Arkansas Association of Defense Counsel

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A Common Summons Error that Actually Originated with the Supreme Court of Arkansas

Summons and service arguments have been the subject of much litigation in Arkansas, so much so that less than a year ago it was proposed that the "strict compliance" standard that creates so much of this litigation be scrapped in favor of a substantial compliance rule. See *In re* Recommendations of the Committee on Civil Practice, 2016 Ark. 29 (suggesting addition of Arkansas Rule of Civil Procedure 4(k)) This new version of Rule 4 has not been adopted however and it is unclear if it is adopted if it would be retroactive. Accordingly, as defense attorneys it is important for us to heavily scrutinize each and every summons we receive to make sure it strictly complies with the language of Rule 4(b) so that we do not waive any potential errors. One such error to be on the lookout for is a one word summons error that may have actually originated from the Supreme Court Summons form.

The One Word Error

In many clerk's offices around this state there are summons on file that state that if the defendant fails to answer the complaint within the time period allotted "judgment by default **will** be entered against him for the relief demanded in the complaint." However, Arkansas Rule of Civil Procedure 4(b) actually requires that the summons must inform the defendant that if he fails to timely answer "judgment by default **may** be entered against him for the relief demanded in the complaint." Ark. R. Civ. P. 4(b) (emphasis added). The appearance of this one-word error appears to be widespread. In fact, during one case where this issue was litigated, it was noted that over sixteen percent of all summons issued by that county in the first half of 2015 contained this particular error.

Many of you may be thinking that this is an immaterial change and not a real summons error. In fact, a verbatim recitation of the language of Rule 4(b) is not required and the Supreme Court has specifically noted that it will "not engage in interpretations that defy common sense and produce absurd results." Nucor Corp. v. Kilman, 358 Ark. 107, 122, 186 S.W.3d 720, 729 (2004); also Dobbs v. Discover Bank, 2012 Ark. App. 678, at 5, 425 S.W.3d 50, 53 (noting "[a]lthough this is not a verbatim recitation of the language of Rule 4(b), the summons conveys precisely the information that the Rule requires"). Although it may seem like a minor detail, the difference between "will" and "may" is actually one of substance with regard to default judgment in two specific ways, and therefore, substitution of the former for the latter will not precisely convey the true meaning of the language of Rule 4(b) and renders the summons and service void.

First, the difference between "will" and "may" is important to convey the certainty, or more precisely lack thereof with regard to default judgment after a failure to timely answer. Substitution of the word "will" for the word "may" does not precisely convey the information required. The word "will" connotes a certainty while the word "may" connotes a possibility. Default judgment is not a certain event based on a failure to timely answer a complaint. Arkansas Rule of Civil Procedure 55 specifically states that if the defendant fails to answer or otherwise plead "judgment by default **may** be entered by the Court." Ark. R. Civ. P. 55(a) (emphasis added). The Supreme Court of Arkansas has held that "the entry of a default judgment is discretionary rather than mandatory." Collins v. Keller, 333 Ark. 238, 245, 969 S.W.2d 621, 624 (1998). Further, Arkansas case law is laced with a plethora of examples of situations where default judgment is not appropriate despite a failure to answer. See, e.g., Smith, 353 Ark. at 718, 120 S.W.3d at 536 (noting that failure to strictly comply with the service requirements imposed by rule rendered a default judgment void); Richardson v. Rodgers, 334 Ark. 606, 612, 976 S.W.2d 941, 944 (1998) (default inappropriate where common defense doctrine applies and separate defendant's answer inures to the benefit of the defendant who failed to timely answer); Goston v. Craig, 34 Ark. App. 23, 26, 805 S.W.2d 92, 94 (1991) (default inappropriate where "there is excusable neglect, unavoidable casualty, or other just cause").

Second, and perhaps more importantly, there is the distinction between admission of facts based on failure to answer and the entry of default judgment for the relief demanded in the complaint. The word "may" in Rule 4(b) in addition to modifying the certainty of default judgment, also modifies the language of Rule 4(b) regarding the "the relief demanded in the complaint." Ark. R. Civ. P. 4(b). Even upon the entry of default it is not a certain event that a plaintiff will receive a judgment for the relief demanded in its complaint. A plaintiff is required to prove entitlement to the amount of damages it seeks; only liability, not damages, is determined by the failure to answer. See Gardner v. Robinson, 42 Ark. App. 90, 92, 854 S.W.2d 356, 357 (1993) ("upon default, all of the plaintiff's material allegations are to be taken as true, and the determination of the amount of the damages to be awarded is all that remains to be done[;]…[t]he plaintiff, of course, must introduce evidence to support any judgment for damages, in excess of nominal damages" (internal citations omitted)); also Ark. R. Civ. P. 55(b).

It is this second rationale that helps us trace the historical roots of the difference between "will" and "may" with regard to default judgment. This word choice actually notes an important difference between state and federal civil procedure laws regarding the entry of a default judgment. The Arkansas Rules of Civil Procedure, adopted by the Supreme Court of Arkansas in 1979, see Ark. R. Civ. P. 86, were modeled after the Federal Rules of Civil Procedure. See St. Paul Mercury Ins. Co. v. Circuit Court of Craighead County, Western Div., 348 Ark. 197, 209, 73 S.W.3d 584, 591 (2002) (Imber, J., concurring). Shortly after the Rules were enacted, in 1981, the Court of Appeals of Arkansas when interpreting the new Arkansas Rule of Civil Procedure 55, setting out default judgment procedure, noted that "regardless of the original basis, our case and statutory authority very clearly requires that the amount of the default judgment must be established by proof." Rice v. Kroeck, 2 Ark. App. 223, 226, 619 S.W.2d 691, 692 (1981). The Court noted that although Arkansas Rule of Civil Procedure 55 mirrored the terms of the corresponding Federal Rule it did not contain the provision in the Federal Rule that allowed for "the clerk to enter judgment by default when the claim is 'for a sum certain or a sum which can by computation be made certain….'" Id. at 226, 619 S.W.2d at 693. The Court then concluded that it was "therefore of the opinion that rule 55 of the Arkansas Rules of Civil Procedure did not change our law with regard to the necessity of proving damages to establish the amount of a default judgment." Id.

Federal Rule 4, upon which the corresponding Arkansas Rule was based, states that a summons must "notify the defendant that a failure to appear and defend **will result** in a default judgment against the defendant for the relief demanded in the complaint." Fed. R. Civ. P. 4(a)(1)(E) (emphasis added). Accordingly, when it was originally adopted in 1979, Arkansas' Rule 4 provided that a summons "shall notify [the defendant] that in case of his failure to [answer the complaint], judgment by default **will be** entered against him for the relief demanded in the complaint." Tucker v. Johnson, 275 Ark. 61, 65, 628 S.W.2d 281, 282 (1982) (emphasis added) (citing 1979 version of Rule 4). The Supreme Court of Arkansas interpreted that language to mean that the summons had to inform a defendant that any "**default judgment will be for the relief demanded**." Tucker, 275 Ark. at 65, 628 S.W.2d at 283 (emphasis added). As noted in Rice this is an inaccurate statement of Arkansas law. The Reporter's Notes to Arkansas Rule of Civil Procedure 4 note that in 1982, the year after the Rice decision and the year of the Tucker decision, "Rule 4(b) was amended to state a default judgment "may," rather than "will," be taken upon failure to answer." See Ark. R. Civ. P. 4, Addition to the Reporter's Notes, 1982 Amendment. The per curiam opinion making the rule change, which actually issued the same day as the Tucker decision, did not state the reason for the change.[1]

The federal versus state rule difference provides the explanation for the prevalence of this summons error and further ties the error right to our very own Supreme Court issued summons form. In 2011, the Supreme Court Committee on Civil Practice issued recommendations for rule changes that were published by the Court for comment. See *In re* Arkansas Rules of Civil Procedure, 2011 Ark. 250 (March 3, 2011). One of the proposed changes

[1]The per curiam was unpublished but can be found in the appendix of volume 275 of the Arkansas Reports at page 491.

was to change the summons form to track recent changes to the federal summons form. The proposed new form contained the word "will" rather than the word "may." The substantive change at issue was allowing 30 days to answer a complaint for both in state and out of state defendant. Id. (June 2, 2011). After additional comment periods, the Court adopted the new summons form by per curiam order on May 24, 2012 to take effect on July 1, 2012. *In re* Arkansas Rules of Civil Procedure, 2012 Ark. 236. This form was published in the 2012 Arkansas Rules desk set. On August 14, 2012, the Court issued an order noting without explanation that "it was necessary to make several corrections" to the summons form issued on May 24, 2012 and issued a summons form that used "may" rather than "will" with the changes noted as being made effective as of July 1, 2012. *In re* Rules of Civil Procedure-Summons Form, 2012 Ark. 317. This revised form was published in the online forms and in the 2013 Rules desk set. Despite this change several attorneys continued to use the erroneous form and several counties actually provide the incorrect summons form on their Circuit Clerk websites.

Conclusion

Having tortured yourself dredging through the details and the minutia of this argument, the real question on your mind is probably: Does this argument actually work? The answer is really undetermined. This issue has not been tested on appeal. However, dismissals have been granted on this basis at the Circuit Court level. Further, the Court of Appeals has noted that "**the actual language** of subsection (b) in Rule 4 of the Arkansas Rules of Civil Procedure sets forth the items that must be included in a summons" and not the language of the summons form. Talley v. Asset Acceptance, LLC, 2011 Ark. App. 757, at 4 (emphasis added). Accordingly, I believe it is important for defense attorneys to look for, consider, raise, and preserve this error.

The AADC thanks Joseph Luebke of Ledbetter, Cogbill, Arnold & Harrison, LLP for writing this article.

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