

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

1 State of Arkansas *As Engrossed: H1/24/03 H1/30/03 S3/6/03*

2 84th General Assembly

# A Bill

3 Regular Session, 2003

HOUSE BILL 1038

4

5 By: Representatives Ferguson, Parks, Agee, Anderson, Bennett, Biggs, Bolin, Borhauer, Boyd, Dees, L.

6 Evans, Gipson, Harris, Jacobs, Kenney, Matayo, Petrus, Rosenbaum, Scroggin, J. Taylor, Walters,

7 Bledsoe, Hutchinson, Pritchard, R. Smith, Norton

8 By: Senators B. Johnson, Bisbee, Baker, Gullett, Horn, J. Jeffress, Miller, Trusty, Whitaker, Womack,

9 Wooldridge, *Hendren, Holt, Altes, Faris, Glover, Higginbothom*

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## For An Act To Be Entitled

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AN ACT TO PROVIDE COMPREHENSIVE AND UNIFORM

14

CIVIL JUSTICE REFORM; AND FOR OTHER PURPOSES.

15

16

### Subtitle

17

"THE CIVIL JUSTICE REFORM ACT OF 2003."

18

19

20 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

21

22 SECTION 1. Modification of joint and several liability.

23 (a) In any action for personal injury, medical injury, property  
24 damage, or wrongful death, the liability of each defendant for compensatory  
25 or punitive damages shall be several only and shall not be joint.

26 (b) Each defendant shall be liable only for the amount of damages  
27 allocated to that defendant in direct proportion to that defendant's  
28 percentage of fault, and a separate several judgment shall be rendered  
29 against that defendant for that amount.

30 (c) To determine the amount of judgment to be entered against each  
31 defendant, the court, with regard to each defendant, shall multiply the total  
32 amount of damages recoverable by the plaintiff by the percentage of each  
33 defendant's fault, and that amount shall be the maximum recoverable against  
34 the defendant.

35

36 SECTION 2. Assessment of percentages of fault.



1           (a) In assessing percentages of fault, the fact finder shall consider  
2 the fault of all persons or entities who contributed to the alleged injury or  
3 death or damage to property, tangible or intangible, regardless of whether  
4 the person or entity was, or could have been, named as a party to the suit.

5           (b)(1) Negligence or fault of a nonparty shall be considered if the  
6 plaintiff entered into a settlement agreement with the nonparty or if the  
7 defending party gives notice not later than one hundred twenty (120) days  
8 prior to the date of trial that a nonparty was wholly or partially at fault.

9           (2) The notice shall be given by filing a pleading in the action  
10 designating the nonparty and setting forth the nonparty's name and last known  
11 address, or the best identification of the nonparty which is possible under  
12 the circumstances, together with a brief statement of the basis for believing  
13 the nonparty to be at fault.

14           (c)(1) Nothing in this section 2 shall eliminate or diminish any  
15 defenses or immunities which currently exist, except as expressly stated  
16 herein.

17           (2) Assessments of percentages of fault of nonparties shall be  
18 used only for accurately determining the percentage of fault of named  
19 parties.

20           (3) Where fault is assessed against nonparties, findings of  
21 fault shall not subject any nonparty to liability in any action, or be  
22 introduced as evidence of liability in any action.

23  
24           SECTION 3. Increase in percentage of several share.

25           (a) Notwithstanding the provisions of Sections 1 and 2, in the event a  
26 several judgment has been entered against multiple party defendants, a  
27 plaintiff, no later than ten (10) days after the entry of judgment, may move  
28 the court to determine whether all or part of the amount of the several share  
29 for which a defendant is liable will not be reasonably collectible.

30           (b) If the court determines, based upon a preponderance of the  
31 evidence, that any defendant's several share or multiple defendants' several  
32 shares will not be reasonably collectible, the court shall increase the  
33 percentage points of the several shares, subject to the limitations in  
34 subsections (c) and (d) of this section, of each of the remaining defendants.

35           (c)(1) If a defendant's percentage of fault is determined by the fact  
36 finder to be ten percent (10%) or less, then the percentage points of that

1 defendant's several share shall not be increased.

2 (2) If a defendant's percentage of fault is determined by the  
3 fact finder to be greater than ten percent (10%), but less than fifty percent  
4 (50%), then the percentage points of that defendant's several share shall be  
5 increased by no more than ten (10) percentage points.

6 (3) If a defendant's percentage of fault is determined by the  
7 fact finder to be fifty percent (50%) or greater, then the percentage points  
8 of that defendant's several share shall be increased by no more than twenty  
9 (20) percentage points.

10 (d) Under no circumstances shall the combined increase in the  
11 percentage points of the remaining defendants' several shares exceed the  
12 lesser of:

13 (1) A total of one hundred (100) percentage points; or

14 (2) The total number of percentage points remaining after  
15 deducting the percentage of fault of the plaintiff, if any.

16 (e) Any defendant whose several share has been increased pursuant to  
17 this section, and who has discharged his obligation to pay the increased  
18 several share, has a right of contribution from the defendants whose several  
19 shares were determined by the court to be not reasonably collectible.

20 (f) The provisions of this section shall not apply to any punitive  
21 damages award or judgment.

22  
23 SECTION 4. Long Term Care Facility Medical Director.

24 The provisions of Section 3 shall not apply to a medical care provider  
25 who is named as a defendant in an action for personal injury, medical injury,  
26 or wrongful death based solely on his capacity as medical director of a long  
27 term care facility.

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29 SECTION 5. Acting in concert.

30 (a) Notwithstanding section 1 of this act, a party is responsible for  
31 the fault of another person or entity, or for payment of the proportionate  
32 share of another person or entity, if both the party and the other person or  
33 entity were acting in concert or if the other person or entity was acting as  
34 an agent or servant of the party.

35 (b)(1) As used in this section 5, "acting in concert" means entering  
36 into a conscious agreement to pursue a common plan or design to commit an

1 intentional tort and actively taking part in that intentional tort.

2 (2) "Acting in concert" does not mean the act of any person or  
3 entity whose conduct was negligent in any degree other than intentional.

4 (3) A person or entity's conduct which provides substantial  
5 assistance to one committing an intentional tort does not constitute "acting  
6 in concert" if the person or entity has not consciously agreed with the other  
7 to commit the intentional tort.

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9 SECTION 6. Burden of proof.

10 This act does not amend the existing law that provides that the burden  
11 of alleging and proving fault is upon the person who seeks to establish  
12 fault.

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14 SECTION 7. Comparative fault.

15 This act does not amend the existing law that provides that the  
16 plaintiff may not recover any amount of damages if the plaintiff's own fault  
17 is determined to be fifty percent (50%) or greater.

18  
19 SECTION 8. Cause of action not created.

20 (a) This act does not create a cause of action.

21 (b) This act does not alter the defenses or immunity of any person or  
22 entity.

23  
24 SECTION 9. Standards for award of punitive damages.

25 In order to recover punitive damages from the defendant, the plaintiff  
26 has the burden of proving that the defendant is liable for compensatory  
27 damages and that either or both of the following aggravating factors were  
28 present and related to the injury for which compensatory damages were  
29 awarded:

30 (1) That the defendant knew or ought to have known, in light of the  
31 surrounding circumstances, that his or her conduct would naturally and  
32 probably result in injury or damage and that he or she continued the conduct  
33 with malice or in reckless disregard of the consequences from which malice  
34 may be inferred;

35 (2) That the defendant intentionally pursued a course of conduct for  
36 the purpose of causing injury or damage.

1  
2        SECTION 10. Burden of proof for award of punitive damages.

3        The plaintiff must satisfy the burden of proof required under Section 9  
4 of this act by clear and convincing evidence in order to recover punitive  
5 damages from the defendant.

6  
7        SECTION 11. Limitations on the amount of punitive damages.

8        (a) Except as provided in subsection (b) of this section, a punitive  
9 damages award shall not be more than the greater of the following:

10            (1) Two hundred fifty thousand dollars (\$250,000); or

11            (2) Three (3) times the amount of compensatory damages awarded  
12 in the action not to exceed one million dollars (\$1,000,000).

13        (b) When the fact finder determines by clear and convincing evidence  
14 that, at the time of the injury, the defendant intentionally pursued a course  
15 of conduct for the purpose of causing injury or damage and determines that  
16 the defendant's conduct did, in fact, harm the plaintiff, then subsection (a)  
17 of this section shall not apply.

18        (c) As to the punitive damages limitations established in subsection  
19 (a) of this section, the fixed sums of two hundred fifty thousand dollars  
20 (\$250,000) set forth in subsection (a)(1) and one million dollars  
21 (\$1,000,000) set forth in subsection (a)(2) shall be adjusted as of January  
22 1, 2006, and at three-year intervals thereafter, in accordance with the  
23 Consumer Price Index rate for the previous year as determined by the  
24 Administrative Office of the Courts.

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26        SECTION 12. No right to punitive damages.

27        Nothing in this act shall be construed as creating a right to an award  
28 of punitive damages.

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30        SECTION 13. No limitation on certain judicial duties.

31        Nothing in this act shall limit the duty of the court, or the appellate  
32 courts, to:

33            (1) Scrutinize all punitive damages awards;

34            (2) Ensure that all punitive damage awards comply with applicable  
35 procedural, evidentiary, and constitutional requirements; and

36            (3) Order remittitur where appropriate.

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SECTION 14. Bifurcated proceeding.

(a) In any case in which punitive damages are sought, any party may request a bifurcated proceeding at least ten (10) days prior to trial. If a bifurcated proceeding has been requested by either party, then:

(1) The fact finder first shall determine whether compensatory damages are to be awarded; and

(2) After a compensatory damages award determination, the fact finder then shall determine whether and in what amount punitive damages will be awarded.

(b) Evidence of the financial condition of the defendant and other evidence relevant only to punitive damages is not admissible with regard to any compensatory damages determination.

SECTION 15. Compensatory damages.

(a) This act does not limit compensatory damages.

(b) Any evidence of damages for the costs of any necessary medical care, treatment, or services received shall include only those costs actually paid by, or on behalf of, the plaintiff or which remain unpaid and for which the plaintiff or any third party shall be legally responsible.

SECTION 16. Venue.

(a) All civil actions, other than those mentioned in Arkansas Code §§ 16-60-101 through 16-60-103, § 16-60-107, § 16-60-114, § 16-60-115 and subsection (e) of this section, must be brought in any of the following counties:

(1) The county in which a substantial part of the events or omissions giving rise to the claim occurred;

(2)(A) The county in which an individual defendant resided;

(B) If the defendant is an entity other than an individual, the county where the entity had its principal office in this state at the time of the accrual of the cause of action; or

(3)(A) The county in which the plaintiff resided.

(B) If the plaintiff is an entity other than an individual, the county where the plaintiff had its principal office in this state at the time of the accrual of the cause of action.

1       (b)(1) The residence of any properly joined named class representative  
2 or representatives may be considered in determining proper venue in a class  
3 action.

4       (2) The residency of any putative or actual member of a class  
5 other than a named representative shall not be considered in determining  
6 proper venue for a class action.

7       (c) In any civil action, venue must be proper as to each or every  
8 named plaintiff joined in the action unless:

9               (A) The plaintiffs establish that they assert any right to  
10 relief against the defendants jointly, severally, or arising out of the same  
11 transaction or occurrence; and

12               (B) That the existence of a substantial number of  
13 questions of law or material fact common to all those persons not only will  
14 arise in the action, but also:

15                       (i) That the questions will predominate over  
16 individualized questions pertaining to each plaintiff;

17                       (ii) That the action can be maintained more  
18 efficiently and economically for all parties than if prosecuted separately;  
19 and

20                       (iii) That the interest of justice supports the  
21 joinder of the parties as plaintiffs in one action.

22       (d)(1) Unless venue objections are waived by the defendant, or by  
23 unanimous agreement of multiple defendants, if venue is improper for any  
24 plaintiff joined in the action, then the claim of the plaintiff shall be  
25 severed and transferred to a court where venue is proper.

26               (2)(A) If severance and transfer is mandated and venue is  
27 appropriate in more than one court, a defendant sued alone or multiple  
28 defendants, by unanimous agreement, shall have the right to select another  
29 court to which the action shall be transferred.

30               (B) If there are multiple defendants who are unable to  
31 agree on another court, the court in which the action was originally filed  
32 may transfer the action to another court.

33       (e) Any action for medical injury brought under Arkansas Code §§ 16-  
34 114-201 through § 16-114-209 against a medical care provider, as defined in  
35 Arkansas Code § 16-114-201(2), shall be filed in the county in which the  
36 alleged act or omission occurred.

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2 SECTION 17. Maximum appeal bond in civil litigation.

3 (a) Appeal bonds shall be determined under Arkansas Code §§ 16-68-301  
4 through 16-68-306, and Rule 8, Arkansas Rules of Appellate Procedure - Civil,  
5 except that the maximum appeal bond that may be required in any civil action  
6 under any legal theory shall be limited to twenty-five million dollars  
7 (\$25,000,000), regardless of the amount of the judgment.

8 (b) If a party proves by a preponderance of the evidence that the  
9 party who has posted a bond in accordance with subsection (a) of this section  
10 is purposely dissipating or diverting assets outside of the ordinary course  
11 of its business for the purpose of evading ultimate payment of the judgment,  
12 the court may enter orders as are necessary to prevent dissipation or  
13 diversion, including requiring that a bond be posted equal to the full amount  
14 of the judgment.

15  
16 SECTION 18. Arkansas Code § 16-114-206(a), concerning the burden of  
17 proof in actions for medical injury, is amended to read as follows:

18 (a) In any action for medical injury, when the asserted negligence  
19 does not lie within the jury's comprehension as a matter of common knowledge,  
20 the plaintiff shall have the burden of proving:

21 (1) ~~The~~ By means of expert testimony provided only by a medical  
22 care provider of the same specialty as the defendant, the degree of skill and  
23 learning ordinarily possessed and used by members of the profession of the  
24 medical care provider in good standing, engaged in the same type of practice  
25 or specialty in the locality in which he practices or in a similar locality;

26 (2) ~~That~~ By means of expert testimony provided only by a medical  
27 care provider of the same specialty as the defendant that the medical care  
28 provider failed to act in accordance with that standard; and

29 (3) ~~That~~ By means of expert testimony provided only by a  
30 qualified medical expert that, as a proximate result thereof, the injured  
31 person suffered injuries which would not otherwise have occurred.

32  
33 SECTION 19. Arkansas Code § 16-114-208(a), concerning damage awards in  
34 actions for medical injury, is amended to read as follows:

35 (a)(1)(A) The damages awarded may include compensation for actual  
36 economic losses recognized by law suffered by the injured person by reason of



1 medical injury including, but not limited to, the cost of reasonable and  
2 necessary medical services, rehabilitation services, custodial care, loss of  
3 services, and loss of earnings or earning capacity;

4 (B) Any evidence of damages for the cost of any necessary  
5 medical care, treatment, or services received shall include only those costs  
6 actually paid by or on behalf of the plaintiff or which remain unpaid and for  
7 which the plaintiff or any third party shall be legally responsible.

8 (2) The damages awarded may include compensation for pain and  
9 suffering and other noneconomic loss recognized by law;

10  
11 SECTION 20. Arkansas Code § 16-114-208(c)(1), concerning awards for  
12 future damages in actions for medical injury, is amended to read as follows:

13 (c)(1) In the event of a judgment for the plaintiff, if the award for  
14 future damages exceeds one hundred thousand dollars (\$100,000) the court ~~may~~  
15 shall, at the request of either party, order that the future damages of the  
16 injured person exceeding one hundred thousand dollars (\$100,000) be paid in  
17 whole, or in part, by periodic payments as determined by the court, rather  
18 ~~than by lump sum payment, on such terms and conditions as the court deems~~  
19 just and equitable in order to protect the plaintiff's rights to future  
20 payments.

21  
22 SECTION 21. Arkansas Code § 16-114-209 is amended to read as follows:  
23 16-114-209. False and unreasonable pleadings.

24 ~~(a) If in any action for medical injury, claims, defenses, or denials~~  
25 ~~are intentionally made without reasonable cause and found to be untrue, the~~  
26 ~~party pleading them shall thereafter be subject to the payment of reasonable~~  
27 ~~costs actually incurred by the other party by reason of the untrue pleading.~~  
28 If any action for medical injury is filed without reasonable cause, the party  
29 or attorney who signed the complaint shall thereafter be subject to the  
30 payment of reasonable costs, including attorneys fees, incurred by the other  
31 party by reason of the pleading and appropriate sanctions as determined by  
32 the court.

33 (b)(1) In all cases where expert testimony is required under § 16-114-  
34 206, reasonable cause for filing any action for medical injury due to  
35 negligence shall only be established by the filing of an affidavit that shall  
36 be signed by an expert engaged in the same type of medical care as is each

1 medical care provider defendant.

2 (2) The affidavit shall be executed under oath and shall state  
3 with particularity:

4 (A) The expert's familiarity with the applicable standard  
5 of care in issue;

6 (B) The expert's qualifications;

7 (C) The expert's opinion as to how the applicable standard  
8 of care has been breached; and

9 (D) The expert's opinion as to how the breach of the  
10 applicable standard of care resulted in injury or death.

11 (3) The plaintiff shall have thirty (30) days after the  
12 complaint is filed with the clerk to file the affidavit before the provisions  
13 of subsection (a) apply. If the affidavit is not filed within thirty (30)  
14 days after the complaint is filed with the clerk, the complaint shall be  
15 dismissed by the court.

16  
17 SECTION 22. Arkansas Code Title 16, Chapter 114, Subchapter 2 is  
18 amended to add additional sections to read as follows:

19 16-114-210. Employed medical care provider.

20 When a medical care provider is a codefendant with a medical care  
21 facility in an action for medical injury, and the only reason for naming the  
22 facility as a defendant is that the defendant medical care provider practices  
23 in the facility, the plaintiff shall have the burden of proving that the  
24 defendant medical care provider is the employee of the facility before the  
25 facility may be held liable for the medical care provider's negligence, if  
26 any is proven.

27  
28 16-114-211. Surveys and inspection reports as evidence.

29 The results of any surveys or inspections by state or federal  
30 regulators, or by accrediting organizations, which are not otherwise  
31 privileged and which the plaintiff seeks to use as evidence against a medical  
32 care provider must be relevant to the plaintiff's injury to be admissible at  
33 trial.

34  
35 16-114-212. Tolling of the statute of limitations.

36 (a) If, within thirty (30) days prior to the expiration of the

1 applicable statute of limitations, a plaintiff serves written notice of  
2 intention to file an action for medical injury, the statute of limitations  
3 shall be tolled for ninety (90) days only if the following conditions are  
4 met:

5 (1) The written notice shall be served by certified mail, return  
6 receipt requested, upon the medical care provider alleged to have cause the  
7 medical injury;

8 (2) The written notice shall include the following:

9 (A) The claimant's full name, date of birth, present  
10 address and address at time of treatment at issue, and social security  
11 number:

12 (B) The date(s) of the treatment in question and a summary  
13 of the alleged wrongful conduct; and

14 (C) The names and addresses of the known medical care  
15 providers relating to the alleged injury; and

16 (3) An authorization to release medical records signed by the  
17 plaintiff, which shall authorize the medical care provider alleged to be  
18 liable to obtain pertinent medical records, shall be attached to the notice.

19 (b) Failure to comply with any of the requirements set forth in  
20 subsection (a) shall be deemed to be material and shall result in the statute  
21 of limitations not being tolled.

22 (c) If the plaintiff files an action for medical injury during this  
23 tolling period without the requisite affidavit required by § 16-114-209(b)(1)  
24 and (2), the complaint shall be dismissed and costs, attorney fees, and  
25 appropriate sanctions as determined by the court shall be assessed. The  
26 provisions of § 16-114-209 (b)(3) do not apply to cases filed during the  
27 tolling period.

28 (d) If a request for the production of copies of the medical records  
29 accompanies the written notice of intention to file an action for medical  
30 injury in accordance with subsection (a), and if copies of those medical  
31 records are not provided within thirty (30) days of receipt of the notice,  
32 then the claimant may file an independent expedited declaratory action  
33 seeking a declaration that the medical care provider failed to produce the  
34 medical records within the thirty-day period. If the court finds that copies  
35 of the medical records were not produced as required by this subsection, the  
36 statute of limitations shall be tolled for a period of seventy-five (75) days

1 from the date of the production of the copies of the medical records. If the  
2 court finds that the failure to produce copies of the requested medical  
3 records is without good cause, the court shall award the claimant his  
4 reasonable costs and attorney fees for the declaratory judgment action.

5  
6 SECTION 23. Attorney General.

7 No provision of this Act shall apply to, or alter existing law with  
8 respect to any claim, charge, action, or suit brought or prosecuted by the  
9 Attorney General.

10  
11 SECTION 24. Coroner or Medical Examiner.

12 Nothing in this act shall be construed to diminish or enlarge the  
13 powers or duties of a coroner or medical examiner.

14  
15 SECTION 25. Applicability and severability.

16 (a) This act applies to all causes of action accruing on or after the  
17 effective date of this act.

18 (b) This act shall not apply to any action filed or cause of action  
19 accruing prior to the effective date of this act.

20 (c) If any provision of this act or the application thereof to  
21 any person or circumstance is held invalid, such invalidity shall not affect  
22 other provisions or applications of the act which can be given effect without  
23 the invalid provision or application, and to this end the provisions of this  
24 act are declared to be severable.

25  
26 SECTION 26. EMERGENCY CLAUSE. It is found and determined by the  
27 General Assembly of the State of Arkansas that in this state, existing  
28 conditions, such as the application of joint and several liability regardless  
29 of the percentage of fault, are adversely impacting the availability and  
30 affordability of medical liability insurance; that those existing conditions  
31 recently have caused several medical liability carriers to stop offering  
32 coverage in the state and have caused some medical care providers to curtail  
33 or end their practices; that the decreasing availability and affordability of  
34 medical liability insurance is adversely affecting the accessibility and  
35 affordability of medical care and of health insurance coverage in this state;  
36 that long term care facilities are having great difficulty hiring qualified

1 medical directors because physicians could be held liable for an entire  
2 judgment even if they are found to be minimally at fault; and that there is a  
3 need to improve access to the courts for deserving claimants; and that this  
4 act is immediately necessary in order to remedy these conditions and improve  
5 access to health care in this state. Therefore, an emergency is declared to  
6 exist and this act being immediately necessary for the preservation of the  
7 public peace, health and safety shall become effective on:

8 (1) The date of its approval by the Governor;

9 (2) If the bill is neither approved nor vetoed by the Governor, the  
10 expiration of the period of time during which the Governor may veto the bill;

11 or

12 (3) If the bill is vetoed by the Governor and the veto is overridden,  
13 the date the last house overrides the veto.

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15 /s/ Ferguson  
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