

SUPREME COURT OF ARKANSAS HOLDS THAT ARK. CODE ANN.  
16-55-202 DOES NOT REQUIRE JURY TO BE INSTRUCTED TO  
APPORTION LIABILITY TO NONPARTIES

In *ProAssurance Idem Co. v. Metheny*, ProAssurance Indemnity Co. (“ProAssurance”), which is the liability insurance provider for Arkansas Children Hospital, appealed a jury verdict that awarded Pamela and Kenny Metheny \$20 million dollars on behalf of their son who suffered injury during a brain surgery.<sup>1</sup> The circuit court reduced the damages to \$11 million dollars and the Metheny’s cross-appealed.<sup>2</sup> The Arkansas Supreme Court affirmed both the direct and cross appeal.

In *ProAssurance Indem Co. v. Metheny*, 15-year-old Cody Metheny underwent elective brain surgery to eliminate his epileptic seizures on the right side of his brain at Arkansas Children’s Hospital (ACH), which was performed by Dr. Badih Adada, an employee of University of Arkansas Medical Sciences.<sup>3</sup> With Pamela Metheny’s consent, ACH invited a reporter for the Arkansas Democrat-Gazette to observe and photograph Cody’s surgery.<sup>4</sup> According to the Metheny’s complaint, when surgery began, Dr. Adada cut the left side of Cody’s brain and removed and damaged significant parts of the left side before realizing the problem needing fixing was on the right side of the brain.<sup>5</sup> Dr. Adada then dismissed the media and began operating on the right side of the brain without informing the family of the mistake.<sup>6</sup> After the surgery, Dr. Adada told the Methenys of the mistake and promised that no harm was done.<sup>7</sup> While it is undisputed that the hospital knew of the problem, the CEO of ACH stated that he was not made aware of such an incident.<sup>8</sup>

It was not until fifteen months after Cody’s surgery, when Cody had difficulty expressing emotion that the Methenys learned that tissue had been removed from the left side of the brain and filed a complaint against ProAssurance claiming direct medical negligence before, during, and after Cody’s surgery on part of ACH’s administration, employees, department heads, and agents.<sup>9</sup> The Metheny’s stated that administration failed to take action against Dr. Adada after the surgical mistake and the surgical team

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1. 2012 Ark. 461 at 1–2, \_\_S.W.3d\_\_.

2. *Id.* at 1–2, \_\_S.W.3d\_\_.

3. *Id.* at 2, \_\_S.W.3d\_\_.

4. *Id.* at 2, \_\_S.W.3d\_\_.

5. *Id.* at 3, \_\_S.W.3d\_\_.

6. *Id.* at 3, \_\_S.W.3d\_\_.

7. *ProAssurance Indem. Co., Inc. v. Metheny*, 2012 Ark. 461 at 3, \_\_S.W.3d\_\_.

8. *Id.* at 3, \_\_S.W.3d\_\_.

9. *Id.* at 4, \_\_S.W.3d\_\_.

never disclosed this information to the Methenys, depriving Cody of rehabilitation time, and thus sought compensatory and punitive damages on two counts of medical negligence and one count of outrage.<sup>10</sup>

ProAssurance responded to the complaint admitting Dr. Adada's mistake but, denied wrongdoing, stating there was no claim for which relief could be granted for punitive damages and asserted two entitlements.<sup>11</sup> The first entitlement was to a setoff for the total amount paid against other tortfeasors in accordance with Ark Code Ann 16-21-294 and the second was a request that the jury assign fault percentages to all tortfeasors, whether a party in the case or not according to Ark. Code Ann 16-55-202.<sup>12</sup> When the Metheny's responded with an amended complaint stating direct and vicarious general administrative negligence by the ACH, as well as a second outrage claim against ProAssurance for advising ACH not to report this as a sentinel event, ProAssurance filed a motion to dismiss the outrage claim arguing that its only connection to ACH was the insurer-insured relationship and the circuit court dismissed the claim.<sup>13</sup> ProAssurance then filed a motion for leave to file a third-party complaint to file against the doctors who had previously settled with the Metheny's because ProAssurance argued it was entitled to contribution, credit for settlement, setoff, appointment, and the circuit court granted but later dismissed.<sup>14</sup> At trial, a nurse testified that ACH followed pre-surgery procedure but did not find out which side of the brain the surgery was to occur until the mistake happened. Once the doctor informed her, she informed the family that Cody was ok but did not note the mistake because she stated it was the duty of the surgeon to do so, which was verified by testimony of another member of ACH.<sup>15</sup> However, an expert nurse testifying for the Methenys stated that a nurse should have known the side of the brain and stopped the surgery, and therefore the hospital did not meet the required standard of care.<sup>16</sup> Dr. Adada also testified stating that, although his mistake was a sentinel event, the procedures that followed after such an event were not conducted.<sup>17</sup>

After all evidence, the jury found for the Methenys, awarded damages of \$20 million, which was lowered to \$11 million by the court, the court denied ProAssurance's motion for JNOV and ProAssurance appealed.<sup>18</sup> ProAssurance argued in its appeal that the circuit court erred (1) by not us-

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10. *Id.* at 4–5, \_\_S.W.3d\_\_.

11. *Id.* at 5, \_\_S.W.3d\_\_.

12. *Id.* at 5, \_\_S.W.3d\_\_.

13. ProAssurance Idem. Co., Inc. v. Metheny, 2012 Ark. 461 at 6, \_\_S.W.3d\_\_.

14. *Id.* at 6–7, \_\_S.W.3d\_\_.

15. *Id.* at 7–8 \_\_S.W.3d\_\_.

16. *Id.* at 8 \_\_S.W.3d\_\_.

17. *Id.* at 10 \_\_S.W.3d\_\_.

18. *Id.* at 10 \_\_S.W.3d\_\_.

ing the jury instruction, which would allow the jury to apportion liability to the physicians who settled, (2) by not letting ProAssurance enter evidence of the settling physician’s fault, and (3) in denying ProAssurance’s motion for JNOV, which demonstrated that future damages were wrongly bundled.<sup>19</sup>

In addressing the first issue, the court stated that there was not an abuse of discretion in not using the offered jury instruction and therefore would not be reversed.<sup>20</sup> In addressing the issue, the court stated that nothing in Ark. Code. Ann section 16-55-201 required a circuit court to submit a jury instruction that would allocate liability to a nonparty and that past cases established such practice to be unconstitutional.<sup>21</sup> Because it is not an abuse of discretion/error for a trial court to not use the offered instructions and instead instructions that will cover the same question, the Arkansas Supreme Court affirmed the trial court.<sup>22</sup>

The second issue the court addressed was whether or not ProAssurance should have been able to present evidence of fault to the UAMS physicians, specifically doctor testimony that was not allowed as evidence.<sup>23</sup> However, the court would not address this issue because there is no record of ProAssurance’s attempt to introduce the evidence and denial of the opportunity.<sup>24</sup> For the court to address this issue, the issue would have had to be preserved for appeal.

The last remaining issue that the court reviewed from ProAssurance’s appeal was whether or not the court erred in denying a motion for JNOV where the only evidence of future medical damages wrongly bundled Cody’s future expenses to his family to see him in a residential facility, because according to ProAssurance, the Metheny’s economists wrongly reduced future damages to present value.<sup>25</sup> However, because the record revealed that ProAssurance only mentioned the issue at closing and did not object to the bundling costs, the court would not review the issue.<sup>26</sup>

In looking at the cross-appeal in which the Methenys asserted that the circuit court erred by reducing the jury’s verdict, ProAssurance countered the argument by stating that Cody’s injuries did not contribute to multiple causes but instead, the one medical incident.<sup>27</sup> The Metheny’s asserted that the different policies that promise to pay for specific times of injury were

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19. ProAssurance Idem. Co., Inc. v. Metheny, 2012 Ark. 461 at 10\_\_S.W.3d\_\_.

20. *Id.* at 12\_\_S.W.3d\_\_.

21. *Id.* at 12–18 \_\_S.W.3d\_\_.

22. *Id.* at 18 \_\_S.W.3d\_\_.

23. *Id.* at 18 \_\_S.W.3d\_\_.

24. *Id.* at 20 \_\_S.W.3d\_\_.

25. ProAssurance Idem. Co., Inc. v. Metheny, 2012 Ark. 461 at 21\_\_S.W.3d\_\_.

26. *Id.* at 22\_\_S.W.3d\_\_.

27. *Id.* at 23\_\_S.W.3d\_\_.

applicable and thus should produce the award.<sup>28</sup> However, the Arkansas Supreme Court agreed with ProAssurance that the surgery was the result of the injury, thus, the Methenys could not increase the policy limits arguing that there were multiple time periods (or even multiple insureds) involved in the accident.<sup>29</sup>

A concurring opinion by Justice Robert L. Brown argued that every holding in the majority was correct except for the fact that ProAssurance had preserved the objection to use testimony.<sup>30</sup> Brown argues that the procedure alone proves the issue was preserved on appeal because ProAssurance questioned the court on not being allowed to use all of a doctor's testimony (but some for deposition), and the court explained that it was true, it could not use the testimony.<sup>31</sup> This, Brown argued, is enough of an objection to preserve this issue on appeal and disagreed with the majority about not reviewing this issue any further than it did.<sup>32</sup>

\*Alex Gooch

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28. *Id.* at 24\_\_S.W.3d\_\_.

29. *Id.* at 25\_\_S.W.3d\_\_.

30. *Id.* at 26\_\_S.W.3d\_\_.

31. ProAssurance Indem. Co., Inc. v. Metheny, 2012 Ark. 461 at 26\_\_S.W.3d\_\_.

32. *Id.* at 26\_\_S.W.3d\_\_.