

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 S3/10/03*

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*

10

11

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For An Act To Be Entitled

13

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 percentage points of the
11 remaining defendants' several shares exceed the lesser of:

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

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

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

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

21
22 SECTION 4. Long Term Care Facility Medical Director.

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

27
28 SECTION 5. Acting in concert.

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

34 (b)(1) As used in this section 5, "acting in concert" means entering
35 into a conscious agreement to pursue a common plan or design to commit an
36 intentional tort and actively taking part in that intentional tort.

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

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

7
8 SECTION 6. Burden of proof.

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

12
13 SECTION 7. Comparative fault.

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

17
18 SECTION 8. Cause of action not created.

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

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

22
23 SECTION 9. Standards for award of punitive damages.

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

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

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

36

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

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

5
6 SECTION 11. Limitations on the amount of punitive damages.

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

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

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

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

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

24
25 SECTION 12. No right to punitive damages.

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

28
29 SECTION 13. No limitation on certain judicial duties.

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

32 (1) Scrutinize all punitive damages awards;

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

35 (3) Order remittitur where appropriate.

36

1 SECTION 14. Bifurcated proceeding.

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

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

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

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

13
14 SECTION 15. Compensatory damages.

15 (a) This act does not limit compensatory damages.

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

20
21 SECTION 16. Venue.

22 (a) All civil actions, other than those mentioned in Arkansas Code §§
23 16-60-101 through 16-60-103, § 16-60-107, § 16-60-114, § 16-60-115 and
24 subsection (e) of this section, must be brought in any of the following
25 counties:

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

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

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

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

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

36 (b)(1) The residence of any properly joined named class representative

1 or representatives may be considered in determining proper venue in a class
2 action.

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

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

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

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

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

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

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

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

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

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

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

36

1 SECTION 17. Maximum appeal bond in civil litigation.

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

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

14
15 SECTION 18. Arkansas Code § 16-114-206(a), concerning the burden of
16 proof in actions for medical injury, is amended to read as follows:

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

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

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

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

31
32 SECTION 19. Arkansas Code § 16-114-208(a), concerning damage awards in
33 actions for medical injury, is amended to read as follows:

34 (a)(1)(A) The damages awarded may include compensation for actual
35 economic losses recognized by law suffered by the injured person by reason of
36 medical injury including, but not limited to, the cost of reasonable and

1 necessary medical services, rehabilitation services, custodial care, loss of
2 services, and loss of earnings or earning capacity;

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

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

9
10 SECTION 20. Arkansas Code § 16-114-208(c)(1), concerning awards for
11 future damages in actions for medical injury, is amended to read as follows:

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

20
21 SECTION 21. Arkansas Code § 16-114-209 is amended to read as follows:

22 16-114-209. False and unreasonable pleadings.

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

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

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

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

5 (B) The expert's qualifications;

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

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

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

15
16 SECTION 22. Arkansas Code Title 16, Chapter 114, Subchapter 2 is
17 amended to add additional sections to read as follows:

18 16-114-210. Employed medical care provider.

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

26
27 16-114-211. Surveys and inspection reports as evidence.

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

33
34 16-114-212. Tolling of the statute of limitations.

35 (a) If, within thirty (30) days prior to the expiration of the
36 applicable statute of limitations, a plaintiff serves written notice of

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

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

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

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

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

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

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

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

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

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

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

5 SECTION 23. Attorney General.

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

10 SECTION 24. Coroner or Medical Examiner.

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

14 SECTION 25. Applicability and severability.

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

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

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

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

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

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

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

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

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14 /s/ Ferguson
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