Arkansas Association of Defense Counsel

March 14, 2016

Navigating Non-party Fault

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It is a month before trial. You receive a phone call from the attorney for the hospital letting you know that she just settled with the plaintiff—leaving your physician as the sole defendant for trial. You breathe a sigh of relief because you no longer have to tiptoe around the codefendant at trial, but now you are left asking: How do I get the hospital on the verdict for apportionment? It may depend on when your action arose.

If your cause of action accrued on or after August 16, 2013, you can rely on the benefits of Act 1116 of 2013, codified at Ark. Code Ann. §§ 16-61-201 *et seq.* Relying on the substantive right to apportionment of fault created by this statute, you can claim the benefits of Rule 49(c) and the model jury instructions. *See* Ark. R. Civ. P. 49(c); AMI 307 & 307A. Assuming that you can chin the bar and establish fault, Rule 49(c)(1) provides that the jury "*shall* determine the fault of all parties or entities, including those not made parties, who may have joint liability or several liability for the alleged injury."

Unfortunately for your client, your case stems from a 2009 surgery and was filed in 2011. So what do you do? Because of the Supreme Court's decision in *English v. Robbins*, 2014 Ark. 511, 452 S.W.3d 566, you cannot rely on Act 1116, but that does not mean that Rule 49(c) is off limits. The solution may rest with the Civil Justice Reform Act of 2003, Act 649 of 2003.

As a general rule, it is settled law that the presumption against retroactive application of lawful enactments does not apply to procedural rules. *See e.g. Divelbliss v. Suchor*, 311 Ark. 8, 13, 841 S.W.2d 600, 602 (1992) (holding that an amendment to Ark. R. Civ. P. 55 was "a procedural rule, [was] remedial in nature and, accordingly, should be given retroactive effect"). A modification of the Rules of Civil Procedure is, by definition, procedural and in goes into effect immediately. As the Supreme Court has explained "statutes [or rules] effecting changes in *civil procedure* or remedy *may have valid retrospective application*, and remedial legislation may, without violating constitutional guarantees, be construed . . . to apply to suits on causes of action which arose prior to the effective date of the statute [or rule]." *JurisdictionUSA, Inc., v. LoisLaw.com, Inc.*, 357 Ark. 403, 412, 183 S.W.3d 560, 565-66 (2004) (quoting *Padgett v. Bank of Eureka Springs*, 279 Ark. 367, 651 S.W.2d 460 (1983)) (emphasis added).

As the Supreme Court made clear in its *per curiam* opinion promulgating the amendment to Rule 49, this rule seeks "to fill the *procedural void* resulting from *procedural aspects* of Act 649 that were struck on separation-of-powers grounds." *In re Special Task Force*, 2014 Ark. 340, at 1 (emphasis added). There is obviously a distinction between "procedural" law and "substantive" law. *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, at 7-8, 308 S.W.3d 135, 141. Fortunately, Rule 49, as a rule of civil procedure, falls on the procedural side of the divide because it prescribes steps which effect a substantive right previously created, i.e. the substantive right of a defendant to be held liable only for his *pro rata* share of fault. *See* Ark. Code Ann. § 16-55-201(b)(1); *Johnson*, *supra*.

The analysis is fairly straightforward. The CJRA created a substantive right and provided a procedural mechanism to effectuate that right. *See* Ark. Code Ann. §§ 16-55-201(b) & 16-55-202. In

Johnson, the Supreme Court took away the procedural mechanism, holding that procedural law is the exclusive province of the Court, but it could not abolish the substantive right created by that same statute. 2009 Ark. 241, at 7-9, 308 S.W.3d at 140-42. From April 30, 2009, through January 1, 2015, there was a "procedural void," which explains the disjointed ruling in *ProAssurance Indem. Co. v. Metheny*, 2012 Ark. 461, 425 S.W.3d 689, and the stymied appeals to the UCATA in *St. Vincent Infirmary Med. Ctr. v. Shelton*, 2013 Ark. 38, 425 S.W.3d 761. It may have been twelve years in the making, but the Court finally provided the procedural mechanism with Rule 49(c).

Will the Court accept this argument? What pushback can you expect from the plaintiff? This is a fluid situation impacting cases falling in the gap between the CJRA and the effective date of Act 1116, but it may also be important in those cases where there is an immune at-fault party, such as an employer, who may not qualify as a "joint tortfeasor" under the UCATA. *See W.M. Bashlin Co. v. Smith*, 277 Ark. 406, 423, 643 S.W.2d 526, 534 (1982). Where the UCATA does not apply, you are left with the CJRA.

In response to this argument, you will likely receive pushback from the plaintiff, citing *English* and *Metheny*. The expected argument can be distilled as follows: *Metheny* held that there is no right to allocation of fault under the CJRA, and *English* held that the substantive right to fault allocation created by the UCATA cannot apply retroactively. Relying on *English* and the Reporters Notes, plaintiff will argue that Rule 49(c) was only put in place to "implement" the "substantive changes" in Arkansas law brought about by Act 1116. The flaw in this argument is that it ignores the language of the *per curiam* opinion that directly ties the rule changes to the CJRA, and it also ignores language in Rule 9(h) de-linking the right to apportionment from Act 1116. *See* Ark. R. Civ. P. 9(h)(1)("...seeking to allocate fault to a nonparty pursuant to Ark. Code Ann. § 16-61-202(c) *or any other statute providing a substantive right to do so*.")(emphasis added). Because Act 1116 is not implicated (you rely on the CJRA) and because *English* did not directly address the CJRA, *English* is distinguishable. Justice Danielson seemed to accept this approach in his *English* dissent, where he stated that he was "certainly sympathetic to the plight of both the circuit court and the parties in trying this case *without the benefit of our most recent rule changes*." *English*, 2014 Ark. 511, at 13, 452 S.W.3d at 574 (Danielson, J., dissenting)(emphasis added).

This leaves you to address *Metheny*. In *English*, the majority attempted to describe the holding in *Metheny* as follows: "[T]he CJRA did not create a substantive right to an allocation of fault." 2014 Ark. 511, at 3, 452 S.W.3d at 569. The decision in *Metheny* was not so clear, and it largely seemed to miss the substantive right created by the CJRA, as acknowledged by Justice Danielson in his *Shelton* dissent. *See Shelton*, 2013 Ark. 38, at 15-16, 425 S.W.3d at 769-71 (Danielson, J., dissenting).

Dating back to *Johnson*, it seems clear that the CJRA created a substantive right for a defendant. "[A defendant has] a right, regardless of the fact that [a co-defendant] had already settled and been dismissed, to be held liable only for the amount of damages allocated to it in direct proportion to its percentage of fault." *See id.* This right is procedurally effectuated by the allocation of fault mechanisms put in place by Rule 49(c). Much of the confusion in the *Metheny* decision stemmed from the lack of clear procedural rules and the absence of a model jury instruction. *See generally Metheny*, *supra*. Both of these problems have now been remedied by Rule 49(c) and AMI 307.

In *Metheny*, the Court confirmed that the CJRA did create a substantive right; although, it was vague as to what that right actually was. For their part, the plaintiffs acknowledged that the remaining defendant should not be held liable for more than its share of fault. *Id.* at 11, 425 S.W.3d at 695-96. At issue was how to instruct the jury given the absence of AMI instructions or clear procedures. Viewing *Metheny* through the lens of an abuse of discretion standard, the Court held that the circuit court had not abused its discretion in utilizing the non-AMI instructions proposed by the plaintiff and by refusing the non-AMI instructions submitted by the defendant. *Id.* at 17, 425 S.W.3d at 699. Unlike in *Metheny*, defendants now have

AMI instructions to cite, thus minimizing the impact of the *Metheny* holding.

The CJRA created a substantive right for a defendant. That right is the right to be held liable only for his proportionate share of the total damages. The statute originally provided a mechanism to safeguard this right through the consideration and apportionment of fault for parties and non-parties responsible for an injury. *See* Ark. Code Ann. § 16-55-202. The *Johnson* Court held that this mechanism was procedural and, therefore, unconstitutional. Until January 1, 2015, there was no procedure in place, explaining the confused rulings in the interim. With the amendments to Rule 49 and the new model jury instructions, the procedural void has been filled.

Now, armed with these arguments, you make your case to the circuit court and proffer your jury instructions. How will the circuit judge handle it? Now remains to be seen, but the argument is sound.

The AADC thanks Mark Wankum, Anderson, Murphy & Hopkins for drafting this article.

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