

AMI 307A
ILLUSTRATIVE INTERROGATORIES – MULTIPLE DEFENDANTS –
NONPARTIES INVOLVED

(Insert signature lines after each interrogatory)

VERDICT FORM

1. Do you find from a preponderance of the evidence that (defendant 1) was [at fault] and that such [fault] was a proximate cause of any damages sustained by (plaintiff)?

	ANSWER:		
		(Yes or No)	

2. Do you find from a preponderance of the evidence that (defendant 2) was [at fault] and that such [fault] was a proximate cause of any damages sustained by (plaintiff)?

	ANSWER:		
		(Yes or No)	

3. Do you find from a preponderance of the evidence that (nonparty 1) was [at fault] and that such [fault] was a proximate cause of any damages sustained by (plaintiff)?

	ANSWER:		
		(Yes or No)	

4. Do you find from a preponderance of the evidence that (nonparty 2) was [at fault] and that such [fault] was a proximate cause of any damages sustained by (plaintiff)?

	ANSWER:		
		(Yes or No)	

5. Answer this interrogatory only if you have answered “Yes” to one or more of Interrogatories 1 through 4:

Do you find from a preponderance of the evidence that (plaintiff) [was at fault][assumed the risk] and that such [fault][assumption of risk] was a proximate cause of any damages [he][she] may have sustained?

	ANSWER:		
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		(Yes or No)	
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6. If you have answered more than one of Interrogatories 1 through 5 “Yes,” then answer this Interrogatory:

Using 100% to represent the total responsibility for the occurrence and for any injuries or damages resulting from it, apportion the responsibility between the persons whom you have found to be responsible.

[To assign a percentage of fault to (defendant 1), you must have answered yes to Question 1; otherwise his/her percentage of fault is zero. To assign a percentage of fault to (defendant 2), you must have answered yes to Question 2; otherwise, his/her percentage of fault is zero. To assign a percentage of fault to (nonparty 1), you must have answered yes to Question 3; otherwise his/her percentage of fault is zero. To assign a percentage of fault to (nonparty 2), you must have answered yes to Question 3; otherwise, his/her percentage of fault is zero. To assign a percentage of fault to (nonparty 2), you must have answered yes to Question 4; otherwise, his/her percentage of fault is zero. To assign a percentage of fault to (plaintiff), you must have answered yes to Question 5; otherwise, his/her percentage of fault is zero.]

ANSWER:			
	Defendant 1		%
	Defendant 2		%
	Nonparty 1		%
	Nonparty 2		%
	Plaintiff		%*
	Total		100%

7. State the amount of any damages that you find from a preponderance of the evidence were sustained by (plaintiff) as a result of the occurrence. Do not reduce those damages by any percentage of fault you may have assigned to (plaintiff)[nonparty 1][nonparty 2].

	ANSWER: .**
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NOTE ON USE

Fault allocation to multiple parties and nonparties requires interrogatories. This illustrative set is intended to provide an example of how to submit fault allocation to a jury and may be modified as necessary – for example, to state the applicable standards of proof and fault. It assumes that appropriate instructions – including those governing the definition of fault (AMI 301), the applicable standard and burden of proof (AMI 202 and 203), the applicable standard of fault (e.g., AMI 303 and 305 for negligence or AMI 1008 for strict products liability), and proximate cause (e.g., AMI 501) – have been given.

Interrogatories such as those suggested here are to be given in conjunction with AMI 307, but only if the conditions set forth in the Note on Use to AMI 307 are met.

If the case involves allegations that the plaintiff is also at fault, the court will need to determine as a matter of law whether, for purposes of Arkansas’s Comparative Fault Act, Ark. Code Ann. §§ 16-64-122(a)-(b), plaintiff’s fault is to be compared only to named defendants or to all persons and entities to whom fault is allocated. This question is discussed in the Comment to this instruction.

Footnotes

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The trial court may want to submit only Interrogatories 1 through 5 initially in order to determine whether Interrogatory 6 need be submitted at all. If this procedure is followed, the introductory sentence to Interrogatory 6 should be omitted.

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The trial court may want the jury to answer fully only Interrogatories 1 through 5 or 1 through 6 as preferred, since these answers will be determinative.

COMMENT

These interrogatories are an adaptation and revision of the illustrative set provided in Chapter 36.

The legal question noted in the last paragraph of the Note on Use to these interrogatories is whether in cases subject to the proportional-fault regime of the 2003 Civil Justice Reform Act (“CJRA”), plaintiff’s fault is to be compared, for purposes of Arkansas’s fifty-percent-bar form of modified comparative fault under Ark. Code Ann. § 16-64-122, to all tortfeasors combined, including nonparties, or to named defendants only. These interrogatories do not attempt to resolve the ultimate question of to whom plaintiff’s fault, if any, is to be compared. The uncertainties surrounding that question are described below. Instead, these interrogatories ask the jury to allocate fault and to state the total amount of damages, leaving it to the trial court to apply comparative fault principles under the court’s resolution of that legal question and to enter judgment accordingly. Thus, under either resolution of that question, these interrogatories do not call for the two-step process described in *Reed v. Malone’s Mechanical, Inc.*, 854 F. Supp.2d 636, 645 (W.D. Ark. 2012).

The three reported cases to consider comparative fault and nonparties – *NationsBank v. Murray Guard, Inc.*, 343 Ark. 437, 36 S.W.3d 291 (2001) (plurality); *Hiatt v. Mazda Motor Corp.*, 75 F.3d 1252 (8th Cir. 1996); and *Reed v. Malone’s Mech., Inc.*, 854 F. Supp.2d 636 (W.D. Ark. 2012) – all excluded nonparty fault from the comparative-fault determination for purposes of the fifty-percent bar. All three cited the Arkansas Comparative Fault Act, Ark. Code Ann. § 16-64-122(a), which provides in pertinent part that “liability shall be determined by comparing the fault chargeable to a claiming party with the fault chargeable to the party or parties *from whom the claiming party seeks to recover damages.*” (Emphasis added.) The courts reasoned that a plaintiff is not “seeking to recover damages” from a nonparty and therefore may not have nonparty fault included in the comparison.

Those three cases may not definitively resolve under current Arkansas law the precise question discussed here. Both *NationsBank* and *Hiatt* predate the Civil Justice Reform Act’s partial abolition of joint and several liability and the provisions for allocation of fault to nonparties adopted under Act 1116 of 2013 and the 2014 amendments to the Arkansas Rules of Civil Procedure. Thus, neither case involved the question whether nonparty fault is to be excluded from comparison to plaintiff’s fault in determining whether plaintiff’s recovery is barred (even if the plaintiff’s fault may be less than fifty percent of all the fault that contributed to his or her injuries), yet included to reduce the recovery of a plaintiff whose claim survives the fifty-percent comparative fault bar. *NationsBank* does not cite *Hiatt*, itself a federal diversity case which framed the key issue as one of federal procedural law rather than Arkansas substantive law. The procedural issue in *Hiatt* implicated concerns about claim-splitting based on the plaintiff’s attempt both to exclude the nonparty from the federal suit to preserve diversity jurisdiction yet to have the nonparty’s fault included for comparative fault purposes. And *Hiatt*’s dicta concerning Arkansas’s comparative fault statute cites not an Arkansas case but another federal case, *Booth v. United States Indus., Inc.*, 583 F. Supp. 1561 (W.D. Ark. 1984), which did not involve application of the fifty-percent bar.

Reed, the only post-CJRA case of the three, bases its comparative-fault analysis on *Hiatt*. With respect to the relationship between the CJRA and the Comparative Fault Act, *Reed* reasons that, “[s]ince the CJRA did not amend Arkansas’ existing law in regard to comparative fault, the plaintiff cannot recover if his own fault is determined to be fifty percent (50%) or greater.” 854 F. Supp.2d at 645. *Reed*’s CJRA reference is to the Act’s savings clause with respect to comparative fault, which states that the CJRA’s provisions “do not amend existing law *that provides that a plaintiff may not recover any amount of damages if the plaintiff’s own fault is determined to be fifty percent (50%) or greater.*” Ark. Code Ann. § 16-55-216 (emphasis added). A court could interpret that clause as referring to the comparative fault statute’s provision that bars a plaintiff at equal or greater fault from recovering, and not including the portion of the comparative fault statute that limits comparison only to those from whom the plaintiff seeks to recover damages. A court could further conclude that this reading and the CJRA’s overall proportional-fault policy are consistent with consideration for comparative fault purposes of the fault of any nonparty to whom fault is allocated for recovery-reduction purposes. So interpreted, current law thus would preclude a plaintiff from any recovery if his or her fault were “fifty percent (50%) or greater” than all those whose fault is ultimately taken into account, but would, if his or her fault were *less* than fifty percent, allow a plaintiff to recover only up to the amount of defendants’ fault.

A related reason the three cases may not resolve the precise question here is that *Hiatt* and *NationsBank* both involved nonparty tortfeasors whom plaintiffs arguably could have sued in the same action but chose not to and the plaintiff in *Reed* had allowed the limitations period to expire against the nonparty. Different considerations may obtain when, as in the case of employers immune under the exclusive-remedy provision of the workers' compensation law or foreign manufacturers not amenable to *in personam* jurisdiction, the plaintiff is legally disabled from joining them as parties. For one thing, the claim-splitting concerns discussed in *Hiatt* do not arise in such cases. As discussed in the Comment to AMI 307, one interpretation of current law would permit allocation of fault to such nonparties for purposes of reducing plaintiff's recovery. If that view were adopted, a court correspondingly might interpret the Arkansas Comparative Fault Act's references to "party or parties from whom the claiming party seeks to recover damages" as excluding from fault-comparison for fifty-percent bar purposes only those nonparties from whom it would have been legally possible for the claiming party to have sought to recover damages.

The second sentence in Interrogatory 7, directing the jury not to reduce its damage award, addresses a different issue. It is intended to offset the risk that the jury might mistakenly reduce the total damages to account for plaintiff's or nonparties' fault (and thus produce a double reduction when the court makes its adjustment). It is also intended to comply with the Arkansas rule prohibiting a trial court, when submitting a case to the jury on interrogatories, from informing the jurors of their answers' effect on the parties' ultimate liability. For discussion of the double-reduction problem, see, e.g., *Schabe v. Hampton Bays Union Free Sch. Dist.*, 103 A.D.2d 418, 430-31, 480 N.Y.S.2d 328, 3336-36 (1984). For exposition and application of the prohibition on what are sometimes called "outcome instructions," see, e.g., *Wright v. Covey*, 233 Ark. 798, 801-02, 349 S.W.2d 344, 346-47 (1961) (holding that instructions, which directed jury to allocate fault between plaintiff and defendant and informed jury that plaintiff's contributory negligence will not bar recovery if less than defendant's fault but will be diminish recovery in proportion to such fault, did not violate rule; reasoning that "rule is not violated if the jury be apprised of a matter they, of necessity, already knew"); *Argo v. Blackshear*, 242 Ark. 817, 819-20, 416 S.W.2d 314, 315-16 (1967) (holding that it was reversible error for trial court, after jury had answered interrogatories by finding equal fault between driver-tortfeasor and pedestrian-victim, to ask jury if they intended for claimants to recover total damages and then, upon receiving an affirmative answer, to resubmit case on general verdict); *Int'l Harvester Co. v. Pike*, 249 Ark. 1026, 1032-34, 466 S.W.2d 901, 905 (1971) (holding that trial court committed reversible error by refusing to grant mistrial after plaintiff's counsel argued to jury that an affirmative response to assumption-of-risk interrogatory would mean plaintiff "will not receive a nickel"; reasoning that rule "is equally applicable to court and counsel"); *Stull v. Ragsdale*, 273 Ark. 277, 283-84, 620 S.W.2d 264, 266 (1981) (upholding trial judge's refusal to allow plaintiff's counsel to argue to jury that assessing damages in response to an interrogatory is not the same as rendering a verdict against defendant for the same amount).

In 1991, Arkansas's Comparative Fault Act was amended to provide that "[i]n cases where the issue of comparative fault is submitted to the jury by an interrogatory, counsel for the parties shall be permitted to argue to the jury the effect of an answer to any interrogatory." Ark. Code Ann. § 16-64-122(d). In *Campbell v. Entergy Ark., Inc.*, 363 Ark. 132, 137, 211 S.W.3d

500, 504 (2005), the court held that it was reversible error to resubmit a case to the jury on interrogatories, after the jury had deadlocked on a general verdict instruction, without giving plaintiff's counsel an opportunity to argue to the jury the effects of their answers to the interrogatories. (The court declined to reach the question whether subsection 122(d) unconstitutionally infringes the court's power under Ark. Const. Amend. 80 to prescribe rules of pleading, practice, and procedure for Arkansas courts. *Id.*, 363 Ark. at 139-40, 211 S.W.3d at 506.)

The Arkansas Supreme Court has not yet had occasion to interpret section 16-64-122(d) in light of the Civil Justice Reform Act's partial abolition of joint and several liability and post-CJRA fault-allocation developments – such as whether the statutory term “cases where the issue of comparative fault is submitted to the jury by interrogatory” includes multi-tortfeasor case in which fault is not alleged against the claiming party but is to be allocated among multiple tortfeasors, some of whom may be nonparties. *Campbell v. Entergy Arkansas, Inc.*, was not decided under the CJRA and there are as yet no other post-CJRA interpretations of section 16-64-122(d). Any bearing that *Rathbun v. Ward*, 315 Ark. 264, 273-74, 866 S.W.2d 403, 408-09 (1993), may have will depend on the interpretation of the term “comparative fault” in light of current law. In that pre-CJRA case, the Arkansas Supreme Court approved the trial court's interpretation of subsection 122(d) to apply only to comparison of fault “between a claiming party and the party against whom the claiming party seeks to recover,” and hence affirmed the trial court's refusal to allow any of the attorneys to argue the effect of joint tortfeasor liability and contribution: “we are not persuaded that section 16-64-122(d) allows the concepts and effects of contribution among joint tortfeasors to be argued to the jury.” *Id.* Under Act 1116 of 2013, which amended Arkansas's Uniform Contribution Among Tortfeasors Act, “allocation of fault as among all joint tortfeasors” is specified as a “right of contribution.” Ark. Code Ann. § 16-61-202(c). A court that combined *Rathbun*'s exclusion of “contribution” from the definition of “comparative fault” under section 16-64-122(d) with Act 1116's definition of fault-allocation as a “right of contribution” could conclude that subsection 122(d) does not allow counsel to make an “outcome” argument in nonparty-fault cases that do not include an allegation of plaintiff's fault. On the other hand, as discussed in the Comment to AMI 307, the historical background to Act 1116's characterization of fault-allocation as a “right of contribution” prominently features a series of post-CJRA court rulings concerning nonparty fault and contribution among severally liable tortfeasors – *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135; *ProAssurance Indemnity Co. v. Metheny*, 2012 Ark. 461, 425 S.W.3d 689; *St. Vincent Infirmary Med. Ctr. v. Shelton*, 2013 Ark. 38, 425 S.W.3d 761 – none of which involved section 16-64-122(d). And the terms “comparative fault” and “comparative responsibility” have sometimes been used to refer more generally to proportional liability. *See generally, e.g., Stull v. Ragsdale*, 273 Ark. 277, 281, 620 S.W.2d 264, 267 (observing that “[t]he purpose of our comparative negligence statute is to distribute the total damages among those who caused them”); Restatement (Third) of Torts: Apportionment of Liability, §§ 11, B19 (Topic 2. Liability of Multiple Tortfeasors for Indivisible Harm, Effect of Several Liability) (using term “comparative responsibility” to refer generically to a severally liable person's portion of an injured person's liability); 1 Comparative Negligence Manual § 1.1 (3d ed., updated 2014) (defining “comparative negligence” as “a fault concept that apportions liability for damages in proportion to the contribution of each tortfeasor causing the injury or damages”). A court that read section 16-64-122(d)'s term “comparative fault” in light of this more general usage, and the

CJRA's adoption of proportional liability and the subsequent creation of fault-allocation mechanisms by statute and rules of procedure, could conclude that there is a right to "outcome" arguments in nonparty-fault cases that do not include an allegation of plaintiff's fault.

At least one federal court has ruled that section 16-64-122(d) does not apply in federal diversity cases. *DeWitt v. Smith*, 152 F.R.D. 162, 166-67 (W.D. Ark. 1993) (ruling that section 16-64-122(d) is "procedural," conflicts with Fed. R. Civ. P. 49 (which is substantially the same as Ark. R. Civ. P. 49) and the general practice in federal courts, and therefore is not binding on federal courts).