NBI CLE: THE MECHANICS OF KENTUCKY CIVIL PROCEDURE

Non-Complaint Claims and Third Party Practice[1]

David J. Treacy
Dinsmore & Shohl LLP
250 W. Main St., Suite 1400
Lexington, KY 40507
859-425-1037
david.treacy@dinsmore.com

I. Counterclaims and Cross Claims in Relation to Principal Claims

A. Counterclaims

A counterclaim is a claim asserted against an opposing party and may be compulsory or permissive. Compulsory counterclaims are governed by CR 13.01, which *requires* a party to plead any claim against the opposing party that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." There are two exceptions to this rule, which provide that a party need not plead a claim arising out of the same transaction or occurrence if (1) "at the time the action was commenced the claim was the subject of another pending action," or (2) "the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under Rule 13." CR 13.01.

A compulsory counterclaim is not a separate, independent action, which means that if it is not presented by pleading, a claim that arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim will be res judicata. *England v. Coffey*, 350 S.W.2d 163, 164 (Ky. 1961). Stated differently, a failure to assert such a counterclaim precludes one from bringing it later in a separate action. *Id.* Such a failure constitutes a waiver that extends to both separate and collateral attacks on the instant action. *Shanklin v. Townsend*, 467 S.W.2d 779, 781 (Ky. 1971) (forbidding one of the defendants from using CR 15.02 to amend the pleadings to include a compulsory

[1] Thanks to Haley McCauley, Esq., a colleague at Dinsmore, for her excellent assistance in preparing these materials.

counterclaim after entry of judgment). This requirement for asserting a compulsory counterclaim applies to a third-party defendant, meaning that if a defendant asserts a cross claim for contribution or indemnity against a co-defendant, that co-defendant must assert any claims arising out of the same transaction or occurrence that it has against the third party plaintiff or they will be lost. *Ecker v. Clark*, 428 S.W.2d 620, 621 (Ky. 1968). Further, a defendant that is duly summonsed and suffers a default loses both his right to defend himself in that litigation and his right to assert any claims arising out of the same transaction or occurrence against the plaintiff. *Cianciolo v. Lauer*, 819 S.W.2d 726, 727 (Ky. App. 1991).

Permissive counterclaims are governed by CR 13.02, which provides that a party "may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." That provision goes on to provide an example, stating that "[i]n an action by more than one plaintiff, a claim that a plaintiff is or may be liable to the claimant for all or part of the claim asserted against him by another plaintiff in the action may be stated as a counterclaim." CR 13.02. Because such a claim is not compulsory, a party's failure to raise it does not prevent that party from bringing the claim in a separate cause of action. A plaintiff may not assert a permissive counterclaim in its reply. *Id.*

Because the Kentucky Rules do not recognize a counterclaim as a separate pleading, it should be asserted in conjunction with an answer to the complaint, a cross claim, or a third-party complaint. *See* CR 7.01 ("Pleadings."); CR 12.01 ("Defenses and objections—When presented."); UK/CLE, *Kentucky Civil Procedure Before Trial*, § 8.34 (3d ed. 2008). Like any other claim for relief, a counterclaim (whether compulsory or permissive) must contain a short and plain statement of the claim showing that the pleader is entitled to relief, CR 8.01, *Carson Park Riding Club v. Friendly Home for Children*, 421 S.W.2d 832, 835 (Ky. 1967); a statement of special damages, CR 9.06; and a demand for judgment to which the plaintiff deems itself entitled, CR 8.01. In terms of jurisdiction, as long as the amount in controversy has been met by the original claim, it need not be separately met as to the counterclaim. *See* Ky. Rev. Stat. § 24A.120. If the

claim does not yet exist or has not yet arisen when a responsive pleading is filed, the party may seek the permission of the court to present this counterclaim by supplemental pleading pursuant to CR 13.05. In addition, CR 13.06 permits amendment by leave of court if a party "fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires." General rules regarding the amendment of pleadings apply in this situation, *see* CR 15.01-15.04, and abuse of discretion review applies to the court's decision to refuse the addition of a counterclaim, *Barnes v. Barnes*, 415 S.W.2d 602, 603 (Ky. 1966). Finally, a reply to a counterclaim should be filed, replying to each averment to avoid any admissions, within twenty days of service of the counterclaim. *See* CR 7.01; CR 8.04 ("Effect of failure to deny."); CR 12.01.

The Federal Rule regarding counterclaims is in many ways similar to the Kentucky Rules regarding counterclaims. *Compare* Fed. R. Civ. P. 13(a)-(e) *with* CR 13.01-13.06. Although the Federal Rules do not include a provision like CR 13.06, which describes the ability to amend, with leave of court, the responsive pleading to assert a counterclaim inadvertently omitted, such would be covered by the rules regarding amendments to pleadings. *See* Fed. R. Civ. P. 3; Fed. R. Civ. P. 15 (permitting an amendment to a pleading as a matter of course twenty-one days after serving it or twenty-one days after responsive pleading, e.g., answer to counterclaim, or if a Rule 12 motion is filed, by leave of court after such date elapses). Considering these similarities, in applying the Kentucky Rules, courts can look to how the Federal Rules have been applied for guidance. *See, e.g.*, *Duffy v. Wilson*, 289 S.W.3d 555, 558 n.3 (Ky. 2009). The same is true with any of the civil rules discussed below insofar as they parallel the Federal Rules.

B. Cross Claims

A cross claim is a claim asserted against a coparty, i.e., a claim by one defendant against another defendant. Cross claims are governed by CR 13.07, which provides that a party "may state as a cross claim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a

counterclaim therein or relating to any property that is the subject of the original action." For example, one may assert as a cross claim "a claim that the party against whom it is asserted is or may be liable to the cross claimant for all or part of a claim asserted in the action against the cross claimant." CR 13.07. Unlike a permissive counterclaim, a cross claim cannot concern unrelated matters, but like a permissive counterclaim, a cross claim need not be asserted in the action in question.

Kentucky courts give the words "transaction or occurrence" broad and liberal interpretation in this context. *Bickel-Gibson Assocs. Architects, Inc. v. Ins. Co. of North Am.*, 774 S.W.2d 469, 470 (Ky. App. 1989). "Absolute factual identity is not required for a finding that claims arise out of the same transaction or occurrence." *Id.* at 471. Instead, as is contemplated by the rule, "[t]he evidence involved will be substantially the same and allowing the cross-claim will enable the trial court to make a complete determination of all issues arising out of the controversy and perhaps avoid multiplicity of suits." *Id.* Although the rule provides as an example of a cross claim a claim for contribution or indemnity against a coparty, it is not limited to such claims. "By use of the permissive word 'may' in regard to asserting rights against a party for claims owed, the rule language by implication appears to allow cross-claims in situations other than where a party is searching for indemnity when a claim or counterclaim is being asserted against it." *Id.*

Despite not being limited to claims for indemnity or contribution, cross claims are particularly well suited for such actions. In *Lexington Country Club v. Stevenson*, 390 S.W.2d 137 (Ky. 1965), the Court distinguished between contribution and indemnity:

> The theory of *contribution* is that a party is required to pay more than his pro rata share of a common liability to an injured party has a right of recovery for one-half the amount paid against a joint tort feasor in pari delicto, that is, one equally at fault from the standpoint of concurrent negligence of substantially the same character. On the other hand, a right to total *indemnity* exists if the joint tort feasors are not in pari delicto and the party *secondarily* negligent asserts a claim against the one *primarily* negligent.

Id. at 143 (citations omitted). However, if a plaintiff sues two join tortfeasors who are in pari delicto, CR 13.07's authority for filing a cross claim for contribution between the

codefendants provides an "illusory right." *Id.* "This is so because when the jury returns its verdict allowing the plaintiff recovery against one or the other, or against both jointly, or against each in different amounts, it thereby resolves the issue by finally fixing the relative culpabilities and the respective liabilities to the plaintiff." *Id.* This eliminates the need for a cross claim in order to recover from the codefendant. Still, this is "limited to an action in which a claim is made against two or more defendants in pari delicto in the same action." *Id.* at 144. On the other hand, "[i]f one defendant brings in a third party defendant under CR 14.01 ["When defendant may bring in a third party."] to claim contribution *and the plaintiff asserts no claim against such third party*," a cross claim may be necessary, "[u]nless the plaintiff consents to a trial of the issue of contribution between the two." *Id.*

Again, as with any claim for relief, the opposing party must respond to the allegations set forth in a cross claim or they will be considered admitted, and the opposing party must file an answer to the cross claim within twenty days of service of the cross-claim pleading. *See* CR 7.01; CR 8.04; CR 12.01. Notably, because a cross claim initiates an action between two parties in an action, in order for an action asserted in a cross claim to commence, a summons must be issued or an appearance must be made by the party against whom the cross claim is asserted. *See* CR 4.01; *Hays v. Lundy*, 293 Ky. 711, 170 S.W.2d 49, 50 (Ky. 1943); *Conseco Fin. Servicing Corp. v. Hurstbourne Healthcare, LLC*, 2004 Ky. App. Unpub. LEXIS 718, at *7-8 (Ky. App. Dec. 3, 2004). Although cross claims "may be adjudicated in the principal action," the Kentucky Supreme Court has explained that "it is within the discretion of the trial judge . . . as to how the cross-claims shall be tried." *Clarks Adm'x v. Rucker*, 258 S.W.2d 9, 12 (Ky. 1953). Pursuant to CR 13.09, "[i]f the court orders separate trials as provided in Rule 42.02, judgment on a counterclaim or cross claim may be rendered in accordance with the terms of Rule 54.02 ["Judgment upon multiple claims or involving multiple parties."] even if the claims of the opposing party have been dismissed or otherwise disposed of." Finally, if additional parties are needed for the granting of complete relief in considering a cross claim or counterclaim, those parties may be brought in as defendants in

accordance with the rules regarding joinder of parties. CR 13.08; *see* CR 14.01-14.02 (third-party practice); CR 19.01-19.04 (joinder of parties).

The Federal Rule regarding cross claims is almost identical to the civil rule regarding cross claims. *Compare* Fed. R. Civ. P. 13(g) *with* CR 13.07. Thus, we can look to how the Federal Rules have been applied for guidance on how to apply the Kentucky rule.

II. How to Use Injunctions and Prejudgment Remedies

A. Injunctive Relief

Kentucky's Civil Rules set forth three forms of injunctive relief that may be sought from the circuit court: a restraining order, a temporary injunction, and a permanent injunction. CR 65.01 et seq. "A restraining order shall only restrict the doing of an act. An injunction may restrict or mandatorily direct the doing of an act." CR 65.01. The terms of a restraining order or injunction must be specific, i.e., it must "describe in detail, and not by reference to the complaint or other document, the act restrained or enjoined." CR 65.02. Moreover, if issued, a restraining order or injunction is not only binding on the parties to an action, but also their officers, agents, attorneys, and "other persons in active concert or participation with them who receive actual notice of the restraining order or injunction by personal service or otherwise." *Id.* But "[a] restraining order granting injunctive relief against the enforcement of a statute or ordinance is to be directed against the acts of those specific public officials charged with enforcing the statute to enjoin their threatened enforcement." *Commonwealth v. Mountain Truckers Assoc.*, 683 S.W.2d 260, 263 (Ky. 1984). Any injunctive relief attempting to bind the Commonwealth in its entirety—including all of its executive, judicial, and legislative officials and their agents—would be overly broad and vague. *Id.*

The specificity requirement for injunctive relief was stressed by the Kentucky Supreme Court in *Fiscal Court of Jefferson County v. Courier-Journal & Louisville Times Co.*, 554 S.W.2d 72 (Ky. 1977). That case explained that the specificity requirement in CR 65.02 is mandatory. *Id.* at 73. The supreme court stated that

"[b]lanket injunctions against general violation of a statute are repugnant to the American spirit and should not lightly be either administratively sought or judicially granted." *Id.* at 73-74. Thus, the supreme court held that "[t]he mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged." *Id.* at 74. However, the Court of Appeals has noted limits to the specificity required, explaining in *White v. Sullivan*, 667 S.W.2d 385, 388 (Ky. 1983), that an injunction enforcing a covenant not to compete and prohibiting the solicitation of customers need not list specific customers the defendant is forbidden from soliciting.

1. Issuance of Injunctive Relief

Civil Rule 65.03 governs the issuance of a restraining order. It permits the following judicial officials to grant a restraining order: a judge of the circuit court in which the action is pending; a district judge of that judicial district if no circuit judge is present in the county; a district trial commissioner of that county if he is an attorney and if neither a circuit judge nor district judge is present in the county; or any circuit judge if no judge of the circuit court in which the action is pending is present in his judicial circuit. CR 65.03(2). But a restraining order can be dissolved only on motion to the circuit court judge in whose circuit the action is pending or, if no such judge is present, by any circuit judge. *Id.* A restraining order can be issued without prior notice to the adverse party or his attorney if two prerequisites are satisfied: (1) "it clearly appears from specific facts shown by verified complaint or affidavit that applicant's rights are being or will be violated by the adverse party and applicant will suffer immediate and irreparable injury, loss or damage before the adverse party or his attorney can be heard in opposition," and (2) "the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claims that notice should not be required." CR 65.03(1). This remedy has been described as "extreme" because "it deprives the defendant of substantial rights before he has had an

opportunity to present his defense to the action." *Oscar Ewing, Inc. v. Melton*, 309 S.W.2d 760, 761 (Ky. 1958). Therefore, "[t]he plaintiff must establish the urgent necessity for immediate relief on the ground that he is now suffering or will suffer such serious and irreparable injury that even a favorable final judgment will not give him adequate relief." *Id.* Relief is inappropriate if there is an adequate remedy at law as then the injury would not be "irreparable." *Collins v. Commonwealth*, 324 S.W.2d 406, 408-09 (Ky. 1959).

If the court grants a restraining order, the restraining order must be signed by the officer granting it, endorsed with the date and hour of its issuance, and filed in the clerk's office. CR 65.03(3). In addition, if granted without notice, the restraining order must also include a definition of the injury and a statement of why this injury is irreparable and why the order was granted without notice. *Id.* A copy of the restraining order is to be served upon each party to be restrained via delivery to a person authorized to serve a summons and pursuant to CR 4.04 ("Personal service—Summons and initiating document."). *Id.* But if the order is issued at the commencement of an action, then a copy of it must be served with the summons. *Id.* A restraining order goes into effect, binding the party restrained, when that party is served or when he is informed of the order, whichever comes earlier. CR 65.03(5). Further, a restraining order remains in effect until its date of termination, the time set for a hearing on a motion to dissolve unless there is a motion for a temporary injunction pending, the entry of an order on a motion for a temporary injunction, or the entry of a final judgment, whichever comes earlier. *Id.* An order granting or denying a motion for restraining order is interlocutory (not final) and may not be appealed. *Common Cause v. Com. ex rel. Fletcher*, 143 S.W.3d 634, 636 (Ky. 2004). Although CR 65.07 permits interlocutory review of an order on a motion for a temporary injunction, "[t]he rules do not provide for appellate relief from the grant or denial of a restraining order." *Id.*; *see also Ky. High Sch. Ath. Ass'n v. Edwards*, 256 S.W.3d 1, 3-4 (Ky. 2008).

Civil Rule 65.04 governs the issuance of a temporary injunction. It permits a temporary injunction to be granted, modified, or dissolved by motion to the judge of the

court in which the action is pending or, if unavailable, by any circuit judge. CR 65.04(2). A temporary injunction can be granted in the following circumstances, demonstrated by verified complaint, affidavit, or other evidence: "the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such final judgment ineffectual." CR 65.04(1). The Kentucky Court of Appeals has noted, in its seminal case regarding temporary injunctions, that "[t]he purpose of these requirements is to insure that the injunction issues only where absolutely necessary to preserve a party's rights pending the trial of the merits." *Maupin v. Stansbury*, 575 S.W.2d 695, 698 (Ky. App. 1978). "Although the injunction is not to be substituted for a full trial on the merits, it is clear that the party must show, either by verified complaint, affidavit, or other proof, that such harm is likely to occur unless the injunction issues." *Id.* (citation omitted).

In considering the requirements for injunctive relief under CR 65.04(1), the court should apply a "balance-of-the-hardships test," meaning "if the complaint shows a probability of irreparable injury and the equities are in favor of issuance, it is sufficient [for purposes of issuing the temporary injunction] if the complaint raises a serious question warranting a trial on the merits." *Id.* at 699. Therefore, under Kentucky law, an application for temporary injunctive relief should be considered on three levels:

> First, the trial court should determine whether plaintiff has complied with CR 65.04 by showing irreparable injury. This is a mandatory prerequisite to the issuance of any injunction. Secondly, the trial court should weigh the various equities involved. Although not an exclusive list, the court should consider such things as possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo. Finally, the complaint should be evaluated to see whether a substantial question has been presented.

Id. If each of these requirements is met, a temporary injunction should issue, but the "actual overall merits of the case" need not be addressed. *Id.* To demonstrate a risk of immediate and irreparable injury to one's rights, a movant must first allege "some substantial claim to a personal right." *Id.* at 698. Then the movant must clearly show that the right will be immediately impaired, i.e., that there is an "urgent necessity" for

relief. *Id.* "This means that '[a]n injunction will not be granted on the ground merely of an anticipated danger or an apprehension of it, but there must be a reasonable probability that injury will be done if no injunction is granted.'" *Id.* (quoting *Hamlin v. Durham*, 235 Ky. 842, 32 S.W.2d 413, 414 (1930)). Clearly, irreparable injury is shown "where it appears that final judgment would be rendered completely meaningless should the probable harm alleged occur prior to trial." *Id.* But if the matter can be remedied by money damages, then the injury cannot be considered irreparable. *See Indep. Order of Foresters v. Chauvin*, 175 S.W.3d 610, 614-15 (Ky. 2005). Moreover, if a further administrative remedy is available, there is not a claim of irreparable injury. *Sturgeon Mining Co. v. Whymore Coal Co.*, 892 S.W.2d 591, 592 (Ky. 1995).

Only a trial court has jurisdiction to consider an original action seeking injunctive relief. *Courier-Journal & Louisville Times Co. v. Peers*, 747 S.W.2d 125, 126 (Ky. 1988). In other words, the Kentucky Court of Appeals does not have original jurisdiction to consider a motion for injunctive relief. Although an order on a motion for temporary injunction is also interlocutory, the Kentucky Civil Rules permit an adversely affected party to seek relief from that order in the appellate courts (discussed in subsection 2. below). *Brooks Erection Co. v. William R. Montgomery & Assocs.*, 576 S.W.2d 273, 275 (Ky. 1979). But "injunctive relief is . . . addressed to the sound discretion of the trial court," and thus that court's determination should not be set aside on appeal unless it constitutes an abuse of discretion. *Maupin*, 575 S.W.2d at 697-98; *but see North Fork Collieries, LLC v. Hall*, 322 S.W.3d 98, 102 (Ky. 2010) ("Although injunctive relief is said to be within the sound discretion of the trial court, in this context [whether to enforce a contractual agreement to arbitrate] that discretion extends no further than the correct application of the law, and accordingly we have held that the improper denial of a motion to compel arbitration warrants relief under CR 65.09. The trial court's factual findings, if any, are reviewed for clear error, but its construction of the contract, a purely legal determination, is reviewed de novo." (citations omitted)). In addition to issuing a temporary injunction, the trial court has authority to enforce it—compliance with a

restraining order or a temporary injunction is compelled by CR 65.06 and disobedience is punishable by contempt.

For a restraining order or temporary injunction to issue, the applicant must provide a bond with surety. CR 65.05(1). The judicial representative considering the application for relief will determine the amount of the bond, which should provide "for the payment of such costs and damages as may be incurred or suffered by any person who is found to have been wrongfully restrained or enjoined." *Id.* The party being restrained or enjoined can later move for additional security, which may be required if "the surety is insufficient, or the amount of the bond is insufficient." CR 65.05(3). If such additional security is not provided within a reasonable time, "the court may vacate the restraining order or temporary injunction." *Id.* The surety upon the bond submits himself to the jurisdiction of the court and his address must be shown on the bond. CR 65.05 (1), (2). The bond may be enforced against the surety through a motion—i.e., without an independent action—that must be served on the surety pursuant to CR 5 ("Service and filing of pleadings and other papers.") at least twenty days prior to the hearing on the motion. CR 65.05(2).

There can be no recovery pursuant to the bond when there has been no damage suffered. For example, in *Motorists Mutual Insurance Co. v. Terry*, 536 S.W.2d 472, 473 (Ky. 1976), a restraining order had enjoined the Workmen's Compensation Board from adjudicating whether the plaintiff insurance company had a policy covering the claims of the defendants then pending before the Board. The Kentucky Supreme Court found that the insurance company was not liable to the Board for any costs or damages suffered by reason of the restraint, which was later found inappropriate, because "[i]t could not have precipitated any substantial costs and damages upon the Board except for the expenses of having it lifted." *Id.* Moreover, those expenses were not recoverable as all of the members of the Board were attorneys and they represented themselves throughout the proceedings, meaning no legal fees were incurred. *Id.* In addition, although expenses resulting from a temporary injunction generally may be recovered if the injunction is later vacated, "[w]here injunctive relief is the sole relief sought, and is not merely ancillary to

some other relief, attorneys' fees may not be recovered as damages in an action on an injunction bond." *Int'l Bhd. of Firemen & Oilers v. Bd. of Educ. of Jefferson Cnty.*, 393 S.W.2d 793, 795-96 (Ky. App. 1965) (citing *Grant Cnty. Bd. of Educ. v. Baston*, 251 S.W.2d 880 (Ky. 1952)).

2. Relief from Order on Motion for Injunctive Relief

Adversely affected parties can seek relief from orders regarding injunctive relief at various stages in the litigation. First, CR 65.07 permits the party adversely affected by the circuit court's grant, denial, modification, or dissolution of a temporary injunction to move for interlocutory relief in the court of appeals *prior* to final judgment. The adversely affected party has twenty days after the entry of the circuit court's order to seek relief from the Kentucky Court of Appeals, and the respondent may file a response to the adversely affected party's motion within ten days after it is served (or thirteen days if it is served by mail). CR 65.07(1); *see also* CR 6.05 ("Additional time after service by mail."). The adversely affected party also may simultaneously request emergency relief from a member of the court of appeals if that party will "suffer irreparable injury before the motion will be considered by a panel." CR 65.07(6). Such an emergency motion can be granted ex parte if necessary, but the movant must "state why it is impractical to notify opposing counsel so that they may appear, in person or by phone, before the judge to whom the request for emergency relief is presented." *Id.* The Rule does not address whether the respondent may submit a response to the emergency motion; however, upon receipt of such a motion, it is advisable to contact the clerk of the court of appeals to inquire whether a response may be submitted before the emergency appeal is decided. Further, the court of appeals may contact the respondent to request a response, or a hearing, if deemed necessary to resolve the emergency motion.

The circuit court also has the discretion to suspend the operation of an order dissolving a temporary injunction previously granted for a period not to exceed twenty days—in order to permit the adversely affected party to file its motion and move for emergency relief with the court of appeals. CR 65.07(1). This appears to provide a means for staying the dissolution until an appeal is taken (and the party can seek a similar

stay from the court of appeals while an appeal is pending). The Rule specifically authorizes a party's use of this procedure only to situations involving the dissolution of a temporary injunction, and not in connection with the grant, denial, or modification of a temporary injunction.

The movant must provide an original and four copies of the motion for interlocutory relief for filing with the office of the appellate court clerk and must pay a filing fee. CR 65.07(2); CR 76.42(2)(a)(viii). The motion must be formatted as would any other motion before the court of appeals and must include the original or a copy of the relevant record or proceedings below. CR 65.07(2); *see also* CR 76.34 (procedure for filing motions with court of appeals). In addition, the motion must include a clear statement of the procedural history of the case, the factual history of the dispute, and the grounds on which movant's claim for interlocutory relief is based. CR 65.07(2). The motion will be considered by a panel without oral argument, unless ordered by the court of appeals on motion or sua sponte. CR 65.07(5)(a). The panel will be guided by the standards for a temporary injunction set forth in CR 65.04(1) (described above). CR 65.07(5)(b). If relief is granted, a bond may be required as provided in CR 65.05. *Id.* The court of appeals' ruling on this motion cannot be reconsidered. CR 65.07(8).

As noted above, the court of appeals reviews a lower court's ruling on a motion for a temporary injunction for an abuse of discretion:

> Because the injunction is an extraordinary remedy, sufficiency of the evidence below must be evaluated in light of both substantive and equitable principles. Realizing that the elements of CR 65.04 must often be tempered by the equities of any situation, injunctive relief is basically addressed to the sound discretion of the trial court. Unless the trial court has abused that discretion, this Court has no power to set aside the order below.

Maupin, 575 S.W.2d at 697-98. This standard of review places an "enormous burden" on the party seeking relief from the lower court's order, as "[t]he test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Com. ex rel Conway v. Thompson*, 300 S.W.3d 152, 162 (Ky. 2009) (quoting *Kindred Hosps. Ltd. P'ship v. Lutrell*, 190 S.W.3d 916, 919 (Ky. 2006);

Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999)). A "temporary injunction is not void even though, at the time of its issuance, it was not supported by findings of fact and conclusions of law," but it is voidable. *United Auto., Aerospace & Agric. Implement Workers v. Int'l Harvester Co.*, 597 S.W.2d 157, 158 (Ky. App. 1980). Thus, when the lower court fails to make such findings, the appellate court can either dissolve the temporary injunction or remand to the trial court for its findings of fact and conclusions of law (Kentucky courts have not expressed a preference for taking one action over the other). *Id.* Finally, the filing of a motion to dissolve does not waive the party's right to seek removal of the action to federal court as it is a defensive act. *Bedell v. H.R.C., Ltd.*, 522 F. Supp. 732, 738-39 (E.D. Ky. 1981). In other words, if an injunction is issued against a defendant, that defendant can seek relief from the court of appeals *and* seek removal of the case to the federal court, as the former action does not waive the right of removal.

Kentucky Civil Rule 65.08 provides the second method for seeking relief from an order regarding injunctive relief. It permits the party adversely affected by a final judgment granting or denying an injunction to request that the court grant, suspend, or modify the order regarding injunctive relief *while an appeal of the final judgment is pending*. CR 65.08(1). The adversely affected party may seek such relief from the circuit court and/or the Kentucky Court of Appeals, but if relief is sought only from the court of appeals, the movant must state why a request for relief from the circuit court was impractical. CR 65.08(2), (3). The circuit court may, in its discretion, order "that the status existing immediately before the entry of the final judgment shall be maintained for a specified limited time to protect a party wishing to [promptly move for relief from the court of appeals]." *Id.* Notably, "the provisions of CR 62.03 ["Pending appeal of judgment other than injunction judgment."] and CR 73.04 ["Supersedeas bond."] for effecting a stay of judgment by the execution of a supersedeas bond do not apply to a judgment granting or denying injunctive relief," as CR 65.08 "is the exclusive authority under which a stay may be had after a final judgment granting or denying injunctive

relief has been appealed." *Bella Gardens Apts., Ltd. v. Johnson*, 642 S.W.2d 898, 900 (Ky. 1982).

As with a motion for interlocutory relief prior to a final judgment, an original and four copies of a motion for interlocutory relief pending final judgment must be filed with the appellate court; the motion must be formatted as would any other motion before the court of appeals; the motion must include an original or copy of the relevant record or proceedings below; a response to the motion may be filed by any party within ten (or thirteen if served by mail) days of service of the motion; and there will be no oral argument on the motion, which will be submitted to a panel, unless ordered by the court of appeals. CR 65.08(3)-(6). Also similar to a motion for interlocutory relief prior to a final judgment, if the movant will suffer irreparable harm before the court of appeals will hear the motion for interlocutory relief pending final judgment, the movant may request emergency relief from a member of the court. CR 65.08(7). Such relief may be granted ex parte if necessary and if ex parte relief is requested, the motion must state why it is impractical to notify opposing counsel before presenting the request for relief. *Id.* The Rule does not address whether the respondent may submit a response to the emergency motion; however, upon receipt of such a motion, it is advisable to contact the clerk of the court of appeals to inquire whether a response may be submitted before the emergency appeal is decided. Further, the court of appeals may contact the respondent to request a response, or a hearing, if deemed necessary to resolve the emergency motion. A bond, pursuant to CR 65.05, may be required if relief is granted, and a ruling granting or denying relief cannot be reconsidered. CR 65.08(8), (9). The circuit court retains jurisdiction to enforce all restraining orders and injunctions it issues, *except* an injunction pending an appeal that the court of appeals issues pursuant to CR 65.08. *Hale v. Cundari Gas Transmission Co.*, 454 S.W.2d 679, 680 (Ky. App. 1969). "While for certain purposes an appeal transfers jurisdiction to [the court of appeals], it comports with the proper administration of justice that the enforcement of an unsuperseded judgment be subject to control of the circuit court entering such judgment." *Id.* (citation omitted).

The third method of relief is found in CR 65.09, which permits the party adversely affected by an order of the Kentucky Court of Appeals granting or denying relief under CR 65.07 or CR 65.08 to request that the Kentucky Supreme Court modify or vacate that order. This request must be made within five days of the entry of the court of appeals' order, through the adversely affected party's filing of ten copies of the motion along with the original or copies of the court of appeals' order and all relevant materials filed with the court of appeals. CR 65.09(1). The opposing party may submit a response, but the Rule does not provide a deadline by which the response must be submitted. *See id*. It is within the supreme court's discretion whether to review the court of appeals' order, and such order should only be reviewed "for extraordinary cause shown in the motion." *Id.* The supreme court does not have jurisdiction to grant injunctive relief pursuant to CR 65.09 because "[t]he specific mandate of the rule states that such action arises only when a party is affected by an order of the Court of Appeals in a proceeding under CR 65.07, CR 65.08 or in a habeas corpus proceeding." *Green Valley Envt'l Corp. v. Clay*, 798 S.W.2d 141, 143 (Ky. 1990). Thus, if relief has not been sought previously in one of those three forms, relief pursuant to CR 65.09 is inappropriate. *Id.*

The Kentucky Supreme Court also can grant discretionary review of the court of appeals' ruling on a motion for emergency relief under CR 65.07(6) or CR 65.08(7). CR 65.09(3). The adversely affected party must move the supreme court for relief from the ruling on the emergency motion in the same manner it would seek relief from the court of appeals' ruling, as outlined above. *Id.* But failure to seek emergency review does not affect a party's right to otherwise seek review of the court of appeals' ruling on the motion for interlocutory relief. CR 65.09(3)(c). "If the Supreme Court declines to exercise its discretion to immediately review the ruling, the motion for relief in the Court of Appeals will be assigned to a panel of that Court for decision." CR 65.09(5)(a)." But "[i]f the Supreme Court decides to exercise its discretion to immediately review the ruling, the Supreme Court review shall encompass both the emergency motion and the motion for relief under CR 65.07 and CR 65.08." CR 65.09(5)(b).

Finally, the party adversely affected by the order regarding injunctive relief can seek relief from that order by appealing a final judgment granting or denying injunctive relief pursuant to the rules regarding appeals generally.

B. Prejudgment Remedies

1. Writs of Possession

One form of prejudgment remedy is the writ of possession. A writ of possession is mainly used by secured creditors when self-help repossession cannot be obtained. Mathew Bender, 2 *Caldwell's Kentucky Form Book* § 152.00 (5th ed. 2011); s*ee also Owens v. First Comm. Bank*, 706 S.W.2d 414, 416 n.1 (Ky. App. 1985). Ky. Rev. Stat. § 425.011(1) permits seeking a writ of possession in an action for the recovery of personal property. This can be done after filing a complaint or at any time prior to judgment by filing a written motion for a writ of possession with the court in which the action is brought. *Id.* Such a motion must be executed under oath and must include:

> (a) A showing of the basis of the plaintiff's claim and that the plaintiff is entitled to possession of the property claimed. If the basis of the plaintiff's claim is a written instrument, a copy of the instrument shall be attached.
>
> (b) A showing that the property is wrongfully detained by the defendant, of the manner in which the defendant came into possession of the property, and, according to the best knowledge, information, and belief of the plaintiff the reason for the detention.
>
> (c) A particular description of the property and a statement of its value. A description of property sufficient under KRS 355.9-108 [describing sufficiency of description of collateral in secured transaction] shall meet the requirement of this section. The statement of value may be as to the worth of the property as a whole.
>
> (d) A statement, according to the best knowledge, information and belief of the plaintiff, of the location of the property and if the property, or some part of it, is within a private place which may have to be entered to take possession a showing that there is probable cause to believe that such property is located there. Although such showing may be based on information and belief the judicial officer at the hearing herein provided must be presented with facts sufficient to show that the information and the informant are credible and reliable.

> (e) A statement that the property has not been taken for a tax assessment, or fine, pursuant to a statute; or seized under an execution against the property of the plaintiff; or if so seized, that it is by statute exempt from such seizure.

Id. § 425.011(2). An affidavit filed with the motion can satisfy these requirements. *Id.* § 425.011(3).

Demand, notice, and opportunity for a hearing must be provided before a writ of possession may be issued. *Id.* § 425.012. Demand must be made in writing at or after the filing of the suit "by delivering such demand and a copy of the complaint, motion and summons to the defendant or by sending them to him by registered or certified mail, return receipt requested, to the last known place of residence at least seven and not more than sixty days before such order is sought." *Id.* § 425.012(1); *see also* CR 69.01 (providing that these documents may be served upon defendant as prescribed in CR 4, by any person authorized to serve a subpoena pursuant to CR 45.03, or by certified mail to defendant's last known place of residence). Moreover, the demand must contain: a statement that defendant has seven days to petition the court for a hearing or to pay in full the amount claimed in the complaint; notice that a writ of possession will issue unless a hearing is set or the amount paid; and identification of the court in which suit has been brought, the grounds for the suit, the date of the demand, the amount claimed, and the name and address of the plaintiff and his attorney. *Id.* If the defendant does not petition the court for a hearing within the time allotted, the clerk will issue the writ of possession. *Id.* § 425.012(2).

If, however, the defendant requests a hearing on the plaintiff's motion for a writ of attachment, such a hearing must be conducted pursuant to Ky. Rev. Stat. § 425.031. The judicial officer presiding over the hearing shall issue a writ of possession if he or she finds that "[t]he plaintiff has established the probable validity of his claim to possession of the property" and that "[t]he plaintiff has provided a bond as required by KRS 425.111." *Id.* § 425.036(1). The plaintiff's bond must ensure that "if the plaintiff fails to recover judgment in the action, the plaintiff shall return the property to the defendant, if return thereof be ordered, and shall pay all costs that may be awarded to the defendant

and all damages . . . sustained by the defendant which are proximately caused by . . . the levy of the writ of possession, and loss of possession of the property pursuant to [that] levy." *Id.* § 425.111.

When the court grants the plaintiff's motion for a writ of attachment, the plaintiff must prepare the actual writ and present it to the court. The writ must: be directed to the sheriff; describe the specific property to be seized; specify any private place that may be entered to take possession of the property or some part of it; direct the sheriff to levy on the property pursuant to Ky. Rev. Stat. § 425.091 if it is found and to retain it in his custody until it is released or sold according to Ky. Rev. Stat. § 425.101; inform the defendant of its right to obtain redelivery of the property by filing a bond with one or more sufficient sureties; and inform the defendant of its right to seek an order from the court to quash the writ and release the property seized. *Id.* § 425.046(1). The court may appoint a special bailiff to serve a writ of possession "where the interests of justice and the orderly working of the court demand," such as when the sheriff's office is dealing with a heavy caseload or the writ requires especially difficult or complex service. Op. Ky. Att'y Gen. 84-366 (1984).

The court may issue an ex parte writ of possession if the affidavit demonstrates that "great or irreparable injury would result to the plaintiff if issuance of the writ were delayed until the matter could be heard on notice." Ky. Rev. Stat. § 425.076(1). Such an extraordinary writ is appropriate if there is "[a] danger that the property sought to be attached [will] be concealed or placed beyond the process of the court or substantially impaired in value if the issuance of the order were delayed until the matter could be heard on notice;" "[t]he defendant gained possession of the property by wrongfully taking the property from the plaintiff . . . [unless] the defendant has fraudulently appropriated property entrusted to him or obtained possession by false pretense or by embezzlement;" "[t]he property is a credit card;" or other circumstances exist that show "that great or irreparable injury would result to the plaintiff if issuance of the writ were delayed until the matter could be heard on notice." *Id.* § 425.076(2). The court may instead, on plaintiff's motion for an ex parte writ of possession, issue a temporary restraining order if

conditions for an ex parte writ are present "but the issuance of the temporary restraining order instead of the writ of possession would be in the interest of justice and equity to the parties." *Id.* § 425.086(1).

The plaintiff may also apply for a temporary restraining order at or after moving for a writ of possession "by setting forth in the motion a statement of grounds justifying the issuance of such order." *Id.* § 425.066(1). In this instance, the temporary restraining order "fills the gap which exists between a noticed motion of a writ of possession and proceeding *ex parte*." UK/CLE, *Kentucky Civil Practice Before Trial*, § 12.60 (3d ed. 2008). "When a [temporary restraining order] is sought in conjunction with a writ of possession it is pursuant to statutory process, rather than the Civil Rules. For this reason there is disagreement between judges, commentators and practitioners as to whether or not the notice requirements of CR 65.03 ["Restraining order."] are applicable." *Id.* If the court believes that the property at issue in plaintiff's motion for writ of possession is at immediate risk of becoming unavailable to levy because of transfer, concealment, or removal or of having its value substantially impaired, it may issue the temporary restraining order. *Id.* § 425.066(2). Pursuant to Ky. Rev. Stat. § 425.071, the temporary restraining order may prevent defendant from doing the following:

> (a) Transferring any interest in the property by sale, pledge, or grant of security interest, or otherwise disposing of or encumbering, the property. If the property is farm products held for sale or lease or is inventory, the order may not prohibit the defendant from transferring the property in the ordinary course of business, but the order may impose appropriate restrictions on the disposition of the proceeds from such transfer.
>
> (b) Concealing or otherwise removing the property in such a manner as to make it less available to seizure by the levying officer.
>
> (c) Impairing the value of the property either by acts or destruction or by failure to care for the property in a reasonable manner.

If the court later determines that the plaintiff is entitled to a writ of possession, it may issue a temporary injunction to protect the property from the expiration of the temporary restraining order until the property is seized. *Id.* § 425.066(3). But if the court

determines that the plaintiff is not entitled to a writ of possession, the temporary restraining order must be dissolved. *Id.*

2. Attachment

Another form of prejudgment remedy is attachment, which is governed by Ky. Rev. Stat. § 425.301 et seq. As opposed to a writ of possession, an attachment offers a provisional remedy through the seizure of property in which plaintiff *does not* possess a security or ownership interest. *See* UK/CLE, *Kentucky Civil Practice Before Trial*, § 12.68 (3d ed. 2008). An attachment can take many different forms, including garnishment of bank accounts and wages, a lien against real estate, or seizure of personal property. *See id.*

Section 425.301 provides that a plaintiff, either at or after the commencement of an action, may "have an attachment against the property of the defendant, including garnishees as security for the satisfaction of such judgment as may be recovered." The provision then sets forth the circumstances under which an attachment may be had:

> (1) In an action for the recovery of money against:
>
> (a) A defendant who is a foreign corporation or nonresident of the state; or
>
> (b) Who has been absent herefrom for four (4) months; or
>
> (c) Has departed herefrom with intent to defraud his creditors; or
>
> (d) Has left the county of his residence to avoid the service of a summons; or
>
> (e) So conceals himself that a summons cannot be served upon him; or
>
> (f) Is about to remove, or has removed, his property, or a material part thereof out of this state, not leaving enough therein to satisfy the plaintiff's claim, or the claims of said defendant's creditors; or
>
> (g) Has sold, conveyed, or otherwise disposed of, his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder or delay his creditors; or
>
> (h) Is about to sell, convey, otherwise dispose of his property, with such intent. But an attachment shall not be granted on

> the ground that the defendant is a foreign corporation, or a nonresident of this state, for any claim other than a debt or demand arising upon a contract, express or implied, or a judgment or award.
>
> (2) In an action for the recovery of money due upon a contract, judgment or award, if the defendant have no property in this state subject to execution, or not enough thereof to satisfy the plaintiff's demand, and the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found.

Id. An attachment also may be ordered when an equitable action for indemnity is brought before a debt or liability upon a contract becomes due or matures "by a creditor against his debtor; by a surety against his principal; or by one who is jointly liable with another for such debt or liability, against the latter" and any of the grounds for attachment mentioned in Ky. Rev. Stat. § 425.301(1)(c)-(h) exist. *Id.* § 425.306.

Section 425.301 goes on to provide that before an order of attachment can be issued, the plaintiff must, at least seven and not more than sixty days before such order is sought, make a written demand "at or after the time the suit is filed, by delivering such demand and a copy of the complaint, motion and summons to the debtor or by sending them to him by registered or certified mail, return receipt requested, to his last known place of residence." *Id.* § 425.301(3). As with a writ of possession, these documents should be served upon defendant as prescribed in CR 4, by any person authorized to serve a subpoena pursuant to CR 45.03, or by certified mail to defendant's last known place of residence. CR 69.01. Although the procedural requirements for giving notice are identical to those for seeking a writ of possession, the required contents of the notice are different. The written demand with a motion for attachment must: (1) "contain a statement in substance that the debtor has seven (7) days in which to petition the court for a hearing or in which to pay the claim in full and that unless a hearing is set or the claim paid, an order will be sought to subject his property to payment of the claim;" (2) identify the court in which the suit has been filed; (3) identify the grounds for the suit; (4) set for the date of the demand; (5) set forth the amount of the claim; and (6) provide the address of the plaintiff and his attorney. *Id.* An order will not be issued until plaintiff provides "[a]n affidavit of the plaintiff or his attorney evidencing compliance with this section."

Section 425.307 sets forth the requirements for a motion for an order of attachment. Such a motion must be executed under oath and set forth "(a) [t]he nature of the plaintiff's claim; (b) [t]hat it is just; (c) [t]he sum which the plaintiff believes he ought to recover; and (d) [t]he existence of any grounds for an attachment." *Id.* § 425.307(2); *see also Universal C.I.T. Credit Corp. v. Collett,* 256 S.W.2d 35, 36 (Ky. 1953) ("Where the affidavit states that the affiant believes the facts therein, but is sworn to as true and not on belief merely, or where the affidavit states the facts directly, and it is sworn to on information and belief, it is in either instance sufficient." (quoting *Colovas v. Allen Motor Co.*, 242 Ky. 93, 45 S.W.2d 809, 810 (Ky. 1932)). The clerk shall then issue an order of attachment, assuming the plaintiff has made a written demand of the debtor (per §425.301(3)), unless the defendant has requested a hearing on the motion. Ky. Rev. Stat. § 425.307(3). If the defendant requests a hearing, such hearing shall be conducted pursuant to Ky. Rev. Stat. § 425.031, which is the same provision applicable to a hearing on a motion for a writ of possession. Also similar to a writ of possession, if the court grants the motion for an attachment, the attachment cannot issue "until a bond has been executed by one (1) or more sufficient sureties of the plaintiff in an amount not less than double the amount of the plaintiff's claim." *Id.* § 425.309(1). Unlike a writ of possession, the amount of the bond for attachment is based on the plaintiff's claim rather than on the value of the property attached. The provisions governing an attachment also differ in that they do not provide guidance as to how an attachment order, once entered, is to be implemented.

The court may enter an order of attachment ex parte "if it appears from facts shown by affidavit that great or irreparable injury would result to the plaintiff if issuance of the order were delayed until the matter could be heard on notice." *Id.* § 425.308(1). However, for the court to grant such an ex parte order, the plaintiff's motion must satisfy all of the requirements set forth in § 425.307 (described above) and must also "include a showing that great or irreparable harm would result to the plaintiff if issuance of the order were delayed until the matter could be heard on notice." *Id.* § 425.308(2). When an order of attachment is issued pursuant to any of these provisions, the defendant whose

property is attached "may apply for an order that the attachment be quashed and any property taken, or attached, be released from the attachment" through noticed motion and an immediate hearing. *Id.* § 425.302. The attachment also must be dissolved and any proceeds of it received by plaintiff returned to defendant "[s]hould the defendant post a bond, with sufficient sureties, insuring compliance with a final judgment, in an amount equal to the plaintiff's claim, including court costs and attorney's fees as stated in plaintiff's complaint." *Id.* § 425.309(2).

III. Apportionment Considerations

Apportionment considerations factor into decisions to join additional parties to a lawsuit. Kentucky law provides the following in regard to apportionment in tort actions:

> (1) In all tort actions, including products liability actions, involving fault of more than one (1) party to the action, including third-party defendants and persons who have been released under subsection (4) of this section, the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories or, if there is no jury, shall make findings indicating:
>
> > (a) The amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and
> >
> > (b) The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under subsection (4) of this section.
>
> (2) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.
>
> (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 unless it so provides. However, the claim of the releasing person against other persons shall be reduced by the amount

> of the released person's equitable share of the obligation, determined in accordance with the provisions of this section.

Ky. Rev. Stat. § 411.182. Considering this, any party who might be liable for the injury being claimed should be joined—pursuant to impleader or joinder as described in Section IV below—in the action.

If a party is not joined, then his liability cannot be taken into account when apportioning fault. *See Bass v. Williams*, 839 S.W.2d 559, 563-64 (Ky. App. 1992) *overruled on other grounds by Regenstreif v. Phelps*, 142 S.W.3d 1 (Ky. 2004). "KRS 411.182 applies to persons named as parties, regardless of how named, and those persons who bought their peace from the litigation by way of releases or agreements." *Id.* at 564; *see also Baker v. Webb*, 883 S.W.2d 898, 900 (Ky. App. 1994) ("[T]he thrust of KRS 411.182, considered in its entirety, limits allocation of fault to those who actively assert claims, offensively or defensively, as parties in the litigation or who have settled by release or agreement. When the statute states that the trier-of-fact shall consider the conduct of 'each party at fault,' such phrase means those parties complying with the statute as named parties to the litigation and those who have settled prior to litigation, not the world at large."). This rule applies without regard to venue restrictions, as it does not permit the court "to exercise jurisdiction over persons who could not otherwise be summoned in that jurisdiction." *Copass v. Monroe Cnty. Med. Found.*, 900 S.W.2d 617, 620 (Ky. App. 1995). However, Kentucky's venue provisions and Ky. Rev. Stat. § 411.182 are not inconsistent "as that statute provides that apportionment may be had against all parties or settling tort-feasors, but it vests no authority to force tort-feasors to trial in an improper venue." *Id.* In addition, "a person or entity entitled to absolute immunity is not a 'party to the action' under subsection (1) [of § 411.182]." *Lexington-Fayette Urban Cnty. Gov't v. Smolcic*, 142 S.W.3d 128, 135 (Ky. 2004). Thus, "fault [can]not be apportioned against a person or entity that possess[es] absolute immunity." *Id.* at 136.

Because Ky. Rev. Stat. § 411.182 calls for the apportionment of damages among the parties, there is no longer any need for a claim of contribution among joint tortfeasors whose respective liabilities are to be determined in the original action. *Degener v. Hall*

Contracting Corp., 27 S.W.3d 775, 779 (Ky. 2000). But Kentucky courts have not addressed "the viability of a claim for contribution against other joint tortfeasors who were not parties to that action." *Id.* Contribution involves a right that arises "when two or more joint tortfeasors are guilty of concurrent negligence of substantially the same character which converges to cause the plaintiffs damages," and in that scenario joint tortfeasors are considered jointly liable to the plaintiff, meaning the plaintiff could recover from them jointly or severally. Under § 411.182, defendants are only severally liable to the plaintiff. *Id.* at 779. Kentucky courts have, however, noted that § 411.182 "does not do away with the common law right to indemnity, which is available 'to one exposed to liability because of the wrongful act of another with whom he/she is not *in pari delicto*[,]' or equally liable." *York v. Petzl Am., Inc.*, ____ S.W.3d ____, 2010 Ky. App. LEXIS 173, at *8 (Ky. App. Sept. 24, 2010) (quoting *Degener*, 27 S.W.3d at 780). The Kentucky Supreme Court has explained as follows:

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

Degener, 27 S.W.3d at 780 (quoting *Louisville Ry. Co. v. Louisville Taxicab & Transfer Co.*, 256 Ky. 827, 77 S.W.2d 36, 39 (1934)).[2]

Considering this, parties should seek to include all persons who might be liable for the injuries claimed in the lawsuit. Although indemnity can be sought later against a person who was not joined, it is not clear whether contribution can be sought and thus joining them at the outset is preferable. Of course, practical considerations might dictate whether one is joined in the lawsuit. For example, if a company is sued for injuries sustained on its premises, the company likely would be more willing to join a third-party

[2] The Kentucky Supreme Court has helpfully chronicled the history of Kentucky's apportionment law in *Degener*, 27 S.W.3d at 778-79.

if that third party were a criminal who violated the law in injuring the plaintiff than it would if that third party were a vendor or client of company with whom the company would like to maintain a working relationship. These practical considerations must be weighed along with apportionment considerations in determining whether to implead or join a third party (pursuant to the rule set forth in Section IV below).

IV. Third Party Practice: Impleader/Cite-In/Joinder

A. Impleader

In Kentucky, third party practice is referred to as impleader.[3] Pursuant to CR 14.01, "[a] defendant may move for leave as a third-party plaintiff to assert a claim against a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." This rule parallels Federal Rule 14(a), and "[t]he general purpose of Rule 14 is to avoid two actions which should be tried together to save time and cost of a reduplication of evidence, to obtain consistent results from identical or similar evidence, and to do away with the serious handicap to a defendant of a time difference between a judgment against him and a judgment in his favor against a third-party defendant." *Jackson & Church Div., Yorkshipley, Inc. v. Miller*, 414 S.W.2d 893, 894 (Ky. 1967) (quoting James Wm. Moore et al., *Moore's Federal Practice* § 14.04 (2d ed.)).[4]

It is within the court's sole discretion to grant or deny defendant's motion to assert a third-party claim. *Com. Dep't of Highways v. Louisville Gas & Electric Co.*, 346

---

[3] "Cite-in" is a term that has been used in some jurisdictions to refer to impleader. *See, e.g., Strain v. Chandler*, 88 N.H. 318, 188 A.461, 462 (N.H. 1936).

[4] The Sixth Circuit has set forth guidance for when third-party claims are permissible under Federal Rule 14(a):

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

Am. Zurich Ins. Co. v. Cooper Tire & Rubber Co., 512 F.3d 800, 805 (6th Cir. 2008).

S.W.2d 536, 537 (Ky. 1961). Unlike the Kentucky Rule, Federal Rule 14 allows a defendant to bring in a third-party defendant within fourteen days of serving its answer without leave of court (though the court still has discretion to deny impleader because there is no absolute right to implead, James Wm. Moore et al., *Moore's Federal Practice* § 14.20 (2011)). Fed. R. Civ. P. 14(a)(1). After these fourteen days have elapsed, the defendant must seek leave of court to assert a third-party claim. *Id.* Under the Kentucky Rule, there is no specific time within which a defendant should move to file a third-party complaint, but "inordinate delay" in requesting third-party relief is a factor the trial court may consider in determining whether to permit a third-party claim. *Am. Hardware Mut. Ins. Co. v. Fryer*, 692 S.W.2d 278, 283 (Ky. App. 1984). If the defendant's motion for leave to assert a third-party claim is denied, the order is not immediately appealable because "it does not finally dispose of any rights of the defendant." *Com. Dep't of Highways*, 346 S.W.2d at 537.

If the defendant's motion for leave to assert a claim as a third-party plaintiff is granted, "summons and a copy of the third party complaint, with a copy of the original complaint attached as an exhibit, shall be served on such a person, who shall be called the third-party defendant." CR 14.01. To do so, the court must possess personal jurisdiction over the third-party defendant. But the venue provisions of Ky. Rev. Stat. § 452.480 need not be met as to the third-party defendant. *Am. Collectors Exchange, Inc. v. Ky. State Democratic Cent. Exec.Comm.*, 566 S.W.2d 759, 761 (Ky. Ct. App. 1978); *see also Goodwin Bros. v. Preferred Risk Mut. Ins. Co.*, 410 S.W.2d 714, 716 (Ky. 1967). Once served, the third-party defendant "shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross claims against other third-party defendants as provided in Rule 13." CR 14.01.

The third-party defendant has the right to assert, and should assert, any defenses against the original plaintiff that the third-party defendant has to that plaintiff's claims and may also assert "any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff." *Id.* Likewise, the original plaintiff has the right to assert "any claim against

the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses . . . and his counterclaims and cross claims . . . ." *Id.* A third-party defendant also may proceed according to this rule, joining "any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant." *Id.* In addition, if a counterclaim is asserted against a plaintiff, it may bring in a third party in the same manner a defendant is entitled to do so. CR 14.02; *see also Hoop v. Hahn*, 568 S.W.2d 57, 58 (Ky. App. 1978). However, the plaintiff may not use CR 14.02 as a means to skirt venue requirements that would otherwise apply to defendants in an action. *See Hoop*, 568 S.W.2d at 58 (explaining that the venue exception enumerated in *Goodwin Bros.* only applies to third-party practice under CR 14.01). Moreover, if one is immune from liability, then he or she cannot be liable for all or part of the claim against the defendant (or third-party plaintiff) and, thus, he or she cannot be made a third-party defendant. *Jefferson Cnty. Com. Att'y's Office v. Kaplan*, 65 S.W.3d 916, 921 (Ky. 2001).

B. Joinder

Joinder refers to the joining of multiple parties as plaintiffs or defendants to a suit and may be permissive or compulsory. Permissive joinder is governed by CR 20.01, which provides as follows:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

That rule goes on to provide that a joined plaintiff or defendant need not have an interest in obtaining or defending against all the relief sought, and that the court may grant a

judgment for one or more of the plaintiffs or against one or more of the defendants according to their respective rights or liabilities. CR 20.01.

Although CR 20.01 permits the joining of multiple plaintiffs or defendants to one suit, when several plaintiffs assert independent claims against the same defendant, those plaintiffs must satisfy separately jurisdictional requirements. In other words, "the independent claims of several plaintiffs against the same defendant . . . cannot be added together for purposes of jurisdictional amount[, nor] can the claims of nonappearing parties." *Ky. Dep't Store, Inc. v. Fidelity-Phoenix Fire Ins. Co.*, 351 S.W.2d 508, 509 (Ky. 1961); *but see* CR 23.01 et seq. (regarding class actions); *Lamar v. Office of Sheriff*, 669 S.W.2d 27, 31 (Ky. App. 1984) ("[T]he sums of the individual claims of the respective parties may not be aggregated in order to meet the jurisdictional amount requirements for an action to be brought in the circuit court and be maintained as a class action where none of the individual claims is equal to or exceeds the statutory jurisdictional amount.")

As an example of permissive joinder, two plaintiffs joined in one action for damages as the result of a car accident in *Ingram v. Galliher*, 309 S.W.2d 763 (Ky. 1958). In that case, the plaintiffs, Betty Galliher and Kathleen Hackworth, were injured when the car Galliher was driving with Hackworth as a passenger was struck by James Lee Ingram, who was driving on the wrong side of the road. *Id.* at 764-65. The trial court permitted Galliher and Hackworth to sue Ingram jointly, as authorized by CR 20.01. *Id.* at 764. Galliher and Hackworth's claims against Ingram arose out of the same transaction and would involve a common question regarding Ingram's negligence in driving on the wrong side of the road.

As a further example, the Kentucky Court of Appeals held that two defendants were improperly joined in *Nelson v. Conyers' Administrix*, 288 S.W.2d 626 (Ky. 1956). That case arose from the collision of a taxicab, being pushed by Conyers because it had broken down, and a vehicle driven by Lyman Nelson. *Id.* at 627. Conyers sued Nelson for the damage to the cab and joined Nelson's insurance company, asserting that the insurance company had agreed to pay Conyers $1000 for damage to the cab if Conyers

refrained from suing Nelson until after a personal injury claim against Nelson (by a passenger riding in the taxicab when it was struck) was settled. *Id.* The jury found for Conyers against Nelson, but ruled in favor of the insurance company on the alleged oral agreement. *Id.* Nelson appealed, arguing that the trial court erred in overruling Nelson and the insurance company's motions for separate trials and allowing these claims to be tried together. *Id.* The court of appeals, applying CR 20.01, held that the joinder was improper and reversed the judgment against Nelson. *Id.* In so holding, the court of appeals assumed that Conyers' claims against Nelson and his insurance company arose out of the same transaction or occurrence, but found that they did not "involve common questions of law and fact sufficient to permit their joinder." *Id.* This was because "[t]he claim against Nelson revolve[d] around the question of whose negligence caused the collision and whether there was contributory negligence[, and] [t]he claim against the Insurance Company turn[ed] on whether there was an oral agreement on which suit [could] be maintained." *Id.*

Compulsory joinder is governed by CR 19.01, which provides as follows:

> A person who is subject to service of process, either personal or constructive, shall be joined as a party in the action if (a) in his absence complete relief cannot be accorded among those already parties, or (b) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Persons falling within this rule are referred to as "necessary parties."[5] The rule goes on to provide that the court shall order such a necessary party be made a party if he or she has not been joined. *Id.* In addition, if a necessary party should be joined as a plaintiff but refuses to do so, the rule instructs that he or she may be made a defendant or, if the circumstances permit, an involuntary plaintiff. *Id.* Finally, "[i]f the joined party objects

[5] Unlike the Kentucky Rules of Civil Procedure, Federal Rule 19 no longer uses the "necessary" and "indispensible" terminology. *See* Fed. R. Civ. P. 19.

to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action." *Id.*

If a litigant believes that there is a necessary (or indispensable) party, "it should request the court to order joinder by the simple expedient of filing a motion. If the court concurs then service of process shall issue, but in any event, it should be accomplished by pleading or motion and a brief is neither." *Cabinet for Human Resources v. Ky. State Personnel Bd.*, 846 S.W.2d 711, 714 (Ky. App. 1992). Thus, in *Cabinet for Human Resources*, the court of appeals held that the appellant had not preserved the issue of joinder for appeal where it merely included this issue in a brief to the lower court. *Id.*; *see also Tri-County Nat'l Bank v. GreenPoint Credit, LLC*, 190 S.W.3d 360, 363-64 (Ky. App. 2006) ("[T]he party who believes an indispensable party should be joined has the obligation of filing an appropriate motion or other pleading with the trial court in an attempt to join that party. Because [appellant] failed to file such a motion, this issue is not subject to appellate review."). In addition, CR 19.01 only permits *parties* to move for joinder, and a person seeking to become a party cannot move for joinder pursuant to that rule. *Murphy v. Lexington-Fayette Cnty. Airport Bd.*, 472 S.W.2d 688, 690 (Ky. 1971).

It is possible that a person might be considered necessary, according to CR 19.01, but that he or she cannot be joined because the court cannot exercise personal jurisdiction over him or her. In this situation, CR 19.02 provides that "the court shall determine whether in equity and good conscience, the action should proceed among the parties before it or should be dismissed, the absent party being thus regarded as indispensable." That rule goes on to set forth four factors to be considered by the court in making this determination:

> (a) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (b) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (c) whether a judgment rendered in the person's absence will be adequate; (d) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id. CR 19.03 goes on to require that "[a] pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons described in Rule 19.01 who are not joined, and the reasons why they are not joined."

Various cases shed light onto who might be considered necessary and/or indispensable parties. For example, in *Root v. John Deere Co.*, 413 S.W.2d 901, 902 (Ky. 1967), the court of appeals found that the trial court properly overruled a motion to dismiss for failure to join the assignor as an indispensable party in a suit involving enforcement of an assigned note. The court of appeals explained that the assignee was the real party in interest, that the assignee could sue in its own name, and that, thus, joinder of the assignor was unnecessary. In addition, the Kentucky Supreme Court has explained that statutes providing for judicial review of decisions of administrative bodies that require certain parties to be joined "in effect transform such parties into indispensable ones [pursuant to CR 19.01]." *Ky. Unemployment Ins. Comm'n v. Carter*, 689 S.W.2d 360, 362 (Ky. 1985). Therefore, failure to join the employer as a party to an action pursuant to Ky. Rev. Stat. § 341.450 (regarding appeals from the Kentucky Unemployment Insurance Commission), which required all parties to the proceeding before the commission be made a defendant on appeal, warranted the trial court's dismissal of the employee's complaint. *Id.* at 361. For additional cases regarding necessary and/or indispensable parties, see, e.g., *Mills v. Buell*, 685 S.W.2d 561, 563-64 (Ky. App. 1985) (ordering the dismissal of plaintiffs complaint seeking to enjoin school from finding their son ineligible to participate in interscholastic athletics when plaintiffs failed to join State Board of Education and Kentucky High School Athletic Association in suit); *Duff v. Cisco's Adm'r*, 299 S.W.2d 99, 100 (Ky. 1956) (holding that "an action may not be maintained against a subordinate official without joining his superior as a party if the relief sought will require such superior to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him" and calling the superior official an indispensable party in such cases); *Baker v. Weinberg*, 266 S.W.3d 827, 831-32 (explaining that the owner of record must be named as a party to a quiet title action and refusing to address appellants' adverse possession claim because of

the failure to include this indispensable party). Because there is a close relationship between CR 17 (real party in interest), CR 19 (indispensable party), CR 23 (class action), and CR 24 (intervention), precedents under the various rules are mutually helpful. John Leathers, *Civil Procedure*, 71 Ky. L. J. 395, 397 (1982-83) (citing James Wm. Moore et al., *Moore's Federal Practice* ¶ 24.09-1(3) (2d ed. 1948)).

Civil Rule 21 outlines how to treat misjoinder and nonjoinder of parties:

> Misjoinder of parties is not ground for dismissal of any action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately, in the discretion of the court.

Essentially, a court should sever the claims of the improperly joined parties to a suit rather than dismiss the action all together. *See Marr v. Falls City Stone Co.*, 353 S.W.2d 390, 392 (Ky. 1962). This rule only relates "to parties to an *action*, not an *appeal*," and it "does not apply to *indispensable* parties." *George v. Ky. Alcoholic Bev. Control Bd.*, 403 S.W.2d 24, 25 (Ky. 1966); *see also Commonwealth Dep't of Hwys. v. Alexander*, 388 S.W.2d 599, 601 (Ky 1965) ("It is exceedingly doubtful whether a party brought into a case as a result of ruling that he is indispensable can ever claim prejudicial error from such ruling."). Further, if a party fails to move for severance of claims or otherwise object to a joinder of parties, he or she cannot claim on appeal that a party was improperly joined as the failure to raise the issue below constitutes a waiver of any objection. *Bradford v. Sagraves*, 556 S.W.2d 166, 168 (Ky. App. 1977).

A ruling granting or denying a motion for severance is reviewed for an abuse of discretion. *Huff v. Daniels*, 335 S.W.2d 332, 333 (Ky. 1960). In *Huff*, a husband and wife brought a joint action against Huff to recover for personal injuries and property damage sustained in an automobile accident. *Id.* Ultimately, the trial court dismissed the husband from the suit and the jury ruled in favor of the wife and awarded her damages. *Id.* But before the trial began, Huff moved to remove the wife from the complaint, arguing that she had been improperly joined as a plaintiff. *Id.* Huff based this motion on the fact that he wished to make the husband a party defendant and assert a cross claim against him for contribution. *Id.* The trial court denied Huff's motion. *Id.* After the

verdict was rendered in favor of the wife, Huff appealed and argued that the trial court erred in overruling his motion for severance. *Id.* The Kentucky Court of Appeals agreed that the husband's and wife's claims should have been severed, and held that "overruling [Huff's] motion was an abuse of the discretion given the court under the last sentence of CR 21." *Id.* However, the court of appeals did not consider this error to be prejudicial because Huff did not move to add the husband as a third party defendant after he was dismissed as a plaintiff from the suit, and because at trial the parties stipulated that the husband was acting as the wife's agent and servant when driving the automobile and there could be no separate basis for contribution against him (since it would have to be imputed to his wife). *Id.*

According to Federal Rule 21, which is almost identical to CR 21, the nonjoinder of a necessary party should not lead to the dismissal of the action, but instead should be cured by the addition of the third party. *See* James Wm. Moore et al., *Moore's Federal Practice* § 21.04 (2011). Considering their similarity, we can assume that the same is true according to Kentucky's Civil Rules. However, if that party cannot be joined, the court must follow the analysis set forth in CR 19.02 for determining if the third party is indispensable, and the action can continue on without him, or if the case must be dismissed.