

# What's New? Act 116 of 2013 Creates Allocation of Fault Without Actual Contribution

By Benjamin R. McCorkle<sup>1</sup>

Reacting to *Johnson v. Rockwell Automation, Inc., ProAssurance Indemnity Co., Inc. v. Metheny* and *St. Vincent Infirmary Medical Center v. Shelton*, the Arkansas General Assembly passed Act 1116 of 2013, amending the Uniform Contribution Among Tortfeasors Act ("UCATA"), codified as amended at Ark. Code Ann. § 16-61-201, et seq. (Supp. 2013). The General Assembly created a new right to allocation of fault to a nonparty at trial regardless of whether the trial party's right to actual monetary contribution existed; the trial party simply could request that the jury allocate fault to a nonparty. The absence of the right to actual monetary contribution did not matter.

Two cases made their way to the Arkansas Supreme Court. *J. McDaniel Construction Company, Inc. v. Dale E. Peters Plumbing Ltd.*<sup>2</sup> is a "bad house" case involving the home buyer, the builder and the subcontractors. *English v. Robbins*<sup>3</sup> is a medical malpractice case, where one defendant settled and the plaintiff proceeded to trial against the other defendants.<sup>4</sup>

#### Was Act 1116 Constitutional If Applied Retroactively?

To determine whether an Act of the legislature can be applied retroactively, a court must determine, based on the facts of the case, whether retroactive application imposes a new right or whether it is purely remedial applying a previously existing right. The analysis becomes one of as-applied constitutionality.

#### 1. If the right to contribution is present and being sought, then it is constitutional.

*J. McDaniel* involved a dispute among defendants, the contractor and the subs concerning the contractor's right to actual monetary contribution after the plaintiff settled. The Court found that Act 1116 was essentially procedural and remedial in nature where the right to actual monetary contribution was sought. Because contribution among tortfeasors for indemnity and money damages was a previously existing right, Act 1116 could be applied retroactively.

#### 2. If the right to contribution does not exist and is not being sought, then application of Act 1116 retroactively is unconstitutional.

In *English*, the defendants added a third-party defendant close to trial for the purpose of allocation of fault and did not seek actual monetary contribution. On appeal, the Court held that Act 1116 created a new right to allocation of fault where actual monetary contribution did not exist nor was being sought and that such a new right could not be applied retroactively without violating the Arkansas Constitution.

#### Impact of Act 1116 on Plaintiffs

1. Defendants are able to place some nonparties on the jury ballot for the purpose of allocation of fault, without claims for actual monetary contribution (see below). Therefore, defense counsel will not be limited to telling the jury that some other unnamed nonparty or named party, not present at trial, is responsible for some or all of the fault.

2. Act 1116 is generally procedural and remedial in nature where the right to actual monetary contribution exists; however it also created a new right—allocation of fault where the right to actual monetary contribution does not exist and is not being sought.

3. If the defendant is claiming a right to actual contribution for indemnity or money damages from another party or former party to the lawsuit who may have settled, Act 1116 can be applied retroactively. For example, after the plaintiff settles, Act 1116 can be applied retroactively to permit the defendants to fight it out over allocation of fault for contribution purposes (*J. McDaniel*) where the right to contribution still exists (see below).

4. If the issue is just allocation of fault, then it cannot be applied retroactively. (*English*).

5. Adding a third-party defendant for allocation purposes can result in a role reversal for both defendant's and plaintiff's trial counsel:

a. Defendant's counsel must take on the role traditionally held by plaintiff's counsel because the defendant has the burden of proving that the third-party defendant was negligent.

b. Plaintiff's counsel must defend the absent, third-party defendant to explain the relative negligence shared by all the defendants placed on the jury ballot.

Two additional takeaways from *English* are tangentially related to Act 1116.

1. Rule 14 allows a third-party complaint within 10 days of answering a complaint, or allows a third-party complaint with leave of the court after 10 days.<sup>5</sup> However, the timing of adding a third-party defendant can be unduly prejudicial. The *English* Court found that the circuit judge did not abuse her discretion in concluding the plaintiff was unduly prejudiced by the defendant's waiting over two years and then filing a third-party complaint close to the time of trial.<sup>6</sup>

2. Failing to instruct the jury that the defendant has the burden of proving the fault of the third-party defendant may be unduly prejudicial. At trial, the *English* trial judge instructed the jury that the plaintiff had the burden of proving the third-party defendant's negligence and denied a proffered jury instruction based on AMI 206.<sup>7</sup> Improperly instructing the jury on the burden of proof can provide sufficient prejudice to justify a new trial.<sup>8</sup>

#### Unanswered Questions

*McDaniel* and *English* shed some light on post-Act 1116 third-party defendant actions, especially on the question of retroactive application. However, several questions remain unanswered.

#### 1. Can a defendant who has been assigned some, but not all, of the fault by a jury take an additional offset based on the amount of the settlement paid by a third-party defendant?

Section 5(c)(1) of Act 1116 states that defendant's judgment is reduced by the amount of the settlement or the pro rata share of the settlement, whichever is greater. Assume Plaintiff sues D1 and D2. D1 settles for \$100. The jury awards Plaintiff \$300, attributing 50% of the fault each to D1 and D2. D2's liability is \$150. Plaintiff gets a total of \$250. Plaintiff is short \$50, but that's life. However, under section 5(c)(1) D2's judgment is reduced by \$100 (settlement), and P only recovers \$50 from D2, in spite of the jury's award. If section 5(c)(1) is inter-

preted as allowing a reduction beyond that specified by the jury, this would effectively limit the amount of recovery by a plaintiff. Article V, Section 32 of the Arkansas Constitution provides that other than for workman's compensation, "no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property; . . ." If this section is interpreted to allow an additional offset, its constitutionality is seriously in doubt.

#### 2. When does the application of Act 1116 become retroactive?

We know that attempting to apply Act 1116 after the jury has rendered a verdict is a retroactive application. However, suppose a case is filed before the effective date of Act 1116, and the defendant attempts to invoke the new right of allocation of fault prior to the commencement of trial.<sup>10</sup> Is that an attempt to apply Act 1116 retroactively because Act 1116 was not in effect at the time the action was commenced? Some would argue that the right to file a third-party complaint with leave of the court existed at the time Act 1116 became effective. Therefore, no vested right would be impaired. However, other courts have refused to apply a new law to a tort committed before the law was enacted.<sup>11</sup>

#### 3. Can a defendant add an immune nonparty as a third-party defendant for allocation of liability?

For example, in a highway construction case, can the Arkansas Highway Department be placed on the verdict form for allocation of fault, even though they are immune as a governmental entity? Or, can a hospital that is immune from a damage award under charitable immunity be added as a third-party defendant under Act 1116? Or, can an employer who is immune under the Workers' Compensation Act be third-partied in for allocation of fault? My best guess is no. Act 1116 applies only to "two (2) or more persons or entities who may have joint liability or several liability in tort for the same injury. . . ." If a potential party is immune from suit or damages, then that party could not be held liable.

#### 4. Is Act 1116 facially unconstitutional



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