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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000117-MR

MICHAEL B. FLYNN, M.D.;
STEPHEN J. WINTERS, M.D.;
UNIVERSITY OF LOUISVILLE PHYSICIANS, INC.;
UNIVERSITY SURGICAL ASSOCIATES, P.S.C.; AND
UNIVERSITY MEDICAL ASSOCIATES, P.S.C. APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANNIE O'CONNELL, JUDGE
ACTION NO. 16-CI-000488

HAMZA SHEIKH, M.D.;
RICHARD MCGAHAN, M.D.; AND
CATHY OVERTON, INDIVIDUALLY AND
AS EXECUTRIX OF THE ESTATE OF
IVAN OVERTON APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CALDWELL, JONES, AND TAYLOR, JUDGES.

JONES, JUDGE: The Appellants, Michael B. Flynn, M.D.; Stephen J. Winters, M.D.; University of Louisville Physicians, Inc.; University Surgical Associates,

P.S.C.; and University Medical Associates, P.S.C. appeal the Jefferson Circuit Court's January 3, 2019 order dismissing Appellees, Hamza Sheikh, M.D. and Richard McGahan, M.D., as third-party defendants for lack of venue.[1]

Appellants argue that dismissal was improper because the ancillary venue rule applies to third-party practice under CR[2] 14.01. Appellees counter that the third-party complaint against Drs. Sheikh and McGahan was not a permissible use of CR 14.01 because Drs. Flynn and Winters do not properly allege a right to contribution or indemnity from Drs. Sheikh and McGahan. As such, Appellees maintain that dismissal was appropriate because Drs. Sheikh and McGahan reside and practice in Warren County, where they treated Ivan Overton prior to his death, making venue in Jefferson County improper pursuant to KRS[3] 452.460. Having reviewed the record in conjunction with all applicable legal authority, we affirm.

I. BACKGROUND

A. Ivan Overton's Medical Treatment

In February of 2009, Ivan was diagnosed with an asymmetrical enlargement of the thyroid. A fine needle aspiration of the nodules revealed

[1] Appellants filed a joint appellant brief. Dr. Sheikh, Dr. McGahan, and Cathy Overton (in her individual capacity and in her capacity as executrix of Ivan Overton's estate) each filed a separate appellee brief; however, each Appellee asserts a similar position.

[2] Kentucky Rules of Civil Procedure.

[3] Kentucky Revised Statutes.

Hürthle cell neoplasm, which can be, but is not always, malignant. In April of 2009, Dr. Timothy Wierson[4] performed surgery to remove Ivan's thyroid but was unable to complete the removal due to complications. Dr. Wierson referred Ivan to Dr. Flynn, a surgeon in Jefferson County. Dr. Flynn decided not to recommend removal of the remaining mass or Ivan's thyroid at that time. Instead, he recommended monitoring the mass for growth and directed Ivan to continue treating with Dr. Winters, a Jefferson County endocrinologist. Dr. Winters began treating Ivan for goiter and thyroiditis and monitored the growth of Ivan's tumor with periodic ultrasounds. Dr. Winters shared the results of the ultrasounds with Dr. Flynn.

An ultrasound performed in June of 2013 revealed the tumor in Ivan's thyroid had undergone significant enlargement since Ivan's last ultrasound. As a result, Dr. Winters referred Ivan to Dr. Flynn for a biopsy. Dr. Flynn biopsied the tumor in July of 2013. This biopsy, like the one performed in 2009, indicated a Hürthle cell neoplasm. In late September of 2013, Dr. Flynn performed a right lobectomy. Pathology from the surgery revealed follicular carcinoma. Sometime thereafter, Ivan began treating with Dr. Sheikh, an endocrinologist in Warren County, where Ivan and his wife, Cathy, resided, for his thyroid cancer.[5]

[4] Dr. Wierson is not a party to this action.

[5] According to Dr. Sheikh, he first saw Ivan near the beginning of December of 2013.

Dr. Flynn scheduled Ivan to have a complete thyroidectomy in mid-December of 2013. In late November of 2013, Ivan had preoperative x-rays performed; the x-rays revealed the presence of small nodules throughout Ivan's lungs. The parties dispute whether Cathy was informed about the nodules at this time by Dr. Flynn, but Dr. Flynn did forward Ivan's chest x-rays to Dr. Sheikh prior to Ivan's consult.

Dr. Flynn performed the thyroidectomy in mid-December of 2013. Sometime thereafter, Ivan saw Dr. McGahan, a Warren County oncologist, for the first time. Dr. McGahan alleges that his treatment of Ivan was very limited. Ivan took a radioactive iodine pill and received a full body PET scan. Dr. McGahan did not see Ivan again before his death on January 18, 2018.

B. Procedural History

On February 2, 2016, Ivan and Cathy filed suit in Jefferson Circuit Court against Drs. Flynn and Winters as well as the entities they are associated with seeking damages for medical negligence and loss of consortium.[6] Ivan and Cathy claimed that Drs. Flynn and Winters mismanaged Ivan's thyroid cancer treatment over a four-year period, 2009 to 2013.[7] Specifically, Ivan and Cathy

[6] Ivan passed away on January 18, 2018. Cathy, acting as executrix of Ivan's estate, revived the action and was substituted in place of Ivan. Thereafter, the initial complaint was amended to include a wrongful death claim.

[7] University of Louisville Physicians, Inc.; University Surgical Associates, P.S.C.; and University Medical Associates, P.S.C. were also named as defendants because they employed

alleged that Drs. Flynn and Winters breached the applicable standard of care by adopting a "wait and see" approach during which time Ivan's cancer metastasized, thereby dramatically reducing his expected rate of survival and treatment options.

On August 3, 2017, Drs. Flynn and Winters filed a motion for leave to file a third-party complaint against Drs. Sheikh and McGahan pursuant to CR 14.01. Drs. Sheikh and McGahan reside and practice in Warren County where they treated Ivan. On May 17, 2018, the trial court granted Drs. Flynn's and Winters's motion to file their third-party complaint.

On June 21, 2018, Drs. Sheikh and McGahan filed their individual answers to the third-party complaint. In addition to denying that they breached the applicable standards of care in treating Ivan, both Dr. Sheikh and Dr. McGahan asserted the affirmative defense of improper venue. Along with their answers, Drs. Sheikh and McGahan also filed CR 12.02 motions to dismiss based on improper venue. Drs. Sheikh and McGahan maintained that venue in Jefferson County was improper because they were residents of Warren County and their treatment of Ivan was undertaken in Warren County. They disclaimed having provided any care to Ivan in Jefferson County. Drs. Flynn and Winters did not dispute that Drs. Sheikh and McGahan did not provide care to Ivan in Jefferson County. They

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Drs. Flynn and Winters during the relevant time period making them potentially liable under the theory of *respondeat superior*.

asserted, however, that the location of the care was not relevant because the ancillary venue rule made venue in Jefferson County proper irrespective of the location of the care or residence of the third-party defendants.

The trial court heard arguments on the motions to dismiss on July 2, 2018, and August 27, 2018. On January 3, 2019, the trial court granted Drs. Sheikh's and McGahan's motions to dismiss. Specifically, the trial court found:

> [T]his Court cannot find any applicable exception to the venue statute in this matter. While Defendants/Third-Party Plaintiffs argue that the apportionment statute essentially carves an exception for medical malpractice claims, Kentucky's courts have explicitly stated otherwise. See *Copass v. Monroe County Medical Foundation, Inc*., 900 S.W.2d 617 (Ky. App. 1995) ("Merely because a plaintiff will have difficulty sorting out liability is not enough to disregard our venue statutes.") and *O'Bannon v. Allen*, 337 S.w.3d [sic] 662 ([Ky. App.] 2011) (referring to the *Copass* opinion, "while the comparative negligence statute favored the bringing of related claims in one action, it did not abrogate the venue statute"). While tension may exist between the venue and apportionment statutes, Kentucky courts have been clear that issues regarding venue control. "[V]enue is purely a legislative matter, and the judiciary may not rewrite the statutes." *Copass*, 900 S.W.2d at 619.

(Record (R.) at 1745).

This appeal followed.

II. STANDARD OF REVIEW

The facts necessary to determine proper venue are not disputed. Rather, this Court is charged with interpreting the interplay between KRS 452.460(1), CR 14.01, and KRS 411.182. Because this matter is purely a matter of law, this Court owes no deference to the trial court's ruling. *Lawrence v. Bingham, Greenbaum, Doll, LLP*, 567 S.W.3d 133, 137 (Ky. 2018). Therefore, we review this matter *de novo*. *Id.*

III. ANALYSIS

"[V]enue is a creature of statute[.]" *O'Bannon v. Allen*, 337 S.W.3d 662, 665 (Ky. App. 2011). Kentucky's venue statute for an action for injury to person, property, or character is codified at KRS 452.460. This statute provides an action for an injury to the person of the plaintiff "against a defendant residing in this state, must be brought in the county in which the defendant resides, or in which the injury is done." KRS 452.460(1).

When medical negligence is the alleged cause of the injury, venue is proper where the care was sought and the alleged breach and resulting injury occurred. *See O'Bannon*, 337 S.W.3d at 666.[8] This matter is complicated by the

[8] "Dr. Allen's duty arose when Roy sought treatment in Ohio County. Any breach of that duty also occurred in Ohio County, when Dr. Allen treated Roy and/or failed to act when advised of Roy's alleged misuse of the prescribed medications. Therefore, the injury was 'done' in Ohio County, not in Muhlenberg County, and Ohio County was the appropriate venue for the O'Bannons' claims against Dr. Allen." *Id.*

fact that four different doctors were involved in Ivan's care over an extended period of time. Two of the doctors, Drs. Flynn and Winters, reside in and provided care to Ivan in Jefferson County. The other two doctors, Drs. Sheikh and McGahan, reside in and provided care to Ivan in Warren County.

Decades ago, in *Rose v. Sprague*, 59 S.W.2d 554, 556 (Ky. 1933), our highest court determined that even though a plaintiff had been treated for the same condition by various doctors, he could not join all the doctors who provided care to him in a single action because the doctors resided and practiced in separate venues. *Id.* The plaintiff in *Rose* filed a single complaint in Whitley County against numerous physicians who treated him over an extended period of time. Only two of the physicians resided and practiced in Whitley County. The other physicians moved to dismiss the complaint against them because they did not treat the plaintiff in Whitley County. The plaintiff responded that the defendants were jointly liable to him and, therefore, the action was proper. The Court disagreed. It held that:

> [P]hysicians when engaged and acting independently of each other in diagnosing and treating a patient, during different and distinct periods of time, each is only liable to his patient for his own wrong or negligence, but not for the negligence of the other, even though neither of them effects a cure of the patient's ailment.
>
> It may be considered in such case that the failure of both physicians to afford relief is concurrent, but such concurrent failure to effect a cure cannot and does not

> create a joint cause of action against them, simply because neither of them cured the patient, or achieved the result he desired or expected, when he separately engaged and received independent treatment at their hands.

Id. at 557. In other words, each physician may be independently liable to the plaintiff for his own wrong, but has no liability for the wrong committed by the other physicians treating the plaintiff. Following this logic, the Court held that the plaintiff could not force all the defendants into a single venue.

Drs. Flynn and Winters acknowledge that under the venue statutes and applicable appellate case law, Ivan's estate could not maintain a direct action against Drs. Sheikh and McGahan in Jefferson County. They point out, however, that Drs. Sheikh and McGahan were not brought into this action by way of a complaint filed directly against them by Ivan's estate; they were brought into the action by way of CR 14.01, which allows the trial court to exercise ancillary venue notwithstanding the venue statutes for an independent action.

In relevant part, CR 14.01 provides:

> 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. If the motion 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.

The procedure for bringing a party into an action pursuant to CR 14.01 is known as impleader. Kurt A. Phillips, Jr., David V. Kramer, & David W. Burleigh, 6 KY. PRAC. R. CIV. PROC. ANN. Rule 14.01 (2019). Third-party practice or impleader is permitted only where the defendant can show that if he is found liable to the plaintiff then the third-party defendant will be liable to him. *Id.*

> A proposed third-party complaint must allege facts sufficient to establish that the third-party defendant is secondarily liable to the defendant. Under Rule 14.01, a third-party complaint is appropriate only in those cases where the proposed third-party defendant would be secondarily liable to the original defendant in the event the latter is liable to the plaintiff. *A third-party complaint that alleges merely that the third-party defendant is liable to the plaintiff is improper.*

Id. (emphasis added) (footnote omitted). "[T]hird-party defendants may often be entitled to dismissal on the grounds that they cannot be liable to the third-party plaintiff." *Kevin Tucker & Associates, Inc. v. Scott & Ritter, Inc.*, 842 S.W.2d 873, 874 n.5 (Ky. App. 1992), *disapproved of on other grounds by Degener v. Hall Contracting Corp.*, 27 S.W.3d 775 (Ky. 2000).

In *Goodwin Brothers v. Preferred Risk Mutual Insurance Company*, 410 S.W.2d 714 (Ky. 1967), Kentucky's high court was confronted for the first time with the interplay between CR 14.01 and Kentucky's venue statutes.[9] The

[9] The statute at issue in *Goodwin Brothers* was KRS 452.450, which governs venue when a tort or contract action is brought against a corporation. In contrast, the venue statute at issue in this appeal is KRS 452.460, which controls where an action for injury to person, property, or

Court ultimately held that "a third party may be joined 'who is or may be liable to' a defendant 'for all or part of' the plaintiff's 'claim against' the defendant, regardless of whether the provisions of [the venue statutes] are met as to the third party." *Id.* at 716. The Court's decision was motivated by the "desirability of minimizing the multiplicity of suits[.]" *Id.*

Applying *Goodwin Brothers*, this Court later held that "[u]nder CR 14.01, a third party against whom ***contribution or indemnification*** is sought may be joined regardless of whether the [statutory] venue provisions . . . are met as to the third party." *American Collectors Exchange, Inc. v. Kentucky State Democratic Central Executive Committee*, 566 S.W.2d 759, 761 (Ky. App. 1978) (emphasis added). Or, as stated in *Goodwin Brothers*, ancillary venue is proper where the CR 14.01 complaint alleges that the "third party 'may be liable to him' (defendant) 'for all or part of' (the plaintiff's) 'claim against him' (defendant)." *Goodwin Bros.*, 410 S.W.2d at 715.

Under Kentucky law, "[t]he right to contribution arises when two or more joint tortfeasors are guilty of concurrent negligence of substantially the same character which converges to cause the plaintiff's damages." *Degener*, 27 S.W.3d

character must be brought when brought against an individual. We cannot appreciate a rational distinction based merely on the precise venue statute at issue. Therefore, we believe *Goodwin Brothers* applies to personal injury actions brought against individuals as well as to personal injury actions brought against corporations.

at 778. "Under the doctrine of contribution, the liability of each joint tort-feasor is equal and is not apportioned on the basis of causation." *Dix & Associates Pipeline Contractors, Inc. v. Key*, 799 S.W.2d 24, 29 (Ky. 1990) (citation omitted).

The right to indemnity can arise either contractually or by common law. *Crime Fighters Patrol v. Hiles*, 740 S.W.2d 936, 938, (Ky. 1987). Common law indemnity is available to "one exposed to liability because of the wrongful act of another with whom he/she is not in pari delicto." *Degener*, 27 S.W.3d at 780.

> The right to recover indemnity [at common law] exists in favor of the passively or secondarily negligent party against the actively or primarily negligent party where one of two parties does an act or creates a hazard by which the other party, though not concurrently joining in the act, is thereby exposed to liability to a third party.

Kentucky Utilities Co. v. Jackson County Rural Elec. Co-op. Corp., 438 S.W.2d 788, 790 (Ky. 1968).

Keeping the standards for indemnification and contribution in mind, we now turn to Drs. Flynn's and Winters's third-party complaint. It alleges that Drs. Sheikh and/or McGahan breached the applicable standards of care in their treatment of Ivan and that "[a]s a result of these alleged failures to comply with the standard of care, a jury could find that Drs. Sheikh and/or McGahan are additional tortfeasors in this action and, as such, *apportion a percentage of fault* to them." (R. at 867) (emphasis added). In their prayer for relief, Drs. Flynn and Winters requested a judgment against Drs. Sheikh and McGahan as follows:

> 1. That a jury in this matter receive an instruction, pursuant to KRS 411.182, to apportion a percentage of fault to all defendants and third-party defendants in this action;
>
> 2. Indemnity and contribution, pursuant to KRS 412.030, for and against any judgment against these defendants for the appropriate share of any judgment against these defendants; and
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> 3. Trial by jury on all issues herein.

Id.

Contribution is not available in this case as there was no true concurrent negligence among the physicians. The physicians treated Ivan at different times, and they did not act in concert with one another during the various time periods Ivan was under their care. "Neither the engagements nor the services of the physicians were in any sense 'concurrent.'" *Rose*, 59 S.W.2d at 556.

> It may be considered in such case that the failure of both physicians to afford relief is concurrent, but such concurrent failure to effect a cure cannot and does not create a joint cause of action against them, simply because neither of them cured the patient, or achieved the result he desired or expected, when he separately engaged and received independent treatment at their hands.

Id. at 557. Therefore, the right to contribution is not a basis to exercise ancillary jurisdiction in this case.

There was no contact between the physicians in this case so indemnity, if available, can only be through application of the common law.

However, this is not a case where one party is alleged to have been only passively negligent. Ivan's estate alleges active negligence by Drs. Flynn and Winters. Drs. Flynn and Winters in turn allege active negligence by Drs. Sheikh and McGahan. Since all four doctors actively treated Ivan, each doctor would be liable for his independent breach of the standard of care related to that treatment. None of the doctors would be entitled to indemnity from any of the other doctors.

In this case, Cathy and Ivan's estate may have a direct claim against Drs. Sheikh and McGahan if these doctors breached the applicable standard of care as alleged by Drs. Flynn and Winters. Drs. Flynn and Winters, however, have not properly alleged that they have any derivative claims against Drs. Sheikh and McGahan for indemnification or contribution. As evidenced by their third-party complaint, what Drs. Flynn and Winters want is to force Drs. Sheikh and McGahan into the action so that the jury will have to determine whether the second set of doctors is directly liable to Ivan's estate for their independent acts of negligence related to Ivan's care. In simpler terms, as set forth in their prayer for relief, Drs. Flynn and Winters want an apportionment instruction pursuant to KRS 411.182.

In *Copass v. Monroe County Medical Foundation, Inc.*, 900 S.W.2d 617 (Ky. App. 1995), our Court considered whether a patient could bring a single action against a surgeon and hospital located in one county and a follow-up physician and hospital located in a second county over the objection of the second

hospital and physician for improper venue. On appeal, the patient argued that because liability is now to be apportioned according to the degree of fault involved, fundamental fairness required that all potential tortfeasors be tried in a single trial with a single jury. While we acknowledged that the patient's argument had some merit, we nevertheless concluded that:

> [O]ur venue statutes do not permit this suit to be tried against all defendants in one location, unless venue is waived. We also do not believe there is any inconsistency between the venue statutes and KRS 411.182, 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. at 620 (emphasis added).

Drs. Flynn and Winters argue that *Copass* is distinguishable because in that case it was the patient-plaintiff who was trying to join the second doctor and hospital in the primary action. They point out that in this case Drs. Sheikh and McGahan were brought in as third-party defendants through CR 14.01 making it appropriate for the court to exercise ancillary venue over them. The problem with this argument is that Drs. Flynn's and Winters's third-party complaint does not meet CR 14.01's requirements. As stated by the *Goodwin Brothers* court, ancillary venue is proper where the CR 14.01 complaint alleges that the "third party 'may be liable to him' (defendant) 'for all or part of' (the plaintiff's) 'claim against him' (defendant)." 410 S.W.2d at 715. Ancillary venue would be proper *if* the third-

party complaint properly alleged that Drs. Sheikh and McGahan may be liable to Drs. Flynn and Winters for all or part of the estate's and Cathy's claims against Drs. Flynn and Winters. This is not what the third-party complaint actually alleges in this case. When boiled down to its simplest terms, the third-party complaint alleges that Drs. Sheikh and McGahan may be directly liable to Ivan's estate, and based on the principles of comparative negligence the jury should be required to apportion damages between the four doctors.

In *Memorial Sports Complex, LLC v. McCormick*, 499 S.W.3d 700 (Ky. App. 2016), this Court considered whether a third-party complaint premised on apportionment of liability was properly dismissed by the circuit court. In *Memorial Sports Complex*, the plaintiff, a baseball player, was injured during a game when his arm slid under the fence. The player-plaintiff sued the owner of the field where he was injured, Memorial Sports Complex. Memorial Sports Complex filed a third-party complaint against the fence manufacturer as well as the player-plaintiff's coach and father seeking indemnity, contribution, and apportionment. The circuit court dismissed the third-party complaint, and Memorial Sports Complex appealed. On appeal we held that the circuit court properly dismissed Memorial Sports Complex's third-party complaint because "the third-party defendants . . . did not owe any duty to Memorial," and apportionment of liability was not a valid basis on which to file a third-party complaint under CR 14.01. *Id.*

at 705. However, we went on to hold that because the dismissed parties were once named as defendants, Memorial Sports Complex could properly seek an allocation instruction notwithstanding their later dismissal.

> Although Memorial will not receive contribution from the dismissed third-party defendants, it will not be responsible for any damages attributed to them because it can receive an apportionment instruction allowing allocation of fault to them. Thus the dismissal of the third-party defendants cannot harm Memorial. Mowery [the plaintiff-baseball player] is the only party who can suffer the negative consequences of not receiving damages for any fault attributed to the dismissed third-party defendants. However, he has not objected to their dismissal or made any attempt to join them and has not appealed their dismissal.

Id. at 707.

Memorial Sports Complex's logic is sound. When a third-party defendant is joined solely for the purposes of allocation of fault, as in this case, the standard venue rules apply. Apportionment, as governed by KRS 411.182, is not a situation where ancillary venue applies. To hold otherwise would be to permit the plaintiff to seek recovery against defendants whom it would not be allowed to sue in the first instance in that particular venue. In tort-based cases where impleader is used solely to put a third-party defendant before the court who may also be directly liable to the plaintiff for the purpose of an allocation of fault instruction, as in this case, it would do violence to the venue statutes enacted by our General Assembly to allow the venue of the main action to control. It would allow the plaintiff to do

what he was unable to do in the first instance. It would render those statutes useless. In such an instance, judicial economy must give way to fairness principles and should require an adherence to the venue statutes enacted by the General Assembly. Therefore, the circuit court was correct to dismiss the third-party complaint. Ancillary venue was not proper due to Drs. Sheikh's and McGahan's lack of direct liability to the third-party plaintiffs, Drs. Flynn and Winters.[10]

[10] We fully recognize that our decision places defendants like Drs. Flynn and Winters in a procedural quagmire. As noted in the concurring opinion in *Memorial Sports Complex,* this issue is one that could benefit greatly from some guidance by our Supreme Court:

> [I]n practice, contribution and indemnity merely serve as a basis for impleading third-party defendants who are later dismissed due to their lack of direct liability to the third-party plaintiff. Nevertheless, KRS 411.182 requires that those dismissed defendants be included for purposes of apportionment of fault.
>
> In my opinion, this process has created a procedural tangle for trial courts and a source of potential confusion for juries. As a point of law, contribution and indemnity still exist. However, they are not needed because KRS 411.182 requires apportionment among all potentially liable parties, including those who have been dismissed or are not before the court. And while the purpose of apportionment is to assign liability in direct proportion to fault, the application often has the opposite effect. The jury is faced with the task of assigning liability among all potentially liable defendants, even those who are not present and do not present a defense. As the majority correctly notes, apportionment under these circumstances often serves only to diminish the amount of damages that can be obtained against the known defendant.
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> Consequently, I believe that our Supreme Court should take the opportunity to sort out the continued viability of contribution and indemnity and their proper relationship to statutory apportionment of fault. Doing so would alleviate a great source of confusion for trial courts and for juries. Until then, however, I must conclude that the majority opinion correctly sets out the procedure for

IV. CONCLUSION

For the foregoing reasons we AFFIRM the order of the Jefferson Circuit Court dismissing Dr. Sheikh and Dr. McGahan as third-party defendants.

ALL CONCUR.

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impleading third-party defendants and apportioning fault among all potentially liable parties.

Memorial Sports Complex, 499 S.W.3d at 708 (Maze, J., concurring).

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