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Julie O'Daniel McClellan

University of Kentucky

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Apportioning Liability to Nonparties in Kentucky Tort Actions: A Natural Extension of Comparative Fault or a Phantom Scapegoat for Negligent Defendants?

INTRODUCTION

In *Walt Disney World v. Wood*, a frequently noted and highly publicized decision, the Supreme Court of Florida affirmed the trial court's joint judgment against Walt Disney World for eighty-six percent of the total damages, even though the jury had only apportioned one percent of fault to the company. The plaintiff in that case was injured when a bumper car driven by her fiancé struck the bumper car that she was driving. At trial, the jury apportioned fourteen percent of the fault to the plaintiff, eighty-five percent of the fault to the fiancé, and only one percent of the fault to Walt Disney World. However, since the plaintiff did not join the fiancé as a defendant to the action, the court issued a judgment against the corporate defendant for eighty-six percent of the damages under the doctrine of joint and several liability. This case illustrates the inequity that has caused some states to abandon the judicially created doctrine of joint and several liability in favor of a system which apportions liability among multiple tortfeasors according to their equitable share of fault.

Joint and several liability is a judicially created doctrine in which each defendant is liable for the entire amount of a plaintiff's damages, no matter how minimal his contribution to the accident. Therefore, the

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1 *515 So. 2d 198* (Fla. 1987).
2 *Id.* at 199.
3 *Id.*
4 *Id.*
5 In fact, the *Wood* case “arose before the adoption of *Fla. Stat. Ann. 768.81 ... which severely limits the doctrine of joint and several liability. The statute would dictate a different result.*” HENRY WOODS, *The Negligence Case, Comparative Fault § 13:4*, at 80-81 (Supp. 1991).
6 *Wood, 515 So. 2d* at 200.
plaintiff can recover all of his damages from any defendant. The doctrine is based on the theory that has been used to rationalize the doctrine of contributory negligence—that an injury caused by joint tortfeasors is indivisible. The indivisible injury theory rests on the premise that it is impossible to divide liability or damages for a single injury, such as death or a broken arm, that has been created by more than one causative force. Because the injury cannot be divided, each tortfeasor is liable for the entire amount of damages. In most states, however, paying defendants are entitled to contribution from other tortfeasors on a pro rata basis (each tortfeasor pays an equal amount no matter how minimal his contribution to the damages).

The shift away from joint and several liability is often viewed as a natural extension of the principles that supported the countrywide adoption of the doctrine of comparative negligence. In the past two decades, a substantial majority of states have abandoned the common law doctrine of contributory negligence, which acts as an absolute bar to the plaintiff's recovery in negligence actions, and have replaced it with the more equitable doctrine of comparative negligence, which apportions damages between the plaintiff and defendant according to each party's relative degree of fault. In moving away from a contributory negligence scheme to a fault-based comparative negligence system, courts and legislatures across the country have struggled to justify other common law or statutory doctrines, such as joint and several liability, that evolved as part of a contributory negligence system. Changes in some of these long-standing doctrines were inevitable, however, if a fault-based system were to survive. Although some states have remained reluctant to alter common law principles, many of which have been embedded in our

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7 Woods, supra note 5, at 225.
9 Id.
10 Id.
11 Id. § 50 at 338, 340.
12 See Floyd v. Carlisle Constr. Co., 758 S.W.2d 430, 432 (Ky. 1988) (holding that in order to be consistent with comparative negligence principles, fault must be apportioned to those settling with the plaintiff before trial, even if the plaintiff did not file a formal claim against them).
13 Keeton et al., supra note 8, § 67, at 471-72.
14 See, e.g., id. at 475-79 (discussing the effect of comparative negligence on joint and several liability and other tort doctrines).
15 Id. at 475. Other doctrines at risk include the last clear chance doctrine and the assumption of the risk defense. Id. at 477.
country's tort system for the past century, other states have recognized and responded to the need to revise doctrines such as joint and several liability in order to avoid troublesome results like that reached in the Woods case.\textsuperscript{16}

The general policy justification behind a move to a fault-based system for allocating damages between a plaintiff and defendant is that each party's liability should be limited to the extent of his fault rather than a plaintiff's recovery and a defendant's liability being an all-or-nothing situation.\textsuperscript{17} This policy raises questions about the need for a similar allocation of damages among multiple defendants. Although most states retained the judicially created doctrine of joint and several liability following the move to comparative negligence,\textsuperscript{18} many of these states' legislatures or judiciaries have eventually abrogated or limited joint and several liability in favor of an apportionment scheme.\textsuperscript{19} However, the abandonment of joint and several liability itself raises questions about the fate of other long-standing common law and statutory doctrines such as contribution, indemnity, and the traditional application of workers'

\textsuperscript{16} Id. at 475-79.
\textsuperscript{17} Id. at 468-70.
\textsuperscript{18} WOODS, supra note 5, at 225 (1978).
\textsuperscript{19} Id. For example, Vermont's comparative fault statute, VT. STAT. ANN. tit. 12, § 1036 (1979), partially abandons joint and several liability by providing that each tortfeasor is liable only for the relative share of damage that he caused, compared to the damage caused by the other liable defendants. New Hampshire and Nevada have similar statutes. Two additional states, Texas and Oregon, have statutorily limited joint and several liability when the plaintiff is more causally at fault than the defendant(s). WOODS, supra note 5, at 225-26; Walt Disney World Co. v. Wood, 515 So. 2d 198, 201 n.4 (Fla. 1987).

A similar Florida statute has also recently been interpreted as having been "enacted to replace joint and several liability with a system that requires each party to pay for noneconomic damages only in proportion to the percentage of fault by which that defendant contributed to the accident." Fabre v. Martin, 623 So. 2d 1182, 1185 (Fla. 1993). Joint and several liability remains in force in certain limited situations, such as for economic damages when the plaintiff's negligence is less than that of the defendant. Id. at 1184, 1186 n.1.

In addition, according to Wood, 515 So. 2d at 200-01, the following states have completely eliminated the common law doctrine of joint and several liability: Kansas, in Brown v. Keill, 580 P.2d 867, 874 (Kan. 1978) (interpreting KAN. STAT. ANN. § 60-258a(d) (1976)); New Mexico, in Bartlett v. New Mexico Welding Supply, Inc., 646 P.2d 579, 586 (N.M. Ct. App.), cert. denied, 648 P.2d 794 (N.M. 1982) (ruling that because New Mexico was a pure comparative negligence state, a defendant should not be held liable for the negligence of an unknown driver); and Oklahoma, in Paul v. N.L. Indus., Inc., 624 P.2d 68, 70 (Okla. 1980) ("To limit the jury to viewing the negligence of only one tortfeasor and then ask it to apportion that negligence to the overall wrong is to ask it to judge a forest by observing just one tree.").
compensation law. Therefore, the states that have taken a step away from joint and several liability have encountered the difficult choice of either incorporating these long-standing doctrines into the fault-based scheme or eliminating them completely.

Although judiciaries adopting the comparative negligence doctrine generally anticipated and discussed some of the impending problems more thoroughly than the legislatures, they did not foresee or provide for all of the problems and intricacies that have emerged. Kentucky is no exception. The Kentucky Supreme Court adopted the comparative negligence system relatively late20 and, therefore, had the benefit of hindsight in dealing with difficulties faced by other jurisdictions. Since its adoption of the doctrine, the Kentucky Supreme Court has consistently taken a proactive stance in its decisions, trying to anticipate and prevent many of the problems that have produced litigation in other jurisdictions. Nevertheless, Kentucky has encountered a considerable amount of difficulty in applying the comparative negligence doctrine to situations involving multiple tortfeasors.

Considering the initial reluctance of the Kentucky Supreme Court and General Assembly to adopt comparative negligence,23 Kentucky has since taken a rather aggressive stance in extending the reaches of the doctrine by providing for the apportionment of fault among multiple tortfeasors, some of whom are not present at trial. In fact, some members of the court have emphatically asserted that Kentucky has gone too far.24 Ironically, part of

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21 The Kentucky Supreme Court adopted comparative negligence in Hilen v. Hays, 673 S.W.2d 713, 718 (Ky. 1984).

22 See, e.g., Floyd v. Carlisle Constr. Co., 758 S.W.2d 430, 431-32 (Ky. 1988) (holding that fault must be apportioned to settling parties, even if they never had a formal claim asserted against them); Dix & Assocs. Pipeline Contractors Inc. v. Key, 799 S.W.2d 24, 29 (Ky. 1990) (approving apportionment of fault to a third-party defendant employer); Stratton v. Parker, 793 S.W.2d 817, 820-21 (Ky. 1990) (holding that when a jury apportions no fault to a settling party, the remaining defendant is not entitled to a credit for the amount paid by the settler, but must pay according to the percentage that the jury found the defendant to be at fault).

In his separate opinions in the above cases, Justice Leibson vigorously criticized the court’s proactive confrontation of issues not before it. See Floyd, 758 S.W.2d at 433-36 (Leibson, J., dissenting); Dix, 799 S.W.2d at 31-37 (Leibson, J., dissenting); Stratton, 793 S.W.2d at 821-23 (Leibson, J., concurring).

23 See Hilen, 673 S.W.2d at 715-17. Kentucky was the forty-second state to adopt comparative negligence. Id.

24 In a line of Kentucky Supreme Court cases involving apportionment of fault
what has prompted Kentucky to be so aggressive in its extension of comparative fault principles to multiple tortfeasor situations is that the state had actually been apportioning fault among multiple defendants in limited situations long before its adoption of comparative negligence. Kentucky first began to depart from the common law doctrine of joint and several liability as early as the late 1800s when it enacted section 454.040 of the Kentucky Revised Statutes ("KRS"), which provides that the jury in a trespass action may, in its sole discretion, assess several damages.25

In 1988, the Kentucky General Assembly passed a statute,26 modeled after portions of the Uniform Comparative Fault Act,27 that provides for the allocation of fault in tort actions.28 Although the statute deals directly with some of the problems previously raised, many questions and controversies remain, particularly in the area of apportioning fault to "nonparties." This Note surveys the present status of Kentucky law involving apportionment of fault to multiple tortfeasors and discusses and evaluates some of the controversies regarding the soundness of the law as it currently stands.

Part I of this Note focuses on the policies behind the widespread adoption of the comparative negligence doctrine in courts and legislatures across the country.29 Part II discusses the Kentucky legislative and judicial evolution of the doctrine of apportioning fault among tortfeasors prior to the state's adoption of comparative negligence.30 The Note then analyzes some Kentucky decisions following the adoption of comparative negligence that involve the extension of the comparative fault policy to multiple tortfeasor situations where fault is apportioned to "nonparties," particularly settling tortfeasors and parties who are immune, unnamed, unreachable, or have been dismissed before or during trial.31 Particular attention is paid to the ongoing debate between members of the Kentucky Supreme Court concerning the viability of these decisions and the

among multiple tortfeasors, some of whom are not present at trial, there has been an ongoing debate between Justice Vance and Justice Leibson regarding the soundness of the policies behind many of the court's decisions.

25 KY. REV. STAT. ANN. § 454.040 (Baldwin 1993); Stratton, 793 S.W.2d at 818-20 (providing a historical description of the development of joint and several liability and apportionment law in Kentucky).

26 KY. REV. STAT. ANN. § 411.182 (Baldwin 1993).


28 KY. REV. STAT. ANN. § 411.182 (Baldwin 1993).

29 See infra notes 34-68 and accompanying text.

30 See infra notes 69-104 and accompanying text.

31 See infra notes 105-85 and accompanying text.
competing interests involved. The final section discusses the 1988 Kentucky Apportionment of Liability Statute and its allocation of fault in tort actions, the Kentucky Supreme Court's response, and some questions involving the current state of the law.

I. THE COUNTRYWIDE STAMPEDE TOWARD COMPARATIVE NEGLIGENCE

The contributory negligence doctrine was first introduced into American common law as a defense in tort actions in 1824. Eventually, every American state adopted the doctrine and developed a body of common law based on a contributory negligence system. Under this system, when the defendant in a tort action raises contributory negligence as a defense, a plaintiff's recovery is completely barred if his own negligence in any way contributed to the accident. Similarly, under Kentucky's contributory negligence doctrine, which was judicially adopted in 1892, a plaintiff who had contributed to his injury to the extent that the accident would not have happened "but for" his negligence would not be able to recover from the defendant.

Although comparative negligence first appeared in American jurisprudence in the early twentieth century, the inherently inequitable doctrine of contributory negligence remained the prevalent rule in American states until around 1970. By the mid-1960s, only seven states had switched to comparative negligence. With the 1970s, however, came a stampede of states abandoning contributory negligence in favor of a more equitable system of comparative fault. By 1982, forty states had followed the trend. As of 1991, forty-four states had adopted some form of compar-
The primary criticism of contributory negligence is that its all-or-nothing approach to recovery provides a windfall for either the plaintiff or the defendant. Therefore, the general policy behind most states' move to a comparative negligence scheme is that the cost of the accident should not always be borne completely by the plaintiff or completely by the defendant. Rather, the liability for any particular injury should be assessed in direct proportion to fault. However, this seemingly straightforward policy might have underlying dual justifications of apportioning liability according to fault and ensuring recovery of injured plaintiffs which become antagonistic when the policy is extended to a multiple defendant situation.

The basic idea behind the comparative negligence doctrine is that in a system which bases liability upon fault, the extent of that fault should govern the extent of liability. If this justification is sound, it should arguably be extended to multiple tortfeasor situations in order to protect defendants from paying more than their equitable share of damages. However, increasing the likelihood that persons injured by negligent defendants will be fully compensated might also be an underlying motive for switching to a comparative negligence scheme. Instead of supporting apportionment of liability to joint tortfeasors, this latter justification would require the retention of joint and several liability.

In 1984, Kentucky became one of the last states to adopt a comparative fault system, in which the plaintiff's recovery in a negligence action is reduced in direct proportion to his fault. In *Hilen v. Hays* the Kentucky

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41 Prosser et al., *supra* note 20, at 576. The states that have adopted comparative negligence by judicial decision are Kentucky, California, Alaska, Michigan, Missouri, West Virginia, New Mexico, Illinois, Iowa and Florida. *Id.* at 570, 576. See generally Franklin & Rabin, *supra* note 20, at 388-89 (discussing the move toward comparative negligence in the United States).

42 See *Hilen v. Hays*, 673 S.W.2d 713, 717-19 (Ky. 1984) (adopting comparative negligence on the premise that liability should be limited to the extent of a party's fault).

43 See *id.* at 718.

44 See, e.g., *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1230-31 (Cal. 1975) (adopting comparative negligence in California and providing an extensive analysis of the doctrine).


46 *Id.*

47 *Id.*


49 *Id.*
Supreme Court acknowledged the inequities of an all-or-nothing contributory negligence system wherein any negligence on the part of the plaintiff completely bars his recovery. While recognizing the tendency of many other state courts to defer to the legislature, Justice Leibson, writing for the majority, justified the judicial implementation of the new doctrine of comparative negligence on the theory that since contributory negligence was a judicially created doctrine, it was the court's responsibility to abandon it.

Despite the fact that all of the Kentucky Supreme Court justices in Hilen agreed on the principles that support a comparative negligence approach, the court has been consistently split in recent decisions involving apportionment of liability among tortfeasors. Different underlying motivations of the individual justices might help to explain this split. Justice Leibson, writing for the majority in Hilen v. Hays, quoted Prosser in justifying the court's adoption of comparative negligence:

"The attack upon contributory negligence has been founded upon the obvious injustice of a rule which visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and quite possible much less at fault than the defendant who goes scot-free. No one has ever succeeded in justifying that as a policy, and no one ever will."

The above quotation seems to emphasize fairness to the plaintiff as a justification, thus supporting the retention of joint and several liability. Later in the opinion, though, Justice Leibson stated that "[c]omparative negligence . . . calls for liability for any particular injury in direct proportion to fault." This statement seems to support apportionment of damages among joint tortfeasors. However, Leibson consistently dissented in subsequent cases in which a majority of the court extended apportionment of liability to joint tortfeasors, some of whom were not present at trial, viewing it as a "natural extension" of the policies expressed in Hilen v. Hays.

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50 Id. at 717-19.
51 Id. at 715-17.
52 Id. at 718-19 (Leibson, J., majority); id. at 722 (Vance, J., dissenting) ("It seems just to me that in a system in which liability is based upon fault, the extent of the fault should govern the extent of the liability.").
53 Id. at 717 (quoting William L. Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 469 (1953)).
54 Id. at 718.
55 See, e.g., Floyd v. Carlisle Constr. Co., 758 S.W.2d 430, 433-36 (Ky. 1988) (Leibson, J., dissenting) (arguing that fault should not be apportioned to parties from
The extent to which the move to comparative negligence will affect tort law generally differs from state to state, depending on which form of comparative negligence the particular state adopts. There are basically three types of comparative negligence: pure, modified and slight/gross. In a pure comparative negligence system, a plaintiff's negligence in no way bars recovery, but serves to reduce his damages in proportion to his fault. The plaintiff recovers from a defendant even if the plaintiff himself was ninety-nine percent at fault. The Uniform Comparative Fault Act, which is widely endorsed by commentators, adopts pure comparative negligence. Fourteen states have opted for a pure system, including nine out of the ten states that have adopted comparative negligence through judicial decision. The Kentucky Supreme Court followed the trend set by other judiciaries in opting for a pure comparative fault system.

In a modified comparative negligence system, the plaintiff's contributory negligence does not prevent recovery unless it rises above a certain amount of the total fault. Two slight variations of the modified system exist, an "equal fault bar" approach and a "greater fault bar" approach. Under the "equal fault bar" approach, a plaintiff cannot recover if his fault is greater than or equal to the defendant's fault. Under the "greater fault bar" approach, a plaintiff is prevented from recovering only if his fault is greater than that of the defendant. This approach has been sharply criticized because of the likelihood that a jury will apportion equal fault in a close case. Most state

whom the plaintiff accepted a nominal settlement); Prudential Life Ins. Co. v. Moody, 696 S.W.2d 503, 506-10 (Ky. 1985) (Leibson, J., dissenting) (arguing that fault should not be apportioned to a party against whom the claim was dismissed because the statute of limitations barred the claim against him).

56 KEETON ET AL., supra note 8, § 67, at 471.
57 Id. at 471-72.
58 UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 33 (Supp. 1981). This Act was promulgated by the National Conference of Commissioners on Uniform State Laws. The Act has not yet been adopted in full by any state, but portions of the Act have served as models for state legislation and judicial decisions. Iowa and Washington, in particular, have adopted substantial portions of the Act. IOWA CODE ANN. § 668.3 (West 1984); WASH. REV. CODE ANN. § 4.22.070 (West 1986).
59 KEETON ET AL., supra note 8, § 67, at 472.
60 Id. at 471-72 & nn. 28, 31. West Virginia is the only state that has judicially adopted a modified comparative negligence scheme. Id. at 472 & n.32 (citing to Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979)).
61 Hilen v. Hays, 673 S.W.2d 713, 719 (Ky. 1984) (discussing pure and modified forms and ultimately selecting the pure form).
62 KEETON ET AL., supra note 8, § 67, at 473.
63 Id.
64 Id.
legislatures that have adopted comparative negligence have chosen one of the two modified versions. Two states have rejected the pure form as well as the variations of the modified form, however, and have instead opted for the slight/gross approach, wherein the plaintiff may recover only if his negligence is slight in comparison to the that of the defendant.

The move to comparative negligence was inevitably accompanied by a host of unanticipated implementation difficulties that have produced endless litigation in courtrooms across the country. The application of comparative negligence remains relatively straightforward in actions involving one plaintiff and one defendant. However, the difficulties in applying the comparative fault doctrine in actions where multiple parties are involved have necessitated a re-examination of some long-standing common law doctrines that are grounded in a contributory negligence regime. One major issue confronted by courts and legislatures is whether fault should be apportioned only to plaintiffs and defendants to an action, or also to third-party defendants and tortfeasors who are not present at trial, such as settling, unreachable, or immune tortfeasors.

II. THE COMMON LAW DEVELOPMENT OF APPORTIONMENT IN KENTUCKY

A. The State of the Law Prior to the Adoption of Comparative Negligence

The first Kentucky Supreme Court decision dealing with the apportionment of liability to “defendants” who are no longer present at

65 FRANKLIN & RABIN, supra note 20, at 389. The various rules regarding the comparative negligence systems adopted by legislative bodies have been explained as “the result of compromise between conflicting interests in the legislatures, and [as] smack[ing] of political expediency rather than of any reason or logic in the situation.” WILLIAM L. PROSSER, THE HANDBOOK OF THE LAW OF TORTS 437 (4th ed. 1971).

66 KEETON ET AL., supra note 8, § 67, at 474. The two states that have adopted the slight/gross approach are Nevada and South Dakota. Id. See generally FRANKLIN & RABIN, supra note 20, at 388 (explaining the various systems); PROSSER ET AL., supra note 20, at 577-79 (discussing the various approaches and providing examples of each).

67 KEETON ET AL., supra note 8, § 67, at 477-79 (discussing the effect of comparative negligence on other doctrines).

68 FRANKLIN & RABIN, supra note 20, at 389, 395-98. States adopting a modified version of comparative negligence also must determine whether the plaintiff’s negligence should be compared against each defendant or against all defendants combined. Id. at 397. This Note does not address that issue since Kentucky has adopted a pure comparative negligence system.
trial was *Orr v. Coleman*. In *Orr*, a passenger in an automobile accident sued the driver of the car in which she was riding, the owner of the car in which she was riding, and the driver of the other car involved in the accident. The plaintiff settled with the driver and owner of the car in which she was riding. At trial, the jury, pursuant to an instruction informing it of the $19,000 settlement and directing it to award an amount equal to the difference between the total damages and the amount of the settlement, awarded $22,000 against the remaining defendant. The Kentucky Supreme Court reversed, holding that neither the prior settlement nor its amount should have been disclosed to the jury, and that the jury should have been required to apportion fault to the settling tortfeasors.

The Supreme Court's decision in *Orr* was based not on comparative fault principles, but on an old Kentucky statute that allowed juries the discretion either to apportion fault among joint defendants to an action or to impose joint damages. If a jury decided to apportion under the statute, no right to contribution among defendants existed; each defendant just paid the percentage of total damages equal to his proportionate share of fault. The underlying policy behind the statute was that the damages should be apportioned among the joint tortfeasors according to their relative culpability even though the tortfeasors' liability to the plaintiff is joint and several. Until *Orr*, the statute's reach was relatively narrow because, when read literally, it only extended to joint defendants who were still present at trial when the verdict was rendered. The significance of the previously narrow reading of the statute was that the plaintiff's recovery was in no way affected by an apportionment of fault.

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69 455 S.W.2d 59 (Ky. 1970).

70 Id. at 60.

71 Id. It was unclear whether the damage figure set by the jury represented the plaintiff's total damages or damages after the subtraction of the settlement amount. However, the court did not have to reach that question in light of its decision that damages should have been apportioned. Id.

72 Id. at 61-62.

73 The decision in *Orr* was rendered fifteen years prior to the Kentucky Supreme Court's adoption of comparative negligence in 1984.

74 KY. REV. STAT. ANN. § 454.040 (Baldwin 1993).

75 Id.; KEETON ET AL., supra note 8, § 52, at 347 & n.25; Rogers, supra note 45, at 105.

76 *Orr*, 455 S.W.2d at 61.

77 This assumption is based on a literal reading of "defendants" as used in the statute. Rogers, supra note 45, at 105-06.
In Orr, the court interpreted the statute more broadly so as to include situations involving a settling defendant. The Orr court held that in such a situation, apportionment would no longer be discretionary as provided for under the statute, but mandatory. The rationale was that when a settling tortfeasor is no longer before the court, the remaining defendant has no chance of the jury choosing to apportion under the statute. Without apportionment, a judgment for the entire amount of damages is rendered against the remaining defendant, with a credit being given for amounts paid by the other party in settlement. Hence, if apportionment were not required, the defendant would pay the difference between the damages and the amount of the settlement and would therefore bear the burden of shouldering low settlements.

Allowing the nonsettling tortfeasor's liability to depend upon the amount of a settlement over which he has no control does not accomplish the statute's underlying policy of limiting a defendant's liability to an amount in proportion to his share of culpability. If this problem were solved by first assessing all of the damages to the remaining defendant and then allowing contribution from the settling tortfeasor, settlements would be discouraged. Therefore, the court reasoned that the solution was to require apportionment among the parties who had bought their peace before trial, on the arbitrary assumption that the jury would have exercised their discretion to apportion under the statute if the settler had gone to trial. Thus, after Orr, no matter what amount the settling party had paid the plaintiff, the plaintiff's recovery from the remaining defendant(s) would be reduced by the percentage of fault that the jury allocated to the settling party.

Although the court decided Orr long before it adopted comparative negligence, the policy behind its application of KRS section 454.040 indicates an underlying concern for fairness to defendants and a tendency toward a system of apportioning liability based on fault as well as a desire to encourage settlement. Orr was the first step on a long path taken by the Kentucky court system toward accomplishing those objectives.

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78 Orr, 455 S.W.2d at 61.
79 Id.; Rogers, supra note 45, at 105-06.
80 Orr, 455 S.W.2d at 61. The defendant bears this burden because without apportionment, the defendant will pay the difference between the damages and the settlement. In other words, the defendant only receives a credit for the amount paid by the settling defendant.
81 Id.
82 Id.; Rogers, supra note 45, at 106-07.
83 Orr, 455 S.W.2d at 61; Rogers, supra note 45, at 106.
Thus, when the court adopted comparative negligence several years later, it noted that Orr and KRS section 454.040 seem to favor a policy of apportioning liability according to fault.  

The Kentucky Supreme Court in Nix v. Jordan refused to extend apportionment to third-party defendants who, because they shared some close relationship to the plaintiff, were not originally joined as defendants, but whom the defendant brought into the action seeking contribution or indemnity.  

Although the court expressed a belief that it "might otherwise make good sense to apply the principle of apportionment among joint tortfeasors without exception," it declined to extend apportionment to third-party defendants for two reasons. First, the court explained that third-party defendants do not fit under the literal wording of KRS section 454.040 because it applies only to "defendants" to an action.  

The court refused to read the statute so liberally as to include third-party defendants and instead confined application of the statute to joint defendants, or defendants "as to the original plaintiff." Second, the court recognized that the Orr policy of encouraging settlement would not be furthered in this situation, because the plaintiff did not have any intention of asserting a claim against the third-party defendant. Therefore, after Nix, joint and several liability with the possibility of contribution continued in third-party claims against one who had not been joined by the plaintiff.  

After Orr and Nix, the jury could apportion liability between defendants in two situations. In the first situation, KRS section 454.040 gave the jury the option of either apportioning liability or issuing a joint judgment against defendants who remained present at trial. In the second situation, Orr required that the jury apportion fault to any of the named defendants who settled before trial. A few years later, the court extended the Orr doctrine to require apportionment to defendants who had

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84 Hilen v. Hays, 673 S.W.2d 713, 715 (Ky. 1984).
85 532 S.W.2d 762 (Ky. 1975), overruled by Dix & Assocs. Pipeline Contractors, Inc. v. Key, 799 S.W.2d 24, 29 (Ky. 1990).
86 Id. at 762-63. The third-party defendant in Nix was the plaintiff's husband, which may explain why she did not name him as an original defendant.
87 Id. at 763.
88 Id.
89 Id. The court also distinguished Orr v. Coleman, 455 S.W.2d 59 (Ky. 1970).
90 Nix, 532 S.W.2d at 763; Rogers, supra note 45, at 108.
91 Rogers, supra note 45, at 107 ("In cases such as Nix where there is no apportionment, contribution is permitted.").
92 KY. REV. STAT. ANN. § 454.040 (Baldwin 1993).
93 Orr, 455 S.W.2d at 59.
the claims against them dropped prior to submission to the jury, "whatever may have been the reason." In *Daulton v. Reed*, the plaintiff sued two defendants, but dropped the claim against one prior to submission to the jury. The jury found total damages of $8,568.75 and apportioned seventy-five percent of the damages to the remaining defendant and twenty-five percent to the dismissed defendant. However, since the latter was no longer present, the trial court entered the whole judgment against the remaining defendant and gave him a judgment for contribution against the dismissed defendant for twenty-five percent of the damages.

The Supreme Court of Kentucky reversed the trial court's decision in *Daulton* based on the principles asserted in *Orr*. The court noted that *Orr* "applies when there has been an active assertion of a claim against one who would be a defendant but for the fact that he had settled the claim." The court held that the same line of reasoning supports the application of *Orr* when the claim against the defendant has been dismissed, "whatever may have been the reason." In analogizing this situation to a settlement, the court seems to have based its decision on the assumption that the plaintiff in some way facilitated the dismissal of the claim. However, the court's statement that fault must be apportioned when a claim is dropped "no matter what may have been the reason" could be construed to include dismissal of claims by the trial court for reasons unrelated to the plaintiff's actions. In a later case, the Kentucky Supreme Court explained the application of apportionment: "A tortfeasor who is not actually a defendant is construed to be one for purposes of apportionment if he has settled the claim against him [*Orr*] or if he was named as a defendant in the plaintiff's complaint even though the complaint was subsequently dismissed as to him [*Daulton*]."

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94 Daulton v. Reed, 538 S.W.2d 306, 308 (Ky. 1976).
95 Id. at 307.
96 Id. at 308.
97 Id.
98 Id.
99 Id.
100 Id.
101 Id.
102 Id.
103 Id.
104 Rogers, *supra* note 45, at 108 ("It may be, then, that the *Daulton* Court reasoned that there must have been some sort of quid pro quo without which the claim would not have been dismissed.").
105 The former interpretation is more consistent with the *Orr* policy of protecting the incentive to settle in order to decrease the number of cases that must be resolved through the courts. *Id.* This point becomes important in analyzing more recent decisions which are based on the principles asserted in *Orr* and *Daulton*.
Thereafter, the state of the apportionment law in Kentucky remained unchanged until the adoption of comparative negligence in 1984.¹⁰⁴

B. Kentucky Apportionment Decisions After the Adoption of Comparative Negligence

Although the status of Kentucky's apportionment law did not change significantly in the first few years following the state's adoption of comparative negligence, a case decided by the Kentucky Supreme Court in 1985¹⁰⁵ started an ongoing debate between members of the court concerning the apportionment of liability to parties in multiple tortfeasor situations, particularly those in which one or more participants in the accident were not joined or were no longer parties to the action. In *Prudential Life Insurance Co. v. Moody*,¹⁰⁶ the jury apportioned liability between two defendants, pursuant to KRS section 454.040. The Kentucky Supreme Court reversed as to one defendant because the statute of limitations had run. The trial court subsequently denied the plaintiff's motion for a judgment against the remaining defendant for the entire amount.¹⁰⁷ The court of appeals reversed and entered a judgment for the entire amount of damages against the remaining defendant, reasoning that if the trial court had originally dismissed the claim against the other defendant, the jury would not have apportioned. Therefore, a joint judgment would have originally been rendered against the remaining defendant.¹⁰⁸

¹⁰⁴ John M. Rogers, *Apportionment in Kentucky After Comparative Fault*, supra note 45, provides a critical analysis of Kentucky's apportionment law. One major criticism of Kentucky's approach is that it seems illogical to allow apportionment (based on the theory that apportionment among joint tortfeasors should be allocated according to fault) when either the jury decides to apportion under KY. REV. STAT. ANN. § 454.040 (Baldwin 1993), or the plaintiff has entered into a partial settlement and, yet, *not* to allow it when the plaintiff for whatever reason decides not to assert a claim against a particular tortfeasor. In addition, *Nix* allows a plaintiff to sidestep the consequences of apportionment by simply not asserting a claim against, and not settling with, a certain defendant who either happens to be a friend or relative or has insufficient financial resources. This criticism led to the eventual overruling of *Nix* "to the extent that it prohibits apportionment of liability in tort actions between an original defendant and defendants brought into the litigation as third-party defendants." *Dix & Assocs. Pipeline Contractors, Inc. v. Key*, 799 S.W.2d 24, 29 (Ky. 1990).


¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 504.

¹⁰⁸ *Id.*
Upon discretionary review, the Kentucky Supreme Court reversed the court of appeals, based on a broad reading of KRS section 454.040 and Daulton v. Reed. The holding in Prudential Life significantly broadens the Daulton holding. In Daulton, the court analogized the dismissal of the claim to a quid pro quo settlement, thus justifying its decision by the fact that the plaintiff had in some way facilitated the dismissal of the claim in return for some form of compensation. Therefore, the Daulton court was merely extending the reasoning of the Orr court, with an eye toward encouraging settlement and eliminating unnecessary litigation.

Rather than focusing on Daulton's general policy of encouraging settlement, the Prudential Life court focused on the portion of the Daulton decision that stated that fault should be apportioned to a party against whom a claim had previously been dropped, "whatever may have been the reason." The result is that, under Prudential Life, fault is apportioned to parties from whom the plaintiff has not received, and cannot possibly receive, any compensation. The plaintiff's recovery is diminished by the amount of fault apportioned to the dismissed defendant.

Prudential Life is distinguishable from Daulton because the plaintiff in Prudential Life did not drop the claim against the defendant and received nothing as a result of the dismissal. Therefore, the policy of encouraging settlements, which was relied upon in Daulton, was inapplicable to the facts of Prudential Life. That discrepancy might have been the force behind Justice Vance's concurring opinion in Prudential Life, which rested explicitly on the general "fault" rational. Justice Vance asserted that the result reached by the majority was justified because of the principle asserted in Hilen v. Hays: no party should be held liable for more of the damages than the percentage caused by his fault.

Not surprisingly, Justice Leibson issued a dissenting opinion in Prudential Life in which he attacked KRS section 454.040 and the

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109 538 S.W.2d 306 (Ky. 1976). For a description of the case, see supra notes 95-103 and accompanying text.

110 Prudential Life, 696 S.W.2d at 504.

111 Daulton, 538 S.W.2d at 308.

112 Id.

113 Prudential Life, 696 S.W.2d at 504.

114 Rogers, supra note 45, at 117.

115 Prudential Life, 696 S.W.2d at 504 (Vance, J., concurring).

116 673 S.W.2d 713 (Ky. 1984).

117 Id. at 717.

118 Prudential Life, 696 S.W.2d at 506 (Leibson, J., dissenting).

119 Id. at 507.
Kentucky Supreme Court majority opinions in *Orr* and *Daulton*. Leibson stated that the statute was flawed because it was irreconcilable with the "indivisible injury" theory\(^\text{120}\) upon which joint and several liability is based and that *Orr* and *Daulton*, by analogy, unnecessarily extended the statute to dismissed parties.\(^\text{121}\) Leibson based this assertion on the premise that reducing a defendant's liability by an absent party's percentage of fault benefits the wrongdoer at the expense of the victim.\(^\text{122}\) Leibson pointed out that *Prudential Life* exemplifies the inequity of that result because the plaintiff, who was not at fault, only received compensation for half of his injury.\(^\text{123}\) According to Justice Leibson, in this situation, the negligent defendant should bear the loss rather than the innocent victim.\(^\text{124}\)

The tension between the opinions of Justice Vance and Justice Leibson\(^\text{125}\) underscores the diverse motivations of each in adopting comparative negligence. Although these differences at first may seem academic, they have proved to be the root of an ongoing split in the Kentucky Supreme Court in subsequent apportionment decisions.\(^\text{126}\)

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\(^\text{120}\) *Id.* The indivisible injury theory is the primary justification for the imposition of joint liability and is based on the assumption that certain results by their nature are incapable of practical division. When two or more causes combine, producing a single result such as death or a broken leg, the damages are viewed as incapable of allocation. Hence, courts have imposed the entire liability on each party whose negligence was a substantial factor in causing the loss. *Keeton et al.*, *supra* note 8, at 347.

\(^\text{121}\) *Prudential Life*, 696 S.W.2d at 508 (Leibson, J., dissenting).

\(^\text{122}\) *Id.*

\(^\text{123}\) *Id.* at 509.

\(^\text{124}\) *Id.* at 510.

\(^\text{125}\) Justice Vance's statement in his concurring opinion in *Prudential Life* reveals the extent of this tension:

The author [Leibson] of the majority opinion in *Hilen v. Hays*, *supra*, which held it basically unfair to charge a plaintiff with a greater share of the loss than his percentage of fault would justify, now dissents from a holding that it is basically unfair to charge a defendant with a greater share of the loss than his percentage of fault would justify. The dissent considers it fair for a defendant who is only 50% responsible for an injury to be saddled with 100% of the liability. *Prudential Life*, 696 S.W.2d at 505 (Vance, J., concurring).

\(^\text{126}\) See Dix & Assocs. Pipeline Contractors, Inc. v. Key, 799 S.W.2d 24, 29 (Ky. 1990) (apportioning fault to a third-party defendant); Stratton v. Parker, 793 S.W.2d 817, 821 (Ky. 1990) (holding the defendant responsible for the entire injury when the jury apportioned no fault to the settling party); Floyd v. Carlisle Constr. Co., 758 S.W.2d 430, 433 (Ky. 1988) (apportioning fault to a party who had settled with the plaintiff before trial even though the plaintiff did not assert a claim against the settling party); *Prudential Life*, 696 S.W.2d 503, 504 (Ky. 1985) (apportioning fault to a party who had been
Justice Vance's position is that joint and several liability does not survive the move to comparative negligence. In contrast, Justice Leibson's position is that joint and several liability should be retained in fairness to plaintiffs, despite its inconsistency with comparative fault principles.

The *Prudential Life* decision was an important cornerstone upon which Kentucky's apportionment law would be built. Although the majority did not explicitly base its decision on comparative fault principles, the opinion did signify a change in the attitude of the court, which was beginning to show less of an absolute concern for the recovery of the plaintiff and more concern for reaching an equitable result for all parties. The result in *Prudential Life* is arguably not unfair to the plaintiff because it was within the plaintiff's control to bring the claim within the time prescribed by the statute of limitations. Requiring the remaining defendant to pay for the plaintiff's failure to bring the claim within the statutory period would not have been fair. However, the applicability of such principles to situations in which the claim is dismissed for some reason outside of the plaintiff's control remains open.

In the year following *Prudential Life*, the court handed down a decision that seemed somewhat to back away from its prior decisions. In *Burke Enterprises, Inc. v. Mitchell*, the plaintiff, who was injured by a post-hole digger, sued the manufacturer and the rental company. He settled with the manufacturer on the eve of trial for $10,000, and the jury rendered a verdict for $17,956 against the rental company. The rental company did not request an apportionment instruction, and the jury did not receive one. The Kentucky Supreme Court held that an apportionment instruction against the settling party will not be given if not requested and that the remaining defendant should pay the entire amount of damages, minus a credit for the amount paid by the settler.

In rationalizing its decision, the court retreated to the indivisible injury theory that had seemed to be extinguished, or at least discredited,

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127 See Dix, 799 S.W.2d at 29-30 (Vance, J.) (reversing a required contribution by a defendant on the ground that it exceeds the defendant's liability under apportionment).
128 See id. at 33 (Leibson, J., dissenting) (protesting the apportionment scheme that abolishes the plaintiff's right to recover from a third-party tortfeasor by refusing to apply "equal shares" contribution among tortfeasors).
129 700 S.W.2d 789 (Ky. 1985).
130 Id. at 790.
131 Id. at 791.
132 Id. at 790.
133 Id. at 794.
134 Id. at 796.
The court noted the long-standing tort rule that "where two or more persons are potentially liable for a single indivisible harm, a payment by or on behalf of any of them shall be a credit against the total amount due." The opinion explained that the purpose of the rule was to prevent double recovery by the plaintiff. The reason that apportioning fault does not solve the double recovery problem is that apportionment presupposes the fault of the settler. When, as in Burke, no instruction is given, no fault is attributed to the settler. Thus, there should be no apportionment. In order to prevent a plaintiff from receiving a double recovery in such a situation, the remaining defendant should be given a credit.

Burke appears to be an illogical decision on many levels. First, Orr and Daulton seemed to mandate that juries apportion fault to settling parties in order to encourage settlement. Burke, in contrast, gives plaintiffs and defendants the option of agreeing to joint liability principles rather than apportionment. Justice Leibson pointed out this inconsistency in his dissenting opinion and suggested that the court overrule Orr. Justice Leibson's approach would be to restrict apportionment to the original confines of KRS section 454.040, that is, to defendants who are present at trial when the judgment is rendered, and to give defendants against whom the jury awards full damages a credit for the amount paid by a settling tortfeasor. This approach, Leibson argued, is the only way that the plaintiff will ever receive the amount of damages fixed by the jury. If fault is apportioned, he will invariably either receive a windfall (if the jury apportions little or no fault to the settler), or be sorely undercompensated (if the jury apportions a large portion of fault to the settler).

Justice Leibson's approach, which is one of three suggested by the Restatement (Second) of Torts, is followed by several other jurisdic-

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135 673 S.W.2d 713 (Ky. 1984). See supra notes 49-55 and accompanying text.
136 Burke, 700 S.W.2d at 794.
137 Id. at 795.
138 Id.
139 Id.
140 Id.
141 Orr v. Coleman, 455 S.W.2d 59, 61 (Ky. 1970).
142 Daulton v. Reed, 538 S.W.2d 306, 308 (Ky. 1976).
143 Rogers, supra note 45, at 121.
144 Burke, 700 S.W.2d at 797-98 (Leibson, J., dissenting).
145 Id. at 799.
146 Id. at 797-98.
147 RESTATEMENT (SECOND) OF TORTS § 886A cmt. m (1975).
tions that have adopted comparative negligence. One of the other Restatement approaches is to reduce the plaintiff's recovery by the percentage of the settling tortfeasor's liability for damages as apportioned by the jury. Justice Wintersheimer, who dissented in Burke, argued that this approach should be applied across the board. The approach taken by the Burke majority is a hybrid of Justice Leibson's and Justice Wintersheimer's approach.

One of the last cases to be decided before enactment of the 1988 statute is also one of the most noted and significant. In Floyd v. Carlisle Construction Co., the Kentucky Supreme Court approved apportionment of fault to a joint tortfeasor who was not named as a party to the action. In a thorough analysis of the majority's position on apportionment of fault to multiple defendants, Justice Vance emphatically stated that a tortfeasor who is not actually a defendant will be treated as a party to the action for apportionment purposes if he has "bought his peace" with the plaintiff before trial or if the claim against him has been dismissed. The opinion also made it clear that the apportionment of

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148 See American Motorcycle Assoc. v. Superior Court, 578 P.2d 899, 915 (Cal. 1979) (holding that a release or covenant entered into in good faith will reduce a joint tortfeasor's liability dollar for dollar and bar contribution from the settler) (superseded by statute, CAL. CIV. CODE § 143 (West 1994)).

149 Id. The third Restatement approach is to hold the nonsettling defendant liable for the whole amount and allow him contribution from the settling party if he pays more than his fair share. RESTATEMENT (SECOND) OF TORTS § 886A cmt. m (1975). This approach obviously discourages settlement and provides the plaintiff with a windfall. A fourth approach, which is followed in New York, is to reduce the defendant's liability by either the dollar amount of the settlement or the percentage of fault apportioned to the settler, whichever is the greater amount. FRANKLIN & RABIN, supra note 20, at 398.

150 Burke, 700 S.W.2d at 798 (Wintersheimer, J., dissenting); see also Orr v. Coleman, 455 S.W.2d 59, 61-62 (Ky. 1970) (giving sample jury instruction that would achieve this result).

151 The soundness of the Burke approach may be somewhat academic. It is hard to envision a situation in which both the plaintiff and the defendant would find a strategic advantage in not requesting an apportionment instruction. Aside from an oversight, this situation would only arise if the defendant viewed the settlement as being so high that he would be better off with a credit and the plaintiff viewed the settlement as being so low that he would be better off if the defendant were given a credit. Indicative of the scarcity with which this will occur is the fact that since Burke, there has been no reported case in which an apportionment instruction was not requested. Search of LEXIS, Kentucky library, Case file (Jan. 3, 1994).

152 KY. REV. STAT. ANN. § 411.182 (Baldwin 1993).

153 758 S.W.2d 430 (Ky. 1988).

154 Id. at 432.

155 Id.
fault to someone who is no longer a party to the action would not impose liability on them or warrant a judgment against them. Rather, the sole purpose of apportionment is to determine the amount of responsibility of the remaining parties and thereby limit their amount of liability.\textsuperscript{156}

The \textit{Floyd} decision is particularly significant in that the court took one more step in the direction of apportioning fault to "nonparties" by apportioning to a party who had never had a formal claim brought against them. The majority considered its decision to be a "natural consequence of [its] decision in \textit{Hilen v. Hays}"\textsuperscript{157} that liability should be limited to the extent of a party's fault.\textsuperscript{158} The opinion also indicated, in dicta, that if given the opportunity, the court would overrule \textit{Nix v. Jordan}\textsuperscript{159} and allow apportionment to third-party defendants without contribution.\textsuperscript{160} \textit{Floyd} illustrates the eagerness of the Kentucky Supreme Court to extend the reaches of apportionment of liability to multiple defendants.

In \textit{Floyd}, Justice Leibson again vigorously dissented\textsuperscript{161} to the majority's opinion, criticizing the court's willingness to confront issues not before it and insisting that apportionment of fault to parties who are "noncollectible" is not in line with \textit{Hilen v. Hays} and instead permits defendants to evade liability by "throwing blame on an unnamed person."\textsuperscript{162} Leibson's argument rests on the premise that apportionment should not be applied when the plaintiff has accepted some nominal settlement without naming the settling tortfeasor as a defendant.\textsuperscript{163} Leibson asserted that in all prior cases in which the court had approved apportionment pursuant to \textit{Orr},\textsuperscript{164} it was the plaintiff's decision to sue a party that had triggered the defendant's right to an apportionment instruction.\textsuperscript{165} In \textit{Floyd}, the plaintiff had not made such a choice, though he still could have prevented apportionment by not accepting the nominal settlement from the potential defendant. Nevertheless, Leibson views \textit{Floyd} as a "critical departure from established precedent."\textsuperscript{166}

\textsuperscript{156} \textit{Id.}
\textsuperscript{157} 673 S.W.2d 713, 718 (Ky. 1984) (adopting comparative negligence based on the principle that liability should be equal to fault).
\textsuperscript{158} 758 S.W.2d at 432.
\textsuperscript{159} 532 S.W.2d 762 (Ky. 1975), overruled by Dix & Assocs. Pipeline Contractors, Inc. v. Key, 799 S.W.2d 24, 29 (Ky. 1990). For a description of \textit{Nix}, see \textit{supra} notes 85-90 and accompanying text.
\textsuperscript{160} 758 S.W.2d at 432 n.1.
\textsuperscript{161} \textit{Id.} at 433 (Leibson, J., dissenting).
\textsuperscript{162} \textit{Id.} at 435.
\textsuperscript{163} \textit{Id.} at 434.
\textsuperscript{164} \textit{See supra} notes 69-83 and accompanying text.
\textsuperscript{165} 758 S.W.2d at 434 (Leibson, J., dissenting).
\textsuperscript{166} \textit{Id.}
C. Summary of the Law Prior to the Enactment of KRS Section 411.182

At the time the Kentucky Supreme Court decided Floyd, the Kentucky legislature was in the process of enacting KRS section 411.182, which was intended to clarify this area of the law. Prior to enactment of the statute, there were primarily three situations in which fault could be apportioned. Under KRS section 454.040, the jury had the option of either apportioning liability among defendants present at trial or rendering a joint judgment against them. Fault could also be apportioned to “nonparties,” or parties who were no longer present at trial, in two situations. First, under Orr and Floyd, the jury was required to apportion liability to a settling party, subject to the Burke limitation that if an apportionment instruction against a settling party were not requested, none would be given. Second, the Daulton/Prudential Life rule mandated that fault be apportioned to a party who had been dismissed before or during trial, “whatever may have been the reason.”

Prior to the enactment of KRS section 411.182, the plaintiff retained a strategic advantage and could control the outcome in almost every situation.

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168 See supra notes 74-76 and accompanying text.

169 See Rogers, supra note 45, at 104-05 (discussing the state of the law in Kentucky prior to the adoption of comparative negligence in Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984)).

170 455 S.W.2d 59 (Ky. 1970). See supra notes 69-83 and accompanying text.

171 758 S.W.2d 430 (Ky. 1988). See supra notes 153-66 and accompanying text.

172 700 S.W.2d 789 (Ky. 1985). See supra notes 129-46 and accompanying text.

173 538 S.W.2d 306 (Ky. 1976). See supra notes 95-103 and accompanying text.

174 696 S.W.2d 503 (Ky. 1985). See supra notes 106-26 and accompanying text.

175 Daulton, 538 S.W.2d at 308; see also Prudential Life, 696 S.W.2d at 504. The court has never addressed whether the Burke limitation, discussed supra notes 129-46, would apply in this situation. Theoretically, Burke should apply, because the reasoning behind Burke was that apportionment presupposes a finding of fault. It seems anomalous to allow the parties the option in one situation, and not to allow it in an analogous situation. However, if it is hard to fathom a situation in which neither the plaintiff nor the defendant would find an advantage in not requesting an apportionment instruction against a settling party, it is impossible to imagine a situation in which a defendant would not find it advantageous to have fault apportioned to a party who has been dismissed from the action. In that situation, the defendant has everything to gain and nothing to lose. Conversely, the plaintiff will invariably find an advantage in not requesting an instruction.
situation in which apportionment was possible. The plaintiff could always avoid apportionment by not joining a particular tortfeasor as a party to the action and by not settling with him before trial. Therefore, the plaintiff could exercise his discretion by not suing or settling with friends or relatives who might have played a major role in causing the accident and still recover the full amount of his damages from the named defendant, even though the defendant caused only a small part of the accident. Similarly, the plaintiff could choose not to sue financially insecure tortfeasors and recover the full amount from “deep pockets” who would have little or no chance of getting contribution from an insolvent joint tortfeasor. Therefore, prior to KRS section 411.182, the nonparty “scapegoat,” which would serve to reduce the defendant’s liability, only existed if the plaintiff himself provided it.

The result of the law as it existed was the defeat of one of the major policies behind Orr and Daulton, encouraging settlement, and the inconsistent application of the other principal justification behind apportionment, that each party’s liability should be limited to his amount of fault. For instance, why should the jury be required to apportion fault to a settling party and not to a defendant who is still present at trial? In either situation, if the jury did not apportion, at least one defendant ran the risk of paying much more of the judgment than the portion for which he was responsible.

The court’s decisions provided the plaintiff with the luxury of controlling the situation by drawing the line beyond which fault would be apportioned at the point where the plaintiff lost his strategic advantage. By 1988, however, this line had become rather blurred. For example, although Nix, which prohibited apportionment of fault to third-party defendants on the premise that they were not “defendants as to the original plaintiff,” remained valid, the Floyd majority had subse-

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176 The one exception to this rule was the situation in which the jury had the option of apportioning pursuant to KRS section 454.040.
177 See Walt Disney World Co. v. Wood, 515 So. 2d 198, 201 (Fla. 1987) (upholding trial court’s joint judgment against Walt Disney World for eighty-six percent of the plaintiff’s damages even though the jury had only apportioned one percent of fault to the company because the fiancé, who was found to be eighty-five percent at fault, was not a party to the action).
178 455 S.W.2d 59 (Ky. 1970). See supra notes 69-83 and accompanying text.
179 538 S.W.2d 306 (Ky. 1976). See supra notes 95-103 and accompanying text.
180 532 S.W.2d 762 (Ky. 1975), overruled by Dix & Assocs. Pipeline Contractors, Inc. v. Key, 799 S.W.2d 24, 29 (Ky. 1990).
181 Id. at 763.
182 758 S.W.2d 430, 432 n.1 (Ky. 1988).
quently put the *Nix* ruling in serious jeopardy by expressing a desire to overrule the decision.

Therefore, as of 1988, Kentucky law regarding the liability of multiple defendants was a hybrid of joint and several liability and apportionment of liability according to fault.\(^{183}\) At that time, the destiny of Kentucky apportionment law was far from settled, but one point of certainty was that change was on its way. From the time that *Orr*\(^{184}\) was decided in 1970 to the time KRS section 411.182 was passed in 1988, Kentucky common law underwent a clear, steady progression away from joint and several liability toward a more equitable system of apportioning liability in tort actions to both parties and nonparties according to fault.\(^{185}\) The statute that the legislature enacted in 1988 answered many of the questions and responded to many of the inconsistencies that were left by the court’s long string of decisions while, at the same time, leaving a few questions of its own behind.

III. THE KENTUCKY LEGISLATURE STEPS IN

A. KRS Section 411.182 and Allocation of Fault in Tort Actions

On July 15, 1988, KRS section 411.182 became effective. The statute, which applies to all tort actions involving injuries taking place subsequent to its enactment, reads as follows:

(1) In all tort actions, including products liability actions, involving fault of more than one 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:

(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

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\(^{183}\) It is important to remember, however, that because KRS section 454.040, discussed *supra* notes 71-72, had been on the books for a number of years, Kentucky technically never had pure joint and several liability, even before it adopted comparative negligence principles.

\(^{184}\) 455 S.W.2d 59 (Ky. 1970).

\(^{185}\) *See supra* notes 69-184 and accompanying text.
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.

(3) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under subsection (4) of this section, and shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(4) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable, shall discharge that person from all liability for contribution, but it shall not be considered to discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons shall be reduced by the amount of the released persons' equitable share of the obligation, determined in accordance with the provisions of this section.186

The Kentucky General Assembly modeled the statute after portions of the Uniform Comparative Fault Act.187 Perhaps the most important aspect of KRS section 411.182 is not the portions of the Uniform Act that it includes but, instead, the portions that it does not include. First, the Kentucky Act completely omits the section in the Uniform Act which provides for joint and several liability.188 In addition, the Kentucky General Assembly intentionally omitted sections of the Uniform Act dealing with set-off, contribution, and enforcement of contribution.189

The modern trend for states that have retained joint and several liability after adopting comparative fault is to also allow contribution

186 KY. REV. STAT. ANN. § 411.182 (Baldwin 1993).
188 UNIF. COMPARATIVE FAULT ACT § 2(c), 12 U.L.A. 33 (Supp. 1981) states: The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under section 6 [the equivalent of 411.182 section (4)] and enter judgment against each party liable on the basis of joint and several liability. For purposes of contribution under sections 4 and 5, the court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault. Compare this to KY. REV. STAT. ANN. § 411.182(3) (Baldwin 1993).
among defendants based on pure comparative fault. In contrast, those states that have abandoned joint and several liability have recognized the futility of retaining contribution. The omission of the joint and several liability and contribution provisions from the Kentucky statute indicates an intention of the General Assembly to abrogate joint and several liability, thereby obviating the need for contribution.

KRS section 411.182 does not significantly depart from the Kentucky Supreme Court’s treatment of liability of multiple tortfeasors. Although the court’s earlier decisions had retained joint and several liability in limited situations, the court seemed to be heading slowly in the direction of abandoning joint and several liability altogether. In fact, abandonment of joint and several liability is directly aligned with the court’s reasoning in Orr, Daulton, Hilen, Prudential Life and Floyd. However, while at first glance it appears that the General Assembly intended to abrogate joint and several liability completely, a


191 WOODS, supra note 7, at 227. The effect of adopting comparative negligence and abolishing joint and several liability is the elimination of any basis for contribution in those states. The reason is that if each party’s liability is limited to his extent of fault, each party will only have paid for his fair share of responsibility and will thus never be entitled to contribution from any other party. Id.

192 The situations in which joint and several liability was not completely abandoned were those involving third-party defendants, Nix v. Jordan, 532 S.W.2d 762, 762 (Ky. 1975), overruled by Dix & Assocs. Pipeline Contractors, Inc. v. Key, 799 S.W.2d 24, 29 (Ky. 1990), and where the jury exercised its discretion not to apportion under KRS section 454.040. The court had not yet directly addressed whether there would still be joint verdicts rendered in cases where no claim was ever asserted against a tortfeasor.

193 455 S.W.2d 59, 61 (Ky. 1970) (holding that apportionment to a settling tortfeasor is mandatory). See supra notes 69-83.

194 538 S.W.2d 306, 308 (Ky. 1976) (holding that fault should be apportioned to a defendant who has been dismissed from the suit for any reason). See supra notes 95-103 and accompanying text.

195 673 S.W.2d 713, 718 (Ky. 1984) (adopting comparative fault based on the premise that liability should be limited to fault). See supra notes 49-55 and accompanying text.

196 696 S.W.2d 503, 504 (Ky. 1985) (reaffirming Daulton by holding that fault should be apportioned to a defendant dismissed by the court because the statute of limitations had expired). See supra notes 106-26 and accompanying text.

197 758 S.W.2d 430, 432 (Ky. 1988) (holding that fault should be apportioned to a tortfeasor with whom the plaintiff had settled but had never named as a party to the action based on the premise that liability of named defendants should be limited to the amount of damages caused by their fault). See supra notes 153-66 and accompanying text.
closer look at particular situations raises some questions about the statute's application.

Some recent decisions in which the Kentucky Court of Appeals has attempted to apply section 411.182 indicate that joint and several liability might not be completely dead and that in situations in which it has been abandoned, new issues must be addressed. The Kentucky Supreme Court has not yet had the opportunity to apply the statute because of its prospective nature. Yet, in several recent decisions, the court discussed section 411.182 while acknowledging its inapplicability to the case before it. These decisions have embraced the posture of the statute and are indicative of what the court's interpretation will be. A brief look at some of these decisions sheds light on the future of apportionment of liability law in Kentucky tort actions.

B. Apportionment to Third-Party Defendants

KRS section 411.182 expressly provides for apportionment of liability to third-party defendants. This means that for the first time under Kentucky law, judges could apportion liability among multiple parties based on their fault. This was a significant change from previous law, which often held all defendants equally liable for damages.

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198 See Kevin Tucker & Assocs., Inc. v. Scott & Ritter Inc., 842 S.W.2d 873, 875 (Ky. Ct. App. 1992) (holding that when a third-party defendant is joined, the claim against him must be dismissed for failure to state a claim because if fault is to be apportioned, the defendant does not have a claim against the third-party defendant) (discussed infra notes 229-52 and accompanying text); Bass v. Williams, 839 S.W.2d 559, 564 (Ky. Ct. App. 1992) (refusing to apportion fault to a negligent tortfeasor who had intentionally not been named as a party to the action) (discussed infra notes 293-302 and accompanying text).

199 Dix & Assocs. Pipeline Contractors, Inc. v. Key, 799 S.W.2d 24 (Ky. 1990); Stratton v. Parker, 793 S.W.2d 817 (Ky. 1990). Justice Leibson adamantly voiced his disapproval of this approach in his dissents to these two decisions. For example, in Stratton, he accused the majority of inappropriately using the case to "expound views on apportionment issues not involved in this case." Stratton, 793 S.W.2d at 821. He went on to assert that in expounding its views, the majority "erroneously characterizes the meaning and effect of a number of earlier cases." Id. In his lengthy dissent from the majority decision in Dix, which was joined by Justices Combs and Lambert, Leibson again attacked the majority's approach:

NONE OF THESE ISSUES ARE BEFORE US. Yet the Majority Opinion speaks to all . . . of these issues in derogation of the limits of judicial power which extend only to deciding cases in controversy. . . . Justice Vance's Opinion acknowledges, in a backhand manner, that he raises and decides issues which are not framed by the decision of the trial court nor raised by the parties on appeal.

Dix, 799 S.W.2d at 33-34.

200 See Dix & Assocs. Pipeline Contractors, Inc. v. Key, 799 S.W.2d 24, 29 (Ky. 1990) (approving apportionment of liability to third-party defendant) (discussed infra notes 204-22 and accompanying text).

201 KY. REV. STAT. ANN. § 411.182(1)(b) (Baldwin 1993).
law, the plaintiff does not completely dictate which parties will have fault apportioned to them. Hence, the plaintiff can no longer avoid apportionment and recover fully from a defendant who is only partially at fault by not bringing an action against a negligent friend, relative, or financially unstable tortfeasor. The defendant can prevent such a result by bringing a third-party claim against the unnamed joint tortfeasor. The Kentucky Supreme Court expressed a desire to reach this result in *Nix*, but believed that it was statutorily restrained from doing so.\(^{202}\)

*Dix & Associates Pipeline Contractors, Inc. v. Key,\(^{203}\)* was the first case in which the Kentucky Supreme Court approved apportionment of liability to a third-party defendant, expressly overruling *Nix v. Jordan*.\(^{204}\) Although KRS section 411.182 was not even arguably applicable to the case because the facts arose prior to the statute’s enactment, it undoubtedly had an effect on the court’s decision. In *Dix*, a deceased worker’s estate filed a tort action against a negligent party, who filed a third-party complaint against the plaintiff’s employer.\(^{205}\) The employer subsequently filed a counterclaim against the original defendant to recover the workers’ compensation that it had paid to the deceased employee’s family.\(^{206}\) Before trial, the original action was settled and dismissed, leaving the third-party claim for indemnity and/or contribution and the subrogation claim.\(^{207}\)

At trial, the jury apportioned ninety-five percent of the fault to the defendant and five percent of the fault to the employer (the third-party defendant).\(^{208}\) The court held that it was proper for the jury to apportion fault to the employer as a third-party defendant.\(^{209}\) The only way for the court to reach this result was to overrule *Nix*,\(^{210}\) since the statute approving apportionment to third-party defendants was inapplicable to the

\(^{202}\) *Nix v. Jordan*, 532 S.W.2d 762 (Ky. 1975), *overruled by Dix & Assocs. Pipeline Contractors, Inc. v. Key*, 799 S.W.2d 24, 29 (Ky. 1990). "Though it might otherwise make good sense to apply the principle of apportionment among joint tortfeasors without exception, the authority for *Orr v. Coleman*, Ky., 455 S.W.2d 59 (1970) derives from a statute (KRS 454.040) which cannot fairly be construed that liberally." *Id.* at 763.

\(^{203}\) 799 S.W.2d 24 (Ky. 1990).

\(^{204}\) 799 S.W.2d at 29.

\(^{205}\) *Id.* at 25.

\(^{206}\) *Id.* at 25-26.

\(^{207}\) *Id.* at 26.

\(^{208}\) *Id.*

\(^{209}\) *Id.* at 29.

\(^{210}\) *Nix v. Jordan*, 532 S.W.2d 762, 763 (Ky. 1975) (holding that fault could not be apportioned to third-party defendants), *overruled by Dix & Assocs. Pipeline Contractors, Inc. v. Key*, 799 S.W.2d 24, 29 (Ky. 1990).
case.211 In overruling Nix, the court also necessarily overruled another decision212 that had relied on Nix to the extent that Nix precluded apportionment of liability between an employer and a third person from whom the employee sought recovery of damages.213

_Dix_ is an important decision in a number of respects. First, it not only approved apportionment of liability to a third-party defendant, but, specifically, to a third-party defendant employer which was immune from further liability 214 under KRS section 342.690, which states that if an employer secures payment of compensation as required by that chapter, workers' compensation shall be the exclusive source of liability to which he can be held.215 KRS section 342.690 specifically mentions suits in which an employer may be liable to a defendant who may be liable for or who has paid damages to an employee of the employer.216 In that situation, the statute allows the named defendant to seek contribution from the employer but limits his recovery to the amount for which the employer can be held liable in workers' compensation benefits.217

After _Dix_, the employer still enjoys limited liability. However, when a defendant joins an employer as a third-party defendant and fault is apportioned, the outcome differs from the traditional result under workers' compensation law. According to KRS section 342.700, an employee has the option of recovering compensation benefits or proceeding at law against the negligent third party.218 If he elects to collect worker's compensation, he cannot collect the full amount of his damages in a tort claim.219 Before _Dix_, this meant that the employee who had been paid workers' compensation for an injury could sue a negligent third party and recover for the full amount of his damages. The employer, however, was entitled to intervene and recoup out of the employee's recovery the full

211 Dix, 799 S.W.2d at 33 n.2 (Leibson, J., dissenting).
212 See Burrell v. Electric Plant Bd. of Franklin, Ky., 676 S.W.2d 231, 237 (Ky. 1984) (relying on Nix in precluding apportionment of liability between an employer and third person from whom the employee sought to recover damages), _overruled by Dix & Assocs._ Pipeline Contractors, Inc. v. Key, 794 S.W.2d 24, 29 (Ky. 1990).
213 Dix, 799 S.W.2d at 29. In overruling Burrell, the Dix court noted that Burrell was decided shortly after the court adopted comparative negligence in _Hilen v. Hays_, 673 S.W.2d 713, 718 (Ky. 1984), and that the court had not yet had time to consider all of the ramifications of comparative negligence. Dix, 799 S.W.2d at 28.
214 Dix, 799 S.W.2d at 29.
216 Id.
217 Id.
218 KY. REV. STAT. ANN. § 342.700(1) (Baldwin 1993).
219 Id.
amount of workers' compensation that he had paid.\textsuperscript{220} Therefore, the employer escaped liability without regard to his fault.

After \textit{Dix}, a different result is reached. An injured worker can only recover from a negligent defendant to the extent of the defendant's fault.\textsuperscript{221} The employer is thus entitled to recoup from the plaintiff's settlement or judgment the percentage of the amount paid, or payable, as compensation benefits equal to the percentage of fault apportioned to the negligent defendant.\textsuperscript{222} For example, assume that a plaintiff is injured at work and receives $100,000 in workers' compensation benefits from his employer. Assume further that a jury decides that the plaintiff is entitled to recover $200,000 in total damages, apportioning seventy-five percent of the fault to the defendant and twenty-five percent of the fault to the employer, whom the defendant joined as a third-party defendant. The negligent defendant must pay $150,000, seventy-five percent of the total damages. The employer is subject to no further liability and can recover $75,000 from the $150,000 judgment, which represents the amount of damages attributable to the other tortfeasor's negligence multiplied by the total amount for which he is liable in workers' compensation.\textsuperscript{223} The injured employee is left with the $75,000 remaining from the judgment plus the $100,000 he previously received in workers' compensation benefits. Thus, the plaintiff ends up with $175,000. He receives less than his total damages because he chose to settle with the employer by taking workers' compensation benefits.

This result is consistent with the underlying policy of KRS section 342.700, which prohibits the worker from recovering from both workers' compensation and a tort claim.\textsuperscript{224} Workers' compensation is considered to be a full settlement; thus, the amount of workers' compensation benefits paid must be reduced by an amount proportional to the other negligent party's fault in order to be consistent with an apportionment scheme. Under this result, the employer pays for his amount of fault in workers' compensation benefits, the defendant pays for his amount of fault in damages, and the plaintiff receives compensation for his injuries without receiving a windfall.

Although the court in \textit{Dix} approved apportionment to the employer as a third-party defendant,\textsuperscript{225} the court's decision might have broader

\begin{footnotes}
\item[220] \textit{Dix}, 799 S.W.2d at 30-31.
\item[221] \textit{Id.} at 31.
\item[222] \textit{Id.} at 30-31.
\item[223] This is the percentage of the workers' compensation benefits equal to the third party's percentage of fault as determined by the jury.
\item[224] \textit{Dix}, 799 S.W.2d at 30.
\item[225] \textit{Id.} at 29.
\end{footnotes}
implications. Writing for the majority, Justice Vance, in dicta, analogized workers' compensation coverage to a settlement between an employee and employer whereby the employee settles his tort claim for the amount that he will receive as compensation.\(^{226}\) This analogy follows the policy that underlies apportionment law. A natural extension of Justice Vance's position is that fault can be apportioned to an employer who has paid workers' compensation even if he is not joined as a third-party defendant. Therefore, just as a joint tortfeasor who has settled his claim before trial can have fault apportioned to him but is liable for no more than the amount for which he settled, an employer can have fault apportioned to it but is liable for no more than the amount of workers' compensation that it has paid or will pay.

Requesting an apportionment instruction against the employer without joining him as a third-party defendant would always be to a defendant's strategic advantage. This strategy would minimize the adversity to the defendant's position by providing the opportunity to have a greater amount of fault apportioned to the employer, thereby reducing the defendant's liability.\(^{227}\) There is no real reason to require the employer to be present at trial since he cannot be held liable for any further damages and thus has very little incentive to oppose the accusations against him. The employer does, however, retain the right to bring a subrogation action in order to recover the workers' compensation benefits that he has paid, so he may in some instances ultimately become a party to the action.\(^{228}\)

Aside from the many extraneous implications of *Dix*, the opinion makes it clear that a majority of the Kentucky Supreme Court fully agrees with the General Assembly's decision to apply apportionment of liability.

\(^{226}\) *Id.* "For all practical purposes, in this case, Dix & Associates occupies the position of a tort-feasor which has settled the tort claim against it." *Id.*

\(^{227}\) In Justice Leibson's dissent in *Floyd v. Carlisle Constr. Co.*, 758 S.W.2d 430, 433 (Ky. 1988) (Leibson, J., dissenting), he quoted the defense attorney's response to a question during oral argument about why he did not file a third-party complaint against the released defendant: "'Why would any defense attorney bring someone into a case who obviously would be antagonistic to them if they did not have to?'" *Id.* at 433.

Justice Leibson views this as an undesirable result. However, the plaintiff in this situation has ample opportunity to rebut the defendant's evidence of the third party's negligence in order to preserve the damage award to which he is entitled. Nevertheless, there does seem to be a bothersome overtone in allowing two parties to litigate a third party's negligence in the third party's absence.

\(^{228}\) How often the employer would exert the time and effort involved in bringing a subrogation claim in order to recover the minimal workers' compensation that he has or will be required to pay is another matter.
to third-party defendants. In a recently decided case, however, the Kentucky Court of Appeals has once again muddied the water in the area of apportionment. In *Kevin Tucker & Associates v. Scott & Ritter, Inc.* the city of Bowling Green brought a negligence and breach of contract action against an architectural firm for faulty construction of a golf course. The architect filed a third-party complaint for contribution against the building contractor under Kentucky Rule of Civil Procedure 14. The court held that because *Floyd* and KRS section 411.182 make it mandatory to apportion fault to each tortfeasor, the third-party complaint had to be dismissed for failure to state a claim.

Under Kentucky Rule of Civil Procedure 14, a third-party complaint can only be brought if the third-party defendant is, or may be, liable to the defendant for all or part of the plaintiff's claim. The contractor in *Kevin Tucker & Assocs.* could not possibly have been liable to the architect if fault were to be apportioned, because under apportionment it is impossible for the architect to be held liable for anyone's fault other than his own. The very idea behind apportionment is that each party's liability should be limited to his amount of fault. Civil Rule 14 allows a defendant to bring third-party claims against other tortfeasors that are, or may be, liable to the defendant for all or part of the plaintiff's claim against the defendant. Consequently, when a defendant is held liable only to the extent of his own fault, a third party will never be liable to the defendant because the defendant will have paid only for the amount of damages for which he was responsible. Nevertheless, in a footnote in the opinion, the *Kevin Tucker & Assocs.* court encouraged defendants to continue bringing third-party claims because without an "active assertion of a claim" against a party, fault cannot be apportioned. Therefore, if the *Kevin Tucker & Assocs.* decision is followed, defendants will bring claims against third parties in an attempt to have fault apportioned to those parties, but the claims will routinely be dismissed. In other words, the court encouraged form over substance in

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230 Id. at 873-74.
231 Id. at 874.
232 758 S.W.2d 430 (Ky. 1988). *See supra* notes 153-66 and accompanying text.
233 *Kevin Tucker & Assocs.*, 842 S.W.2d at 874.
234 KY. R. CIV. P. 14.01.
235 *Kevin Tucker & Assocs.*, 842 S.W.2d at 874 n.5.
236 PROSSER ET AL., *supra* note 20, at 575.
237 KY. R. CIV. P. 14.01.
238 *Kevin Tucker & Assocs.*, 842 S.W.2d at 874 n.5 (citing Floyd v. Carlisle Constr. Co., 758 S.W.2d 430, 432 (Ky. 1988)).
order to allow apportionment of fault to as many negligent parties as possible.

The court of appeals rested its decision in *Kevin Tucker & Assocs.* on a number of assumptions. First, the court assumed that the *Burke* rule, which requires an apportionment instruction only if requested by one of the parties, did not survive the enactment of KRS section 411.182. If *Burke* was not superseded by the statute, then there was no failure to state a claim in *Kevin Tucker & Assocs.* unless an apportionment instruction was requested because, if no apportionment instruction is requested or given, the possibility of contribution would still exist. Although the use of the word “shall” in the statute suggests that apportionment of fault is mandatory, the word “shall” is qualified by the phrase “unless otherwise agreed by all parties.” This clause might indicate an intention by the Kentucky General Assembly to retain the *Burke* rule. More importantly, in a post-statute decision, *Stratton v. Parker*, the Kentucky Supreme Court faced a prime opportunity to overrule *Burke* when *Burke*’s ruling stood in the way of apportioning fault to a settling tortfeasor. Instead of taking advantage of this opportunity, however, the court distinguished *Stratton* on the basis that no apportionment instruction was requested or given in *Burke*, whereas such an instruction was requested in *Stratton*.

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239 700 S.W.2d 789, 796 (Ky. 1985) (holding that if no apportionment instruction was requested by either party, none would be given and joint and several damages would be issued with the possibility of contribution). See supra notes 129-46.

240 KY. REV. STAT. ANN. § 411.182(1) (Baldwin 1993).

241 However, the construction of the statute alone is not convincing enough to conclude that *Burke* lives. It is doubtful that the language of the statute was intended to preserve the *Burke* result because the phrase “unless otherwise agreed” was taken directly from the Uniform Comparative Fault Act. Besides, *Burke* seems to say that no apportionment instruction will be given “unless otherwise agreed,” whereas the statute indicates the opposite, that an apportionment instruction will be given unless otherwise agreed.

242 793 S.W.2d 817 (Ky. 1990).

243 See id. at 820. In *Stratton* the plaintiff brought an action against three defendants, one with which he settled before trial, one which had the claim against it dismissed before trial, and one which was present at trial. At trial, the jury apportioned twenty-five percent to the defendant, seventy-five percent to the plaintiff, and zero percent to the settling tortfeasor. The trial court allowed the defendant a credit for the amount paid by the settler, citing *Burke*, and the Supreme Court reversed. Justice Leibson blamed the problems incurred by the trial court and court of appeals in reaching their decisions on the “ill conceived result” that the court reached in *Burke Enterprises, Inc. v. Mitchell*, 700 S.W.2d 784 (Ky. 1985). He went on to say, “[i]n my [d]issenting [o]pinion . . . , I warned of the internal inconsistency between the principles of law involved and the result reached. . . . The present [o]pinion can but add to the vexatious problems faced by our
Another assumption implicit in *Kevin Tucker & Assocs.* is that fault will not be apportioned to a party unless there is an active assertion of a claim against him.\(^{244}\) The *Kevin Tucker & Assocs.* court relied on the supreme court’s decision in *Floyd* in making this assumption. In *Floyd*, the court reviewed its prior cases, which stated that fault would be apportioned whenever there is an “active assertion of a claim” against a party.\(^{245}\) However, it also stated that a party’s liability would be limited to a percentage of the damages equal to his amount of fault.\(^{246}\) These two statements become logically inconsistent when there is a negligent party who has not had a claim asserted against him.

For instance, if a plaintiff does not bring a claim against his negligent brother-in-law, *Kevin Tucker & Assocs.* assumes that fault will not be apportioned against the brother-in-law unless the defendant pursues a third-party complaint.\(^{247}\) Consequently, the court of appeals encouraged defendants to continue to assert third-party complaints that, under its analysis, must necessarily be dismissed. If the defendant fails to actively assert a third-party complaint and fault is not apportioned, the defendant will be required to pay the entire amount of damages, even if he is only fifty percent, ten percent, or even one percent at fault.\(^{248}\) Therefore, it is illogical to state a rule that fault will only be apportioned to parties against which there has been an active assertion of a claim, and in the next breath, state a policy that each party’s liability is limited to the portion of damages caused by his fault. This whole scenario can be avoided under a construction of the statute which allows apportionment of fault across the board, even without an active assertion of a claim.\(^{249}\)

Assuming that the court of appeals’ procedural analysis is correct, the literal reading of Civil Rule 14 in *Kevin Tucker & Assocs.* is more a

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\(^{245}\) *Floyd* v. Carlisle Constr. Co., 758 S.W.2d 430, 432 (Ky. 1988); accord Daulton v. Reed, 538 S.W.2d 306 (Ky. 1976); Nix v. Jordan, 532 S.W.2d 762 (Ky. 1975), overruled by Dix & Assocs. Pipeline Contractors, Inc. v. Key, 799 S.W.2d 24, 29 (Ky. 1990); Orr v. Coleman, 455 S.W.2d 54 (Ky. 1970).

\(^{246}\) *Floyd*, 758 S.W.2d at 432.

\(^{247}\) *Kevin Tucker & Assocs.*, 842 S.W.2d at 874 n.5.

\(^{248}\) See Walt Disney World Co. v. Wood, 515 So. 2d 198 (Fla. 1987) (upholding the trial court’s judgment against Walt Disney World for eighty-six percent of the plaintiff’s damages even though the jury only found the company to be one percent at fault).

\(^{249}\) The soundness of such an application of the current law will be discussed in the next section of this Note.
matter of form than substance and creates difficulties that surely were not intended by the General Assembly. Reading Civil Rule 14 to mandate that a third-party claim be asserted and dropped simultaneously would defeat the purpose of the General Assembly in providing for the allocation of fault to "third-party defendants" in KRS section 411.182(1)(b).\(^{250}\) Additionally, the Dix court expressed no intention to produce such a result when it approved apportionment to third-party defendants.\(^{251}\)

The court of appeals in \textit{Kevin Tucker & Assocs.} expressed discontent with the apportionment law as it now stands, but purported to be merely following the precedent to which it is bound.\(^{252}\) No precedent set by the Kentucky Supreme Court or the General Assembly, however, mandates the result reached in \textit{Kevin Tucker & Assocs.} Desirability of the result is also far from clear. The damage is slight in cases where the third-party defendant is an immune tortfeasor from whom the plaintiff has already recovered, such as an employer. Dix indicates that the defendant could get an apportionment instruction in that situation, even without bringing a third-party claim.\(^{253}\) However, the \textit{Kevin Tucker & Assocs.} rule encourages plaintiffs to bring claims against as many potential defendants as possible, and defendants to assert claims against as many third-party defendants as possible. This result is diametrically opposed to the policy of encouraging settlement that played a major role in bringing apportionment to Kentucky in the first place.\(^{254}\) At best, the holding in \textit{Kevin Tucker & Assocs.} encourages the assertion of claims that would have never been brought before this decision; at worst, \textit{Kevin Tucker & Assocs.} encourages defendants to assert third-party complaints, regardless of their merit, for the sole purpose of getting an apportionment instruction which will reduce the defendant's liability once the claim is dismissed for "failure to state a claim."


\(^{252}\) \textit{Kevin Tucker & Assocs.}, 842 S.W.2d at 874 n.3. ("We do not believe that these rules are good policy; they seem to produce unjust results in many cases. See Justice Leibson's dissents in \textit{Dix} and \textit{Moody, supra}. Nevertheless, until the Legislature or Supreme Court changes them, we are bound to follow them.") (citation omitted).

\(^{253}\) Dix, 779 S.W.2d at 27-28.

\(^{254}\) \textit{See supra} notes 69-104 and accompanying text (discussing Kentucky's policy of using apportionment to encourage settlement).
If the technical reading of Civil Rule 14 by the Kevin Tucker & Assocs. court is permitted to stand, the rule should be amended to allow defendants to assert third-party claims against parties who are, or may be, liable to the plaintiff for all, or part, of his injury. The Rule was written to accommodate a system of joint and several liability with the possibility of contribution or indemnity and, as written, has no place in a comparative negligence system. If, in enacting KRS section 411.182, the Kentucky General Assembly intended to abrogate joint and several liability, thereby obviating the need for contribution, Civil Rule 14 needs to be reworded in order to accommodate that policy.

C. Unreachable, Unnamed, and Insolvent Tortfeasors

In enacting KRS section 411.182, the General Assembly did not explicitly address who would bear the liability of an absent tortfeasor who was not named as a party to the action. These "phantom tortfeasors" include unreachable tortfeasors, such as a hit and run driver; unnamed tortfeasors, such as a friend or relative of the plaintiff; or insolvent tortfeasors, who may or may not have been named as a party to the action, but are nonetheless unable to pay for their share of liability. The issue that then arises is what should happen to the "phantom defendant’s" share of liability. Should the plaintiff, the defendant, or both bear the burden of paying a phantom’s share of the damages?

Most states that have retained joint and several liability continue to place the burden of paying a phantom’s share of damages on the defendant. The rationale is that the defendant’s conduct was more egregious than the plaintiff’s because the defendant jeopardized the safety of others, whereas the plaintiff was negligent only by failing to provide for his own safety. This same rationale is used by other jurisdictions that have purported to abandoned joint and several liability, but nevertheless continue to hold the defendant jointly liable for the liability of phantom defendants. The more aggressive states, which have aban-

255 See, e.g., American Motorcycle Assoc. v. Superior Court, 578 P.2d 899, 903-06 (Cal. 1978) (holding that the state would retain joint and several liability even though it had previously implemented comparative negligence, based partly on the theory that a plaintiff’s culpability is not on a level with the defendant’s because the plaintiff’s failure was in protecting himself, not others) (superseded by statute, CAL. CIV. CODE § 143) (West 1994)).

256 See UTAH CODE ANN. tit. 12, § 1036 (Supp. 1993) (partially abandoning joint and several liability by providing that each tortfeasor is liable only for the proportionate amount of damages caused by his negligence as compared to the proportionate amount of damages caused by the negligence of each other sued tortfeasor).
doned joint and several liability completely, apportion fault to all tortfeasors whether or not they were joined as parties. These states apply the rationale that a party's liability should be limited to his percentage of fault. Under the latter approach, the plaintiff bears the same risk that exists every time a party is injured through someone else's negligence—that the negligent party will be unknown, insolvent, or someone that the plaintiff would rather not sue.

The Uniform Comparative Fault Act retains joint and several liability, making the defendant responsible for the liability of phantoms. In the case of an insolvent party who is held liable, however, the Act allocates the insolvent defendant's liability among all solvent parties, including the plaintiff, according to the percentage of fault that the jury assigned to each. The Kentucky statute does not expressly address this issue, and the Kentucky Supreme Court has not had the issue directly before it. Despite the lack of clear guidance on this issue in Kentucky, a close reading of the statute, the case law, and the common policies behind each, indicates that Kentucky law is headed in the direction of a full-scale apportionment regime in which fault is apportioned in all situations, including those involving phantom defendants. The aforementioned position is most consistent with the pure comparative fault system that the supreme court adopted in *Hilen v. Hays* and with the principles asserted by its line of apportionment decisions.

In the case of a known, unnamed tortfeasor, the problem is solved (ignoring the *Kevin Tucker & Assocs.* rule) by allowing the defendant to assert a third-party claim against the unnamed party and then apportioning liability between himself and the third-party defendant. If the defendant for some reason neglects to join the unnamed tortfeasor, the result will depend upon the construction given to the statute. KRS section 411.182(1)(b) reads as follows:

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257 See Albertson v. Volkswagenwerk Aktiengesellschaft, 634 P.2d 1127, 1132 (Kan. 1981) (holding that under comparative fault principles, the fault of all parties to an accident must be considered when determining liability).


260 673 S.W.2d 713, 719-20 (Ky. 1984) (adopting comparative negligence on the theory that liability should be limited to the extent of a party's fault).

261 See Floyd v. Carlisle Constr. Co., 758 S.W.2d 430, 432 (Ky. 1988) (stating that damages in tort actions in Kentucky are no longer joint and several but several only); Stratton v. Parker, 793 S.W.2d 817, 820 (Ky. 1990) (stating that a party is liable for an amount equal to his degree of fault, no more and no less); Dix & Assocs. Pipeline Contractors, Inc. v. Key, 799 S.W.2d 24, 29 (Ky. 1990) (approving apportionment to a third-party defendant employer).
(1) In all tort actions ... involving fault of more than one 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 ... indicating:

(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.262

The correct interpretation of the statute depends upon the method of allocating fault. If liability really is limited to each party’s amount of fault, then the defendant would have to be allowed to bring in evidence of an unnamed tortfeasor’s conduct in order to prove the true extent of the defendant’s fault. In other words, the court would have to allow apportionment to absent parties. The statute provides that in determining percentages of fault, the fact-finder should consider the nature of each party’s conduct and "the extent of the causal relation between the conduct and the damages claimed."263 However, the statute does not mention whether fault of other parties should also be considered.

If nonparties, parties who are unnamed for one of the three reasons mentioned above, are ignored, then the absent party’s fault is essentially being redistributed among parties to the action to whom fault is apportioned, including the plaintiff. In this situation, each party’s liability is not "limited by the extent of his fault"264 because each is to be charged with the unnamed party’s share of liability in accordance with the percentages of liability as determined by the jury.

In contrast to KRS section 411.182, the Uniform Comparative Fault Act places the burden of the unnamed party’s liability on the defendant by retaining joint and several liability265 with the possibility of contribution.266 The Act provides for allocation of fault to parties for the purpose of contribution.267 It is reasonable to infer that by intentionally omitting the sections on joint and several liability and contribution from KRS section 411.182, the Kentucky General Assembly intended to

262 KY. REV. STAT. ANN. § 411.182(1)(b) (Baldwin 1993).
263 Id. § 411.182(2).
264 Floyd, 758 S.W.2d at 432.
completely abrogate the two doctrines, adopting the policy that no party should be liable for more than the percentage of damages caused by his own fault. Under such a construction, the plaintiff bears the burden of not naming a negligent party, because his recovery will be reduced by the nonparty's percentage of fault.

Although they were not technically applying the statute, the decisions of the Kentucky Supreme Court after the enactment of KRS section 411.182 seem to support the apportionment of fault to unnamed parties. In Stratton v. Parker,\textsuperscript{268} the jury apportioned seventy-five percent of the fault to the injured plaintiff, twenty-five percent to the defendant, and zero percent to the settling tortfeasor.\textsuperscript{269} The trial court allowed the defendant a credit for the amount paid by the settling tortfeasor.\textsuperscript{270} The Kentucky Supreme Court reversed, and Justice Vance's majority opinion discussed the current state of Kentucky's apportionment law: "The appellee is liable for an amount equal to his degree of fault, no more, and no less."\textsuperscript{271} Later that year, Justice Vance made a similar statement in Dix:\textsuperscript{272}

The principles announced in Hilen v. Hays, supra, which established comparative negligence in Kentucky, and cases which followed it, including Prudential Life Insurance Co. v. Moody, supra; Floyd v. Carlisle Construction Co., Inc., supra; and Stratton v. Parker, supra; have established that liability among joint tort-feasors in negligence cases is no longer joint and several but is several only . . . . Our decision in Hilen v. Hays, was premised upon the principle of fundamental fairness, that liability should be . . . . determined by the extent of the fault. . . . Whereas it is fundamentally unfair for a plaintiff who is only 5 percent at fault to be absolutely barred from recovery from a defendant who is 95 percent at fault, it is equally and fundamentally unfair to require one joint tortfeasor who is only 5 percent at fault to bear the entire loss when another tortfeasor has caused 95 percent of the loss.\textsuperscript{273}

Although Justice Vance's opinions in both Stratton and Dix addressed apportionment to parties against whom the plaintiff had actively asserted

\textsuperscript{268} 793 S.W.2d 817 (Ky. 1990).
\textsuperscript{269} Id. at 818.
\textsuperscript{270} Id. at 820.
\textsuperscript{271} Id. at 820.
\textsuperscript{272} Dix & Assocs. Pipeline Contractors, Inc. v. Key, 799 S.W.2d 24 (Ky. 1990).
\textsuperscript{273} Id. at 27.
a claim, the reasoning behind his comments also supports apportionment of liability to phantom parties. The court has already approved apportionment to settling parties and to parties who have been dismissed from trial. In both of these situations, the party to whom fault is being apportioned is not present at trial and, at least in the situation involving a party who has been dismissed for some reason other than an agreement with the plaintiff, the plaintiff will not be able to recover from him.

For example, in Prudential Life the court approved apportionment to a defendant who had been dismissed from trial because of the running of the statute of limitations and upheld a judgment imposing liability on the remaining defendant only to the extent of his fault. The court’s holding could be based on the premise that it would be inequitable to hold a defendant liable for the entire injury when he only caused a fraction of it. This situation is arguably indistinguishable from a situation where the plaintiff did not bring a claim against the released defendant at all. It is no more equitable to hold a defendant liable for the entire injury in the latter case than in the former.

The plaintiff can minimize the corresponding reduction in his recovery by naming all negligent parties against whom he can possibly recover, including friends and relatives. If the plaintiff chooses not to join

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274 Id. at 29 (considering a workers’ compensation settlement to be an active assertion of a claim); Stratton v. Parker, 793 S.W.2d 817, 819 (Ky. 1990) (apportioning liability to settling tortfeasor who had at one time had a claim asserted against him).

275 See Orr v. Coleman, 455 S.W.2d 59, 61-62 (Ky. 1970) (“[T]he jury should be required to assess the total amount of the claimant’s damages and fix the proportionate share of the nonsettling tortfeasor’s liability on the basis of his contribution to the causation.”); Floyd v. Carlisle Constr. Co., 758 S.W.2d 430, 432 (Ky. 1988) (“A tortfeasor who is not actually a defendant is construed to be one for the purposes of apportionment if he has settled the claim against him. . . .”).

276 See Daulton v. Reed, 538 S.W.2d 306, 308 (Ky. 1976) (“The principle of Orr v. Coleman applies when there has been an active assertion of a claim against one who would be a defendant but for the fact that he has settled the claim. The same rationale applies . . . [where] the claim by the Reeds [plaintiff] against the Phillips [defendant] was later dropped. . . .”) (citations omitted); Prudential Life Ins. Co. v. Moody, 696 S.W.2d 503, 504 (Ky. 1985) (“The court of appeals reasoned that apportionment is permitted only against ‘defendants’ . . . and concluded since we held that Carney [defendant] should have been dismissed . . . he could not have been considered a ‘defendant’ . . . for the purpose of the apportionment statute. We are of the opinion the court of appeals is in error in this respect.”).

277 696 S.W.2d 503 (Ky. 1985). See supra notes 106-26 and accompanying text.

278 Id. at 504.

279 Id. at 504 (Vance, J., concurring) (“I concur with the majority opinion. I do so because it fairly apportions liability according to the percentage of fault.”).
certain tortfeasors as defendants, the named defendants should not suffer the consequences of that choice. While extension of apportionment to known, unnamed parties would in no way discourage settlement, it might increase litigation by encouraging plaintiffs to bring claims they would not otherwise have asserted.\textsuperscript{260} But, as Justice Leibson asserted in writing for a unanimous Court in \textit{Hilen v. Hays}, "[t]o those who speculate that comparative negligence will cost more money or cause more litigation, we say there are no \textit{good} economies in an \textit{unjust} law."\textsuperscript{281}

The principles behind the Kentucky Supreme Court's approval of apportionment to settling parties\textsuperscript{282} and employers\textsuperscript{283} should be extended to allow apportionment of fault to parties who enjoy interspousal or similar immunity because, as is the case of an employer, the immunity exists independent of the defendant's liability. The immunity in each situation exists for a valid reason, and the plaintiff receives a windfall if he is allowed to recover in full from the remaining defendant who was only partly at fault.\textsuperscript{284} The only way to be consistent with comparative negligence principles is to determine a party's percentage of fault by comparing that party's percentage to all of the other parties who contributed to the accident, regardless of whether they were or could have been joined as defendants.\textsuperscript{285} In this manner, liability is to be determined on the basis of the percentage of fault of each participant to the

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\item \textsuperscript{260} \textit{Keeton et al., supra} note 8, at 475.
\item \textsuperscript{281} \textit{Hilen v. Hays}, 673 S.W.2d 713, 718 (Ky. 1984).
\item \textsuperscript{282} \textit{Orr v. Coleman}, 455 S.W.2d 59, 61-62 (Ky. 1970) (stating that the objective that liability should be apportioned between tortfeasors based on culpability is not achieved if "the amount of the nonsettling tortfeasor's liability is made to depend on the amount for which the other has settled.").
\item \textsuperscript{283} \textit{Dix & Assocs. Pipeline Contractors Inc.}, 799 S.W.2d 24, 29 (Ky. 1990) ("[W]orkers' compensation coverage constitutes a settlement between the employee and the employer. . . . For all practical purposes, in this case, \textit{Dix & Associates} occupies the position of a tortfeasor which has settled the tort claim against it.").
\item \textsuperscript{284} In abrogating joint and several liability in Kansas, the Kansas Supreme Court in \textit{Brown v. Keill}, 580 P.2d 867, 874 (Kan. 1978), stated: Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the codefendant to pay more than his fair share of the loss.
\item \textsuperscript{285} See, e.g., \textit{Fabre v. Martin}, 623 So. 2d 1182, 1185 (Fla. 1993) (interpreting a Florida statute to mandate that in determining the liability of a defendant whose fault was less than or equal to the plaintiff's, the fault of all other tortfeasors, named or not, must be considered).
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accident and not on the basis of solvency or amenability to suit of other potential defendants.  

Other states have reached the same result. For example, in Kansas, the fault of phantoms is compared with that of other tortfeasors in order to reduce each party’s liability to the extent of damages caused by his fault. In *Albertson v. Volkswagenwerk Aktiengesellschaft*, the Kansas Supreme Court stated that in order to be consistent with comparative fault principles, “all parties to an occurrence must have their fault determined in one action, even though some parties cannot be formally joined” because they are outside the jurisdiction, uncollectible, etc., or cannot be held legally responsible because they are immune from suit for some reason, and that “those not joined as parties . . . escape liability.” *Albertson* was a reaffirmance of earlier Kansas decisions approving apportionment of fault to employers who are immune because of workers’ compensation and to negligent parties who enjoy interspousal immunity. The arguments advanced by the Kansas Supreme Court in support of this result closely match the reasoning of the Kentucky Supreme Court in its apportionment decisions.

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286 *Id.* at 1186.

287 *See*, e.g., ARIZ. REV. STAT. ANN. § 12-2506(B) (Supp. 1993) (“In assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury . . . regardless of whether the person was, or could have been, named as a party to the suit.”); COLO. REV. STAT. § 13-21-111.5(3)(a) (1987) (“[T]he finder of fact . . . may consider the degree or percentage of negligence of fault of a person not a party to the action . . . ”); Bartlett v. New Mexico Welding Supply, Inc., 646 P.2d 579, 586 (N.M. Ct. App.) (quoting from HEFT & HEFT, COMPARATIVE NEGLIGENCE MANUAL § 8.131 (1978), and stating that all tortfeasors should be included in the apportionment question), *cert. denied*, 648 P.2d 794 (N.M. 1982); Bd. of County Comm’rs v. Ridenour, 623 P.2d 1174, 1191 (Wyo. 1981) (“We conclude that in a comparative negligence case the jury must consider the negligence of not only the parties but all the participants in the transaction which produced the injuries sued upon.”).

288 *Id.* at 1133.

289 *Id.*


291 *See* Miles v. West, 580 P.2d 876, 880 (Kan. 1978). Husband driver enjoyed immunity from suit by his passengers, wife and child. In an action by the wife and child against the driver of the other vehicle, the trial court ordered a reduction of an award rendered against the other driver by the amount of the husband’s negligence. *Id.* at 879. The Supreme Court of Kansas affirmed the trial court’s ruling. *Id.* at 882. *See also* Brown v. Keill, 580 P.2d 867, 876 (Kan. 1978) (approving apportionment to nonparty who was the plaintiff’s son).
In *Bass v. Williams*, however, the Kentucky Court of Appeals refused to apply KRS section 411.182 in order to reach a result similar to that of the Kansas court. In *Bass*, the plaintiff was a passenger in the car in which her husband was driving when he was involved in an accident. The plaintiff brought a claim against the driver of the other car, who requested that the court apportion liability to the negligent husband even though the husband was not sued. The trial court granted the defendant’s request, and the plaintiff appealed.

The court of appeals described the situation as “just one more stump to plow around in the field of comparative fault.”

The defendant argued that the plaintiff’s failure to name the tortfeasor should be classified under KRS section 411.182(4) as “a covenant not to sue, or ‘similar agreement entered in by a claimant and a person liable.’” The court nevertheless rejected the defendant’s argument and concluded that fault and damages may not be apportioned to one who does not fall specifically within the scope of the statute, which includes only named parties and those who have “bought their peace from the litigation by way of releases or agreements.”

Part of the court of appeals’ reluctance to apportion fault to the husband in *Bass* stemmed from its fear that if it accepted the defendant’s argument, “conceivably the courtroom could have many empty chairs belonging to tortfeasors unnamed, and possibly unknown until trial.” However, the court’s reluctance to open the floodgates to apportioning fault to “empty chairs” is directly contradicted by their decision in *Kevin Tucker & Assocs.*, just a few months later. In *Kevin Tucker & Assocs.*, the court actually encouraged apportionment to “empty chairs” by inviting defendants to bring third-party claims, even though such claims would routinely be dropped.

The above analysis changes slightly when the absent party is not a known, unnamed party, but an unknown or unreachable party. In the case of a known, negligent party, the plaintiff has the option of joining the

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294 *Id.* at 560.
295 *Id.* at 563.
296 *Id.*
297 *Id.*
298 *Id.* at 564 (quoting KY. REV. STAT. ANN. § 411.182(4) (Baldwin 1993)).
299 *Id.*
300 *Id.*
302 *Id.* at 874 n.5.
party to the original action. Thus, the plaintiff can avoid being undercompensated by simply joining or reaching a favorable settlement with the party. Conversely, in the case of an unknown party, such as a hit and run driver, or an unreachable party, such as a tortfeasor who is outside the court’s jurisdiction, the plaintiff has no way to recover from the absent parties. If the plaintiff’s award is reduced by the absent party’s amount of fault, the plaintiff in this situation is undercompensated.

Although reducing an injured plaintiff’s recovery by the amount of fault of a party who is unknown or completely unreachable appears harsh, a closer look reveals that the reduction is not as inequitable as it first seems. The possibility that a defendant will be insolvent or unreachable is a risk that a plaintiff faces every time he brings a claim. Furthermore, the instances in which a potential defendant is unknown or completely unreachable would presumably be relatively rare. States that have abandoned joint liability in favor of several liability have predominantly allowed apportionment across the board, meaning that the plaintiff bears the loss in the case of an unknown or unreachable defendant, just as he does if the unreachable or unknown defendant is the only tortfeasor.

The analysis is similar in cases involving insolvent tortfeasors. Insolvent tortfeasors who are not named are the equivalent of unknown or unreachable parties. In dealing with named defendants who turn out to be insolvent, the Kentucky General Assembly enacted KRS section 411.182 while omitting section 2(d) of the Uniform Comparative Fault Act. Section 2(d) of the Uniform Comparative Fault Act provides for the redistribution of amounts uncollectible from a particular negligent party among the other parties, including the plaintiff, in accordance with the respective percentages of fault. Section 2(d) also expressly provides that the party whose liability is reallocated is subject to a contribution

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303 See, e.g., Walt Disney World Co. v. Wood, 515 So. 2d 198, 205 (Fla. 1987) (McDonald, C.J., dissenting) (stating that the plaintiff bears the risk “of the defendant being insolvent” in both the single and multiple defendant situations).

304 It is accepted practice to include all tortfeasors in the apportionment question. This includes nonparties who may be unknown tortfeasors, phantom drivers, and persons alleged to be negligent, but not liable in damages to the injured party . . . .” Bartlett v. New Mexico Welding Supply, Inc., 646 P.2d 579, 586 (N.M. Ct. App.) (quoting HEFT & HEFT, COMPARATIVE NEGLIGENCE MANUAL § 8.131 (1978)), cert. denied, 648 P.2d 794 (N.M. 1982). The Bartlett Court held that because New Mexico was a pure comparative negligence state, a defendant should not be held liable for the negligence of an unknown driver who contributed to an accident. Id. at 586.

Although the Uniform Comparative Fault Act approach seems fair and consistent with comparative fault principles, the General Assembly's intentional omission of this section, together with the omission of a provision for contribution, points to the conclusion that the loss of an uncollectible amount is to be borne by the plaintiff. This conclusion is also consistent with the Kentucky Supreme Court's constant assertion that liability for any particular injury should be in direct proportion to fault.307

By its intentional omission of a joint and several liability provision in KRS section 411.182, the Kentucky General Assembly expressed a desire to abandon joint and several liability. Similarly, the Kentucky Supreme Court has stated in its recent opinions that "liability among joint tort-feasors in negligence cases is no longer joint and several but is several only."308 The next logical step is to extend apportionment of fault to all tortfeasors, regardless of whether they are named as parties to the action. This step seems to be what a majority of the Kentucky Supreme Court has been leading up to and is the only way to maintain consistency in a fault-based system which "calls for liability for any particular injury in direct proportion to fault."309

CONCLUSION

The law in Kentucky regarding apportionment of liability to multiple tortfeasors is far from settled. The move from the long-standing doctrine of contributory negligence to a comparative fault regime, and all that such a regime entails, is a sweeping change in the law and was certain to be infested with implementational difficulties. Abandonment of the doctrine of joint and several liability in favor of apportionment of fault among

306 Id.
307 See, e.g., Hilen v. Hays, 673 S.W.2d 713, 719 (Ky. 1984) (adopting comparative negligence) (discussed supra notes 49-55 and accompanying text); Prudential Life Ins. Co. v. Moody, 696 S.W.2d 503, 504 (Ky. 1985) (allowing a defendant dismissed from the action to still have fault apportioned against him) (discussed supra notes 106-26 and accompanying text); Floyd v. Carlisle Constr. Co., 758 S.W.2d 430, 432 (Ky. 1988) (stating that damages in tort actions in Kentucky are no longer joint and several, but several only) (discussed supra notes 153-66 and accompanying text); Stratton v. Parker, 793 S.W.2d 817, 820 (Ky. 1990) (stating that a party is liable for an amount equal to his degree of fault, no more and no less) (discussed supra notes 268-71 and accompanying text); Dix & Assocs. Pipeline Contractors, Inc. v. Key, 799 S.W.2d 24, 29 (Ky. 1990) (approving apportionment to a third-party defendant employer).
308 Dix, 799 S.W.2d at 27.
309 Hilen, 673 S.W.2d at 718.
joint tortfeasors was one of the many changes necessary to consistently implement a comprehensive comparative fault system. The Kentucky courts and General Assembly have aggressively attacked the inherent problems. Although the battle is not over, Kentucky's comparative fault system is rapidly developing into a more equitable system of assigning liability in tort actions according to fault, rather than according to fictitious assumptions.

The enactment of KRS section 411.182 and the Kentucky decisions following its enactment lead to the conclusion that joint and several liability no longer exists, at least in most situations. However, the applicability of the statute is more evident in some situations than it is in others. Fault clearly can be apportioned to parties who are present at trial to settling tortfeasors, to tortfeasors who were named and later dismissed from the action and to third-party defendants. In addition, after Dix, it is almost certain that the Kentucky Supreme Court would allow apportionment to negligent employers who "settle" an employee's claim against them by paying workers' compensation. In all of these situations, the party to whom fault is apportioned is either available at trial for potential recovery by the plaintiff or is immune from liability because the plaintiff has already partially recovered from him.

The more questionable cases are situations involving unreachable, unknown, unnamed, or insolvent parties from whom the plaintiff has no chance of recovering. KRS section 411.182 does not directly address such "nonparties," but the General Assembly's intentional omission of a provision for joint and several liability and contribution indicates a desire to abandon the doctrines altogether by apportioning fault to all tortfeasors, regardless of whether they were named as parties to the action.

The best way to apportion fault across the board, while maximizing efficiency and fairness to all parties involved, is, first, to allow apportionment of fault to all immune parties, including employers, spouses, and others, without requiring them to be brought into the action. These arrangements could fit under KRS section 411.182(4) as a release "or similar agreement."

Second, the third-party rule should be amended to allow third-party claims to be brought against those who are, or may be, liable to the plaintiff for all, or part, of his claim. This amendment would allow defendants to

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310 KY. REV. STAT. ANN. § 411.182(1)(b) (Baldwin 1993).
311 Orr v. Coleman, 455 S.W.2d 59, 61 (Ky. 1970).
312 Prudential Life Ins. Co. v. Moody, 696 S.W.2d 503, 504 (Ky. 1985).
313 Dix & Assocs. Pipeline Contractors, Inc. v. Key, 799 S.W.2d at 24, 29 (Ky. 1990).
314 See id. at 29 (analogizing workers' compensation to a settled claim). See supra notes 225-28.
315 See supra notes 187-91 and accompanying text.
assert actions against negligent joint tortfeasors whom the plaintiff was reluctant to sue. Amending the third-party rule would prevent the plaintiff from picking and choosing defendants and would eliminate the undesirable result reached by the Kentucky Court of Appeals in *Kevin Tucker & Assocs.*

If liability is apportioned across the board, pursuant to the above scheme, the plaintiff’s chances for recovery will be maximized, and each defendant’s liability will truly be limited to his equitable share of fault. The only situations in which the plaintiff would be undercompensated would be those in which there is an unreachable, unknown, or insolvent defendant. The first two situations are relatively rare. As for the third situation, the risk of an unreachable or insolvent defendant is a risk that every plaintiff who files a tort action faces. The situation should not change merely because multiple tortfeasors are involved.

Kentucky is well on its way to implementing a full-scale comparative fault system in which no party is held liable for more than the damages caused by his fault. Such a system is inherently fair and logical, but the long detour taken by this country in developing a set of rules based on contributory negligence has made courts and legislatures reluctant to change. Kentucky has aggressively taken the most important steps toward accomplishing a completely new tort system based on comparative fault. Now that Kentucky has traveled this far into the new system, it should take the final step by expressly declaring a rule that fault will be apportioned to all tortfeasors, regardless of whether they were named parties to the action.

*Julie O’Daniel McClellan*

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316 See *supra* notes 229-52 and accompanying text.
317 See *supra* notes 69-309 and accompanying text.