at fault" means only "those parties complying with the statute as named parties to the litigation and those who have settled prior to litigation, not the world at large." *Baker v. Webb*, 883 S.W.2d 898, 900 (Ky. App. 1994).

But what happens when a joint tortfeasor responsible for all or a part of the plaintiff's injuries is not a named party in the litigation? It is well-established that the plaintiff is the "master of his complaint" and can sue whomever he wishes. As a matter of practicality, plaintiffs may choose to sue the "deep pockets" or the entity likely to be viewed as less sympathetic to a jury. Other times, a plaintiff may not be able to locate a joint tortfeasor or may only be able to sue joint tortfeasors in different venues. In such situations, a defendant could not receive an apportionment instruction against a non-settling nonparty who may have caused part of the plaintiff's injuries. *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274, 295 (Ky. App. 2009).

Defendants who believe that another party should bear some degree of fault for a plaintiff's injuries may turn to Kentucky Rule of Civil Procedure ("CR") 14.01 or its federal counterpart and seek leave to file a third-party complaint against that party. But first, as all of our civil procedure professors repeatedly emphasized in law school, "What does the rule say?" Rule 14.01 provides as follows:

A defendant may move for leave as a third-party plaintiff to assert a claim against a person not a party to the action *who is or may be liable to him for all or part of the plaintiff's claim against him*… The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13.

CR 14.01 (emphasis added).

The federal counterpart to CR 14.01, FED. R. CIV. P. 14(a)(1), similarly provides that "[a] defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 14 days after serving its original answer."

As written, the impleader rule contemplates that third-party practice is appropriate only for purposes of indemnification – not apportionment.

Contribution, or the right to apportionment, "arises when two or more joint tortfeasors are guilty of concurrent negligence of substantially the same character which converges to cause the plaintiff's damages." *Degener v. Hall Contracting Corp.*, 27 S.W.3d 775, 778 (Ky. 2000). On the other hand, indemnification is only "available to one exposed to liability because of the wrongful act of another with whom he/she is not in pari delicto." *Id.* at 780. With respect to indemnification, the Kentucky Supreme Court has explained:

> The cases in which recovery over is permitted in favor of one who has been compelled to respond to the party injured are exceptions to the general rule, and are based upon principles of equity. Such exceptions obtain in two classes of cases: (1) Where the party claiming indemnity has not been guilty of any fault, except technically, or constructively, as where an innocent master was held to respond for the tort of his servant acting within the scope of his employment; or (2) where both parties have been in fault, but not in the same fault, towards the party injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury.

Id. (citation omitted).

It is within the sound discretion of the trial court whether to grant a defendant leave to file a third-party complaint, but such a pleading "is appropriate only in those cases where the proposed third-party defendant would be secondarily liable to the original defendant in the event

the latter is found liable to the plaintiff." *Dwyer Concrete Lifting of Lexington, Inc. v. Alchemy Eng'g, Inc*., 2013 WL 375471, at *3, 2013 Ky. App. Unpub. LEXIS 81, at *8 (Ky. App. Feb. 1, 2013) (citing 6 KURT A. PHILLIPS, ET AL, KENTUCKY PRACTICE: RULES OF CIVIL PROCEDURE, RULE 14.01 (6th ed. 2012)). The Sixth Circuit has further explained the proper use of the federal impleader rule, FED. R. CIV. P. 14(a), as follows:

> Third-party pleading is appropriate only where the third-party defendant's liability to the third-party plaintiff is dependent on the outcome of the main claim; one that merely arises out of the same set of facts does not allow a third-party defendant to be impleaded. A defendant attempting to transfer the liability asserted against him by the original plaintiff to the third-party defendant is therefore the essential criterion of a third-party claim.

Am. Zurich Ins. Co. v. Cooper Tire & Rubber Co., 512 F.3d 800, 805 (6th Cir. 2008). Yet, "[d]espite the clear language of the impleader rule on this point, some defendants continue to attempt to implead a third party on the basis of the third-party defendant's direct liability to the plaintiff." 3 JAMES WM. MOORE ET AL., MOORE'S FED. PRAC. & PRO. 14.04 (3d ed. 1997)). Such attempts are properly rejected by the courts. *Id.* Thus, where a defendant cannot state a claim against a potential third-party for indemnification, the court may properly deny the defendant leave to file a third-party complaint against a joint tortfeasor.

If a defendant is not entitled to an apportionment instruction against a non-settling non-party and if the court may properly deny leave of court to file a third-party complaint against a joint tortfeasor, how does a defendant in Kentucky achieve that principle of fundamental fairness that liability should be determined only by the extent of fault?

In *Kevin Tucker & Assoc., Inc. v. Scott & Ritter, Inc.*, the Kentucky Court of Appeals suggested in a footnote that impleading a third-party defendant, even if the third-party complaint is later dismissed for failure to state a claim, would enable a defendant to obtain an apportionment instruction at trial:

> Under the apportionment rules set out above, third-party defendants may often be entitled to dismissal on the grounds that they cannot be liable to the third-party plaintiff. This does not mean that defendants should not assert these third-party claims; for if there is never an "active assertion of a claim" against the third party, liability cannot be apportioned to him. . . . Of course, if the third-party plaintiff's claim is dismissed, the plaintiff may ordinarily amend his complaint to make the ex-third-party defendant a defendant.

842 S.W.2d 873, 874 n.5 (Ky. App. 1992), *overruled in part on other grounds by Degener*, 27 S.W.3d 775 (citations omitted). Two years later, the Court of Appeals cautioned that a defendant who does not utilize CR 14.01 to bring into the litigation those nonparties whom she feels may be liable to the plaintiff "does so at her own peril." *Baker v. Webb*, 883 S.W.2d 898, 899 (Ky. App. 1994).

Kentucky courts have thereby fashioned a procedural mechanism for defendants to obtain an apportionment instruction against a joint tortfeasor not named as a party to the action: a defendant must file a third-party complaint against a joint tortfeasor and the court may, on motion, thereafter dismiss the third-party complaint for failure to state a claim.

A federal court's application of the current procedural mechanism required to obtain an apportionment instruction is illustrative. In *Compton v. City of Harrodsburg*, the plaintiff filed suit against the city and city employees for civil rights and state law violations arising out of the plaintiff's sexual relationship with a member of the city police department. 2013 WL 5503195, at *1, 2013 U.S. Dist. LEXIS 142306, at *1-2 (E.D. Ky. Oct. 2, 2013). The city and a city employee then sought leave to file a third-party complaint against the plaintiff's parents. However, "[r]ather than assert a third-party complaint asserting that the Comptons are liable to *Defendants*, Defendants are attempting to assert a third-party claim based upon an allegation that the Comptons are liable to *Plaintiff*." 2013 WL 5503195, at *4, 2013 U.S. Dist. LEXIS 142306, at *9.

Although the defendants stated allegations against the parents that, if proved at trial, would warrant an apportionment instruction, the court recognized that the practice of impleading a third party only for purposes of apportionment was not allowed by the rules of civil procedure. To preserve the defendants' apportionment instruction, the court followed the practice established by courts applying Kentucky law:

> The practice is to bring the alleged wrongdoer into the case by a third party complaint only to then have it dismissed. Based upon this practice, the Court will grant Defendants' Motion to File a Third–Party Complaint. However, as discussed above, Defendants do not assert a valid claim for indemnity, and apportionment is not an independent cause of action. Therefore, in seven days, the Court will sua sponte dismiss without prejudice the third-party complaint for failure to state a claim on which relief can be granted.

2013 WL 5503195, at *5, 2013 U.S. Dist. LEXIS 142306, at *5 (citations and quotations omitted).

II. A look at other jurisdictions

No other state appears to follow a procedure similar to that used in Kentucky. Instead, many states have enacted or adopted more straightforward rules and procedures for seeking apportionment.

Our neighbors to the north have codified their apportionment procedures by statute. In Indiana, "a defendant may be treated along with another defendant as a single party where recovery is sought against that defendant not based upon the defendant's own alleged act or omission but upon the defendant's relationship to the other defendant." IND. CODE § 34-51-2-4. In Ohio, the fault of a non-party must be pled as an affirmative defense, although the statute allows a defendant to raise the affirmative defense "at any time before the trial of the action." OHIO REV. CODE ANN. § 2307.23.

In Arizona, which like Kentucky adheres to a pure form of comparative fault, the statute

is even more straightforward: "In assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury, death or damage to property, regardless of whether the person was, or could have been, named as a party to the suit." ARIZ. REV. STAT. 12-2506(B). Arizona requires a defendant to make a "claim" against the non-party, but it does not mean that a third-party complaint must be filed: "The relative degree of fault of the claimant, and the relative degrees of fault of all defendants and nonparties, shall be determined and apportioned as a whole at one time by the trier of fact." ARIZ. REV. STAT. 12-2506(C). Arizona's appellate courts have interpreted the statute to mean that "a defendant can name a non-party at fault even if the plaintiff is prohibited from directly naming or recovering from such a party" and that the statute prevails over competing state statutes prohibiting the right of contribution against employers. *Ocotillo W. Joint Venture v. Superior Court*, 844 P.2d 653, 655 (Ariz. Ct. App. 1992); *see also Dietz v. Gen. Elec. Co.*, 821 P.2d 166, 171 (Ariz. 1991).

In Colorado,

> the finder of fact in a civil action may consider the degree or percentage of negligence or fault of a person not a party to the action, based upon evidence thereof, which shall be admissible, in determining the degree or percentage of negligence or fault of those persons who are parties to such action. Any finding of a degree or percentage of fault or negligence of a nonparty shall not constitute a presumptive or conclusive finding as to such nonparty for the purposes of a prior or subsequent action involving that nonparty.

COLO. REV. STAT. § 13-21-111.5(3)(a). Defendants in Colorado can seek apportionment from a non-party if they give notice within 90 days of commencement of the action by filing a pleading identifying the non-party and briefly stating the basis for why the non-party is believed to be at fault. COLO REV. STAT. § 13-21-111.5(3)(b).

In Utah, fault can only be allocated to a non-party if a party files a "description of the factual and legal basis on which fault can be allocated and information identifying the non-

party." UTAH CODE ANN. § 78B-5-821(4). The "description" must be filed no later than 90 days before trial. *Id*. This statute was enacted by the state's legislature after the Utah Supreme Court held that the fault of a non-party could not be considered in a jury instruction. *See, e.g., Field v. Boyer Co.*, 952 P.2d 1078 (Utah 1998).

Florida's comparative fault statute provides that "in order to allocate any or all fault to a nonparty, a defendant must affirmatively plead the fault of a nonparty . . . either by motion or in the initial responsive pleading when defenses are first presented, subject to amendment any time before trial . . . ." FLA. STAT. ch. 768.81(3)(a)(1). The statute goes on to articulate the legal standard for apportionment. To allocate fault of a non-party on the verdict form for purposes of apportionment, "a defendant must prove at trial, by a preponderance of the evidence, the fault of the nonparty in causing the plaintiff's injuries." FLA. STAT. ch. 768.81(3)(a)(2). "A defendant seeking to have the jury apportion its fault with that of a nonparty has the burden to plead and prove its entitlement to that benefit." *Clark v. Polk County*, 753 So. 2d 138, 142 (Fla. Dist. Ct. App. 2000). Failure to plead the negligence of a non-party waives the right to apportionment. *D'Angelo v. Fitzmaurice*, 863 So.2d 311, 316 (Fla. 2003).

III. Recommendation for Kentucky

As the law in Kentucky currently stands, a defendant seeking apportionment with a non-party joint tortfeasor must file a third-party complaint against that joint tortfeasor, asserting claims that the defendant knows are not warranted by law and that will thereafter be dismissed for failure to state a claim. It is only by utilizing this convoluted procedure that defendants are ensured fundamental fairness in tort actions.

Many other states have enacted or adopted more straightforward rules and procedures for seeking apportionment, and Kentucky should follow their lead. Kentucky should revise its

apportionment statute, KRS 411.182, to provide that a defendant may freely amend its answer before trial to assert a defense that a non-party is at fault and to permit the apportionment of fault to such a non-party. Because a defendant may not be aware of the identity or the fault of a non-party until the end of the discovery process, this flexible approach will ensure that a defendant's liability to a plaintiff is limited to the extent of its fault, consistent with principles of fundamental fairness.

Until and unless the Kentucky legislature decides to codify a clearer procedural mechanism for defendants to seek apportionment with non-parties, defense attorneys in Kentucky should be cognizant of, and certain to follow, the current entangled pathway that eventually leads to fundamental fairness. As the law currently stands, a defendant must engage in the fiction of filing a third-party complaint asserting unwarranted claims against the joint tortfeasor. While the complaint may be dismissed for failure to state a claim, this active assertion of a "claim" permits the inclusion of an apportionment instruction. Kentucky practitioners who fail to follow this unique procedure do so at their own risk.

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