

## Court of Appeals Limits Defendant's Right to Allocate Fault to Nonparties



**Benjamin Jackson**

[bjackson@mwlaw.com](mailto:bjackson@mwlaw.com)

(501) 688.8887

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The Arkansas Court of Appeals recently limited a defendant's right to allocate fault to nonparties. The allocation of fault to nonparties has long been a source of confusion and uncertainty for litigants in Arkansas. This is in part due to tension between the judiciary and the legislature over tort reform. *See, e.g., Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 7-8, 308 S.W.3d 135, 140-41 (eliminating the legislature's iteration of the empty chair). Now, the Arkansas Code establishes the right to an allocation of fault among all "joint tortfeasors" and the Arkansas Rules of Civil Procedure establish the procedural mechanism for asserting that right. Ark. Code Ann. S 16-61-202(c); Ark. R. Civ. P. 9(h). The Arkansas Court of Appeals recently held that the right to allocate fault to nonparty joint tortfeasors does not include an immune nonparty employer. *Industrial Iron Works v. Hodge*, 2020 Ark. App. 56, \_\_\_ S.W.3d \_\_\_.

The context of the Court's ruling is important. The plaintiff was injured on-the-job in an accident involving the auger of a hopper/fertilizer blender. He applied for and received workers' compensation benefits. Later, he sued the manufacturer of the hopper. The manufacturer asserted in its answer that it sought contribution, indemnity, and the allocation and apportionment of fault. It ultimately amended the answer under Rule 9(h) to allocate fault to the plaintiff's employer, a nonparty immune from suit pursuant to the exclusive remedy provision of workers' compensation. Ark. Code Ann. § 11-9-105.

The plaintiff argued that the law did not allow for the allocation of fault to an employer immune from suit. The manufacturer argued that it was seeking to allocate fault, not to assign liability, and therefore it did not matter that the employer was immune. The Arkansas Court of Appeals disagreed, looking to the language of the relevant statute: The right of contribution exists among joint tortfeasors, which is not limited to money damages but includes the right to an allocation of fault as "as among all joint tortfeasors." Ark. Code Ann. § 16-61-202. "Joint tortfeasor" means two (2) or more persons or entities who may have joint *liability* or several *liability* in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them." Ark. Code Ann. § 16-61-201(1) (emphasis added).

Because the employer was not a "joint tortfeasor" as it could not have "joint or several liability in tort" due to the exclusive remedy provision of workers' compensation, it did not "fall within the confines of the allocation of nonparty fault" under Arkansas law. *Hodge*, 2020 Ark. App. at 2.

The question moving forward will be the scope of the Court's holding. It turns on the application of the statutory definition of "joint tortfeasor" to an immune nonparty. The Court's ruling does not contemplate counties and school districts who are immune "except to the extent that they may be covered by liability insurance." Ark. Code Ann. § 21-9-301(a). Neither does the Court's holding contemplate a charitably immune hospital and a direct action against its insurer. Ark. Code Ann. § 23-79-210. Based on the Court's reasoning, whether a defendant can allocate fault to an immune nonparty depends on whether the

immune nonparty could have joint or several liability in tort. How far the Court's holding extends is up for debate. Fearing a broad application, one concurring judge in *Hodge* wrote: "Stakeholders may want to begin to discuss a legislative solution." 2020 Ark. App. at 11 (Abramson, J. concurring).