Stricken language would be deleted from and underlined language would be added to the Arkansas Constitution.

State of Arkansas *As Engrossed: S3/22/99*
82nd General Assembly
Regular Session, 1999 SJR 9

By: Senators Beebe, Harriman, Brown, Webb, Everett, D. Malone, Mahony, Kennedy
By: Representatives T. Thomas, Vess, Hale, Lynn, Napper, Hunt, Carson

SENATE JOINT RESOLUTION

"PROPOSING AN AMENDMENT TO THE ARKANSAS CONSTITUTION TO REVISE THE JUDICIAL ARTICLE."

Subtitle

"PROPOSING AN AMENDMENT TO THE ARKANSAS CONSTITUTION TO REVISE THE JUDICIAL ARTICLE."

BE IT RESOLVED BY THE SENATE OF THE EIGHTY-SECOND GENERAL ASSEMBLY OF THE STATE OF ARKANSAS AND BY THE HOUSE OF REPRESENTATIVES, A MAJORITY OF ALL MEMBERS ELECTED TO EACH HOUSE AGREEING THERETO:

That the following is hereby proposed as an amendment to the Constitution of the State of Arkansas, and upon being submitted to the electors of the state for approval or rejection at the next general election for Senators and Representatives, if a majority of the electors voting thereon at such election, adopt such amendment, the same shall become a part of the Constitution of the State of Arkansas, to wit:

SECTION 1. JUDICIAL POWER.

The judicial power is vested in the Judicial Department of state government, consisting of a Supreme Court and other courts established by this Constitution.

SECTION 2. SUPREME COURT.

(A) The Supreme Court shall be composed of seven Justices, one of whom shall serve as Chief Justice. The Justices of the Supreme Court shall be

selected from the State at large.

(B) The Chief Justice shall be selected for that position in the same manner as the other Justices are selected. During any temporary period of absence or incapacity of the Chief Justice, an acting Chief Justice shall be selected by the Court from among the remaining justices.

(C) The concurrence of at least four justices shall be required for a decision in all cases.

(D) The Supreme Court shall have:

(1) Statewide appellate jurisdiction;

(2) Original jurisdiction to issue writs of quo warranto to all persons holding judicial office, and to officers of political corporations when the question involved is the legal existence of such corporations;

(3) Original jurisdiction to answer questions of state law certified by a court of the United States, which may be exercised pursuant to Supreme Court rule;

(4) Original jurisdiction to determine sufficiency of state initiative and referendum petitions and proposed constitutional amendments; and

(5) Only such other original jurisdiction as provided by this Constitution.

(E) The Supreme Court shall have power to issue and determine any and all writs necessary in aid of its jurisdiction and to delegate to its several justices the power to issue such writs.

(F) The Supreme Court shall appoint its clerk and reporter.

(G) The sessions of the Supreme Court shall be held at such times and places as may be adopted by Supreme Court rule.

SECTION 3. RULES OF PLEADING, PRACTICE AND PROCEDURE.

The Supreme Court shall prescribe the rules of pleading, practice and procedure for all courts; provided these rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as declared in this Constitution.

SECTION 4. SUPERINTENDING CONTROL.

The Supreme Court shall exercise general superintending control over all courts of the state and may temporarily assign judges, with their consent, to

courts or divisions other than that for which they were elected or appointed. These functions shall be administered by the Chief Justice.

SECTION 5. COURT OF APPEALS.

There shall be a Court of Appeals which may have divisions thereof as established by Supreme Court rule. The Court of Appeals shall have such appellate jurisdiction as the Supreme Court shall by rule determine and shall be subject to the general superintending control of the Supreme Court. Judges of the Court of Appeals shall have the same qualifications as Justices of the Supreme Court.

SECTION 6. CIRCUIT COURTS.

(A) Circuit Courts are established as the trial courts of original jurisdiction of all justiciable matters not otherwise assigned pursuant to this Constitution.

(B) Subject to the superintending control of the Supreme Court, the Judges of a Circuit Court may divide that Circuit Court into subject matter divisions, and any Circuit Judge within the Circuit may sit in any division.

(C) Circuit Judges may temporarily exchange circuits by joint order. Any Circuit Judge who consents may be assigned to another circuit for temporary service under rules adopted by the Supreme Court.

(D) The Circuit Courts shall hold their sessions in each county at such times and places as are, or may be, prescribed by law.

SECTION 7. DISTRICT COURTS.

(A) District Courts are established as the trial courts of limited jurisdiction as to amount and subject matter, subject to the right of appeal to Circuit Courts for a trial de novo.

(B) The jurisdictional amount and the subject matter of civil cases that may be heard in the District Courts shall be established by Supreme Court rule. District Courts shall have original jurisdiction, concurrent with Circuit Courts, of misdemeanors, and shall also have such other criminal jurisdiction as may be provided pursuant to Section 10 of this Amendment.

(C) There shall be at least one District Court in each county. If there is only one District Court in a county, it shall have county-wide *jurisdiction. Fines and penalties received by the district court shall*

continue to be distributed in the manner provided by current law, unless and until the General Assembly shall establish a new method of distribution.

(D) A District Judge may serve in one or more counties. Subject to the superintending control of the Supreme Court, the Judges of a District Court may divide that District Court into subject matter divisions, and any District Judge within the district may sit in any division.

(E) District Judges may temporarily exchange districts by joint order. Any District Judge who consents may be assigned to another district for temporary service under rules adopted by the Supreme Court.

SECTION 8. REFEREES, MASTERS AND MAGISTRATES.

(A) A Circuit Court Judge may appoint referees or masters, who shall have power to perform such duties of the Circuit Court as may be prescribed by Supreme Court rule.

(B) With the concurrence of a majority of the Circuit Court Judges of the Circuit, a District Court Judge may appoint magistrates, who shall be subject to the superintending control of the District Court and shall have power to perform such duties of the District Court as may be prescribed by Supreme Court rule.

SECTION 9. ANNULMENT OR AMENDMENT OF RULES.

Any rules promulgated by the Supreme Court pursuant to Sections 5, 6(B), 7(B), 7(D), or 8 of this Amendment may be annulled or amended, in whole or in part, by a two-thirds (2/3) vote of the membership of each house of the General Assembly.

SECTION 10. JURISDICTION, VENUE, CIRCUITS, DISTRICTS AND NUMBER OF JUDGES.

The General Assembly shall have the power to establish jurisdiction of all courts and venue of all actions therein, unless otherwise provided in this Constitution, and the power to establish judicial circuits and districts and the number of judges for Circuit Courts and District Courts, provided such circuits or districts are comprised of contiguous territories.

SECTION 11. RIGHT OF APPEAL.

There shall be a right of appeal to an appellate court from the Circuit

Courts and other rights of appeal as may be provided by Supreme Court rule or by law.

SECTION 12. TEMPORARY DISQUALIFICATION OF JUSTICES OR JUDGES.

No Justice or Judge shall preside or participate in any case in which he or she might be interested in the outcome, in which any party is related to him or her by consanguinity or affinity within such degree as prescribed by law, or in which he or she may have been counsel or have presided in any inferior court.

SECTION 13. ASSIGNMENT OF SPECIAL AND RETIRED JUDGES.

(A) If a Supreme Court Justice is disqualified or temporarily unable to serve, the Chief Justice shall certify the fact to the Governor, who within thirty (30) days thereafter shall commission a Special Justice, unless the time is extended by the Chief Justice upon a showing by the Governor that, in spite of the exercise of diligence, additional time is needed. If the Governor fails to commission a Special Justice within thirty (30) days, or within any extended period granted by the Chief Justice, the Lieutenant Governor shall commission a Special Justice.

(B) If a Judge of the Court of Appeals is disqualified or temporarily unable to serve, the Chief Judge shall certify the fact to the Chief Justice who shall commission a Special Judge.

(C) If a Circuit or District Judge is disqualified or temporarily unable to serve, or if the Chief Justice shall determine there is other need for a Special Judge to be temporarily appointed, a Special Judge may be assigned by the Chief Justice or elected by the bar of that Court, under rules prescribed by the Supreme Court, to serve during the period of temporary disqualification, absence or need.

(D) In naming Special Justices and Judges, the Governor or the Chief Justice may commission, with their consent, retired Justices or Judges, active Circuit or District Judges, or licensed attorneys.

(E) Special and retired Justices and Judges selected and assigned for temporary judicial service shall meet the qualifications of Justices or Judges of the Court to which selected and assigned.

(F) Special and retired judges shall be compensated as provided by law.

SECTION 14. PROHIBITION OF PRACTICE OF LAW.

Justices and Judges, except District Judges, shall not practice law during their respective terms of office. The General Assembly may, by classification, prohibit District Judges from practicing law.

SECTION 15. PROHIBITION OF CANDIDACY FOR NON-JUDICIAL OFFICE.

If a Judge or Justice files as a candidate for non-judicial governmental office, that candidate's judicial office shall immediately become vacant.

SECTION 16. QUALIFICATIONS AND TERMS OF JUSTICES AND JUDGES.

(A) Justices of the Supreme Court and Judges of the Court of Appeals shall have been licensed attorneys of this state for at least eight years immediately preceding the date of assuming office. They shall serve eight-year terms.

(B) Circuit Judges shall have been licensed attorneys of this state for at least six years immediately preceding the date of assuming office. They shall serve six-year terms.

(C) District Judges shall have been licensed attorneys of this state for at least four years immediately preceding the date of assuming office. They shall serve four-year terms.

(D) All Justices and Judges shall be qualified electors within the geographical area from which they are chosen, and Circuit and District Judges shall reside within that geographical area at the time of election and during their period of service. A geographical area may include any county contiguous to the county to be served when there are no qualified candidates available in the county to be served.

(E) The General Assembly shall by law determine the amount and method of payment of Justices and Judges. Such salaries and expenses may be increased, but not diminished, during the term for which such Justices or Judges are selected or elected. Salaries of Circuit Judges shall be uniform throughout the state.

(F) Circuit, District, and Appellate Court Judges and Justices shall not be allowed any fees or perquisites of office, nor hold any other office of trust or profit under this state or the United States, except as authorized by law.

SECTION 17. ELECTION OF CIRCUIT AND DISTRICT JUDGES.

(A) Circuit Judges and District Judges shall be elected on a nonpartisan basis by a majority of qualified electors voting for such office within the circuit or district which they serve.

(B) Vacancies in these offices shall be filled as provided by this Constitution.

SECTION 18. ELECTION OF SUPREME COURT JUSTICES AND COURT OF APPEALS JUDGES.

(A) Supreme Court Justices and Court of Appeals Judges shall be elected on a nonpartisan basis by a majority of qualified electors voting for such office. Provided, however, the General Assembly may refer the issue of merit selection of members of the Supreme Court and the Court of Appeals to a vote of the people at any general election. If the voters approve a merit selection system, the General Assembly shall enact laws to create a judicial nominating commission for the purpose of nominating candidates for merit selection to the Supreme Court and Court of Appeals.

(B) Vacancies in these offices shall be filled by appointment of the Governor, unless the voters provide otherwise in a system of merit selection.

SECTION 19. TRANSITION PROVISIONS, TENURE OF PRESENT JUSTICES AND JUDGES, AND JURISDICTION OF PRESENT COURTS.

(A) Tenure of Present Justices and Judges.

(1) Justices of the Supreme Court and Judges of the Court of Appeals in office at the time this Amendment takes effect shall continue in office until the end of the terms for which they were elected or appointed.

(2) All Circuit, Chancery, and Circuit-Chancery Judges in office at the time this Amendment takes effect shall continue in office as Circuit Judges until the end of the terms for which they were elected or appointed; provided further, the respective jurisdictional responsibilities for matters legal, equitable or juvenile in nature as presently exercised by such Judges shall continue until changed pursuant to law.

(3) Municipal Court Judges in office at the time this Amendment takes effect shall continue in office through December 31, 2004; provided, if a vacancy occurs in an office of a Municipal Judge, that vacancy shall be

filled for a term which shall end December 31, 2004.

(B) Jurisdiction of Present Courts.

(1) The Jurisdiction conferred on Circuit Courts established by this Amendment includes all matters previously cognizable by Circuit, Chancery, Probate and Juvenile Courts including those matters repealed by Section 22 of this Amendment. The geographic circuits and subject matter divisions of these courts existing at the time this Amendment takes effect shall become circuits and divisions of the Circuit Court as herein established until changed pursuant to this Amendment. Circuit Courts shall assume the jurisdiction of Circuit, Chancery, Probate and Juvenile Courts.

(2) District Courts shall have the jurisdiction vested in Municipal Courts, Corporation Courts, Police Courts, Justice of the Peace Courts, and Courts of Common Pleas at the time this Amendment takes effect. District Courts shall assume the jurisdiction of these courts of limited jurisdiction and other jurisdiction conferred in this Amendment on January 1, 2005. City Courts shall continue in existence after the effective date of this amendment unless such City Court is abolished by the governing body of the city or by appropriate action of the General Assembly. Immediately upon abolition of such City Court, the jurisdiction of the City Court shall vest in the nearest District Court in the county where the city is located.

(C) Continuation of Courts.

The Supreme Court provided for in this Amendment shall be a continuation of the Supreme Court now existing. The Court of Appeals shall be regarded as a continuation of the Court of Appeals now existing. All laws and parts of laws relating to the Supreme Court and to the Court of Appeals which are not in conflict or inconsistent with this Amendment shall remain in full force and effect and shall apply to the Supreme Court and Court of Appeals, respectively, established by this Amendment until amended, repealed or superseded by appropriate action of the General Assembly or the Supreme Court pursuant to this Amendment. The Circuit Courts shall be regarded as a continuation of the Circuit, Chancery, Probate and Juvenile Courts now existing. Effective January 1, 2005, the District Courts shall be regarded as a continuation of the Municipal Courts, Corporation Courts, Police Courts, Justice of the Peace Courts and Courts of Common Pleas now existing. All the papers and records pertaining to these courts shall be transferred accordingly, and no suit or prosecution of any kind or nature shall abate

because of any change made by this Amendment. All writs, actions, suits, proceedings, civil or criminal liabilities, prosecutions, judgments, decrees, orders, sentences, regulations, causes of action and appeals existing on the effective date of this Amendment shall continue unaffected except as modified in accordance with this Amendment.

SECTION 20. PROSECUTING ATTORNEYS.

A Prosecuting Attorney shall be elected by the qualified electors of each judicial circuit. Prosecuting Attorneys shall have been licensed attorneys of this state for at least four years immediately preceding the date of assuming office. They shall be qualified electors within the judicial circuit from which they are elected and shall reside within that geographical area at the time of the election and during their period of service. They shall serve four-year terms.

SECTION 21. EFFECTIVE DATE.

This Amendment shall become effective on July, 2001.

SECTION 22. REPEALER.

(A) The following sections of Article 7 of the Constitution of the State of Arkansas are hereby repealed effective July 1, 2001; 1 through 18; 20 through 22; 24; 25; 32; 34; 35; 39; 40; 42; 44; 45 and 50.

~~§ 1. Judicial power vested in courts.~~

~~The judicial power of the State shall be vested in one Supreme Court, in circuit courts, in county and probate courts, and in justices of the peace. The General Assembly may also vest such jurisdiction as may be deemed necessary in municipal corporation courts, courts of common pleas, where established, and, when deemed expedient, may establish separate courts of chancery.~~

~~§ 2. Supreme Court.~~

~~The Supreme Court shall be composed of three judges, one of whom shall be styled chief justice, and elected as such; any two of whom shall constitute a quorum, and the concurrence of two judges shall, in every case, be necessary to a decision.~~

~~§ 3. Increase of number of judges.~~

~~When the population of the State shall amount to one million, the~~

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~~General Assembly may, if deemed necessary, increase the number of judges of the Supreme Court to five; and, on such increase, a majority of judges shall be necessary to make a quorum or a decision.~~

~~§ 4. Jurisdiction and powers of Supreme Court.~~

~~The Supreme Court, except in cases otherwise provided by this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the State, under such restrictions as may from time to time be prescribed by law. It shall have a general superintending control over all inferior courts of law and equity; and, in aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of error and supersedeas, certiorari, habeas corpus, prohibition, mandamus and quo warranto, and, other remedial writs, and to hear and determine the same. Its judges shall be conservators of the peace throughout the State, and shall severally have power to issue any of the aforesaid writs.~~

~~§ 5. Jurisdiction to issue quo warranto.~~

~~In the exercise of original jurisdiction the Supreme Court shall have power to issue writs of quo warranto to the circuit judges and chancellors when created, and to officers of political corporations when the question involved is the legal existence of such corporations.~~

~~§ 6. Qualifications of judges of Supreme Court.~~

~~A judge of the Supreme Court shall be at least thirty years of age, of good moral character, and learned in the law; a citizen of the United States and two years a resident of the State, and who has been a practicing lawyer eight years, or whose service upon the bench of any court of record, when added to the time he may have practiced law, shall be equal to eight years. The judges of the Supreme Court shall be elected by the qualified electors of the State and shall hold their offices during the term of eight years from the date of their commissions; but at the first meeting of the court after the first election under this Constitution the judges shall by lot divide themselves into three classes, one of which shall hold his office for four, one for six and the other for eight years, after which each judge shall be elected for a full term of eight years. A record shall be made in the court of this classification.~~

~~§ 7. Clerk and reporter.~~

~~The Supreme Court shall appoint its clerk and reporter, who shall hold their offices for six years subject to removal for good cause.~~

~~§ 8. Place of holding court.~~

~~The terms of the Supreme Court shall be held at the seat of government at the times that now are, or may be, provided by law.~~

~~§ 9. Special judges.~~

~~In case all or any of the judges of the Supreme Court shall be disqualified from presiding in any cause or causes the court or the disqualified judge shall certify the same to the Governor, who shall immediately commission the requisite number of men learned in the law to sit in the trial and determination of such causes.~~

~~§ 10. Compensation of Supreme Court judges - Dual office holding.~~

~~The Supreme Judges shall at stated times receive a compensation for their services to be ascertained by law, which shall not be, after the adjournment of the next General Assembly, diminished during the time for which they shall have been elected. They shall not be allowed any fees or perquisites of office, nor hold any other office, nor hold any office of trust or profit under the State or the United States.~~

~~§ 11. Circuit courts - Jurisdiction.~~

~~The circuit court shall have jurisdiction in all civil and criminal cases the exclusive jurisdiction of which may not be vested in some other court provided for by this Constitution.~~

~~§ 12. Terms of circuit court.~~

~~The circuit courts shall hold their terms in each county at such times and places as are, or may be, prescribed by law.~~

~~§ 13. Judicial circuits.~~

~~The State shall be divided into convenient circuits, each circuit to be made up of contiguous counties, for each of which circuits a judge shall be elected, who, during his continuance in office, shall reside in and be a conservator of the peace within the circuit for which he shall have been elected.~~

~~§ 14. Superintending control and appellate jurisdiction over inferior courts - Writs - Power to issue.~~

~~The circuit courts shall exercise a superintending control and appellate jurisdiction over county, probate, court of common pleas and corporation courts and justices of the peace, and shall have power to issue, hear and determine all the necessary writs to carry into effect their general and specific powers, any of which writs may be issued upon order of the judge of~~

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~~the appropriate court in vacation.~~

~~§ 15. Equity jurisdiction.~~

~~Until the General Assembly shall deem it expedient to establish courts of chancery the circuit court shall have jurisdiction in matters of equity, subject to appeal to the Supreme Court, in such manner as may be prescribed by law.~~

~~§ 16. Qualifications of circuit judges.~~

~~A judge of the circuit court shall be a citizen of the United States, at least twenty-eight years of age, of good moral character, learned in the law, two years a resident of the State, and shall have practiced law six years, or whose service upon the bench of any court of record, when added to the time he may have practiced law, shall be equal to six years.~~

~~§ 17. Election of circuit judges -- Term of office.~~

~~The judges of the circuit court shall be elected by the qualified electors of the several circuits, and shall hold their offices for the term of four years.~~

~~§ 18. Compensation of circuit court judges -- Dual office holding.~~

~~The judges of the circuit courts shall at stated times receive a compensation for their services, to be ascertained by law, which shall not, after the adjournment of the first session of the General Assembly, be diminished during the time for which they are elected. They shall not be allowed any fees or perquisites of office, nor hold any other office of trust or profit under this State or the United States.~~

~~§ 20. Disqualification of judges -- Grounds.~~

~~No judge or justice shall preside in the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by consanguinity or affinity, within such degree as may be prescribed by law; or in which he may have been of counsel or have presided in any inferior court.~~

~~§ 21. Special judges of circuit courts.~~

~~Whenever the office of judge of the circuit court of any county is vacant at the commencement of a term of such court, or the judge of said court shall fail to attend, the regular practicing attorneys in attendance on said court may meet at 10 o'clock a. m. on the second day of the term, and elect a judge to preside at such court, or until the regular judge shall appear; and if the judge of said court shall become sick or die or unable to continue to~~

~~hold such court after its term shall have commenced, or shall from any cause be disqualified from presiding at the trial of any cause then pending therein, then the regular practicing attorneys in attendance on said court may in like manner, on notice from the judge or clerk of said court, elect a judge to preside at such court or to try said causes, and the attorney so elected shall have the same power and authority in said court as the regular judge would have had if present and presiding; but this authority shall cease at the close of the term at which the election shall be made. The proceeding shall be entered at large upon the record. The special judge shall be learned in law and a resident of the State.~~

~~§ 22. Exchange of circuits.~~

~~The judges of the circuit courts may temporarily exchange circuits or hold courts for each other under such regulations as may be prescribed by law.~~

~~§ 24. Prosecuting attorneys.~~

~~The qualified electors of each circuit shall elect a prosecuting attorney, who shall hold his office for the term of two years, and he shall be a citizen of the United States, learned in the law, and a resident of the circuit for which he may be elected.~~

~~§ 25. Judges debarred from practice.~~

~~The judges of the Supreme, circuit, or chancery courts shall not, during their continuance in office, practice law or appear as counsel in any court, State or Federal, within this State.~~

~~§ 32. Courts of common pleas -- Jurisdiction.~~

~~The General Assembly may authorize the judge of the county court of any one or more counties to hold severally a quarterly court of common pleas in their respective counties, which shall be a court of record, with such jurisdiction in matters of contract and other civil matters not involving title to real estate as may be vested in such court.~~

~~§ 34. Probate courts - Jurisdiction - Trial of issues -- Terms.~~

~~In each county the Judge of the court having jurisdiction in matters of equity shall be judge of the court of probate, and have such exclusive original jurisdiction in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians, and persons of unsound mind and their estates, as is now vested in courts of probate, or may be hereafter prescribed by law. The judge of the probate court shall try all issues of the law and of facts arising in causes or proceedings within the~~

~~jurisdiction of said court, and therein pending. The regular terms of the courts of probate shall be held at such times as is now or may hereafter be prescribed by law; and the General Assembly may provide for the consolidation of chancery and probate courts. [As amended by Const. Amend. 24, § 1.]~~

~~§ 35. Appeals from probate court.~~

~~Appeals may be taken from judgments and orders of courts of probate to the Supreme Court; and, until otherwise provided by the General Assembly, shall be taken in the same manner as appeals from courts of chancery and subject to the same regulations and restrictions. [As amended by Const. Amend. 24, § 2.]~~

~~§ 39. Number in each township.~~

~~For every two hundred electors there shall be elected one justice of the peace, but every township, however small, shall have two justices of the peace.~~

~~§ 40. Exclusive and concurrent jurisdiction of justices of the peace - Criminal jurisdiction - Process - Power to issue.~~

~~They shall have original jurisdiction in the following matters: First, exclusive of the circuit court, in all matters of contract where the amount in controversy does not exceed the sum of one hundred dollars, excluding interest, and concurrent jurisdiction in matters of contract where the amount in controversy does not exceed the sum of three hundred dollars, exclusive of interest; second, concurrent jurisdiction in suits for the recovery of personal property where the value of the property does not exceed the sum of three hundred dollars, and in all matters of damage to personal property where the amount in controversy does not exceed the sum of one hundred dollars; third, such jurisdiction of misdemeanors as is now, or may be, prescribed by law; fourth, to sit as examining courts and commit, discharge or recognize offenders to the court having jurisdiction, for further trial, and to bind persons to keep the peace or for good behavior; fifth, for the foregoing purposes they shall have power to issue all necessary process; sixth, they shall be conservators of the peace within their respective counties, provided a justice of the peace shall not have jurisdiction where a lien on land or title or possession thereto is involved.~~

~~§ 42. Appeals from justices of peace.~~

~~Appeals may be taken from the final judgments of the justices of the peace to the circuit courts under such regulations as are now, or may be,~~

~~provided by law.~~

~~§ 44. Pulaski Chancery Court.~~

~~The Pulaski Chancery Court shall continue in existence until abolished by law, or the business pending at the adoption of this Constitution shall be disposed of, or the pending business be transferred to other courts. The judge and clerk of said court shall hold office for the term of two years, and shall be elected by the qualified voters of the State. All suits and proceedings which relate to sixteenth section lands or to money due for said lands shall be transferred to the respective counties where such lands are located in such manner as shall be provided by the General Assembly at the next session.~~

~~§ 45. Separate criminal courts abolished.~~

~~The separate criminal courts established in this State are hereby abolished, and all the jurisdiction exercised by said criminal courts is vested in the circuit courts of the respective counties; and all causes now pending therein are hereby transferred to said circuit courts respectively. It shall be the duty of the clerks of said criminal courts to transfer all the records, books and papers pertaining to said criminal courts to the circuit courts of their respective counties.~~

~~§ 50. Vacancies.~~

~~All vacancies occurring in any office provided for in this article shall be filled by special election, save that in case of vacancies occurring in county and township offices six months and in other offices nine months, before the next general election, such vacancies shall be filled by appointment by the Governor.~~

(B) Sections 34 and 35 of Article 7 of the Constitution of the State of Arkansas, as amended by Sections 1 and 2 of Amendment 24, are hereby repealed effective July 1, 2001.

~~§ 34. Probate courts - Jurisdiction - Trial of issues - Terms.~~

~~In each county the Judge of the court having jurisdiction in matters of equity shall be judge of the court of probate, and have such exclusive original jurisdiction in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians, and persons of unsound mind and their estates, as is now vested in courts of probate, or may be hereafter prescribed by law. The judge of the probate court shall try all issues of the law and of facts arising in causes or proceedings within the jurisdiction of said court, and therein pending. The regular terms of the~~

~~courts of probate shall be held at such times as is now or may hereafter be prescribed by law; and the General Assembly may provide for the consolidation of chancery and probate courts. [As amended by Const. Amend. 24, § 1.]~~

~~§ 35. Appeals from probate court.~~

~~Appeals may be taken from judgments and orders of courts of probate to the Supreme Court; and, until otherwise provided by the General Assembly, shall be taken in the same manner as appeals from courts of chancery and subject to the same regulations and restrictions. [As amended by Const. Amend. 24, § 2.]~~

(C) Section 43 of Article 7 of the Constitution of the State of Arkansas is hereby repealed effective January 1, 2005.

~~§ 43. Corporation courts - Jurisdiction.~~

~~Corporation courts for towns and cities may be invested with jurisdiction concurrent with justices of the peace in civil and criminal matters, and the General Assembly may invest such of them as it may deem expedient with jurisdiction of any criminal offenses not punishable by death or imprisonment in the penitentiary, with or without indictment, as may be provided by law, and, until the General Assembly shall otherwise provide, they shall have the jurisdiction now provided by law.~~

(D) Section 1 of Amendment 58 of the Constitution of the State of Arkansas is hereby repealed effective July 1, 2001.

~~§ 1. Court of Appeals.~~

~~The General Assembly is hereby empowered to create and establish a Court of Appeals and divisions thereof. The Court of Appeals shall have such appellate jurisdiction as the Supreme Court shall by rule determine, and shall be subject to the general superintending control of the Supreme Court. Judges of the Court of Appeals shall have the same qualifications as justices of the Supreme Court and shall be selected in the manner provided by law.~~

(E) Section 1 of Amendment 64 of the Constitution of the State of Arkansas is hereby repealed effective January 1, 2005.

~~§ 1. Concurrent jurisdiction - Jurisdictional amount.~~

~~Notwithstanding any provision of this Constitution to the contrary and in addition to jurisdiction now conferred on municipal courts, municipal courts shall have jurisdiction concurrent with circuit courts (a) in matters of contract where the amount in controversy does not exceed three thousand dollars ($3,000) excluding interest, (b) in suits for the recovery of personal~~

~~property where the value of the property does not exceed three thousand dollars ($3,000), and (c) in all matters of damage to personal property where the amount in controversy does not exceed three thousand dollars ($3,000); provided that the General Assembly may by law increase or decrease the jurisdictional limit by a two-thirds vote of each house of the General Assembly.~~

(F) Section 1 of Amendment 77 of the Constitution of the State of Arkansas is hereby repealed effective July 1, 2001.

~~SECTION 1. (A) If a Supreme Court justice is disqualified or temporarily unable to serve, the Chief Justice shall certify the fact to the Governor, who within thirty (30) days thereafter, shall commission a special justice, unless the time is extended by the Chief Justice upon a showing by the Governor that in spite of the exercise of diligence, additional time is needed. If the Governor fails to commission a special justice within thirty (30) days, or at the end of an extended period granted by the Chief Justice, the Lieutenant Governor shall commission a special justice.~~

~~(B) If a judge of the Court of Appeals is disqualified or temporarily unable to serve, the Chief Judge shall certify the fact to the Chief Justice who shall commission a special judge.~~

~~(C) If a circuit, chancery, or probate judge is disqualified or temporarily unable to serve, or if the Chief Justice shall determine there is other need for a special judge to be temporarily appointed, a special judge may be assigned by the Chief Justice or elected by the bar of that Court, under rules prescribed by the Supreme Court, to serve during the period of temporary disqualification, absence or need.~~

~~(D) In naming special justices and judges, the Governor or the Chief Justice may commission, with their consent, retired justices or judges, active circuit, chancery, or probate judges, or licensed attorneys.~~

~~(E) Special and retired justices and judges selected and assigned for temporary judicial service shall meet the qualifications of justices or judges of the Court to which selected and assigned.~~

~~(F) Special and retired judges shall be compensated as provided by law.~~

(G) No other provision of the Constitution of the State of Arkansas shall be repealed by this Amendment unless the provision is in irreconcilable conflict with the provisions of this Amendment.

/s/ Beebe

THE CIVIL JUSTICE REFORM ACT OF 2003
(as it existed on August 12, 2013)

16-55-201. Modification of joint and several liability.
(a) In any action for personal injury, medical injury, property damage, or wrongful death, the liability of each defendant for compensatory or punitive damages shall be several only and shall not be joint.
(b)(1) Each defendant shall be liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault.

(2) A separate several judgment shall be rendered against that defendant for that amount.
(c)(1) To determine the amount of judgment to be entered against each defendant, the court shall multiply the total amount of damages recoverable by the plaintiff with regard to each defendant by the percentage of each defendant's fault.

(2) That amount shall be the maximum recoverable against that defendant.

16-55-202. Assessment of percentages of fault.
(a) In assessing percentages of fault, the fact finder shall consider the fault of all persons or entities who contributed to the alleged injury or death or damage to property, tangible or intangible, regardless of whether the person or entity was or could have been named as a party to the suit.
(b)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if the defending party gives notice that a nonparty was wholly or partially at fault not later than one hundred twenty (120) days prior to the date of trial.

(2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.
(c)(1) Except as expressly stated in this section, nothing in this section shall eliminate or diminish any defenses or immunities which currently exist.

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

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

16-55-203. Increase in percentage of several share.
(a)(1) Notwithstanding the provisions of §§ 16-55-201 and 16-55-202, in the event a several judgment has been entered against multiple-party defendants, a plaintiff may move the court no later than ten (10) days after the entry of judgment to determine whether all or part of the amount of the several share for which a defendant is liable will not be reasonably collectible.

(2) If the court determines, based upon a preponderance of the evidence, that any defendant's several share or multiple defendants' several shares will not be reasonably collectible, the court shall increase the percentage points of the several shares of each of the remaining defendants, subject to the limitations in subdivisions (a)(3) and (4) of this section.

(3)(A) If a defendant's percentage of fault is determined by the finder of fact to be ten percent (10%) or less, then the percentage points of that defendant's several share shall not be increased.

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

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

(4) Under no circumstances shall the combined percentage points of the remaining defendants' several shares exceed the lesser of:

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

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

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

(b) The provisions of subsection (a) of this section shall not apply to any punitive damages award or judgment.

16-55-205. Acting in concert.

(a) Notwithstanding § 16-55-201, a party is responsible for the fault of another person or entity or for payment of the proportionate share of another person or entity if both the party and the other person or entity were acting in concert or if the other person or entity was acting as an agent or servant of the party.

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

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

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

16-55-206. Standards for award of punitive damages.

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

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

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

16-55-207. Burden of proof for award of punitive damages.
A plaintiff must satisfy the burden of proof required under § 16-55-206 by clear and convincing evidence in order to recover punitive damages from the defendant.

16-55-208. Limitations on the amount of punitive damages.
(a) Except as provided in subsection (b) of this section, a punitive damages award for each plaintiff shall not be more than the greater of the following:

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

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

(b) Subsection (a) of this section shall not apply when the finder of fact:

(1) Determines by clear and convincing evidence that, at the time of the injury, the defendant intentionally pursued a course of conduct for the purpose of causing injury or damage; and

(2) Determines that the defendant's conduct did, in fact, harm the plaintiff.

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

16-55-209. No right to punitive damages.
Nothing in § 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), 16-114-209, and 16-114-210 — 16-114-212 shall be construed as creating a right to an award of punitive damages.

16-55-210. No limitation on certain judicial duties.
Nothing in § 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), 16-114-209, and 16-114-210 — 16-114-212 shall limit the duty of a court or the appellate courts to:

(1) Scrutinize all punitive damages awards;

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

(3) Order remittitur where appropriate.

16-55-211. Bifurcated proceeding.
(a)(1) In any case in which punitive damages are sought, any party may request a bifurcated

proceeding at least ten (10) days prior to trial.

(2) If a bifurcated proceeding has been requested by either party, then:

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

(B) After a compensatory damages award determination, the finder of fact 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.

16-55-212. Compensatory damages.

(a) Section 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), 16-114-209, and 16-114-210 — 16-114-212 do 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.

16-55-213. Venue.

(a) All civil actions other than those mentioned in §§ 16-60-101 — 16-60-103, 16-60-107, 16-60-114, and 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.

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

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

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

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

(2) The existence of a substantial number of questions of law or material fact common to all those persons not only will arise in the action, but also that:

(A) The questions will predominate over individualized questions pertaining to each plaintiff;

(B) The action can be maintained more efficiently and economically for all parties than if prosecuted separately; and

(C) The interest of justice supports the joinder of the parties as plaintiffs in one (1) action.

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

(2)(A) If severance and transfer is mandated and venue is appropriate in more than one (1) court, a defendant sued alone or multiple defendants, by unanimous agreement, shall have the right to select another court to which the action shall be transferred.

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

(e) Any action for medical injury brought under § 16-114-201 et seq. against a medical care provider, as defined in § 16-114-201(2), shall be filed in the county in which the alleged act or omission occurred.

16-55-214. Maximum appeal bond in civil litigation.

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

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

(c) Notwithstanding the provisions of § 16-55-220, the maximum appeal bond for any cause of action brought under any legal theory shall be limited to twenty-five million dollars ($25,000,000), regardless of the amount of the judgment or the date the cause of action accrued, subject to the provisions of § 16-55-214(b).

16-55-215. Burden of proof.

Section 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), 16-114-209, and 16-114-210 — 16-114-212 do not amend the existing law that provides that the burden of alleging and proving fault is upon the person who seeks to establish fault.

16-55-216. Comparative fault.

Section 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-114-209 — 16-114-212 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.

16-55-217. Cause of action not created.

(a) Section 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-114-209 — 16-114-212 do not create a cause of action.

(b) Section 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-14-209 — 16-114-212 do not alter the defenses or immunity of any person or entity.

16-55-218. Attorney General.
No provision of § 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-114-209 — 16-114-212 shall apply to or alter existing law with respect to any claim, charge, action, or suit brought or prosecuted by the Attorney General.

16-55-219. Coroner or medical examiner.
Nothing in § 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-114-209 — 16-114-212 shall be construed to diminish or enlarge the powers or duties of a coroner or medical examiner.

16-55-220. Applicability and severability.
(a) Section 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-114-209 — 16-114-212 shall apply to all causes of action accruing on or after March 25, 2003.
(b) Section 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-114-209 — 16-114-212 shall not apply to any action filed or cause of action accruing prior to March 25, 2003.
(c) If any provisions of Section 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-114-209 — 16-114-212 or the application of § 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-114-209 — 16-114-212 to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of § 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-114-209 — 16-114-212 which can be given effect without the invalid provision or application, and to this end the provisions of § 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-114-209 — 16-114-212 are declared to be severable.

16-114-201. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Action for medical injury" means any action against a medical care provider, whether based in tort, contract, or otherwise, to recover damages on account of medical injury;

(2) "Medical care provider" means a physician, certified registered nurse anesthetist, physician's assistant, nurse, optometrist, chiropractor, physical therapist, dentist, podiatrist, pharmacist, veterinarian, hospital, nursing home, community mental health center, psychologist, clinic, or not-for-profit home health care agency licensed by the state or otherwise lawfully providing professional medical care or services, or an officer, employee or agent thereof acting in the course and scope of employment in the providing of such medical care or medical services; and

(3) "Medical injury" or "injury" means any adverse consequences arising out of or sustained in the course of the professional services being rendered by a medical care provider, whether resulting from negligence, error, or omission in the performance of such services; or from rendition of such services without informed consent or in breach of warranty or in violation of contract; or from failure to diagnose; or from premature abandonment of a patient or of a course of treatment; or from failure to properly maintain equipment or appliances necessary to the rendition of such services; or otherwise arising out of or sustained in the course of such services.

16-114-202. Applicability.

This subchapter applies to all causes of action for medical injury accruing after April 2, 1979, and, as to such causes of action, shall supersede any inconsistent provision of law.

16-114-203. Statute of limitations.

(a) Except as otherwise provided in this section, all actions for medical injury shall be commenced within two (2) years after the cause of action accrues.

(b) The date of the accrual of the cause of action shall be the date of the wrongful act complained of and no other time. However, where the action is based upon the discovery of a foreign object in the body of the injured person which is not discovered and could not reasonably have been discovered within such two-year period, the action may be commenced within one (1) year from the date of discovery or the date the foreign object reasonably should have been discovered, whichever is earlier.

(c)(1) If an individual is nine (9) years of age or younger at the time of the act, omission, or failure complained of, the minor or person claiming on behalf of the minor shall have until the later of the minor's eleventh birthday or two (2) years from the act, omission, or failure in which to commence an action.

(2) However, if no medical injury is known and could not reasonably have been discovered prior to the minor's eleventh birthday, then the minor or his representative shall have until two (2) years after the medical injury is known or reasonably could have been discovered, or until the minor's nineteenth birthday, whichever is earlier, in which to commence an action.

16-114-205. Allegation of damages.

(a) In any action for medical injury, the declaration or other affirmative pleading shall not specify the amount of damages claimed but shall, instead, contain a general allegation of damage and shall state that the damages claimed are within any minimum or maximum jurisdictional limits of the court to which the pleading is addressed.

(b) At any time after service of the pleading, the defendant may, by special interrogatory, demand a statement of the amount of damages claimed by the plaintiff, which shall be answered within thirty (30) days.

16-114-206. Burden of proof.

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

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

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

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

(b)(1) Without limiting the applicability of subsection (a) of this section, when the plaintiff claims that a medical care provider failed to supply adequate information to obtain the informed consent of the injured person, the plaintiff shall have the burden of proving that the treatment, procedure, or surgery was performed in other than an emergency situation and that the medical care provider did not supply that type of information regarding the treatment, procedure, or surgery as would customarily have been given to a patient in the position of the injured person or other persons authorized to give consent for such a patient by other medical care providers with similar training and experience at the time of the treatment, procedure, or surgery in the locality in which the medical care provider practices or in a similar locality.

(2) In determining whether the plaintiff has satisfied the requirements of subdivision (b)(1) of this section, the following matters shall also be considered as material issues:

(A) Whether a person of ordinary intelligence and awareness in a position similar to that of the injured person or persons giving consent on his or her behalf could reasonably be expected to know of the risks or hazards inherent in such treatment, procedure, or surgery;

(B) Whether the injured party or the person giving consent on his or her behalf knew of the risks or hazards inherent in such treatment, procedure, or surgery;

(C) Whether the injured party would have undergone the treatment, procedure, or surgery regardless of the risk involved or whether he or she did not wish to be informed thereof; and

(D) Whether it was reasonable for the medical care provider to limit disclosure of information because such disclosure could be expected to adversely and substantially affect the injured person's condition.

16-114-207. Expert witnesses.
In any action for medical injury:

(1) Rule 702 of the Uniform Rules of Evidence shall govern the qualifications of expert witnesses;

(2) No witness whose compensation for his services is in any way dependent on the outcome of the case shall be permitted to give expert testimony;

(3) No medical care provider shall be required to give expert opinion testimony against himself or herself as to any of the matters set forth in § 16-114-206 at a trial. However, this shall not apply to discovery. Discovery information can be used at a trial as in other lawsuits.

16-114-208. Damage awards — Periodic payment of future damages.
(a)(1)(A) The damages awarded may include compensation for actual economic losses recognized by law suffered by the injured person by reason of medical injury, including, but not limited to, the cost of reasonable and necessary medical services, rehabilitation services, custodial care, loss of services, and loss of earnings or earning capacity;

(B) Any evidence of damages for the cost 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.

(2) The damages awarded may include compensation for pain and suffering and other noneconomic loss recognized by law.
(b) In the event of a verdict for the plaintiff, the finder of fact shall separately state its awards for both past and future economic losses and for both past and future noneconomic losses.
(c)(1) In the event of a judgment for the plaintiff, if the award for future damages exceeds one hundred thousand dollars ($100,000), the court, at the request of either party, shall order that the future damages of the injured person exceeding one hundred thousand dollars ($100,000) be paid, in whole or in part, by periodic payments as determined by the court, rather than by lump sum payment, on such terms and conditions as the court deems just and equitable in order to protect the plaintiff's rights to future payments.

(2) As a condition to authorizing periodic payments of future damages, the court may order a judgment debtor who is not adequately insured to post security adequate to assure full payment of such damages.

(3) In the event of the death of the injured person prior to completion of installment payments of principal and interest upon motion of any party in interest, the court shall modify the order by deducting from the remaining balance the amount representing unpaid compensation for future pain and suffering and future expenses of care and by ordering the remainder to be paid into and become a part of the estate of the decedent.

16-114-209. False and unreasonable pleadings.
(a) If any action for medical injury is filed without reasonable cause, the party or attorney who signed the complaint shall thereafter, as determined by the court, be subject to:

(1) The payment of reasonable costs, including attorney's fees, incurred by the other party by reason of the pleading; and

(2) Appropriate sanctions.

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

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

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

(B) The expert's qualifications;

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

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

(3)(A) The plaintiff shall have thirty (30) days after the complaint is filed with the clerk to file the affidavit before the provisions of subsection (a) of this section apply.

(B) If the affidavit is not filed within thirty (30) days after the complaint is filed with the clerk, the complaint shall be dismissed by the court.

16-114-210. Employed medical care provider.

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

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

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

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

(a) If a plaintiff serves written notice of intention to file an action for medical injury within thirty (30) days prior to the expiration of the applicable statute of limitations, the statute of limitations shall be tolled for ninety (90) days only if the following conditions are met:

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

(2) The written notice shall include the following:

(A) The plaintiff's full name, date of birth, present address, address at the time of treatment at issue, and social security number;

(B) The date or dates of the treatment in question and a summary of the alleged wrongful conduct; and

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

(3) An authorization to release medical records signed by the plaintiff, which shall

authorize the medical care provider alleged to be liable to obtain pertinent medical records, shall be attached to the notice.

(b) Failure to comply with any of the requirements set forth in subsection (a) of this section shall be deemed to be material and shall result in the statute of limitation's not being tolled.

(c)(1) If the plaintiff files an action for medical injury during this tolling period without the requisite affidavit required by § 16-114-209(b)(1) and (2), the complaint shall be dismissed and costs, attorney's fees, and appropriate sanctions as determined by the court shall be assessed.

(2) The provisions of § 16-114-209(b)(3) do not apply to cases filed during the tolling period.

(d)(1) If a request for the production of copies of the medical records accompanies the written notice of intention to file an action for medical injury in accordance with subsection (a) of this section, and if copies of those medical records are not provided within thirty (30) days of receipt of the notice, then the plaintiff may file an independent expedited declaratory action seeking a declaration that the medical care provider failed to produce the medical records within the thirty-day period.

(2)(A) If the court finds that copies of the medical records were not produced as required by this subsection, the statute of limitations shall be tolled for a period of seventy-five (75) days from the date of the production of the copies of the medical records.

(B) If the court finds that the failure to produce copies of the requested medical records is without good cause, the court shall award the plaintiff his or her reasonable costs and attorney's fees for the declaratory judgment action.

ATTACHMENT 3

Supreme Court of Arkansas.
Tomosa SUMMERVILLE, Appellant,
v.
Dr. Rufus THROWER, Joy Woolfolk, and Healthcare for Women, P.A., Appellees.

No. 06–501.
March 15, 2007.
Rehearing Denied April 26, 2007.

Background: Plaintiff filed medical malpractice action. The Circuit Court, Pulaski County, Chris Piazza, J., dismissed action based on plaintiff's failure to submit reasonable cause affidavit within 30 days of filing complaint. Plaintiff appealed.

Holding: The Supreme Court, Robert L. Brown, J., held that statutory requirement of dismissing medical malpractice action for failure to timely submit reasonable cause affidavit was unconstitutional.

Reversed and remanded.

Annabelle Clinton Imber, J., filed opinion concurring in result.

West Headnotes

[1] Constitutional Law 92 ⚖990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In general. Most Cited Cases

Constitutional Law 92 ⚖996

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k996 k. Clearly, positively, or unmistakably unconstitutional. Most Cited Cases

Every act carries a strong presumption of constitutionality, and before an act will be held unconstitutional, the incompatibility between it and the constitution must be clear.

[2] Constitutional Law 92 ⚖1002

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1001 Doubt
92k1002 k. In general. Most Cited Cases

Any doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality.

[3] Constitutional Law 92 ⚖1030

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1030 k. In general. Most Cited Cases

Heavy burden of demonstrating the unconstitutionality of a statute is upon the one attacking it.

[4] Constitutional Law 92 ⚖990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction

as to Constitutionality
92k990 k. In general. Most Cited Cases

If possible, court will construe a statute so that it is constitutional.

[5] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In general. Most Cited Cases

Appeal and Error 30 ⚿895(2)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k895 Scope of Inquiry
30k895(2) k. Effect of findings below. Most Cited Cases

Supreme Court reviews circuit court's interpretation of the State Constitution de novo, and though Supreme Court is not bound by the circuit court's decision, the circuit court's interpretation will be accepted as correct on appeal in the absence of a showing that the circuit court erred.

[6] Health 198H ⚿805

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk805 k. Sanctions for failing to file affidavits; dismissal with or without prejudice. Most Cited Cases

Statutory requirement of dismissing medical malpractice action if reasonable cause affidavit was not filed within 30 days of filing of complaint was procedural, rather than substantive, as it involved enforcement of a remedy, such that alleged conflict of automatic dismissal provision with civil procedure rule governing commencement of an action would be examined to determine provision's constitutionality. West's A.C.A. § 16–114–209(b)(3)(A); Rules Civ.Proc., Rule 3.

[7] Constitutional Law 92 ⚿2357

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2357 k. Remedies and procedure in general. Most Cited Cases

Health 198H ⚿604

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(A) In General
198Hk601 Constitutional and Statutory Provisions
198Hk604 k. Validity. Most Cited Cases

Statutory requirement that a medical malpractice action be dismissed if reasonable cause affidavit was not filed within 30 days of the filing of complaint added legislative encumbrance not found in civil procedure rule governing commencement of actions and was therefore unconstitutional as being in direct conflict with that rule and with Supreme Court's authority to make rules of pleading, practice, and procedure for state's courts. West's A.C.A Const. Art. 80, § 3; West's A.C.A. § 16–114–209(b)(3)(A); Rules Civ.Proc., Rule 3.

[8] Statutes 361 ⚿1535(3)

361 Statutes
361VIII Validity
361k1532 Effect of Partial Invalidity; Severability
361k1535 Particular Statutes
361k1535(2) Courts, Actions, and Pro-

ceedings

361k1535(3) k. In general. Most Cited Cases

(Formerly 361k64(7))

Remainder of statutory provisions relating to filing of reasonable cause affidavit in medical malpractice action were valid despite the striking down as unconstitutional of provision requiring dismissal of action if reasonable cause affidavit was not filed within 30 days of the filing of complaint, as enactment creating those provisions contained a severability clause. West's A.C.A. § 16–114–209(b).

West Codenotes

Held Unconstitutional § 16–114–209(b)(3)(A).

****416** R. David Lewis, Little Rock, AR, for appellant.

Barber, McCaskill, Jones & Hale, P.A., by: John S. Cherry, Jr., and Perry L. Wilson, Little Rock, AR, for appellee Joy Woolfolk.

Mitchell, Blackstock, Barnes, Wagoner, Ivers & Sneddon, PLLC, by: Emily Sneddon, Little Rock, AR, for amici curiae American Medical Ass'n and Arkansas Medical Society in Support of Appellees Dr. Rufus Thrower, et al.

ROBERT L. BROWN, Justice.

***232** Appellant Tomosa Summerville appeals the dismissal of her medical-malpractice complaint against appellees Dr. Rufus Thrower, Joy Woolfolk, and Healthcare for Women, P.A.,[FN1] which dismissal was based on her failure to file an affidavit of reasonable cause within thirty days of filing her complaint, as required by Act 649 of 2003, now codified at Ark.Code Ann. § 16–114–209(b) (Repl.2006). She raises multiple issues for reversal. We conclude that the mandatory thirty-day requirement for the affidavit of reasonable cause after filing the complaint directly conflicts with Rule 3 of our Rules of Civil Procedure regarding commencement of litigation. Accordingly, we reverse and remand.

FN1. At various times in the record, Healthcare is spelled as two words. We choose to spell it as one word, which is the spelling on the cover of the record.

On July 21, 2005, the appellant, Tomosa Summerville, filed a complaint in Pulaski County Circuit Court against Dr. Rufus Thrower, Joy Childress,[FN2] and Healthcare for Women, P.A. ("Healthcare") for medical negligence. The complaint alleged that on January 23, 2003, Dr. Thrower, a practicing obstetrician and gynecologist and owner of Healthcare, a clinic for women, "cut and tied [Summerville's] tubes." Summerville visited Healthcare again on August 8, 2003, and informed Joy Woolfolk, a licensed nurse practitioner working there, that the result of a recent ***233** pregnancy test was positive. Woolfolk diagnosed Summerville as having a normal pregnancy and advised her to return to Healthcare on September 5, 2003, for prenatal care.

FN2. An amended complaint was filed on August 29, 2005, stating essentially the same allegations as the original complaint and changing Joy's last name from Childress to Woolfolk.

On August 28, 2003, Summerville became delirious and experienced abnormally heavy vaginal bleeding. She was taken to the University of Arkansas for Medical Sciences (UAMS) and was diagnosed with a tubal pregnancy and underwent emergency surgery. In her complaint, Summerville alleged that Dr. Thrower, Woolfolk, and Healthcare all violated the applicable standard of care. She alleged that Dr. Thrower, as owner of Healthcare, did not adequately supervise Woolfolk or take steps to assure that she was supervised by a physician and did not thoroughly examine Summerville or her medical chart. She further alleged that if Dr. Thrower did examine her medical chart, he should have diagnosed****417** Summerville with a tubal pregnancy.

With regard to Woolfolk, Summerville alleged

that she should not have undertaken Summerville's medical care without the adequate supervision of a physician and that Woolfolk should have diagnosed her with a tubal pregnancy and requested that Dr. Thrower examine her. Summerville asked for damages against the defendants for mental and physical suffering, disfigurement, and the incurrence of medical expenses. She also asked for punitive damages and alleged that Dr. Thrower intentionally and illegally allowed Woolfolk to provide medical care to her without the supervision of a physician. The doctor further assisted Woolfolk, according to Summerville, in the practice of medicine without a license.

On September 16, 2005, separate defendants Dr. Thrower and Healthcare filed a motion to dismiss the complaint, wherein they contended that Summerville failed to submit an affidavit of reasonable cause from a medical expert as required by § 16–114–209(b). Summerville responded to that motion and urged that § 16–114–209(b) was unconstitutional for multiple reasons. She also attached an affidavit to her response from her attorney, R. David Lewis, which stated that Lewis had researched the medical issues at the UAMS library and was convinced that there was a valid cause of action. The affidavit further stated that the physician who performed Summerville's surgery at UAMS had agreed to testify for Summerville but had not responded to the request for an affidavit. Separate defendant Woolfolk filed a motion to dismiss the complaint and asserted that the statute of limitations had ***234** expired on the claim against her and also that Summerville had failed to meet the requirements of § 16–114–209(b).

Summerville subsequently filed two affidavits. The first, filed on October 11, 2005, was submitted by Dr. Nancy Andrews, a UAMS physician practicing obstetrics and gynecology, which averred that the standard of care in this community had been violated under the facts of Summerville's case. The second affidavit, filed on January 10, 2006, was submitted by Sarah Rhoads, a clinical assistant professor at the UAMS College of Nursing and a licensed advanced nurse practitioner specializing in women's health. That affidavit explained the applicable standard of care for nurse practitioners in this community relating to ectopic pregnancies.

A hearing was held, following which the circuit court entered an order on January 13, 2006, in which it ruled that § 16–114–209(b) was constitutional. As a result, the court dismissed Summerville's complaint with prejudice against all defendants for failure to submit an affidavit of reasonable cause by a qualified expert within thirty days of the filing of the complaint, as required by § 16–114–209(b) [FN3]. Summerville filed a motion for a new trial and modification of the judgment and contended that the dismissal should have been without prejudice. Because the circuit court did not rule on the motion for a new trial and modification of the judgment within thirty days, the motion was deemed denied.

> FN3. The circuit court denied separate defendant Woolfolk's motion to dismiss which was based on the statute of limitations.

Summerville appeals and contends that the circuit court erred for multiple reasons in ruling that § 16–114–209(b) was constitutional. She first claims that the statute is in conflict with this court's Rules 1, 3, 8, 9, 10, 11, 12, 15, 41, and ****41856** of the Arkansas Rules of Civil Procedure. Because we reverse on the issue that § 16–114–209(b)(3)(A) directly conflicts with Rule 3 of our Rules of Civil Procedure, we need not address the remaining issues raised on appeal.

The entire statute in question in this case provides as follows:

> (a) If any action for medical injury is filed without reasonable cause, the party or attorney who signed the complaint shall thereafter, as determined by the court, be subject to:

*235 (1) The payment of reasonable costs, including attorney's fees, incurred by the other party by reason of the pleading; and

(2) Appropriate sanctions.

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

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

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

(B) The expert's qualifications;

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

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

(3)(A) The plaintiff shall have thirty (30) days after the complaint is filed with the clerk to file the affidavit before the provisions of subsection (a) of this section apply.

(B) If the affidavit is not filed within thirty (30) days after the complaint is filed with the clerk, the complaint shall be dismissed by the court.

Ark.Code Ann. § 16–114–209 (Repl.2006).

[1][2][3][4][5] This court has often stated our standard for reviewing the constitutionality of a statute:

It is well settled that there is a presumption of validity attending every consideration of a statute's constitutionality; every act carries a strong presumption of constitutionality, and before an act will be held un-constitutional, the incompatibility between it and the constitution must be clear. *Eady v. Lansford,* [351 Ark. 249, 92 S.W.3d 57 (2002)]. Any doubt as to the constitutionality of a statute *236 must be resolved in favor of its constitutionality. *Id.* The heavy burden of demonstrating the unconstitutionality is upon the one attacking it. *Id.*

Whorton v. Dixon, 363 Ark. 330, 336, 214 S.W.3d 225, 230 (2005). If possible, this court will construe a statute so that it is constitutional. *See McLane Southern, Inc. v. Davis,* 366 Ark. 164, 233 S.W.3d 674 (2006). This court reviews the circuit court's interpretation of the constitution *de novo,* and though this court is not bound by the circuit court's decision, the circuit court's interpretation will be accepted as correct on appeal in the absence of a showing that the circuit court erred. *See First Nat'l Bank of DeWitt v. Cruthis,* 360 Ark. 528, 203 S.W.3d 88 (2005).

The Oklahoma Supreme Court recently considered an appeal from a dismissal of a medical-malpractice complaint due to failure to attach an affidavit from a qualified medical expert attesting to the merit of the cause of action. *See Zeier v. Zimmer, Inc.,* 152 P.3d 861, (Okla. 2006). In that case, the Oklahoma General Assembly had enacted legislation requiring that an affidavit**419 of merit from a qualified expert be attached to medical-malpractice complaints. For good cause, a plaintiff could obtain a ninety-day extension of time to file the affidavit. Otherwise, the plaintiff's complaint would be dismissed. The Oklahoma plaintiff filed a medical-malpractice complaint without the affidavit and did not request an extension. The trial court dismissed the complaint without prejudice, and the plaintiff appealed.

The Oklahoma Supreme Court held that the act requiring an affidavit of merit was unconstitutional under Oklahoma's state constitution as special legislation and as constructing a monetary barrier to

access to the courts. In so holding, the court said:

> The Oklahoma Legislature implemented the Affordable Access to Health Care Act (Health Care Act), 63 O.S. Supp.2003 § 1–1708.1A *et seq.* for the purpose of implementing reasonable, comprehensive reforms designed to improve the availability of health care services while lowering the cost of medical liability insurance and ensuring that persons with meritorious injury claims receive fair and adequate compensation. Although statutory schemes similar to Oklahoma's Health Care Act do help screen out meritless suits, the additional certification costs have produced a substantial and disproportionate reduction in the number of claims filed by low-income plaintiffs. The affidavit of merit provisions frontload ***237** litigation costs and result in the creation of cottage industries of firms offering affidavits from physicians for a price. They also prevent meritorious medical malpractice actions from being filed. The affidavits of merit requirement obligates plaintiffs to engage in extensive pre-trial discovery to obtain the facts necessary for an expert to render an opinion resulting in most medical malpractice causes being settled out of court during discovery. Rather than reducing the problems associated with malpractice litigation, these provisions have resulted in the dismissal of legitimately injured plaintiffs' claims based solely on procedural, rather than substantive, grounds.
>
> *Zeier,* 152 P.3d at 869.

For Summerville's point that § 16–114–209(b) conflicts with Rule 3 regarding commencement of a cause of action, she relies on *Weidrick v. Arnold,* 310 Ark. 138, 835 S.W.2d 843 (1992). In *Weidrick,* this court held that the statutory requirement for a sixty-day notice to medical-malpractice defendants prior to the filing of an action was superseded by Rule 3 of the Arkansas Rules of Civil Procedure. In so holding, we concluded that Rule 3 governs the commencement of all civil actions and requires only that a complaint be filed with the clerk of the appropriate court. We concluded that the sixty-day-notice requirement added an additional condition for the commencement of a medical-malpractice action, and we struck down this procedural hurdle as being directly at odds with Rule 3. The crux of Summerville's contention on appeal today is that a mandatory requirement for an affidavit thirty days after filing a complaint, the absence of which will lead to a dismissal, is an added encumbrance for filing a complaint that does not differ essentially from the mandatory sixty-day notice we struck down in *Weidrick, supra.*

[6] The appellees respond that *Weidrick, supra,* is distinguishable from this case because, first, the affidavit requirement under § 16–114–209(b) is substantive law rather than a mere procedural rule, and, second, the statute does not directly conflict with any of this court's Rules of Civil Procedure. The boilerplate definition of substantive law is "[t]he part of the law ****420** that creates, defines, and regulates the rights, duties, and powers of parties," while procedural law is defined as "[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves." *Black's Law Dictionary* 1443, 1221 (7th ed.1999). Along those same ***238** lines, this court said in *Middleton v. Lockhart,* 355 Ark. 434, 438, 139 S.W.3d 500, 502–03 (2003), "a true statute of limitations, one that will be considered procedural in nature, extinguishes only the right to *enforce the remedy* and not the substantive right itself." We added that if the statute extinguished the right to bring the lawsuit itself, rather than the right to enforce the remedy, then it would be substantive. *See Middleton, supra.* While the requirement for an affidavit of reasonable cause may well fall in the category of substantive law, an automatic dismissal of the cause of action if the affidavit is not filed within thirty days concerns enforcement of a remedy, and we hold it is procedural.

At the outset, it is important to highlight the fact that the Medical Malpractice Act currently con-

templates two averments by experts: (1) the affidavit of reasonable cause, which is the subject of this appeal; and (2) expert testimony of the community's standard of care, the absence of which may lead to summary judgment in favor of the defendant. *See* Ark.Code Ann. § 16–114–206 (Repl.2006). Since the enactment of the Medical Malpractice Act in 1979, our law has provided that the plaintiff has the burden of proof and that expert testimony by a physician must be produced, establishing a violation of the standard of care in the locality where the defendant doctor practices or in a similar locality to withstand summary judgment. *See* Act 709 of 1979, now codified at Ark.Code Ann. §§ 16–114–201–16–114–212 (Repl.2006). *See also Eady v. Lansford,* 351 Ark. 249, 92 S.W.3d 57 (2002). The act specifies no time frame in which the expert testimony must be given. This court has upheld that requirement for expert testimony regarding the standard of care and held that it does not constitute special legislation. *See Haase v. Starnes,* 323 Ark. 263, 915 S.W.2d 675 (1996).

Act 649 of 2003, now codified at Ark.Code Ann. § 16–114–209, requires an additional medical expert averment in the form of an affidavit of reasonable cause within thirty days of filing a complaint and justifies it in the Emergency Clause on the basis that lower medical-malpractice insurance costs will follow. It is only the affidavit of reasonable cause required by § 16–114–209(b), and its dismissal procedure that we consider today.

[7] Because we conclude that § 16–114–209(b) is procedural, we turn to its asserted conflict with Rule 3. The Arkansas Constitution is clear that rules of pleading, practice, and procedures for our courts fall within the domain of this court. Ark. ***239** Const. amend. 80, § 3. We are hard pressed to distinguish the situation at hand from that in *Weidrick, supra.* As already observed, in *Weidrick,* this court struck down an act requiring a mandatory sixty-day notice prefatory to filing a medical-malpractice action as being in direct conflict with our Rule 3 for commencing civil actions. In doing so, we said:

> We can think of few rules more basic to the civil process than a rule defining the means by which complaints are filed and actions commenced for a common law tort such as medical malpractice. The express intent of the Arkansas Constitution and Act 38 of 1973 is for the governance of the procedure of the courts of this state to fall within the power and authority of the Arkansas Supreme Court. How civil actions are ****421** commenced is [a] fundamental cog in that procedural wheel.

Weidrick, 310 Ark. at 146, 835 S.W.2d at 847. There is little, if any, practical difference in this court's mind between a mandatory legislative requirement before commencing a cause of action like we had in *Weidrick* and a mandatory requirement within thirty days immediately after filing a complaint such as we have here. Both procedures add a legislative encumbrance to commencing a cause of action that is not found in Rule 3 of our civil rules. Appellees Thrower and Healthcare appear to acknowledge this when they write in their brief in support of motion to dismiss and for costs: "Alternatively, the pleading mistake [failure to include the reasonable-cause affidavit] means that this action was not properly commenced...."

The constitutional infirmity in § 16–114–209(b) is the provision for dismissal if the affidavit does not accompany a complaint within thirty days. We do not hold today that the balance of § 16–114–209(b), requiring a reasonable-cause affidavit, is constitutionally infirm. Having said that, it appears that without the time limit of thirty days, the statute largely is duplicative of § 16–114–206 regarding the plaintiff's burden of proof and medical expert testimony concerning breach of the standard of care in the community.

[8] We reverse the order of dismissal of the circuit court with respect to the thirty-day dismissal set out in § 16–114–209(b)(3)(A) and strike that provision as directly in conflict with Rule 3 of our

Civil Rules of Procedure and this court's authority under Amendment 80 of the Arkansas Constitution. We note that Section 25 of Act 649 of 2003 contains a severability clause, and we hold that in all other respects, § 16–114–209(b) is valid.

***240** Reversed and remanded.

GLAZE and IMBER, JJ., concur.

ANNABELLE CLINTON IMBER, Justice, concurring.

I concur with the result reached by the majority because Arkansas Code Annotated § 16-114-209(b)(3)(B) (Repl. 2006) conflicts with Rule 11 of the Arkansas Rules of Civil Procedure.

Section 16-114-209(a) authorizes the imposition of appropriate sanctions if a party or attorney files a medical malpractice action without "reasonable cause." In effect, the statutory authorization in § 16-114-209(a) mirrors Ark. R. Civ. P. 11, which empowers the circuit court to impose "appropriate sanctions" on any party or attorney who files a pleading without forming a belief based on reasonable inquiry that the pleading is "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass[,] ... cause unnecessary delay or needless increase in the cost of litigation." Both Rule 11 and § 16-114-209(a) allow the circuit court to use its discretion when determining the appropriate sanction. Thus, it is clear that § 16-114-209(a) does not conflict with Rule 11.

The same cannot be said for section 16-114-209(b)(3)(B), in that it completely strips the circuit court of its discretion in the imposition of sanctions. This statutory provision mandates a Particular sanction" the dismissal of a medical malpractice action"that conflicts with Rule 11 in two respects. First, the statute requires a *particular* sanction, whereas Rule 11 affords the circuit court broad discretion to decide an "appropriate sanction." Second, it provides no opportunity for the plaintiff to withdraw or correct the alleged deficiency after notice of the challenge. Rule 11 specifically bars the filing of a motion for ****422** sanctions unless "the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected," within 21 days after service of the motion, or such other period as the court may prescribe. Ark. R. Civ. P. 11(b). Thus, our rule allows for a "safe harbor" during which a party may, without penalty, correct an alleged deficiency.

As the majority noted, the Arkansas Constitution expressly grants this court the authority to develop rules of pleading, practice, and procedure. Ark. Const. amend. 80, § 3. I would ***241** reverse and remand because § 16-114-209(b)(3)(B) is directly in conflict with Rule 11 of our Civil Rules of Procedure and this court's authority under Amendment 80 of the Arkansas Constitution.

GLAZE, J., joins this concurrence.

Ark.,2007.
Summerville v. Thrower
369 Ark. 231, 253 S.W.3d 415

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ATTACHMENT 4

Supreme Court of Arkansas.
Darrell JOHNSON & A. Jan Thomas, Jr., Bankruptcy Trustee in the Matter of Darrell W. Johnson and Janet K. Johnson, Debtors, Petitioners,
v.
ROCKWELL AUTOMATION, INC.; Consolidated Electrical Distributors, Inc., d/b/a Keathley–Patterson Electric; & John Does 1–5, Respondents.

No. 08–1009.
April 30, 2009.

Background: Mechanic, who was injured while working on "starter bucket" for his employer, brought products liability action against manufacturer of bucket in federal court. The United States District Court for the Eastern District of Arkansas, J. Leon Holmes, J., certified questions.

Holdings: The Supreme Court, Paul E. Danielson, J., held that:
(1) nonparty-fault provision of the Civil Justice Reform Act of 2003 (CJRA) violates separation of powers under the Arkansas Constitution, and
(2) medical-costs provision of the Civil Justice Reform Act of 2003 (CJRA) violates separation of powers under the Arkansas Constitution.

Certified questions answered.

West Headnotes

[1] Constitutional Law 92 ⇐990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In general. Most Cited Cases

Constitutional Law 92 ⇐996

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k996 k. Clearly, positively, or unmistakably unconstitutional. Most Cited Cases

There is a presumption of validity attending every consideration of a statute's constitutionality; every act carries a strong presumption of constitutionality, and before an act will be held unconstitutional, the incompatibility between it and the constitution must be clear.

[2] Constitutional Law 92 ⇐1002

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1001 Doubt
92k1002 k. In general. Most Cited Cases

Any doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality.

[3] Constitutional Law 92 ⇐1030

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1030 k. In general. Most Cited Cases

The heavy burden of demonstrating the unconstitutionality of a statute is upon the one attacking it.

[4] Constitutional Law 92 ⚿990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In general. Most Cited Cases

When possible, the Supreme Court will construe a statute so that it is constitutional.

[5] Constitutional Law 92 ⚿969

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)1 In General
92k969 k. Scope of inquiry in general. Most Cited Cases

In determining the constitutionality of statutes, the Supreme Court looks to the rules of statutory construction.

[6] Statutes 361 ⚿1072

361 Statutes
361III Construction
361III(A) In General
361k1071 Intent
361k1072 k. In general. Most Cited Cases
(Formerly 361k181(1))

Statutes 361 ⚿1111

361 Statutes
361III Construction
361III(C) Clarity and Ambiguity; Multiple Meanings
361k1107 Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language
361k1111 k. Plain language; plain, ordinary, common, or literal meaning. Most Cited Cases
(Formerly 361k188)

When construing a statute, the basic rule is to give effect to the intent of the legislature; where the language of a statute is plain and unambiguous, the Supreme Court determines legislative intent from the ordinary meaning of the language used.

[7] Statutes 361 ⚿1092

361 Statutes
361III Construction
361III(B) Plain Language; Plain, Ordinary, or Common Meaning
361k1092 k. Natural, obvious, or accepted meaning. Most Cited Cases
(Formerly 361k188)

In considering the meaning of a statute, the Supreme Court construes it just as it reads, giving the words their ordinary and usually accepted meaning in common language.

[8] Constitutional Law 92 ⚿2357

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2357 k. Remedies and procedure in general. Most Cited Cases

Negligence 272 ⚿203

272 Negligence
272I In General
272k203 k. Constitutional, statutory and regulatory provisions. Most Cited Cases

Negligence 272 ⚿549(8)

272 Negligence
272XVI Defenses and Mitigating Circumstances
272k545 Effect of Others' Fault
272k549 As Grounds for Apportionment; Comparative Negligence Doctrine
272k549(4) Scope and Application of Doctrine
272k549(8) k. Whose acts or fault

may be considered; non-parties. Most Cited Cases

When considered along substantive law modifying joint and several liability, the nonparty-fault provision of the Civil Justice Reform Act of 2003 (CJRA), requiring a fact finder to consider or assess the negligence or fault of nonparties, violates separation of powers under the Arkansas Constitution; the nonparty-fault provision bypasses Supreme Court's rules of pleading, practice and procedure by setting up a procedure to determine the fault of a nonparty and mandating the consideration of that nonparty's fault in an effort to reduce a plaintiff's recovery. West's A.C.A Const. Art. 4, § 2; West's A.C.A Const.Amend. No. 80, § 3;West's A.C.A. § 16–55–202.

[9] Constitutional Law 92 ⚿2357

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2357 k. Remedies and procedure in general. Most Cited Cases

So long as a legislative provision dictates procedure, that provision need not directly conflict with Supreme Court's procedural rules to be unconstitutional as violative of separation of powers; rules regarding pleading, practice, and procedure are solely the responsibility of the Supreme Court. West's A.C.A Const. Art. 4, § 2; West's A.C.A Const.Amend. No. 80, § 3.

[10] Statutes 361 ⚿1004

361 Statutes
361I In General
361k1002 Nature and Definition of Legislative Acts
361k1004 k. Substantive or procedural statutes. Most Cited Cases
(Formerly 361k174)

Law is "substantive" when it is the part of the law that creates, defines, and regulates the rights, duties, and powers of parties.

[11] Statutes 361 ⚿1004

361 Statutes
361I In General
361k1002 Nature and Definition of Legislative Acts
361k1004 k. Substantive or procedural statutes. Most Cited Cases
(Formerly 361k174)

"Procedural law" is defined as the rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves.

[12] Constitutional Law 92 ⚿2364

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2364 k. Damages. Most Cited Cases

Damages 115 ⚿177

115 Damages
115IX Evidence
115k164 Admissibility
115k177 k. Expenses. Most Cited Cases

Medical-costs provision of the Civil Justice Reform Act of 2003 (CJRA), stating that 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, violates separation of powers under the Arkansas Constitution; provision promulgates a rule of evidence by limiting evidence that may be introduced, thereby dictating what evidence is admissible. West's A.C.A Const. Art. 4, § 2; West's A.C.A Const.Amend. No. 80, § 3; West's A.C.A. § 16–55–212(b).

West Codenotes
Held UnconstitutionalWest's A.C.A. §§ 16–55–202,

16–55–212(b). **137 McMath Woods, P.A., by: James Bruce McMath, Little Rock, and Neil Chamberlin, Jacksonville, for petitioners.

Watts, Donovan & Tilley, P.A., by: David M. Donovan and Staci Dumas Carson, Little Rock, for respondents.

Jeffrey R. White, Center for Constitutional Litigation, P.C., and Ralph Cloar, for amicus curiae American Association for Justice.

Shook, Hardy & Bacon, L.L.P., by: Mark A. Behrens, and Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: M. Samuel Jones, III, Little Rock, for amici curiae American Tort Reform Association, Chamber of Commerce of the United States of America, National Association of Manufacturers, American Insurance Association, Property Casualty Insurers Association of America, National Association of Mutual Insurance Companies, American Chemistry Council, American Petroleum Institute, American Health Care Association and the National Center for Assisted Living, Pharmaceutical Research and Manufacturers of America, American Trucking Associations, and Association of American Railroads.

Wilkes & McHugh, P.A., by: Susan Nichols Estes and David L. Eanes, Jr., Little Rock, for amicus curiae Arkansas Advocates for Nursing Home Residents.

Brian G. Brooks, for amicus curiae Arkansas Trial Lawyers Association.

Bassett Law Firm, by: Woody Bassett, Fayetteville; Atchley, Russell, Waldrop & Hlavinka, LLP, by: Alan Harrel; Shackleford, Phillips, & Ratcliff, P.A., by: Dennis Shackleford, El Dorado; and Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: Nicholas Thompson, Little Rock, for amici curiae Meek Manufacturing Company, Inc.; Fed Ex Freight East, **138 Inc.; E.C. Barton & Company; Star Transportation; SeaArk Marine; Pinnacle Investments; Mitchell's Nursing Home; Yarnell's Ice Cream Co.; Cooper Tire & Rubber Company; The Committee to Save Arkansas Jobs, Inc.; and Arkansas Healthcare Association.

Law Office of David Couch, by: David A. Couch, for amicus curiae National Citizen's Coalition for Nursing Home Reform.

Leslie Brueckner, Public Justice, P.C., and Cauley Bowman Carney & Williams, PLLC, by: Hank Bates, Little Rock, for amicus curiae Public Justice, P.C.

PAUL E. DANIELSON, Justice.

*1 This case involves two questions of law certified to this court by the United States District Court for the Eastern District of Arkansas in accordance with Arkansas Supreme Court Rule 6–8 (2008) and accepted by this court on September 11, 2008. *See Johnson v. Rockwell Automation, Inc.*, 374 Ark. 217, 286 S.W.3d 726 (2008).

The questions certified are the following:

1. Under the facts of this case, whether the provisions of Act 649 of 2003, including, but not limited to those codified at Ark.Code Ann. § 16–55–202, *2 that require [FN1] a fact finder to consider or assess the negligence or fault of nonparties, violate the Arkansas Constitution, when considered along with the modification of "joint and several" liability in the same act, codified at Ark.Code Ann. § 16–55–201.

FN1. While the question was phrased by the parties and the district court using the word "allow" rather than "require," the statute itself uses the word "shall," clearly mandating the consideration of the fault of nonparties.

2. Under the facts of this case, whether the provisions of Act 649 of 2003, including, but not limited to those codified at Ark.Code Ann. § 16–55–212(b), that addresses evidence of dam-

ages for the costs of necessary medical care, treatment, or services, violate the Arkansas Constitution.

As to the first question, we conclude that the answer is yes, Ark.Code Ann. § 16–55–202 is unconstitutional. As to the second question, we conclude that the answer is yes, Ark.Code Ann. § 16–55–212(b) is unconstitutional.

According to the district court's order, the certified questions arise from a complaint filed by petitioner Darrell Johnson alleging that on or about February 24, 2004, Johnson was injured while working as a control systems mechanic for Eastman Chemical Company. The district court's order reveals the following facts. At the time of the incident, Johnson was working on a product referred to by Johnson and his coworkers as an Allen–Bradley "starter bucket." The starter bucket was designed, manufactured, and supplied to Eastman by the respondent Rockwell Automation, Inc.

Petitioners alleged before the district court that a safety interlock on the starter bucket was designed, manufactured, and supplied in a defective condition, allowing it to *3 become electrically powered at a time it should have been prevented from doing so, which was an actual and proximate cause of the incident and Johnson's injuries. As a result, petitioners alleged that the respondents were strictly liable for Johnson's injuries; liable for negligently designing, manufacturing, and supplying the starter bucket; and liable for negligently failing to warn about the inherent risks in the design of the starter bucket. However, Rockwell averred that after the starter bucket was supplied to Eastman, **139 Eastman modified it without Rockwell's knowledge.

In its answer, Rockwell pled that the fault of all parties should be apportioned in accordance with the Civil Justice Reform Act of 2003 (Act 649 of 2003) (CJRA), codified at Ark.Code Ann. §§ 16–55–201 to 16–55–220 (Supp.2003), and, further, that it was entitled to "all defenses" available to it under the CJRA, including "restriction of liability to its percentage share of actual liability" and "the right to name nonparties at fault." Rockwell also filed a "Notice of Nonparty Fault," pursuant to Ark.Code Ann. § 16–55–202, designating Eastman as a nonparty at fault for a list of alleged reasons. Petitioners responded that the nonparty-fault provision, section 16–55–202 of the CJRA, violates the Arkansas Constitution under the facts of the case.

Petitioners maintained that Johnson received medical care, treatment, or services, which were necessary due to the incident and resulting injuries. While Johnson's employee medical plan paid the costs for the medical care, treatment, or services, the amount paid by *4 the plan was less than the full amount of the costs incurred. Therefore, Petitioners sought to present evidence of the full amount of costs necessary for the medical care, treatment, or services received by Johnson, even though that amount was greater than the amount of costs actually paid by Johnson or on behalf of Johnson. However, Respondents sought to enforce the terms of section 16–55–212(b) of the CJRA, limiting the evidence to only those costs actually paid by or on behalf of Johnson or which remained unpaid and for which Johnson or any third party was legally responsible. Petitioners argued to the district court that such an interpretation and application of section 16–55–212(b) was a limitation on damages in violation of the Arkansas Constitution and offended the separation-of-powers doctrine.

Petitioners and Respondents then filed a joint motion for certification of the above-stated questions to this court on August 11, 2008. On August 21, 2008, the district court granted the motion. We now turn to providing an answer to each of the certified questions.

[1][2][3][4] It is well settled that there is a presumption of validity attending every consideration of a statute's constitutionality; every act carries a strong presumption of constitutionality, and before an act will be held unconstitutional, the incompatibility between it and the constitution must be clear.

See Shipp v. Franklin, 370 Ark. 262, 258 S.W.3d 744 (2007). Any doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality. *See id.* The heavy burden of demonstrating the unconstitutionality is upon the one attacking it. *See id.* Finally, when possible, we will construe a statute so that it is ***5** constitutional. *See id.*

[5][6][7] In determining the constitutionality of the statutes, we look to the rules of statutory construction. When construing a statute, the basic rule is to give effect to the intent of the legislature. *See Rose v. Arkansas State Plant Bd.,* 363 Ark. 281, 213 S.W.3d 607 (2005). Where the language of a statute is plain and unambiguous, we determine legislative intent from the ordinary meaning of the language used. *See id.* In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *See id.*

I. Ark.Code Ann. § 16–55–202

Petitioners argue that the nonparty-fault provision of the CJRA, codified at Ark.Code Ann. § 16–55–202, is unconstitutional ****140** because: (1) it violates the due-process guarantees of article 2, § 8 of the Arkansas Constitution; (2) it violates article 5, § 32 and article 2, § 13 of the Arkansas Constitution by limiting recoveries and precluding complete recoveries for personal injuries; (3) it invades the Arkansas Supreme Court's constitutional grant of authority to establish the rules of pleading, practice, and procedure pursuant to amendment 80, § 3 of the Arkansas Constitution; and (4) it violates the separation-of-powers clause found in article 4, § 2 of the Arkansas Constitution. Respondents disagree with these arguments and aver that section 16–55–202 should be upheld as it is rationally related to a desirable and legitimate objective.

***6** The nonparty-fault provision of the CJRA reads:

> (a) In assessing percentages of fault, the fact finder shall consider the fault of all persons or entities who contributed to the alleged injury or death or damage to property, tangible or intangible, regardless of whether the person or entity was or could have been named as a party to the suit.
>
> (b)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if the defending party gives notice that a nonparty was wholly or partially at fault not later than one hundred twenty (120) days prior to the date of trial.
>
> (2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.
>
> (c)(1) Except as expressly stated in this section, nothing in this section shall eliminate or diminish any defenses or immunities which currently exist.
>
> (2) Assessments of percentages of fault of nonparties shall be used only for accurately determining the percentage of fault of named parties.
>
> (3) Where fault is assessed against nonparties, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.
>
> Ark.Code Ann. § 16–55–202.

[8] We begin with petitioners' argument that the nonparty-fault provision invades the powers granted to the judiciary by the Arkansas Constitution in violation of article 4, § 2 and amendment 80, § 3 by adding to or varying the Arkansas Rules of Civil Procedure. Specifically, petitioners contend that the nonparty-fault provision effectively establishes a procedure that conflicts with our "rules of pleadings, practice and procedure." We agree, and we hold the provision unconstitutional.

Our state constitution has long recognized the

importance of separation of powers. *7 It reads, "[n]o person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted." Ark. Const. art. 4, § 2. Most importantly, amendment 80, § 3 to the Arkansas Constitution instructs that the Arkansas Supreme Court "shall prescribe the rules of pleading, practice and procedure for all courts."

We have previously struck down acts that conflicted with our procedure for commencing civil actions. In *Summerville v. Thrower,* 369 Ark. 231, 253 S.W.3d 415 (2007), this court struck down the statutory requirement to submit a reasonable-cause affidavit within thirty days of filing a **141 complaint as unconstitutional. Prior to *Summerville,* this court struck down as unconstitutional the sixty-day notice statute that governed actions for medical injury. *See Weidrick v. Arnold,* 310 Ark. 138, 835 S.W.2d 843 (1992). In *Weidrick,* we noted that the statute required a sixty-day notice to sue as a condition before commencing an action for medical injury. *See id.* This court reasoned in both cases that, "[w]e can think of few rules more basic to the civil process than a rule defining the means by which complaints are filed and actions commenced for a common law tort." *Summerville,* 369 Ark. at 239, 253 S.W.3d at 420 (citing *Weidrick,* 310 Ark. at 146, 835 S.W.2d at 847). We noted in *Summerville* that the legislation in that case, as well as the legislation in *Weidrick,* had added an encumbrance to commencing a cause of action that was not found in Ark. R. Civ. P. 3. *See Summerville, supra.*

[9] *8 As was the case in *Summerville* and *Weidrick,* the nonparty-fault provision in the instant case conflicts with our "rules of pleading, practice and procedure." While respondents assert that the nonparty-fault provision should be upheld because it does not directly conflict with our rules of procedure as the legislative requirements did in *Summerville* and *Weidrick,* we take this opportunity to note that so long as a legislative provision dictates procedure, that provision need not directly conflict with our procedural rules to be unconstitutional. This is because rules regarding pleading, practice, and procedure are solely the responsibility of this court. *See* Ark. Const. amend. 80, § 3.

[10][11] Law is substantive when it is "[t]he part of the law that creates, defines, and regulates the rights, duties, and powers of parties." *Summerville,* 369 Ark. at 237, 253 S.W.3d at 419–20 (citing *Black's Law Dictionary* 1443 (7th ed. 1999)). Procedural law is defined as "[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves." *Id.,* 253 S.W.3d at 420 (citing *Black's Law Dictionary* 1221 (7th ed. 1999)).

Clearly the law modifying joint and several liability, Ark.Code Ann. § 16–55–201, defines the right of a party, a defendant, and is substantive. However, after reviewing section 16–55–202, it is clear to this court that the legislature has, without regard to this court's "rules of pleading, practice and procedure," established its own procedure by which the fault of a nonparty shall be litigated. While respondents argued in oral argument that *9 a defendant has always been able to "point to the empty chair," the "phantom defendant" established by section 16–55–202 is different. The nonparty-fault provision bypasses our "rules of pleading, practice and procedure" by setting up a procedure to determine the fault of a nonparty and mandating the consideration of that nonparty's fault in an effort to reduce a plaintiff's recovery.

Additionally, the plain language of the statute even instructs that "a pleading" be filed to meet the notice requirement. *See* Ark.Code Ann. § 16–55–202(b)(2). This is in direct conflict with our Ark. R. Civ. P. 7, which specifically sets forth the pleadings and instructs that "[n]o other pleadings shall be allowed." Because subsection (b) instructs when the negligence or fault of a nonparty shall be considered, subsection (a) falls as well, as it is dependent on (b).

Because the nonparty provision is procedural, it offends the principle of separation of powers and the powers specifically prescribed to this court by amendment 80. Accordingly, we hold that Ark.Code Ann. § 16–55–202 violates separation of powers under article 4, § 2, as well as amendment 80, § 3 of the Arkansas Constitution. Because**142 we conclude the nonparty-fault provision is unconstitutional based on the stated grounds, we need not address the remaining constitutional challenges to this statute presented by the petitioners.

II. Ark.Code Ann. § 16–55–212(b)

[12] *10 Petitioners also assert that the medical-costs provision of the CJRA, codified at Ark.Code Ann. § 16–55–212(b), violates the constitution because: (1) it prevents a plaintiff from recovering the full value of medical services in conflict with the collateral-source rule; (2) it violates the separation-of-powers clause found in article 4, § 2 and violates amendment 80, § 3 of the Arkansas Constitution; and (3) it limits the amount that can be recovered for injury to a plaintiff in violation of article 5, § 32 of the Arkansas Constitution. Respondents aver that the medical-costs provision does not conflict in any way with the collateral-source rule because it does not seek to introduce evidence that other payments were received for a plaintiff's medical bills; rather, they claim, it limits the reasonable value of a plaintiff's expenses to the amount actually paid or to be paid on a plaintiff's behalf. Further, Respondents contend that it does not limit recovery because it does not place a cap, or a dollar limitation, on the amount a plaintiff may recover.

The medical-costs provision of the CJRA reads:

> 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.

Ark.Code Ann. § 16–55–212(b) (Supp.2003) (emphasis added).

It is undisputed that the rules of evidence are "rules of pleading, practice and procedure." Moreover, we have held that the rules of evidence are rules falling within this court's domain. *See Ricarte v. State,* 290 Ark. 100, 717 S.W.2d 488 (1986). Our review of *11 the plain language of the medical-costs provision reveals that the instant statute promulgates a rule of evidence. Here, the provision clearly limits the evidence that may be introduced relating to the value of medical expenses to the amount of medical expenses paid or the amount to be paid by a plaintiff or on a plaintiff's behalf, thereby dictating what evidence is admissible. Because rules regarding the admissibility of evidence are within our province, we hold that the medical-costs provision also violates separation of powers under article 4, § 2 and amendment 80, § 3 of the Arkansas Constitution and, therefore, is unconstitutional.

Because we conclude that Ark.Code Ann. § 16–55–212(b) is unconstitutional based on the stated grounds, we do not address the remaining constitutional challenges to this statute presented by the petitioners.

Certified questions answered.

Ark.,2009.
Johnson v. Rockwell Automation, Inc.
2009 Ark. 241, 308 S.W.3d 135

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ATTACHMENT 5

H

Supreme Court of Arkansas.
BAYER CROPSCIENCE LP; Bayer CropScience Holding, Inc.; Bayer CropScience AG; Bayer AG; and Bayer BioScience NV, Appellants
v.
Randy SCHAFER; end of the Road Farms, Inc.; Schafer Planting Co.; Wallace Farms; Robert E. Moery; Kyle Moery; Carter Farms Partnership; Petrus Farms, Inc.; Robert Petrus, Individually and as Trustee of the Robert Petrus Revocable Trust; R & B Amaden Farms; Randall J. Snider; R & S Planting Co., Inc.; S & R Farms; A.S. Kelly and Sons; Neil Daniels Farms, Appellees.

No. 10–1246.
Dec. 8, 2011.

Background: Rice farmers filed suit against developer of genetically engineered rice, alleging, inter alia, that developer was negligent in allowing the release of genetically engineered rice into the nation's rice supply. After declaring the statutory cap on punitive damages unconstitutional, the Circuit Court, Lonoke County, Phillip Thomas Whiteaker, J., entered judgment on jury verdict awarding rice farmers $5,975,605 in compensatory damages and $42,000,000 in punitive damages. Developer appealed.

Holdings: The Supreme Court, Courtney Hudson Goodson, J., held that:
(1) the statutory cap on punitive damages is unconstitutional under section of the Arkansas Constitution prohibiting the General Assembly from limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property;
(2) rice farmers' claims were not barred by the economic-loss doctrine;
(3) circuit court did not abuse its discretion by allowing expert's testimony on future damages; and
(4) developer failed to preserve for appellate review claim that jury's award of $42,000,000 in punitive damages was grossly excessive.

Affirmed.

Karen R. Baker, J., filed a separate concurring opinion.

West Headnotes

[1] Constitutional Law 92 ⇐2314

92 Constitutional Law
92XIX Rights to Open Courts, Remedies, and Justice
92k2313 Conditions, Limitations, and Other Restrictions on Access and Remedies
92k2314 k. In general. Most Cited Cases

Damages 115 ⇐94.9(2)

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.9 Statutory Provisions
115k94.9(2) k. Validity. Most Cited Cases

The statutory cap on punitive damages is unconstitutional under section of the Arkansas Constitution prohibiting the General Assembly from limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property, as it limits the amount of recovery outside the employment relationship, in violation of the Arkansas Constitution. West's A.C.A. Const. Art. 5, § 32; West's A.C.A. § 16–55–208.

[2] Appeal and Error 30 ⇐170(2)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k170 Nature or Subject-Matter of Is-

sues or Questions
30k170(2) k. Constitutional questions. Most Cited Cases

Supreme Court would not address rice farmer's claim that the statutory cap on punitive damages violates the right to a trial by jury, where the infringement of the right to a jury trial was not raised before the circuit court. West's A.C.A. Const. Art. 2, § 7; West's A.C.A. § 16–55–208.

[3] Appeal and Error 30 ⚿169

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k169 k. Necessity of presentation in general. Most Cited Cases

Appeal and Error 30 ⚿170(2)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k170 Nature or Subject-Matter of Issues or Questions
30k170(2) k. Constitutional questions. Most Cited Cases

Supreme Court will not address an issue raised for the first time on appeal, even a constitutional argument.

[4] Constitutional Law 92 ⚿990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In general. Most Cited Cases

Constitutional Law 92 ⚿996

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k996 k. Clearly, positively, or unmistakably unconstitutional. Most Cited Cases

There is a presumption of validity attending every consideration of a statute's constitutionality; every act carries a strong presumption of constitutionality, and before an act will be held unconstitutional, the incompatibility between it and the constitution must be clear.

[5] Constitutional Law 92 ⚿1002

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1001 Doubt
92k1002 k. In general. Most Cited Cases

Constitutional Law 92 ⚿1030

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1030 k. In general. Most Cited Cases

Any doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality, and the heavy burden of demonstrating the unconstitutionality is upon the one attacking it.

[6] Constitutional Law 92 ⚿990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions

92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In general. Most Cited Cases

When possible, the Supreme Court will construe a statute so that it is constitutional.

[7] Constitutional Law 92 ⚿580

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(A) General Rules of Construction
92k580 k. In general. Most Cited Cases

When interpreting the constitution on appeal, Supreme Court's task is to read the provisions as they are written and interpret them in accordance with established principles of constitutional construction.

[8] Constitutional Law 92 ⚿592

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(A) General Rules of Construction
92k590 Meaning of Language in General
92k592 k. Plain, ordinary, or common meaning. Most Cited Cases

Language of a constitutional provision that is plain and unambiguous must be given its obvious and common meaning.

[9] Constitutional Law 92 ⚿593

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(A) General Rules of Construction
92k590 Meaning of Language in General
92k593 k. Existence of ambiguity. Most Cited Cases

Neither rules of construction nor rules of interpretation may be used to defeat the clear and certain meaning of a constitutional provision.

[10] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In general. Most Cited Cases

It is the Supreme Court's responsibility to decide what a constitutional provision means, and the Court will review a lower court's construction de novo.

[11] Appeal and Error 30 ⚿842(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(1) k. In general. Most Cited Cases

Courts 106 ⚿89

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k89 k. In general. Most Cited Cases

In construing the meaning of the constitution, the Supreme Court is not bound by the decision of the circuit court; however, in the absence of a showing that the circuit court erred in its interpretation of the law, that interpretation will be accepted as correct on appeal.

[12] Constitutional Law 92 ⚿2314

92 Constitutional Law
92XIX Rights to Open Courts, Remedies, and

Justice

92k2313 Conditions, Limitations, and Other Restrictions on Access and Remedies

92k2314 k. In general. Most Cited Cases

Under State Constitution, the General Assembly may limit amount of tort liability only where there is an employment relationship between the parties. West's A.C.A. Const. Art. 5, § 32.

[13] Damages 115 ⚿95

115 Damages

115VI Measure of Damages

115VI(A) Injuries to the Person

115k95 k. Mode of estimating damages in general. Most Cited Cases

Damages 115 ⚿103

115 Damages

115VI Measure of Damages

115VI(B) Injuries to Property

115k103 k. Mode of estimating damages in general. Most Cited Cases

Damages 115 ⚿117

115 Damages

115VI Measure of Damages

115VI(C) Breach of Contract

115k117 k. Mode of estimating damages in general. Most Cited Cases

Compensatory damages are awarded for the purpose of making the injured party whole, as nearly as possible.

[14] Damages 115 ⚿87(1)

115 Damages

115V Exemplary Damages

115k87 Nature and Theory of Damages Additional to Compensation

115k87(1) k. In general. Most Cited Cases

The function of punitive damages is not to compensate but to punish the defendant for his wrong.

[15] Damages 115 ⚿87(2)

115 Damages

115V Exemplary Damages

115k87 Nature and Theory of Damages Additional to Compensation

115k87(2) k. Necessity of actual damage. Most Cited Cases

Punitive damages are dependent upon the recovery of compensatory damages, as an award of actual damages is a predicate for the recovery of punitive damages.

[16] Damages 115 ⚿89(1)

115 Damages

115V Exemplary Damages

115k88 Injuries for Which Exemplary Damages May Be Awarded

115k89 In General

115k89(1) k. In general. Most Cited Cases

Death 117 ⚿93

117 Death

117III Actions for Causing Death

117III(H) Damages or Compensation

117k93 k. Exemplary damages. Most Cited Cases

Although compensatory and punitive damages serve differing purposes, an award of punitive damages is nonetheless an integrant part of the amount recovered for injuries resulting in death or for injuries to persons or property.

[17] Appeal and Error 30 ⚿179(4)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court

30k179 Sufficiency of Presentation of Questions

30k179(4) k. Constitutional questions. Most Cited Cases

Rice farmers preserved for appellate review

claim that the statutory cap on punitive damages is unconstitutional under section of the Arkansas Constitution prohibiting the General Assembly from limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property; the constitutional issue was raised via pretrial motion, and the circuit court conducted a hearing and resolved the motion by issuing a ruling declaring the statute unconstitutional. West's A.C.A. Const. Art. 5, § 32; West's A.C.A. § 16–55–208.

[18] Appeal and Error 30 ⚿242(1)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k242 Necessity of Ruling on Objection or Motion
30k242(1) k. In general. Most Cited Cases

With regard to pretrial motions, the Supreme Court's preservation requirements are simple, straightforward, and well settled; the burden of obtaining a ruling is on the movant, and only objections and matters left unresolved are waived and may not be relied upon on appeal.

[19] Products Liability 313A ⚿156

313A Products Liability
313AII Elements and Concepts
313Ak154 Nature of Injury or Damage
313Ak156 k. Economic losses; damage to product itself. Most Cited Cases

Products Liability 313A ⚿233

313A Products Liability
313AIII Particular Products
313Ak233 k. Feed and seed; pet food. Most Cited Cases

Rice farmers' claims against developer of genetically engineered rice were not barred by the economic-loss doctrine, in light of evidence showing physical harm to rice farmers' lands, crops, and equipment from developer's release of genetically engineered rice into the nation's rice supply; several witnesses testified that the contamination was widespread, and one farmer and his wife testified as to farmer's efforts to clean his equipment as a result of the contamination.

[20] Products Liability 313A ⚿156

313A Products Liability
313AII Elements and Concepts
313Ak154 Nature of Injury or Damage
313Ak156 k. Economic losses; damage to product itself. Most Cited Cases

Torts 379 ⚿118

379 Torts
379I In General
379k116 Injury or Damage from Act
379k118 k. Economic loss doctrine. Most Cited Cases

In jurisdictions where the economic-loss doctrine finds favor, the rule may bar certain tort claims in three general circumstances: (1) when the loss is the subject matter of a contract; (2) when there is a claim against a manufacturer of a defective product where the defect results in damage only to the product and not to the person or to other property; and (3) when the parties are contractual strangers and there is no accompanying claim for damages to a person or property.

[21] Evidence 157 ⚿555.9

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.9 k. Damages. Most Cited Cases

Circuit court did not abuse its discretion by allowing rice farmers' expert's testimony on future damages, in suit brought by rice farmers against developer of genetically engineered rice, alleging,

inter alia, that developer was negligent in allowing the release of genetically engineered rice into the nation's rice supply; expert, who was an economic and financial analyst, a certified public accountant, an attorney, and an engineer, testified that his analysis revealed the existence of a linear relationship between the prices of world rice and Arkansas rice, based on this linear relationship, he calculated past losses using what was known as the classical ordinary-least-squares regression model, his opinion, based on the model, was that the lagging price of Arkansas rice was attributable to developer's contamination of the rice supply, and, in forecasting future damages, he predicted, after consulting the data and considering influences such as imports, exports, tariffs, and foreign exchange rates, that the negative price differential for Arkansas rice would continue for an extended period of time. Rules of Evid., Rule 702.

[22] Appeal and Error 30 ⚿970(2)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k970 Reception of Evidence
30k970(2) k. Rulings on admissibility of evidence in general. Most Cited Cases

Supreme Court reviews the admission of expert testimony under an abuse-of-discretion standard. Rules of Evid., Rule 702.

[23] Evidence 157 ⚿555.2

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.2 k. Necessity and sufficiency. Most Cited Cases

Any weakness in the factual underpinning of an expert's opinion may be explored on cross-examination, and such a weakness goes to the weight and credibility of the expert's testimony.

[24] Damages 115 ⚿91.5(1)

115 Damages
115V Exemplary Damages
115k91.5 Grounds for Exemplary Damages
115k91.5(1) k. In general. Most Cited Cases

In reviewing award of punitive damages, the critical inquiry is whether a party likely knew or ought to have known, in light of the surrounding circumstances, that his conduct would naturally or probably result in injury, and that he continued such conduct in reckless disregard of the consequences from which malice could be inferred.

[25] Appeal and Error 30 ⚿295

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(D) Motions for New Trial
30k295 k. Review of amount of recovery or relief awarded. Most Cited Cases

Appeal and Error 30 ⚿422

30 Appeal and Error
30VII Transfer of Cause
30VII(D) Writ of Error, Citation, or Notice
30k416 Form and Requisites of Notice
30k422 k. Defects, objections, and amendments. Most Cited Cases

Developer of genetically engineered rice failed to preserve for appellate review claim that jury's award of $42,000,000 in punitive damages was grossly excessive, in negligence suit brought against it by rice farmers; developer's arguments challenging the amount of punitive damages were made only in its posttrial motion for new trial and remittitur, the circuit court did not take action on this motion within the applicable 30-day window, and, thus, the motion was deemed denied at the expiration of the 30-day period, and none of the notices of appeal mentioned that an appeal was being sought from the deemed-denial of the motion for new trial and remittitur. Rules App.Proc., Civil Rule 4(b)(1).

[26] Appeal and Error 30 ⇐1004(11)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1004 Amount of Recovery
30k1004(6) Particular Cases and Items
30k1004(11) k. Exemplary or punitive damages. Most Cited Cases

Constitutional Law 92 ⇐4427

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive damages. Most Cited Cases

Punitive damages are reviewed in a two-step process: first, whether the award is consistent with state law; and second, whether it violates the Due Process Clause. U.S.C.A. Const.Amend. 14.

West Codenotes
Held UnconstitutionalWest's A.C.A. § 16–55–208.

****825** Wright, Lindsey & Jennings, LLP, by: Edwin L. Lowther, Jr., Scott Irby, and Gary D. Marts, Jr., for appellants.

Hare, Wynn, Newell & Newton, LLP, by: Scott A. Powell, Don McKenna, Bruce J. McKee, and Paul Byrd, for appellees.

Brian G. Brooks, Attorney at Law, PLLC, by: Brian G. Brooks, for amicus curiae Arkansas Trial Lawyers Association.

Barrett & Deacon, P.A., by: Barry Deacon, Andrew H. Dallas, and Jason M. Milne, for amicus curiae Riceland Foods, Inc.

Lax, Vaughn, Fortson, Jones & Rowe, P.A., by: Roger D. Rowe, for amicus curiae USA Rice Federatio, Inc.

COURTNEY HUDSON GOODSON, Justice.

***1** Appellants Bayer CropScience LP; Bayer CropScience Holding, Inc.; Bayer CropScience AG; Bayer AG; and Bayer BioScience NV (collectively "Bayer") appeal the judgment entered by the Circuit Court of Lonoke County awarding $5,975,605 in compensatory damages and $42,000,000 in punitive damages to appellees, who are the following rice farmers or farming entities: Randy Schafer; End of the Road Farms, Inc.; Schafer Planting Co.; Wallace Farms; Robert E. Moery; Kyle Moery; Carter Farms ***2** Partnership; Petrus Farms, Inc.; Robert Petrus, individually and as trustee of the Robert Petrus Revocable Trust; R & B Amaden Farms; Randall J. Snider; R & S Planting Co., Inc.; S & R Farms; A.S. Kelly and Sons; and Neil Daniels Farms (collectively "rice farmers"). For reversal, Bayer contends that (1) the circuit court erred in ruling that Arkansas Code Annotated section 16–55–208 (Repl.2005) is unconstitutional; (2) the rice farmers' claims are barred by the "economic-loss doctrine"; (3) the circuit court abused its discretion by failing to exclude the testimony of Robert E. Marsh; (4) the circuit court erred by submitting the punitive-damage claim to the jury; and (5) the punitive-damage award is excessive under Arkansas common law and the Due Process Clause of the United States Constitution. As this appeal involves a challenge to the constitutionality of a statute, our jurisdiction is pursuant to Ark. Sup.Ct. R. 1–2(a)(1) and (b)(6). In all respects, we affirm the circuit court's judgment.

****826** I. *Factual and Procedural Background*

To place the issues in context, a review of the record reveals the following facts. In the United States, rice is grown primarily in Arkansas, California, Louisiana, Mississippi, Missouri, and Texas. Of those states, Arkansas is the leading producer of long-grain rice. Prior to 2006, fifty-two percent of the long-grain rice grown in the United States was exported to other countries.

In the 1990s, Bayer or its corporate predecessors developed LibertyLink Rice (LLRice), a genetically engineered rice that is resistant to Bayer's "Liberty" herbicide, a broad-spectrum weed killer that is known for controlling red rice, a pernicious weed that diminishes yield and reduces the price of a rice crop. From 1999 to 2001, Bayer conducted *3 outdoor field tests of LLRice in the United States, primarily at Louisiana State University's Rice Research Station in Crowley, Louisiana, under the supervision of Dr. Steve Linscombe.

As a genetically modified agricultural product, LLRice falls under the regulatory control of the United States Department of Agriculture (USDA). On August 18, 2006, the USDA announced that trace amounts of LLRice 601 had been detected in the United States long-grain rice supply. Initially, the strain LLRice 601 was found in Cheniere, a popular variety of long-grain rice seed. Six months later, LLRice 604 was discovered in Clearfield 131, another variety of long-grain rice. At the time of the August 2006 announcement, the USDA had not granted regulatory approval for either LLRice 601 or 604. In addition, no foreign government had authorized the commercial use of genetically modified rice for human consumption.

Because of the contamination, the USDA banned the use of Cheniere and Clearfield 131 for the 2007–2008 crop year. Those involved in the United States rice industry, including USA Rice Federation, Inc., developed a seed plan to remove the LLRice strains from the American rice supply. Before planting, all rice seed was tested to ensure that it contained no contaminant. First handlers of rice, namely mills, were required to test harvested rice for the presence of LLRice and to document that the rice was free of contamination. The plan also included an educational campaign to promote compliance with the seed plan. Another component of the plan was to clean all rice-farming equipment and storage bins to guard against the risk of further contamination. Crop rotation was encouraged to prevent the germination of any volunteers in a field where rice had been grown in 2006.

*4 Domestically, the USDA took swift action to grant regulatory approval of LLRice 601 in November 2006. However, the world-wide reaction to the contamination of the American long-grain-rice supply with LLRice proved to be profoundly negative, due to government and consumer antipathy toward genetically altered food sources. Mexico, the largest importer of American rice, required a certification that the rice was not genetically modified before the rice would be allowed within its borders. Canada, Iraq, Korea, Taiwan, Saudi Arabia, Cuba, and Japan required testing to guard against the infiltration of LLRice. Trade with the Philippines ceased, and Russia banned the import of all American rice. Most notably, the European Union, consisting of twenty-seven countries and representing one-sixth of the American rice export market, implemented emergency measures to impose stringent testing requirements at points of entry. Between 2005 and 2008, exports of American rice decreased by 622,972 metric tons.

The rice farmers filed suit against Bayer in the Circuit Court of Lonoke County on **827 August 29, 2006. In their fifth amended complaint, they alleged that Bayer knew that the majority of American-grown rice was exported; that Bayer knew that other countries did not import genetically modified rice; and that Bayer knew that any contamination of the United States rice supply with genetically altered rice would depress the export market and adversely affect the price of American long-grain rice.[FN1] As their cause of action, the rice farmers claimed *5 that Bayer was negligent in allowing the adventitious release of LLRice 601 and 604 into the nation's rice supply by not taking adequate precautions during field trials to prevent cross-pollination or the commingling of genetically modified rice seed with conventional seed.[FN2] As damages, they claimed that Bayer's negligence caused economic harm by driving down the market price for American long-grain rice. The rice farmers also alleged that they were entitled to punitive damages because

Bayer knew, or ought to have known, that their negligent conduct would naturally and probably result in damages to them and that Bayer engaged in that conduct in reckless and wanton disregard of the consequences.

> FN1. The rice farmers asserted claims against other Bayer entities and Riceland Foods, Inc., but those claims were dismissed.
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> FN2. The rice farmers alleged additional causes of action for fraudulent concealment, ultra-hazardous activity, and strict liability. Ultimately, only the negligence claim was submitted to the jury.

During the course of the litigation, Bayer moved in limine to exclude the testimony of Robert E. "Jay" Marsh, the rice farmers' expert on the issue of damages. Bayer argued that Marsh's assessment of past damages and his projections regarding future damages were speculative and not based on sound, scientifically reliable methods. The rice farmers responded that the methodology used by Marsh was the standard approach to econometric modeling and that Marsh's testimony satisfied the test of admissibility for expert opinion.

Bayer also filed a motion for summary judgment, arguing that the rice farmers' claims should be dismissed because the "economic-loss doctrine" precludes recovery in tort for economic loss where the plaintiff has suffered no physical injury to his person or property. In opposing the motion for summary judgment, the rice farmers asserted that this court had rejected the doctrine in other contexts and that this court had not recognized the doctrine's ***6** application in negligence cases.

The rice farmers also filed a pretrial motion asking the circuit court to declare unconstitutional the limitation on punitive damages found in Arkansas Code Annotated section 16–55–208. They argued that the statutory cap on punitive damages offends the separation-of-powers doctrine found in article 4, section 2 of the Arkansas Constitution by encroaching upon the judiciary's authority to exercise remittitur and by intruding on this court's power vested under amendment 80, section 3, to prescribe the rules of pleading, practice, and procedure for all courts. In addition, the rice farmers asserted that the statute violates article 5, section 32 of the Arkansas Constitution, which prohibits the General Assembly from limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property. In response, Bayer argued that the statute's cap on punitive damages did not invade the powers of the judiciary because the law is substantive and not procedural in nature. Further, Bayer contended that the statute did not violate article 5, section 32, as its ****828** proscription applies only to compensatory damages.[FN3]

> FN3. In their briefs before the circuit court, the parties quibbled over whether the statute should be subject to strict scrutiny or a rational-basis analysis. However, that standard of review applies to constitutional challenges based on equal-protection-type arguments, and thus that analysis is not applicable here. *Luebbers v. Money Store, Inc.*, 344 Ark. 232, 40 S.W.3d 745 (2001).

The circuit court conducted a pretrial hearing on March 22, 2010. At the hearing, the circuit court orally denied Bayer's motion in limine to exclude the testimony of Marsh, and the court refused Bayer's motion for summary judgment concerning the economic-loss doctrine. From the bench, the circuit court also ruled that ***7**Arkansas Code Annotated section 16–55–208 is unconstitutional.

The case proceeded to trial before a jury, beginning on March 23, 2010, and ending on April 15, 2010. At the conclusion of the rice farmers' case, Bayer moved both orally and in writing for directed verdict on the issue of punitive damages, arguing that the rice farmers had presented insufficient evidence to support a punitive-damage award under Arkansas Code Annotated section 16–55–206

(Supp.2011). The circuit court granted Bayer's motion with regard to the first prong of the statute concerning intentional conduct, finding that the rice farmers had produced no evidence that Bayer intentionally pursued a course of conduct for the purpose of causing injury or damage. The court denied the motion on the second prong of the statute, ruling that the rice farmers had offered substantial evidence that Bayer knew or should have known, in light of the surrounding circumstances, that its conduct would naturally and probably result in injury or damage and that it continued the conduct with malice or reckless disregard of the consequences from which malice could be inferred. In the same fashion, Bayer moved for a directed verdict on the ground that the rice farmers' claims were barred under the economic-loss doctrine. On this point, Bayer reasserted the argument advanced in its previous motion for summary judgment. The circuit court again rejected Bayer's argument and denied the motion for directed verdict. Bayer renewed these motions at the close of all the evidence, and the circuit court denied them.

The jury found that Bayer was negligent, and it awarded compensatory damages in the amounts of $44,806 to Randy Schafer; $62,660 to End of the Road Farms, Inc.; $191,239 to Schafer Planting Co.; $292,794 to Wallace Farms; $221,537 to Robert E. Moery; $117,700 *8 to Kyle Moery; $1,386,988 to Carter Farms Partnership; $32,894 to Robert Petrus, Petrus Farms, and Robert Petrus Revocable Trust; $486,264 to R & B Amaden Farms; $1,222,523 to Randall J. Snider; $437,334 to R & S Planting Co., Inc.; $186,741 to S & R Farms; $1,046,932 to A.S. Kelly and Sons; and $245,193 to Neil Daniels Farms. The jury also assessed punitive damages of $21,000,000 against Bayer CropScience LP and $21,000,000 against Bayer CropScience AG.

On May 5, 2010, the circuit court entered judgment based on the jury's verdicts. On May 19, 2010, Bayer filed timely motions for judgment notwithstanding the verdict (JNOV), new trial, and remittitur. In its motion for new trial and remittitur, Bayer argued that the punitive-damage award should be reduced or that it be granted a new trial because the verdict was grossly excessive under both Arkansas law and the federal constitution. Bayer asked the circuit court to reconsider its decision that **829Arkansas Code Annotated section 16–55–208 is unconstitutional and to apply the statutory limitation to the jury's award of punitive damages. Bayer also contended that it was entitled to JNOV or a new trial because the rice farmers did not offer substantial evidence of conduct for which punitive damages may be imposed. In addition, Bayer incorporated by reference its previously filed motions for summary judgment and directed verdict. The rice farmers opposed the motions, which were deemed denied on June 18, 2010, under Rule 4(b)(1) of the Arkansas Rules of Appellate Procedure–Civil. On July 19, 2010, each Bayer defendant filed separate and timely notices of appeal from the judgment entered on May 5, 2010. This appeal followed.

II. *Constitutionality of Arkansas Code Annotated Section 16–55–208*

[1][2][3] *9 As its first issue on appeal, Bayer contends that the circuit court erred in ruling that Arkansas Code Annotated section 16–55–208 is unconstitutional. Bayer asserts that the statute does not offend article 5, section 32 of the Arkansas Constitution and that it does not violate the constitution's provisions regarding separation of powers found in article 4, section 2 and amendment 80, section 3. We first consider Bayer's contention that section 16–55–208 does not violate article 5, section 32 of our constitution. On this question, Bayer argues that the statutory cap on punitive damages is constitutional because the prohibition against limiting the amount of recovery applies only to compensatory damages. In support of the circuit court's ruling, the rice farmers argue that the cap falls squarely within the constitution's proscription because it limits the amount of a plaintiff's recovery. FN4

FN4. As further support of the circuit court's ruling, the rice farmers assert that the statutory cap also violates the right to a trial by jury guaranteed by article 2, section 7 of the Arkansas Constitution. However, the infringement of the right to a jury trial was not raised before the circuit court. It is well settled that this court will not address an issue raised for the first time on appeal, even a constitutional argument. *Brown v. Kelton,* 2011 Ark. 93, 380 S.W.3d 361.

[4][5][6] We begin by stating that there is a presumption of validity attending every consideration of a statute's constitutionality; every act carries a strong presumption of constitutionality, and before an act will be held unconstitutional, the incompatibility between it and the constitution must be clear. *Proctor v. Daniels,* 2010 Ark. 206, —— S.W.3d ——. Any doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality, and the heavy burden of demonstrating the unconstitutionality is upon the one attacking it. *Clark v. Johnson Reg'l Med. Ctr.,* 2010 Ark. 115, 362 S.W.3d 311. When possible, this court ***10** will construe a statute so that it is constitutional. *Cato v. Craighead Cnty. Circuit Court,* 2009 Ark. 334, 322 S.W.3d 484.

[7][8][9][10][11] In this case, we are called upon to construe the meaning of the constitution. When interpreting the constitution on appeal, our task is to read the laws as they are written and interpret them in accordance with established principles of constitutional construction. *Brewer v. Fergus,* 348 Ark. 577, 79 S.W.3d 831 (2002). Language of a constitutional provision that is plain and unambiguous must be given its obvious and common meaning. *Edwards v. Campbell,* 2010 Ark. 398, 370 S.W.3d 250. Neither rules of construction nor rules of interpretation may be used to defeat the clear and certain meaning of a constitutional provision. *Id.* It is this court's responsibility to decide what a constitutional provision means, and we will review a lower court's construction de ****830** novo. *First Nat'l Bank of DeWitt v. Cruthis,* 360 Ark. 528, 203 S.W.3d 88 (2005). We are not bound by the decision of the circuit court; however, in the absence of a showing that the circuit court erred in its interpretation of the law, that interpretation will be accepted as correct on appeal. *Id.*

Section 16–55–208, which establishes limits on awards of punitive damages, is a segment of the Civil Justice Reform Act of 2003. It states as follows:

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

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

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

(b) Subsection (a) of this section shall not apply when the finder of fact:

***11** 1) Determines by clear and convincing evidence that, at the time of the injury, the defendant intentionally pursued a course of conduct for the purpose of causing injury or damage; and

(2) Determines that the defendant's conduct did, in fact, harm the plaintiff.

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

Article 5, section 32 of the Arkansas Constitution, as amended by amendment 26, provides as follows:

> The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of employees, and to whom said payment shall be made. It shall have power to provide the means, methods, and forum for adjudicating claims arising under said laws, and for securing payment of same. *Provided, that otherwise no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property;* and in case of death from such injuries the right of action shall survive, and the General Assembly shall prescribe for whose benefit such action shall be prosecuted.

(Emphasis added.) Prior to 1938, section 32 of article 5 provided that "[n]o act of the General Assembly shall limit the amount to be recovered for injuries resulting in death or for injuries to persons or property [.]" *Baldwin Co. v. Maner,* 224 Ark. 348, 273 S.W.2d 28 (1954). The language that now precedes the original text was added in 1938 with the adoption of amendment 26 in order to confer upon the General Assembly the power to enact legislation to prescribe the amount of compensation to be paid employees for injury or death. *Young v. G.L. Tarlton, Contractor, Inc.,* 204 Ark. 283, 162 S.W.2d 477 (1942).

[12] ***12** On the occasions that we have considered article 5, section 32, we have interpreted the phrase "injuries to persons or property" as meaning physical injuries to the person and physical injuries to property. *Sw. Bell Tel. Co. v. Wilks,* 269 Ark. 399, 601 S.W.2d 855 (1980). This court has also observed that the General Assembly may alter the common law to advance reasonable****831** policy objectives. *White v. City of Newport,* 326 Ark. 667, 933 S.W.2d 800 (1996). However, our precedents firmly establish that article 5, section 32 bestows upon the General Assembly the power to limit the amount of recovery *only* in matters arising between employer and employee. *See Stapleton v. M.D. Limbaugh Constr. Co.,* 333 Ark. 381, 969 S.W.2d 648 (1998); *Maner, supra; Brothers v. Dierks Lumber & Coal Co.,* 217 Ark. 632, 232 S.W.2d 646 (1950); *Young, supra.* As we have made plain, the General Assembly "may limit tort liability only where there is an employment relationship between the parties." *Stapleton,* 333 Ark. at 392, 969 S.W.2d at 653.

[13][14] Bayer places much emphasis on distinctions drawn between compensatory and punitive damages to argue that article 5, section 32 speaks only to compensatory damages. To be certain, compensatory damages are awarded for the purpose of making the injured party whole, as nearly as possible. *Dunaway v. Troutt,* 232 Ark. 615, 339 S.W.2d 613 (1960), *overruled on other grounds by United Ins. Co. of Am. v. Murphy,* 331 Ark. 364, 961 S.W.2d 752 (1998). On the other hand, the function of punitive damages is not to compensate but to punish the defendant for his wrong. *Id.* We have said,

> "Punitive damages" are not intended to remunerate the injured party for the damages he may have sustained. They are not to compensate; they are the penalty the law inflicts for gross, wanton, and culpable negligence, and are allowed as a warning or as an example to defendants and others. Because they ***13** are an example as to what the law will do for such conduct when it results in injury to the person or property of others, they are sometimes called exemplary damages.

Vogler v. O'Neal, 226 Ark. 1007, 1015, 295 S.W.2d 629, 634 (1956); *see also Vickery v. Ballentine,* 293 Ark. 54, 732 S.W.2d 160 (1987); *Holmes v. Hollingsworth,* 234 Ark. 347, 352 S.W.2d 96 (1961). This court has also recognized that, because compensation of a plaintiff is not the purpose of exemplary or punitive damages, an award may be somewhat of a windfall to him. *Ray Dodge, Inc. v. Moore,* 251 Ark. 1036, 479 S.W.2d 518 (1972).

[15][16] That being said, it is also true that punitive damages are dependent upon the recovery of compensatory damages, as an award of actual damages is a predicate for the recovery of punitive damages. *See Elliott v. Hurst,* 307 Ark. 134, 817 S.W.2d 877 (1991); *Kroger Grocery & Baking Co. v. Reeves,* 210 Ark. 178, 194 S.W.2d 876 (1946). Moreover, we have observed that the issues of compensatory damages and punitive damages are so interwoven that an error with respect to one requires a retrial of the whole case. *Life & Cas. Ins. Co. of Tenn. v. Padgett,* 241 Ark. 353, 407 S.W.2d 728 (1966). Although compensatory and punitive damages serve differing purposes, an award of punitive damages is nonetheless an integrant part of "the amount recovered for injuries resulting in death or for injuries to persons or property."

[17][18] We hold that section 16–55–208 is unconstitutional under article 5, section 32 as it limits the amount of recovery outside the employment relationship. Therefore, we affirm the circuit court's decision. Because we conclude that the statutory cap is unconstitutional ***14** on this basis, we need not address the remaining constitutional challenges to the statute.[FN5] ****832** *Johnson v. Rockwell Automation, Inc.,* 2009 Ark. 241, 308 S.W.3d 135.

> FN5. Despite the concurring justice's protestations to the contrary, it is without question that the issue concerning the constitutionality of the statutory cap on punitive damages is preserved for appeal. In the present case, the constitutional issue was raised via pretrial motion. With regard to such motions, our preservation requirements are simple, straightforward, and well settled. The burden of obtaining a ruling is on the movant; only objections and matters left unresolved are waived and may not be relied upon on appeal. *Stilley v. Univ. of Ark. at Ft. Smith,* 374 Ark. 248, 287 S.W.3d 544 (2008); *Reed v. Guard,* 374 Ark. 1, 285 S.W.3d 662 (2008); *White v. Davis,* 352 Ark. 183, 99 S.W.3d 409 (2003); *Parmley v. Moose,* 317 Ark. 52, 876 S.W.2d 243 (1994). Here, the circuit court conducted a hearing and resolved the motion by issuing a ruling declaring the statute unconstitutional. Our rules require nothing more. If the concurrence were correct in its view, then neither the circuit court's decision denying the motion in limine to exclude Marsh's testimony nor the court's denial of the motion to dismiss based on the economic-loss doctrine would be preserved for review, because the circuit court also disposed of those motions in rulings from the bench.
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> In addition, the circuit court's failure to state the basis for its decision is no impediment to our review. Although considered the better practice for a circuit court to explain its decision, findings of fact and conclusions of law are not necessary with regard to decisions on motions. *Stilley v. Fort Smith Sch. Dist.,* 367 Ark. 193, 238 S.W.3d 902 (2006); Ark. R. Civ. P. 52(a). Thus, the circuit court's failure to specify the ground upon which it found the statute unconstitutional does not deter us from performing our duty to review the circuit court's decision.

III. *Economic–Loss Doctrine*

[19] As its second point on appeal, Bayer contends that, because the rice farmers sought only economic losses resulting from its asserted negligence, the circuit court erred in concluding that the rice farmers' claims are not barred by the economic-loss doctrine. The rice farmers counter with the argument that this court has rejected the economic-loss doctrine in the context of strict liability and that we should apply the same rule to claims involving negligence. They also contend that the doctrine has no application where, as here, ***15** the contamination caused by Bayer resulted in physical harm to property.

[20] In jurisdictions where the economic-loss doctrine finds favor, the rule may bar certain tort claims in three general circumstances: (1) when the loss is the subject matter of a contract; (2) when there is a claim against a manufacturer of a defective product where the defect results in damage only to the product and not to the person or to other property; and (3) when the parties are contractual strangers and there is no accompanying claim for damages to a person or property. *See, e.g., Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.*, 29 S.W.3d 282 (Tex.App.2000). The corollary to the economic-loss doctrine is that the rule does not apply if the plaintiff's economic harm results from physical harm to the plaintiff's person or other property. Dan B. Dobbs, *The Law of Torts* § 609 (2011); *see also In re Genetically Modified Rice Litig.*, 666 F.Supp.2d 1004 (E.D.Mo.2009); *In re StarLink Corn Prods. Liab. Litig.*, 212 F.Supp.2d 828 (N.D.Ill.2002).

As the rice farmers correctly point out, this court has declined to recognize the economic-loss doctrine in cases of strict liability, as we allow the recovery of purely economic losses, even where the damage relates only to the defective product. *Farm Bureau Ins. Co. v. Case Corp.*, 317 Ark. 467, 878 S.W.2d 741 (1994); *Berkeley Pump Co. v. Reed–Joseph Land Co.*, 279 Ark. 384, 653 S.W.2d 128 (1983); *Blagg v. Fred Hunt Co.*, 272 Ark. 185, 612 S.W.2d 321 (1981). Nevertheless, Bayer urges us to extend the doctrine to claims involving negligence. This case, however, does not present the opportunity to decide that question in light of evidence showing physical****833** harm to the rice farmers' lands, crops, and equipment.

***16** Robert Cummings, senior vice president of USA Rice Federation, Inc., testified that the contamination was small, but widespread. Rene Van Acker, the rice farmers' liability expert, testified that the contamination of Cheniere was .06% and that the contamination of Clearfield 131 was .01%. Farmer Randall Amaden testified that, with contamination of .06%, a combine harvesting a field would encounter a contaminated plant every two feet. Farmer Neil Daniels and his wife, Betty Daniels, testified as to Neil's efforts to clean his equipment as a result of the contamination. Although the rice farmers chose not to seek compensation for this harm, the evidence is sufficient for us to conclude that the contamination damaged the rice farmers' lands, crops, and equipment. Because the doctrine does not preclude the recovery of economic losses when there is damage to other property, we affirm on this point without addressing whether the doctrine applies in negligence cases.

IV. *Expert Testimony*

[21] In this argument for reversal, Bayer asserts that the testimony of Jay Marsh, who assessed the rice farmers' damages, was inadmissible because his opinion was not based on scientifically valid methodology. Bayer's complaint focuses only upon Marsh's projection of future damages, and Bayer claims that Marsh calculated those damages in an unscientific manner by taking the past-damages figures and multiplying them by two. The rice farmers respond that Marsh's estimate of future damages was not incompetent because the underpinning for Marsh's projection of future damages was based on standard methodology and because Marsh explained the basis of his opinion that losses would continue in the future.

Rule 702 of the Arkansas Rules of Evidence, which governs expert testimony, states ***17** that if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." In *Farm Bureau Mutual Insurance Co. of Arkansas v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000), this court adopted the analysis set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Under *Foote* and *Daubert*, a circuit court must make a preliminary assessment of whether the reasoning or method-

ology underlying expert testimony is valid and whether the reasoning and methodology used by the expert has been properly applied to the facts in the case. *Coca–Cola Bottling Co. v. Gill,* 352 Ark. 240, 100 S.W.3d 715 (2003). In *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), the United States Supreme Court set out the objective of *Daubert*'s gatekeeping requirement:

> The objective of that requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. Nor do we deny that, as stated in *Daubert,* the particular questions that it mentioned will often be appropriate for use in determining the reliability of challenged expert testimony. Rather, we conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular ****834** expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony.

[22] Our case law provides that we review the admission of expert testimony under an abuse-of-discretion standard. *Crowell v. Barker,* 369 Ark. 428, 255 S.W.3d 858 (2007). In discussing our standard of review for evidentiary rulings, we have said that circuit courts have broad discretion and that a circuit court's ruling on the admissibility of evidence will not be ***18** reversed absent an abuse of that discretion. *Advanced Envtl. Recycling Techs., Inc. v. Advanced Control Solutions, Inc.,* 372 Ark. 286, 275 S.W.3d 162 (2008).

With regard to proof of damages, this court has stated that a plaintiff must present proof that would enable the jury to fix damages in dollars and cents, and damages will not be allowed which are speculative, resting only upon conjectural evidence or the opinion of the parties. *Carr v. Nance,* 2010 Ark. 497, 370 S.W.3d 826; *Mine Creek Contractors, Inc. v. Grandstaff,* 300 Ark. 516, 780 S.W.2d 543 (1989). But this court has also stated that in those instances where damages simply cannot be proven with exactness, when the cause and existence of damages have been established by the evidence, recovery will not be denied merely because the damages cannot be determined with exactness. *Carr, supra.*

In his testimony, Marsh, who is an economic and financial analyst, a certified public accountant, an attorney, and an engineer, testified that his analysis revealed the existence of a linear relationship between the prices of world rice and Arkansas rice. He stated that, based on this linear relationship, he calculated past losses using what is known as the classical ordinary-least-squares regression model. Marsh said that this model was commonly used in the field of economic forecasting and that it was the standard by which all other models are judged. He stated that the model showed that, while the price of Arkansas rice had increased, the price had lagged behind the world price and did not increase as much as it should have. His opinion, based on the model, was that the lagging price of Arkansas rice was attributable to the contamination of the rice supply with LLRice. Marsh assessed the rice farmers' damages for a period beginning with the USDA announcement on August 18, 2006, and ***19** ending on July 31, 2008. Marsh testified that he estimated past damages during this period by calculating the difference between the prices at which people sold rice in Arkansas and the prices they should have been able to obtain but for the contamination. In forecasting future damages, Marsh predicted, after consulting the data and considering influences such as imports, exports, tariffs, and foreign exchange rates, that the negative price differential for Arkansas rice would continue for an extended period of time. In assessing future damages, Marsh said that he used the scientifically based numbers of past damages and multiplied them by two and then made adjustments for each farmer based on future grow-

ing plans. Marsh stressed that his estimates of future losses, as lasting only two years, were conservative, saying, "Knowing what the model has predicted over the past three years and knowing that there's been no change in the economic data, that represents, in my opinion, the minimal future loss."

[23] In this case, Marsh based his estimates of future damages on his calculations of past damages, which Bayer does not contend are unreliable. Marsh used those past-damages figures to extrapolate future losses, based on his judgment that ****835** the price of Arkansas rice would continue to lag behind the world price for a minimum of two years. Marsh thus explained the bases for his opinions. Any weakness in the factual underpinning of an expert's opinion may be explored on cross-examination, and such a weakness goes to the weight and credibility of the expert's testimony. *House v. Volunteer Transp., Inc.*, 365 Ark. 11, 223 S.W.3d 798 (2006); *SEECO, Inc. v. Hales*, 341 Ark. 673, 22 S.W.3d 157 (2000). Bayer had the opportunity to test Marsh's opinions with cross-examination, and it presented the ***20** testimony of its own expert, Walter Thurman, to critique Marsh's analyses. Our conclusion here is that Bayer's criticisms go to the weight but not to the admissibility of Marsh's opinions, and we hold that the circuit court did not abuse its discretion by allowing the testimony.

V. *Punitive Damages*

In this issue, Bayer presents two arguments for our consideration. First, Bayer contends that the circuit court erred by submitting the issue of punitive damages to the jury. Second, Bayer argues that the amount of punitive damages awarded is excessive under Arkansas common law and federal due-process standards.

A. Directed Verdict

Bayer's contention on this point is that it was entitled to a directed verdict as a matter of law because the undisputed evidence demonstrates that it took steps to guard against the risk of an accidental release of genetically altered rice. Bayer states that it established a stewardship program to achieve compliance with federal regulations; that it created compliance notebooks to instruct those conducting field tests regarding containment measures; and that it required those handling LLRice to sign a contract of compliance to verify adherence to the guidelines in the notebooks. Bayer asserts that, under Arkansas law, it cannot be subjected to an award of punitive damages as long as it exercised some level of care, as opposed to an "absence of all care."

Bayer derives this argument from our decision of *National By–Products, Inc. v. Searcy House Moving Co.*, 292 Ark. 491, 731 S.W.2d 194 (1987). There, we noted that an award ***21** of punitive damages is justified only where the evidence indicates that the defendant acted wantonly in causing the injury or with such a conscious indifference to the consequences that malice may be inferred. In defining wantonness and conscious indifference to the consequences, we said,

> Wantonness is essentially an attitude of mind and imparts to an act of misconduct a tortious character, such conduct as manifests a "disposition of perversity." Such a disposition or mental state is shown by a person, when, notwithstanding his conscious and timely knowledge of an approach to an unusual danger and of common probability of injury to others, he proceeds into the presence of danger, with indifference to consequences and *with absence of all care.*
>
> It is not necessary to prove that the defendant deliberately intended to injure the plaintiff. It is enough if it is shown that, indifferent to consequences, the defendant intentionally acted in such a way that the natural and probable consequence of his act was injury to the plaintiff.

Nat'l By–Products, Inc., 292 Ark. at 494, 731 S.W.2d at 195–96 (quoting *Ellis v. Ferguson*, 238 Ark. 776, 778–79, 385 S.W.2d 154, 155 (1964)) (emphasis added). We repeated this definition in *Alpha Zeta Chapter of Pi Kappa Alpha v. Sullivan*, 293 Ark. 576, 740 S.W.2d 127 (1987).

**836 [24] Bayer would have us view the phrase "with absence of all care" in isolation and as an absolute requirement for a punitive-damage award. We do not agree with this assertion. The fact that Bayer employed some measures to prevent the release of LLRice, standing alone and without regard to other facts and attending circumstances, does not absolve it of liability for punitive damages. Rather, the critical inquiry is whether a party likely knew or ought to have known, in light of the surrounding circumstances, that his conduct would naturally or probably result in injury, and that he continued such conduct in reckless *22 disregard of the consequences from which malice could be inferred. *See Union Pac. R.R. Co. v. Barber,* 356 Ark. 268, 149 S.W.3d 325 (2004) (citing *In re Aircraft Accident at Little Rock,* 351 F.3d 874 (8th Cir.2003)). Bayer does not contest the jury's resolution of those factual issues. Thus for the reasons explained, the circuit court did not err by rejecting Bayer's legal argument advanced in its motion for a directed verdict.

B. Excessiveness of the Award

[25][26] As its final point, Bayer contends that the jury's award of $42,000,000 is grossly excessive. Punitive damages are reviewed by our courts in a two-step process: first, whether the award is consistent with state law; and second, whether it violates the Due Process Clause, as analyzed by the United States Supreme Court in *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). *Allstate Ins. Co. v. Dodson,* 2011 Ark. 19, 376 S.W.3d 414. We have set forth the following law related to remittitur and punitive damages in the context of state common-law analysis:

> When considering the issue of remittitur of punitive damages ... [w]e consider the extent and enormity of the wrong, the intent of the party committing the wrong, all the circumstances, and the financial and social condition and standing of the erring party. Punitive damages are a penalty for conduct that is malicious or perpetrated with the deliberate intent to injure another. When punitive damages are alleged to be excessive, we review the proof and all reasonable inferences in the light most favorable to the appellees, and we determine whether the verdict is so great as to shock the conscience of this court or to demonstrate passion or prejudice on the part of the trier of fact. It is important that the punitive damages be sufficient to deter others from comparable conduct in the future.

Advocat, Inc. v. Sauer, 353 Ark. 29, 50, 111 S.W.3d 346, 357–58 (2003) (citations omitted) (quoting *23*Routh Wrecker Serv. v. Washington,* 335 Ark. 232, 240–41, 980 S.W.2d 240, 244 1998)).

In *BMW of North America v. Gore, supra,* the United States Supreme Court set forth three guideposts to consider in determining whether a punitive-damages award is excessive under federal law: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive-damages award, also expressed as the ratio between compensatory and punitive damages; and (3) the difference between the punitive award and comparable civil penalties authorized or imposed in comparable cases. *Dodson, supra.*

We are not able to address Bayer's arguments concerning the excessiveness of the punitive-damage award because this issue is not preserved for appeal. Bayer's arguments challenging the amount of punitive damages were made only in its posttrial motion for new trial and remittitur. The circuit court did not take action on **837 this motion within the thirty-day window allowed by Rule 4(b)(1) of the Arkansas Rules of Appellate Procedure–Civil , and in accordance with this rule, the motion was deemed denied at the expiration of the thirty-day period. Each Bayer defendant filed separate but identical notices of appeal giving "notice of its appeal to the Arkansas Supreme Court from the Court's judgment entered on May 5, 2010." None of the notices of appeal mention that an appeal was

being sought from the deemed-denial of the motion for new trial and remittitur.

Our rule states that a notice of appeal "shall designate the judgment, decree, order or part thereof appealed from." Ark. R.App. P.-Civ. 3(e)(ii). In *Tate–Smith v. Cupples,* 355 Ark. 230, 134 S.W.3d 535 (2003), we noted that, when a motion for a new trial has been ***24** deemed denied, the only appealable matter is the original order and that any previously filed notice of appeal may be amended to appeal from the deemed-denied motion. In *U.S. Bank, N.A. v. Milburn,* 352 Ark. 144, 100 S.W.3d 674 (2003), this court indicated that a notice of appeal should be filed in order to appeal from the denial of a posttrial motion for reconsideration. We have also recognized that a notice of appeal must be "judged by what it recites and not what it was intended to recite." *Thelman v. State,* 375 Ark. 116, 119, 289 S.W.3d 76, 78 (2008) (citing *Ark. Dep't of Human Servs. v. Shipman,* 25 Ark. App. 247, 253, 756 S.W.2d 930, 933 (1988)). In this case, Bayer did not state in the notice of appeal that it was appealing the denial of the posttrial motion for new trial and remittitur. Therefore, the question of the excessiveness of the jury's award is not properly before us. *See, e.g., Vibo Corp. v. State ex rel. McDaniel,* 2011 Ark. 124, 380 S.W.3d 411.

Affirmed.

BAKER, J., concurs.

KAREN R. BAKER, Justice, concurring.

While I agree with the outcome of the case, because I would not reach the constitutional issue on this matter, I must concur.

The circuit court in this case ruled on the constitutional issue from the bench and entered no written opinion in regard to it. This is not enough to preserve a constitutional matter for appeal.

> Although the circuit court ruled on this issue from the bench, the final, written order did not address this issue. In a case where the judge made a constitutional decision from the bench, we stated, "Pursuant to Administrative Order 2(b)(2), an oral order announced from the bench does not become effective until reduced to writing and filed." When the circuit court makes no ruling on an issue, the appellate court is precluded from reaching the issue on appeal.

***25** *Boellner v. Clinical Study Ctrs., LLC,* 2011 Ark. 83, 23, 378 S.W.3d 745, 759–60 (citations omitted) (quoting *Oliver v. Phillips,* 375 Ark. 287, 290 S.W.3d 11 (2008)). *See also McGhee v. Ark. State Bd. of Collection Agencies,* 368 Ark. 60, 243 S.W.3d 278 (2006) (refusing to address the constitutionality of the Check–Cashers' Act where no written order was entered following the trial court's ruling from the bench that the act was unconstitutional); *Ghegan & Ghegan, Inc. v. Barclay,* 345 Ark. 514, 49 S.W.3d 652 (2001) (refusing to address constitutional issue even when the order generally addresses the matter but fails to make a specific ruling on the constitutionality of a statute).

Further, because the circuit court's oral ruling from the bench provided only that, "the Court finds that the statute is unconstitutional," we do not know which of the ****838** two grounds put forth by appellees the court found to be persuasive. Without knowing why the court ruled on an issue, we are unable to review that decision for error. For that reason, this court promulgated Administrative Order No. 2. Without a written order, we are forced to speculate on the reason behind the trial court's ruling and then to usurp the role of the trial court in declaring why Arkansas Code Annotated section 16–55–208 is unconstitutional.

Because the Bayer defendants waived the point by not filing a motion for clarification of the circuit court's ruling or a motion seeking additional findings of fact and conclusions of law under Arkansas Rule of Civil Procedure 52, I agree with the majority's outcome on the matter. However, because the constitutional matter is not preserved for appeal, I concur.

Ark.,2011.

Bayer CropScience LP v. Schafer
2011 Ark. 518, 385 S.W.3d 822

END OF DOCUMENT

ATTACHMENT 6

C

Supreme Court of Arkansas.
Teresa L. BROUSSARD, Appellant
v.
ST. EDWARD MERCY HEALTH SYSTEM, INC. d/b/a St. Edward Mercy Medical CenterSisters of Mercy Health System, St. Louis, Inc.; Dr. Stephen Seffense; Dr. Michael Coleman, Jr.; Mary Brewer; Tony McClory; Gayla Patterson; Jim Self; Jane Does Nos. 1–5; and John Does Nos. 1–5, Appellees.

No. 11–561.
Jan. 19, 2012.

Background: Patient brought medical malpractice action against physicians who had treated an injury that had appeared at surgical site following patient's thyroid surgery. The Circuit Court, Sebastian County, Stephen Tabor, J., entered summary judgment in favor of physicians, and patient appealed.

Holding: The Supreme Court, Jim Hannah, C.J., held that statute requiring expert testimony in malpractice actions to be given by medical care providers of same specialty as defendant violated separation of powers.

Reversed and remanded.

West Headnotes

[1] Appeal and Error 30 ⇐863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In general. Most Cited Cases

Generally, in reviewing the grant of a motion for summary judgment, the appellate court determines if summary judgment was appropriate based on whether the evidence presented in support of summary judgment leaves a material question of fact unanswered.

[2] Appeal and Error 30 ⇐893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In general. Most Cited Cases

The question of the correct application and interpretation of a statute is a question of law, which an appellate court decides de novo.

[3] Constitutional Law 92 ⇐2362

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2362 k. Evidence. Most Cited Cases

Health 198H ⇐604

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(A) In General
198Hk601 Constitutional and Statutory Provisions
198Hk604 k. Validity. Most Cited Cases

Amendment to statute governing plaintiff's burden of proof in medical malpractice actions, requiring expert testimony to be given by medical care providers of same specialty as defendant, violated state constitutional principle of separation of powers and the inherent authority of the courts to protect the integrity of proceedings and the rights of

the litigants, and thus was invalid; amendment was a procedural law that lay solely within province of courts, since it did not define rights or duties, but rather set qualifications a witness must possess before he or she could testify in court. West's A.C.A. § 16–114–206(a); West's A.C.A. Const.Amend. No. 80, § 3.

[4] Constitutional Law 92 ⚿990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In general. Most Cited Cases

Every statute enjoys a presumption of constitutionality.

[5] Constitutional Law 92 ⚿1030

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1030 k. In general. Most Cited Cases

The party asserting that a statute is unconstitutional bears the burden of demonstrating that the statute violates the constitution.

[6] Constitutional Law 92 ⚿1002

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1001 Doubt
92k1002 k. In general. Most Cited Cases

In determining whether a statute is constitutional, any doubt is resolved in favor of constitutionality.

[7] Constitutional Law 92 ⚿990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In general. Most Cited Cases

When possible, a statute will be construed so that it is constitutional.

[8] Statutes 361 ⚿1072

361 Statutes
361III Construction
361III(A) In General
361k1071 Intent
361k1072 k. In general. Most Cited Cases
(Formerly 361k181(1))

When construing a statute, a court interprets the statute to give effect to the intent of the General Assembly.

[9] Statutes 361 ⚿1111

361 Statutes
361III Construction
361III(C) Clarity and Ambiguity; Multiple Meanings
361k1107 Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language
361k1111 k. Plain language; plain, ordinary, common, or literal meaning. Most Cited Cases
(Formerly 361k188)

A court determines legislative intent from the ordinary meaning of the language used where the language of the statute is plain and unambiguous.

[10] Statutes 361 ⚿1092

361 Statutes
361III Construction
361III(B) Plain Language; Plain, Ordinary, or Common Meaning
361k1092 k. Natural, obvious, or accepted meaning. Most Cited Cases
(Formerly 361k188)
Words in a statute are given their ordinary and usually accepted meaning in common language.

[11] Statutes 361 ⚿1004

361 Statutes
361I In General
361k1002 Nature and Definition of Legislative Acts
361k1004 k. Substantive or procedural statutes. Most Cited Cases
(Formerly 361k174)
"Substantive" law creates, defines, and regulates the rights, duties, and powers of parties.

[12] Statutes 361 ⚿1004

361 Statutes
361I In General
361k1002 Nature and Definition of Legislative Acts
361k1004 k. Substantive or procedural statutes. Most Cited Cases
(Formerly 361k174)
"Procedural" law prescribes the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves.

[13] Constitutional Law 92 ⚿2357

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2357 k. Remedies and procedure in general. Most Cited Cases
Under constitutional principle of separation of powers, procedural matters lie solely within the province of the Supreme Court; the General Assembly lacks authority to create procedural rules, even where the procedure it creates does not conflict with already existing court procedure. West's A.C.A. Const.Amend. No. 80, § 3.

[14] Constitutional Law 92 ⚿2362

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2362 k. Evidence. Most Cited Cases
A burden of proof defines and regulates the party's right to recovery and, therefore, constitutes substantive law that a legislature has authority to create, pursuant to constitutional principle of separation of powers. West's A.C.A. Const.Amend. No. 80, § 3.

[15] Evidence 157 ⚿546

157 Evidence
157XII Opinion Evidence
157XII(C) Competency of Experts
157k546 k. Determination of question of competency. Most Cited Cases
As a general rule, whether any witness will be allowed to testify as expert is a matter left to the discretion of the trial court.

[16] Constitutional Law 92 ⚿2362

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2362 k. Evidence. Most Cited Cases
The authority to decide who may testify and under what conditions is a procedural matter solely within the province of the courts pursuant to constitutional principle of separation of powers and pursuant to the inherent authority of common-law courts. West's A.C.A. Const.Amend. No. 80, § 3.

[17] Evidence 157 ⚖508

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k508 k. Matters involving scientific or other special knowledge in general. Most Cited Cases

Rule governing admissibility of expert testimony applies equally to all types of expert testimony. Rules of Evid., Rule 702.

[18] Judgment 228 ⚖178

228 Judgment
228V On Motion or Summary Proceeding
228k178 k. Nature of summary judgment. Most Cited Cases

The object of summary judgment proceedings is to determine if there are any issues to be tried.

West Codenotes
Held UnconstitutionalWest's A.C.A. § 16–114–206(a). ****386** Baker Schulze & Murphy, by: J.G. "Gerry" Schulze, Little Rock, for appellant.

****387** Ledbetter, Cogbill, Arnold & Hsrrison LLP, by: J. Michael Cogbill and Rebecca D. Hattabaugh, Fort Smith, for appellee St. Edward Mercy Health System, Inc.

Conner & Winters, LLP, by: Alan G. Wooten and Vicki Bronson, Fayetteville, for appellees Dr. Stephen Seffense and Dr. Michael Coleman, Jr.

JIM HANNAH, Chief Justice.

***1** Teresa L. Broussard appeals a decision of the Sebastian County Circuit Court entering summary judgment in favor of St. Edward Mercy Medical Center, Dr. Michael Coleman, Jr., and Dr. Stephen Seffense. Broussard asserts that the trial court erred in finding Arkansas Code Annotated section 16–114–206 (Repl.2006) constitutional. More specifically, Broussard argues that the requirement in section 16–114–206(a) that proof in medical-malpractice cases must be made by expert testimony by "medical care providers of the same specialty as the defendant" violates section 3 of amendment 80. We hold that the provisions in section 16–114–206(a), which provide that expert testimony may only be given by "medical care ***2** providers of the same specialty as the defendant," violate the separation-of-powers doctrine, amendment 80, and the inherent authority of the courts to protect the integrity of proceedings and the rights of the litigants. Our jurisdiction is pursuant to Arkansas Supreme Court Rule 1–2(a)(1) (2011).

On April 25, 2006, Dr. Seffense performed a parathyroidectomy on Broussard. After her surgery, Broussard developed what she believed to be a burn located near the surgical site.[FN1] Broussard experienced swelling and pain at the site. She believed that part of the pain was related to the surgery and that part was due to the burn. Broussard was released from the hospital on May 1, 2006. At that time, according to Broussard, the swelling had partially gone down, but the redness in the tissue remained. Broussard described the tissue at the incision as tough and leathery, and she said that black and purplish lines soon appeared that increased in size over time. She went to the emergency room on May 7, 2006, due to pain from the burn, but she was admitted for hypocalcemia and hyperkalemia, conditions related to renal failure. During this second hospitalization, Broussard was under the care of her nephrologist, Dr. Coleman, Jr. While in the hospital under Dr. Coleman, Jr.'s care, Broussard sought and obtained a consultation with a dermatologist regarding the burn. According to Broussard, she was told that the condition at her neck and upper chest would improve and that the damaged skin would slough off and heal. She remained in the hospital at St. Edward on this occasion until May 15, 2006.

FN1. Because Broussard was unable to discover the cause of the injury or burn, she has not pursued alleged medical malpractice in causing the burn but has instead al-

leged and pursued a medical-malpractice action based on alleged negligence in treatment of the burn.

*3 Ultimately, a black eschar (dead and sloughing tissue) developed at her neck and chest. On May 18, 2006, Broussard was admitted to the Hillcrest Burn Center in Tulsa, Oklahoma. There, she underwent removal of "pigskin" and received skin grafts.

Broussard sued St. Edward Mercy Health System, Inc., d/b/a St. Edward Mercy Medical Center Sisters of Mercy Health System, St. Louis, Inc., Dr. Seffense, Dr. Coleman, Jr., and the nurses and technicians present in the operating room. While Broussard's notice of appeal indicates that she is appealing summary judgment entered in favor of St. Edward, she has limited her arguments on appeal to the alleged liability of Dr. Seffense and Dr. Coleman, Jr. She has, therefore, abandoned all claims on appeal except those against Dr. Seffense and Dr. Coleman, Jr.

**388 [1][2] The circuit court decided the constitutionality of section 16–114–206(a) in the context of a motion for summary judgment. Generally, in reviewing the grant of a motion for summary judgment, the appellate court determines if summary judgment was appropriate based on whether the evidence presented in support of summary judgment leaves a material question of fact unanswered. *DaimlerChrysler Servs. N. Am., LLC v. Weiss,* 360 Ark. 188, 192–93, 200 S.W.3d 405, 407 (2004). However, this summary-judgment motion was decided based on the circuit court's decision on the constitutionality of section 16–114–206(a). The question of the correct application and interpretation of an Arkansas statute is a question of law, which this court decides de novo. *DaimlerChrysler,* 360 Ark. at 193, 200 S.W.3d at 407.

[3] The circuit court found section 16–114–206(a) constitutional in that it "establishes *4 substantive law regarding the duty of a plaintiff to produce an expert witness with a requisite level of knowledge, skill, experience, training, or education and ... sets forth the procedure that governs when such a qualified witness may testify." The circuit court further stated that "[a]n expert of the same specialty could state definitively what a general surgeon and nephrologist should have done with respect to the standard of care pursuant to such a state of facts such as are presented here." Broussard asserts that the circuit court erred because section 16–114–206(a) sets a rule of procedure in violation of the separation-of-powers doctrine and section 3 of amendment 80.

[4][5][6][7][8][9][10] Every statute enjoys a presumption of constitutionality. *Johnson v. Rockwell Automation, Inc.,* 2009 Ark. 241, at 4, 308 S.W.3d 135, 139. The party asserting that a statute is unconstitutional bears the burden of demonstrating that the statute violates the constitution. *Id.,* 308 S.W.3d at 139. Any doubt is resolved in favor of constitutionality. *Id.,* 308 S.W.3d at 139. Further, when possible, a statute will be construed so that it is constitutional. *Id.,* 308 S.W.3d at 139. When construing a statute, we interpret the statute to give effect to the intent of the General Assembly. *Id.,* 308 S.W.3d at 139. We determine legislative intent from the ordinary meaning of the language used where the language of the statute is plain and unambiguous. *Id.,* 308 S.W.3d at 139. Words in the statute are given their ordinary and usually accepted meaning in common language. *Id.,* 308 S.W.3d at 139.

Section 16–114–206(a) provides as follows:

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

*5 (1) *By means of expert testimony provided only by a medical care provider of the same specialty as the defendant,* the degree of skill and learning ordinarily possessed and used by members of the profession of the medical care pro-

vider in good standing, engaged in the same type of practice or specialty in the locality in which he or she practices or in a similar locality;

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

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

Arkansas Code Annotated § 16–114–206(a) (emphasis added). The parties agree that at least some issues in this case do not lie within the jury's comprehension as a matter**389 of common knowledge and that expert testimony is required to assist the trier of fact in understanding the evidence and determining facts in issue. Therefore, expert testimony is necessary in the trial of this case. *See* Ark. R. Evid. 702.

[11][12][13] According to the circuit court, the phrase "a medical care provider of the same specialty as the defendant" is constitutional because it constitutes substantive law setting out the burden of proof. Substantive law "creates, defines, and regulates the rights, duties, and powers of parties." *Johnson,* 2009 Ark. 241, at 8, 308 S.W.3d at 141 (quoting *Summerville v. Thrower,* 369 Ark. 231, 237, 253 S.W.3d 415, 419–20 (2007)). In contrast, procedural law prescribes "the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves." *Id.,* 308 S.W.3d at 141 (quoting *Summerville,* 369 Ark. at 237, 253 S.W.3d at 419–20). Procedural matters lie solely within the province of this court. *Id.,* 308 S.W.3d at 141. The General Assembly lacks authority to create *6 procedural rules, and this is true even where the procedure it creates does not conflict with already existing court procedure. *Id.,* 308 S.W.3d at 141.

[14][15][16] Section 16–114–206 purports to set out the burden of proof that must be met to prevail in a medical-malpractice action. A burden of proof defines and regulates the party's right to recovery and, therefore, constitutes substantive law. *See, e.g., United States v. Davis,* 125 F.Supp. 696 (W.D.Ark.1954). Pursuant to section 16–114–206(a), where asserted medical negligence lies outside the jury's comprehension as a matter of common knowledge, the plaintiff's burden of proof is to show by testimony of "a medical care provider of the same speciality as the defendant," the standard of care for the same type of practice in the same or a similar locality, that the standard was breached, and that as a proximate cause of that breach the plaintiff was injured. However, the phrase at issue, "[b]y means of expert testimony provided only by a medical care provider of the same specialty as the defendant," does not define rights or duties.[FN2] It sets qualifications a witness must possess before he or she may testify in court. As a general rule, whether any witness will be allowed to testify is a matter left to the discretion of the trial court. *See, e.g., Williams v. Ingram,* 320 Ark. 615, 899 S.W.2d 454 (1995). The authority to decide who may testify and under what conditions is a procedural matter solely within the province of the courts pursuant to section 3 of amendment 80 and pursuant to the inherent authority of common-law courts. *See* *7Ark. Const., amend. 80, § 3 and *City of Fayetteville v. Edmark,* 304 Ark. 179, 194, 801 S.W.2d 275, 283 (1990) ("The trial court controls the admissibility of evidence and the determination of applicable law and always has the inherent authority to secure the fair trial rights of litigants before it.")

> FN2. Appellees cite *Cathey v. Williams,* 290 Ark. 189, 718 S.W.2d 98 (1986) for the proposition that this court has already held that section 16–114–206 (Ark. Stat. Ann. § 34–2614 (Supp.1985)) is substantive law. However, the challenged language was not part of the statute at that time.

[17] Where expert testimony is required, this court has already set out the procedure to be fol-

lowed in Arkansas Rule of Evidence 702, which has been incorporated within the medical malpractice act in Arkansas Code Annotated section 16–114–207 (Repl.2006). Rule 702 provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified**390 as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Further, Rule 702 "applies equally to all types of expert testimony." *See Coca–Cola Bottling Co. v. Gill,* 352 Ark. 240, 262, 100 S.W.3d 715, 729 (2003). The challenged language, "[b]y means of expert testimony provided only by a medical care provider of the same specialty as the defendant," which adds requirements to Rule 702, attempts to dictate procedure and invades the province of the judiciary's authority to set and control procedure. As such, it violates the separation-of-powers doctrine, amendment 80, and the inherent authority of the courts to protect the integrity of proceedings and the rights of the litigants.[FN3] As the *8 offending language added in 2003 is severable, the rest of the malpractice act, including the remainder of section 16–114–206(a)(1) and (2), is unaffected by this decision.

> FN3. The phrase at issue in this case was added by the General Assembly to section 16–114–206(a) in 2003. The issue of whether Broussard's expert would have qualified under the law prior to the 2003 amendments was raised and argued by the parties; however, no ruling on the issue was obtained. The failure to obtain a ruling precludes our review of the issue because, under appellate jurisdiction, this court is limited to reviewing an order or decree of a lower court. *See Gwin v. Daniels,* 357 Ark. 623, 626, 184 S.W.3d 28, 30 (2004).

[18] Finally, we address the circuit court's conclusion that because the amended complaint only makes assertions of negligence against Dr. Seffense regarding events in the operating room, and because Broussard's expert only provides opinion regarding treatment after surgery, there is a failure of proof justifying entry of summary judgment in Dr. Seffense's favor. The object of summary–judgment proceedings is to determine if there are any issues to be tried. *See Flentje v. First Nat. Bank of Wynne,* 340 Ark. 563, 11 S.W.3d 531 (2000). Although Broussard alleges in her pleadings that Dr. Seffense is negligent for events occurring in the operating room, events in the operating room were not at issue in this case as developed during discovery. Based on discovery undertaken, the parties seem to have understood that Broussard was alleging negligence in treatment of the burn as opposed to events in the operating room, and the motion for summary judgment was tried largely on that basis. Broussard's expert affidavit indicated alleged negligence of Dr. Seffense with respect to care after surgery. However, Broussard did not amended her pleadings to conform with this legal theory. With some limitations, under Arkansas Rule of Civil Procedure 15, a party may amend pleadings at any time. The question of whether Broussard may amend her pleadings has not been addressed. We remand to the circuit court for a determination of whether Broussard may amend her pleadings to conform to the allegations she is making.

We reverse and remand for this determination and for further proceedings consistent with this opinion.

Ark.,2012.
Broussard v. St. Edward Mercy Health System, Inc.
2012 Ark. 14, 386 S.W.3d 385

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ATTACHMENT 7

Justice Reformed: *Johnson v. Rockwell Automation, Inc.*, Torts, and the Separation of Powers in Arkansas*

I. INTRODUCTION

In *Johnson v. Rockwell Automation, Inc.*,[1] the Arkansas Supreme Court declared that two provisions of the Civil Justice Reform Act of 2003[2] (CJRA) violated Arkansas's constitutional division of powers between the legislative and judicial branches.[3] This decision conclusively ended one battle in the tort-reform war, a nationwide conflict fueled by the perception that the civil justice system produces frivolous lawsuits, astronomical jury verdicts, and little else. In public policy, perception is reality,[4] and some meritless and widely publicized claims recently have only reinforced these views.[5]

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* The author has a minority stake in this enterprise. If that reading reveals content that is substantively correct, credit goes to Robert B Leflar, Arkansas Bar Foundation Professor of Law, University of Arkansas School of Law. The author extends special thanks to Russell Atchley, Neil Chamberlin, and Bruce McMath, who agreed to explain the practical operation of the invalidated provisions without any notion of what conclusions my comment would reach. Thanks are also due to Professors Howard W. Brill and Stephen M. Sheppard, whose clear explanations of the relevant law nonetheless exceeded my capacity to understand or relate. Last but never least, I thank Samantha Blassingame Leflar, J.D. 2010, who perceived, after an hour of reading, the resolution I had struggled for nine months to reach.

1. 2009 Ark. 241, __ S.W.3d __.

2. ARK. CODE ANN. §§ 16-55-201 to -220 (Repl. 2005).

3. *Johnson*, 2009 Ark. 241, at 8, 10, __ S.W.3d __, __.

4. *See* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day In Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 987, 988 n.16 (2003) (citing WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991), for the proposition that two-thirds of poll respondents believed more lawsuits are filed than should be). Judges, at least in Georgia, view the civil-justice system more favorably; in a 2007 survey of trial-court judges in that state, eighty-one percent of respondents concluded that ten percent or fewer of the cases in their courts involved frivolous claims. Thomas A. Eaton, *Of Frivolous Litigation and Runaway Juries: A View from the Bench*, 41 GA. L. REV 431, 444 (2007).

5. For example, in 2007 international news organizations covered the predictable defense verdict in a $54 million lawsuit against a drycleaner over a lost pair of suit pants. Henri E. Cauvin, *Court Rules for Cleaners in $54 Million Pants Suit*, WASH. POST, June

The nationwide debate will continue about the need for a tort-reform movement, but few question the movement's success. Most state legislatures have abolished joint-and-several liability,[6] a plaintiff-protective common-law rule that allows recovery of a full award from any defendant who contributes to a plaintiff's indivisible injury.[7] Most state legislatures have also modified or abolished the common-law collateral-source rule, which provides that a plaintiff may recover all her tortiously caused damages notwithstanding third-party ameliorative benefits.[8] Curbs on medical-malpractice lawsuits have featured prominently among tort-reform efforts, fueled by the universally acknowledged increase in medical-malpractice liability premiums.[9] With the CJRA, the Arkansas Legislature addressed all these issues.[10]

In the emergency clause of the CJRA,[11] the legislature declared that conditions "such as the application of joint and several liability regardless of the percentage of fault" had recently caused several insurers to stop offering medical liability coverage within the state.[12] It did not abolish joint-and-several

26, 2007, at A1.

6. AARON D. TWERSKI & JAMES A. HENDERSON, JR., TORTS: CASES AND MATERIALS 505 (2d ed. 2008).

7. DAN B. DOBBS, THE LAW OF TORTS § 385, at 1078 (2000). Only eleven states retain the common-law rule. TWERSKI & HENDERSON, *supra* note 6, at 505.

8. *See* F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 486 (2006). For a list of states that retain the collateral-source rule see *id.* at 486 n.228; for a list of states that have modified the rule, see *id.* at 487 n.229.

9. *See* Kimberly J. Frazier, Note, *Arkansas's Civil Justice Reform Act: Who's Cheating Who?*, 57 ARK. L. REV. 651, 655 (2004).

10. Act 649, 2003 Ark. Acts 2130; *see also* ARK. CODE ANN. § 16-55-201 (Repl. 2005) (eliminating joint-and-several liability for most personal-injury cases alleging negligent conduct); ARK. CODE ANN. § 16-55-212(b) (Repl. 2005) (abolishing the collateral-source rule in part), *invalidated by* Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, __ S.W.3d __; ARK. CODE ANN. § 16-114-206(a) (Repl. 2006) (requiring that expert testimony in medical-malpractice cases be provided by a medical-care professional of the same specialty as the defendant); ARK. CODE ANN. § 16-114-209(b)(1) (Repl. 2006) (providing that a plaintiff alleging a medical-injury claim must produce a medical expert's affidavit within thirty days of filing).

11. Act 649, 2003 Ark. Acts 2130, 2144-45. Amendment 7 to the Arkansas Constitution provides that voters may nullify any legislative enactment by referendum up to ninety days after the General Assembly adjourns. ARK. CONST. amend. 7. Enactments have no legal effect during this time unless they contain factual statements that emergency conditions require the bill to take effect sooner. Burroughs v. Ingram, 319 Ark. 530, 533, 893 S.W.2d 319, 320 (1995).

12. Act 649, 2003 Ark. Acts 2130, 2144.

liability for medical injuries only, however, instead prohibiting joint liability for all "personal injury, medical injury, property damage, or wrongful death" actions.[13]

While section 16-55-201 of the Arkansas Code worked the biggest change in then-existing law, other provisions threatened a parade of horribles for plaintiffs and their attorneys. Section 16-55-202 contained what would come to be called the "empty chair" or "phantom defendant" provision.[14] For the first time it gave defendants, who had always been able to allege fault to nonparties,[15] the right to have that fault determined by juries and subtracted from judgments.[16] Other sections modified the collateral-source rule,[17] changed venue requirements for civil actions,[18] imposed a ceiling on punitive damage awards,[19] and raised the burden for proving entitlement to punitive damages.[20]

After years of debate about the CJRA's constitutionality,[21] in 2009 the Arkansas Supreme Court announced it would decide two certified questions of Arkansas law from the United States District Court for the Eastern District of Arkansas.[22] The

13. *See* ARK. CODE ANN. § 16-55-201(a) (Repl. 2005).

14. ARK. CODE ANN. § 16-55-202(a) (Repl. 2005), *invalidated by* Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, __ S.W.3d __. Professor Robert B Leflar referred to this as the "empty chair" provision. Robert B Leflar, *The Civil Justice Reform Act and the Empty Chair*, 2003 ARK. L. NOTES 67, 67 (2003). The *Johnson* court preferred "phantom defendant." *Johnson*, 2009 Ark. 241, at 8, __ S.W.3d at __.

15. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 34 cmt. c (Proposed Final Draft No. 1, 2005).

16. ARK. CODE ANN. § 16-55-202(a); Telephone interview with J. Bruce McMath & Neil Chamberlin, Partners, McMath Woods P.A. (Oct. 21, 2009) [hereinafter McMath & Chamberlin].

17. ARK. CODE ANN. § 16-55-212 (Repl. 2005).

18. ARK. CODE ANN. § 16-55-213 (Repl. 2005). In March 2010, the Arkansas Supreme Court held that section 16-55-213(e) of the Arkansas Code, setting venue for medical-malpractices actions, did not violate the separation of powers because amendment 80 expressly vests the power to establish venue in the General Assembly. Clark v. Johnson Reg'l Med. Ctr., 2010 Ark. 115, at 12-13, __ S.W.3d __, __. One justice conveyed doubts about the statute's special treatment for the medical industry, however. *See id.* at 13, __ S.W.3d at __ (Danielson, J., concurring).

19. ARK. CODE ANN. § 16-55-208 (Repl. 2005).

20. ARK. CODE ANN. § 16-55-207 (Repl. 2005).

21. *See, e.g.*, Kimberly J. Frazier, Note, *Arkansas's Civil Justice Reform Act of 2003: Who's Cheating Who?*, 57 ARK. L. REV. 651 (2004); Courtney A. Nelson, Note, *To Truly Reform We Must Be Informed:* Davis v. Parham, *the Separation of Powers Doctrine, and the Constitutionality of Tort Reform in Arkansas*, 59 ARK. L. REV. 781 (2006).

22. Johnson v. Rockwell Automation, Inc., 374 Ark. 217, 217-18, 286 S.W.3d 726, 726 (2009).

questions concerned two provisions of the CJRA—section 202 regarding nonparty fault, and subsection 212(b) modifying the collateral-source rule.[23] The case was *Johnson v. Rockwell Automation, Inc.*[24]

This comment examines *Johnson*, its background, how *Johnson* changes Arkansas law, and what that implies for Arkansas practitioners. Part II recounts *Johnson*'s factual and procedural details. Part III explains how *Johnson* changed Arkansas law, beginning with its direct effects on tort law in invalidating the non-party fault provision and reinstating the collateral-source rule, then examining its indirect effects on comparative-fault principles. Part IV discusses *Johnson* as a separation-of-powers case, devoting particular attention to its contrast with *Cato v. Craighead County Circuit Court*,[25] the sole Arkansas Supreme Court case to interpret *Johnson*. This comment concludes that *Johnson* yielded correct results but that continuing inconsistencies in the court's separation-of-powers jurisprudence justify a presumption against deciding cases on separation-of-powers grounds.[26]

II. *JOHNSON V. ROCKWELL AUTOMATION, INC.*

Darrell Johnson was injured in an electrical explosion at a Batesville, Arkansas plant owned by his employer, Eastman Chemical Company (Eastman).[27] Johnson brought suit against Rockwell Automation, Inc., alleging that the starter bucket the defendant had designed, manufactured, and supplied, and which Johnson had been repairing at the time of the explosion, was defective in two respects.[28] Johnson contended, without specifying a theory of defect, that the starter bucket's safety interlock should have prevented the starter bucket from becoming electrified during repair.[29] He also alleged that

23. *Id.* at 218, 286 S.W.3d at 726.

24. 2009 Ark. 241, __ S.W.3d __.

25. 2009 Ark. 334, at ___, ___ S.W.3d ___, ____.

26. This comment also provides an appendix that lists statutes that may now fall to the supreme court's more expansive view of its procedural bailiwick.

27. Joint Motion for Certification of Questions of Law to the Arkansas Supreme Court at 2, Johnson v. Rockwell Automation, Inc., No. 1:06CV-00017-JLH, 2008 WL 3914161 (E.D. Ark. Aug. 11, 2008) [hereinafter Joint Motion].

28. *Id.* at 2-3.

29. *Id.* at 3.

Rockwell should have installed phase barriers between the bucket's fuses to prevent electrical arcing, an actual and proximate cause of the plaintiff's injuries.[30] Johnson also alleged that Rockwell had inadequately warned of the product's dangers.[31]

Rockwell denied liability and gave notice that Eastman, a nonparty to the action, was to blame for Johnson's injuries.[32] Rockwell alleged that the starter bucket Eastman had installed was incompatible with the motor-control center of which it was a part and that Eastman had improperly modified that motor-control center.[33] Rockwell also asserted that Eastman had inadequately trained the plaintiff and had failed to institute proper "lock-out, tag-out" procedures to prevent unexpected electrification during maintenance.[34]

Because Arkansas's Workers' Compensation statute immunized Eastman for its asserted contribution to Johnson's accident, Rockwell could not join Eastman as a co-defendant.[35] Relying on section 16-55-202 of the Arkansas Code, Rockwell thus asserted fault to Eastman as a nonparty.[36] Rockwell also disputed Johnson's claimed medical damages, which exceeded the discounted amounts charged to Johnson's employee medical plan—an apparently inadmissible claim under subsection 16-55-212(b).[37]

Johnson argued that both sections of the CJRA were unconstitutional.[38] Because there was no controlling Arkansas precedent, the parties moved jointly for certification to the Arkansas Supreme Court.[39] Expressing that the court should have a chance to decide these important issues of law, District

30. *Id.*

31. *Id.*

32. Joint Motion, *supra* note 27, at 4.

33. *Id.*

34. *Id.* Lockout/tagout is a system by which electrical repairs in factory settings are made safe by restricting access to potential hazards and taking steps to prevent the re-energization of a system during repair. 29 C.F.R. § 1910.147 (2009).

35. *See* ARK. CODE ANN. § 11-9-105(a) (Repl. 2002).

36. Joint Motion, *supra* note 27, at 4.

37. *Id.* at 5.

38. *Id.* at 3-4.

39. *Id.* at 2. By adopting Rule 6-8 in 2002, the Arkansas Supreme Court assumed the power to answer certified questions of Arkansas law posed by federal courts. ARK. SUP. CT. R. 6-8(a)(1).

Judge J. Leon Holmes approved the motion.[40]

III. HOW *JOHNSON* CHANGES ARKANSAS LAW

Johnson worked substantial changes in Arkansas tort law and contained a clear new statement of the separation of powers in Arkansas government.[41] Arkansas practitioners should understand *Johnson* in both contexts.

A. *Johnson* and Nonparty Fault

Sections 16-55-201 and -202 of the Arkansas Code changed tort law in two ways. Section 201 provided that liability for most torts would be several only, not joint.[42] Section 202 dictated that apportioning this several liability should encompass deducting liability for the fault of nonparties.[43] The combination meant upheaval for civil litigation in Arkansas.

The doctrine of joint-and-several liability has common-law roots dating to the 1700s.[44] Under joint-and-several liability, independently negligent tortfeasors whose acts produced a single harm would each be liable for the entire injury.[45] Tort-feasors who produced distinct harms, even to the same person, would be liable only for those separate injuries.[46] In Arkansas, the CJRA abolished joint-and-several liability for most torts, leaving plaintiffs to recover severally where possible from parties assessed fault by a fact-finder.[47]

The CJRA vexed plaintiffs another way—subsection 202(a) required fact-finders to assign fault to all who contributed to an

40. McMath & Chamberlin, *supra* note 16.

41. *See* 2009 Ark. 241, at 6-7, __ S.W.3d __, __.

42. ARK. CODE ANN. § 16-55-201(a) (Repl. 2005).

43. ARK. CODE ANN. § 16-55-202(a) (Repl. 2005), *invalidated by Johnson*, 2009 Ark. 241, __ S.W.3d __.

44. HOWARD W. BRILL, ARKANSAS LAW OF DAMAGES § 7:2 (5th ed. 2004) (discussing the history of joint and several liability in Arkansas, including the pre-*Johnson* effects from the CJRA); DOBBS, *supra* note 7, § 385, at 1078.

45. *See, e.g.*, Troop v. Dew, 150 Ark. 560, 564, 234 S.W. 992, 994 (1921).

46. *See, e.g., id.* at 563, 234 S.W. at 994 ("[S]eparate and distinct tortious acts resulting in separate and distinct injuries, even to the same subject-matter, do not create joint liability on the part of the tort-feasors.").

47. *See* ARK. CODE ANN. § 16-55-201(a) (Repl. 2005) ("In any action for personal injury, medical injury, property damage, or wrongful death, the liability of each defendant for compensatory or punitive damages shall be several only and shall not be joint.").

injury, including persons not named in the suit.[48] Thus, defendants could dilute their exposure by attributing fault to absent, unknown, or immune nonparties.[49] In addition to reducing a defendant's substantive liability, this increased a plaintiff's trial burden by requiring defense of an unrepresented nonparty.[50] Nonparty-fault allegations were common—one firm estimates that half its cases involved at least one "empty chair"—and most often targeted immune nonparties.[51]

Plaintiff Johnson alleged four constitutional deficiencies in section 202. First, he alleged, it violated the due-process guarantees in the Arkansas Constitution.[52] Second, it violated the constitutional prohibition against limitations on recovery for personal injuries.[53] Third, it intruded on the Arkansas Supreme Court's express power to set rules of pleading, practice, and procedure.[54] And fourth, it violated the general separation-of-powers clause in article 4, section 2 of the Arkansas Constitution.[55] Rockwell defended the statute as being rationally related to a legitimate public-policy objective.[56]

Like the electrical arc that started the case,[57] the court took the path of least resistance: nearly twenty years of separation-of-powers precedent.[58] The General Assembly overstepped with section 202 by "setting up a procedure to determine the fault of a nonparty and mandating the consideration of that nonparty's fault in an effort to reduce a plaintiff's recovery."[59]

48. ARK. CODE ANN. § 16-55-202(a) (Repl. 2005), *invalidated by* Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, __ S.W.3d __.

49. *See* Leflar, *supra* note 14, at 75-76.

50. McMath & Chamberlin, *supra* note 16.

51. *Id.*

52. Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, at 5, __ S.W.3d __, __; *see also* ARK. CONST. art. 2, § 8.

53. *Johnson*, 2009 Ark. 241, at 5, __ S.W.3d at __; *see also* ARK. CONST. art. 5, § 32.

54. *Johnson*, 2009 Ark. 241, at 5, __ S.W.3d at __; *see also* ARK. CONST. amend. 80, § 3 ("The Supreme Court shall prescribe the rules of pleading, practice and procedure for all courts; provided these rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as declared in this Constitution.").

55. *Johnson*, 2009 Ark. 241, at 5, __ S.W.3d at __; *see also* ARK. CONST. art. 4, § 2.

56. *Johnson*, 2009 Ark. 241, at 5, __ S.W.3d at __; Oral argument at the Arkansas Supreme Court on Certified Questions of Law in Johnson v. Rockwell Automation, Inc. (Apr. 16, 2009) (available as an audio recording from the Arkansas Supreme Court).

57. *See* Joint Motion, *supra* note 27, at 3.

58. *See infra* Part IV (discussing the separation-of-powers foundation for *Johnson*).

59. Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, at 8, __ S.W.3d __, __.

The court continued, "Because the nonparty provision is procedural, it offends the principle of separation of powers and the powers specifically prescribed to this court by Amendment 80."[60] Thus the court banished the phantom defendant from Arkansas courtrooms.

Johnson will have important consequences for all civil litigators. Bruce McMath, who represented the plaintiff in *Johnson*, says *Johnson* returns plaintiffs to the status quo pre-CJRA, albeit without joint-and-several liability.[61] The biggest benefit will be to plaintiffs in products liability cases, an area where plaintiffs' attorneys perceived particularly unfair effects. Section 202 allowed a defendant in a products-liability action to allege employer negligence, something the plaintiff employee herself was statutorily barred from doing.[62] To add insult to injury, a negligent employer's negligence could dilute the manufacturer-defendant's fault without reducing the employer's own Workers' Compensation lien against the plaintiff's diminished recovery.[63]

Johnson removes the specter that plaintiff's counsel will be forced to construct a defense for a nonparty that was nearly always named just 120 days before trial.[64] McMath and Neil Chamberlin, McMath's co-counsel on *Johnson*, indicate that nonparty fault was commonly alleged because it was so easy to do: it did not require finding the nonparty or serving a summons on him.[65] Because the civil rules do not address nonparty-fault allegations, plaintiffs could not move to have the allegations dismissed.[66]

60. *Id.*

61. McMath & Chamberlin, *supra* note 16.

62. *See* ARK. CODE ANN. § 11-9-105 (Repl. 2002) (providing the exclusivity of rights and remedies under the Workers' Compensation Act), W.M. Bashlin Co. v. Smith, 277 Ark. 406, 423, 643 S.W.2d 526, 534 (1982) (holding that, where employers are obliged to pay Workers' Compensation benefits, they enjoy immunity from contribution claims by third-party tortfeasors).

63. McMath & Chamberlin, *supra* note 16; *see also* ARK. CODE ANN. § 11-9-410 (Repl. 2002) (giving employer a lien against two-thirds of an employee's tort recovery against a third-party tortfeasor, up to the amount of the employer's Workers' Compensation liability to the employee).

64. McMath & Chamberlin, *supra* note 16; *see* ARK. CODE ANN. § 16-55-202(b) (Repl. 2004), *invalidated by* Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, __ S.W.3d __.

65. McMath & Chamberlin, *supra* note 16.

66. *Id.*

Nonparty fault could be a convenient tool even when the "phantom" was amenable to suit. In a case McMath described, a defendant, *B*, obtained discovery against *C* after joining it as a third-party allegedly responsible to plaintiff *A*. After completing discovery, *B* voluntarily dismissed its claim against *C*. But 120 days before trial, *B* gave notice to *A* of *C*'s nonparty fault. McMath and Chamberlin suggest *B* did so despite knowing from discovery that *C* was blameless.[67] In another tactic, a defendant who could implead a third party would wait until the statute of limitations had run, then assert nonparty fault.[68] *Johnson* nixed these tactics, which the drafters of the CJRA cannot have intended.

The provision was not an unalloyed benefit for defense attorneys, however. Russell Atchley, an attorney with 28 years' experience representing plaintiffs and defendants, pointed out some drawbacks of nonparty-fault allegations.[69] A party's dismissal from an action is a matter of record that can be raised with a jury, and a plaintiff's attorney could use the dismissal to devastating effect to rebut the nonparty-fault allegation.[70] Nonparty-fault pleadings, too, could be raised with a jury, so a plaintiff's attorney could use excessive or frivolous nonparty-fault allegations to suggest bad faith.[71] Defense attorneys have one unqualified lament about the loss of the nonparty-fault provision, however—it had allowed them to gauge precisely how effective they had been at directing blame away from their clients and onto nonparties.[72] Now a defense attorney will know she has succeeded only when her efforts convince a jury to wholly absolve the defendant of responsibility for the plaintiff's injury.[73]

Johnson's restoration of the adversary system is a development worth celebrating. Notwithstanding other scholarship,[74] the nonparty-fault provision is dead and gone. The

67. *Id.*

68. *Id.*

69. Telephone interview with Russell Atchley, Partner, Kutak Rock LLP (Feb. 24, 2010).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* An attorney may also, with the judge's permission, poll the jury. *Id.*

74. Jodie L. Hill, *A Twilight Zone No More: The Arkansas Supreme Court Provides*

certified question from Judge Holmes implicated section 202 as a whole, and the supreme court answered affirmatively—section 202 is unconstitutional.[75] The Eighth Circuit has taken the court at its word,[76] and litigants rely on section 202 at their peril.

B. The Collateral-Source Rule

Johnson also restored the common-law collateral-source rule,[77] which allows a plaintiff to recover the full amount of her provable damages.[78] In Arkansas, this included medical expenses waived or discounted by health care providers, as well as those covered by third-party insurers.[79] Supporting the collateral-source rule is the principle that "the claimant should benefit from the collateral source recovery rather than the tortfeasor, since the claimant has usually paid an insurance premium or lost sick leave, whereas to the tortfeasor it would be a total windfall."[80] The defense bar counters that ignoring collateral-source recoveries subverts tort law's purported goal of making the successful plaintiff whole—but only whole.[81] The collateral-source rule has been a main target for proponents of tort reform.[82]

Subsection 212(b) of the CJRA abandoned the collateral-source rule and allowed evidence only of such medical compensatory damages as the plaintiff or her third-party obligee

Tort Reform Drafting Tips While Distancing Itself from Deference to the General Assembly in Johnson v. Rockwell Automation, Inc., 32 U. ARK. LITTLE ROCK L. REV. 155, 171 (2010) (arguing that the less explicitly procedural provisions of section 202 may remain good law).

75. *See* Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, at 2, __ S.W.3d __, __.

76. *See* McCoy v. Augusta Fiberglass Coatings, Inc., 593 F.3d 737, 743-44 (8th Cir. 2010) (explaining that after *Johnson*, the "law reverts back to what it was prior to the passage of the Civil Justice Reform Act, under which the jury could not apportion the fault of nonparties").

77. *See Johnson*, 2009 Ark. 241, at 10, __ S.W.3d at __.

78. Montgomery Ward & Co. v. Anderson, 334 Ark. 561, 566-67, 976 S.W.2d 382, 385 (1998).

79. *Id.* at 567, 976 S.W.2d at 385 ("We choose to adopt the rule that gratuitous or discounted medical services are a collateral source not to be considered in assessing the damages due a personal-injury plaintiff.").

80. *Id.* at 565, 976 S.W.2d at 384 (quoting E. Tex. Motor Freight Lines, Inc. v. Freeman, 289 Ark. 539, 548, 713 S.W.2d 456, 462 (1986)).

81. *See* Jamie L. Wershbale, *Tort Reform in America: Abrogating the Collateral Source Rule Across the States*, 75 DEF. COUNS. J. 346, 349 (2008).

82. *See* Hubbard, *supra* note 8, at 486.

had been or would be required to pay.[83] Unlike the "empty chair" or "phantom defendant" provision allowing nonparty fault, subsection 212(b) lent itself poorly to nicknaming. But for plaintiffs and their attorneys, it caused more horror than any "phantom."[84] Insurance adjusters use a plaintiff's medical bills as a barometer of the seriousness of a claim.[85] By forbidding a plaintiff to introduce the full totals of subsequently reduced medical bills, the statute could diminish her settlement posture by as much as half.[86] Juries, too, use medical bills as a guidepost for calculating awards for pain and suffering and for punitive damages.[87]

The statute read, "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."[88] The statute's evidentiary language is unsurprising; the collateral-source rule it abrogated is acknowledged to be a rule of evidence as well as a rule of damages.[89] As one of the supreme court's first assertions of rulemaking authority was to adopt the Uniform Rules of Evidence,[90] the statute's evidentiary language also doomed it to fall to a separation-of-powers challenge.

Subsection 212(b) had been challenged before *Johnson*—appended to Johnson's certification brief were thirty-four trial court decisions holding the medical-expense provision unconstitutional.[91] Even the Arkansas Supreme Court had considered subsection 212(b) before *Johnson*; in *Shipp v.*

83. ARK. CODE ANN. § 16-55-212(b) (Repl. 2005), *invalidated by* Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, __ S.W.3d __.

84. McMath & Chamberlin, *supra* note 16.

85. *Id.*

86. *Id.*

87. *Id.*

88. ARK. CODE ANN. § 16-55-212(b).

89. Bryce Benjet et al., *A Review of State Law Modifying the Collateral Source Rule: Seeking Greater Fairness in Economic Damages Awards*, 76 DEF. COUNS. J. 210, 210 (2009).

90. Ricarte v. State, 290 Ark. 100, 104, 717 S.W.2d 488, 489 (1986).

91. Certification of Questions of Law to the Arkansas Supreme Court from the United States District Court Eastern District of Arkansas the Honorable J. Leon Holmes Presiding at Add. 162-289, *Johnson*, 2009 Ark. 241, __ S.W.3d __ (Nov. 26, 2008) (No. 08-1009).

Franklin,[92] the court telegraphed its doubts about the statute by considering the petitioner's separation-of-powers arguments at length while entirely omitting the respondent's.[93]

The supreme court seemed determined to decide the provision's constitutionality; on October 2, 2008, less than a month after accepting the certified questions in *Johnson*, the justices agreed to hear another case challenging the provision.[94] *Johnson*'s petitioner won the race. Beginning an explanation that spanned a mere two paragraphs, the court declared that subsection 212(b)'s plain language limited what evidence of medical compensatory damages could be admitted at trial.[95] As such, it was a rule of evidence.[96] Because rules of evidence are rules of "practice, pleading, and procedure" within the court's exclusive purview, subsection 212(b) was unconstitutional.[97]

C. The CJRA, *Johnson*, and Comparative Fault

Before the introduction of comparative fault, contributory negligence had barred recovery to plaintiffs who bore any responsibility for their own injuries.[98] The Arkansas General Assembly exchanged contributory negligence for pure comparative fault in 1955 at the urging of Dean Prosser.[99] The latter doctrine allowed an injured plaintiff to recover from a defendant who harmed him, regardless of the plaintiff's own contribution to the injury.[100] Pure comparative fault had a very brief ascendancy; in 1957 the General Assembly replaced it with a bar to recovery for plaintiffs fifty percent or more at fault.[101]

Arkansas's comparative fault statute was altered twice

92. 370 Ark. 262, 258 S.W.3d 744 (2007).

93. *See id.* at 266-67, 258 S.W.3d at 748-49. The court declined to decide the issue because the plaintiff's case was moot on other grounds. *Id.* at 267, 258 S.W.3d at 749.

94. *See* Jones v. Fred's Stores of Tenn., 374 Ark. 394, 394-95, 288 S.W.3d 241, 242 (2008) (accepting certification from the United States District Court for the Eastern District of Arkansas).

95. Johnson v. Rockwell Automation, 2009 Ark. 241, at 9-10, __ S.W.3d __, __.

96. *Id.* at 10, __ S.W.3d at __.

97. *Id.* at 9-10, __ S.W.3d at __.

98. *See* Walton v. Tull, 234 Ark. 882, 893, 356 S.W.2d 20, 26 (1962).

99. Joseph R. Falasco, *Sizing Up a Multi-Party Tortfeasor Suit in Arkansas: A Tale of Two Laws—How Fault Is, and Should Be, Distributed*, 26 U. ARK. LITTLE ROCK L. REV. 251, 254 n.25 (2004).

100. *Walton*, 234 Ark. at 893, 356 S.W.2d at 26.

101. Act 296, 1957 Ark. Acts 874, 874 (Extraordinary Session).

more, in 1973[102] and 1975,[103] but neither amendment seemed to change law substance.[104] In fact, for twenty-nine years, the supreme court's holding in *Riddell v. Little*,[105] a 1972 case interpreting the 1957 statute, remained the court's definitive statement on comparative-fault bars to recovery.[106] In 2001, the Arkansas Supreme Court in *NationsBank, N.A. v. Murray Guard, Inc.*, read the 1975 revision to limit the persons whose fault could be compared with the plaintiff's.[107]

Though unmentioned by the court, the *Johnson* decision returned Arkansas to a comparative-fault regime unknown since 2001.[108] Subsection 16-55-202(a), invalidated for its procedural nonparty-fault provision, had also supplanted older statutory language governing comparative-fault assessments.[109] The passage of the CJRA with subsection 202(a) mooted the defendant-friendly *NationsBank* decision by expressly requiring a court to consider the fault of all persons, whether parties or not.[110] Although subsection 202(a) is no more, *NationsBank* should remain moot; if so, plaintiffs can thank an unlikely savior—another section of the CJRA.[111]

102. Act 303, 1973 Ark. Acts 928, 928-29.

103. Act 367, 1975 Ark. Acts 922, 922-23.

104. *See* Falasco, *supra* note 99, at 254.

105. 253 Ark. 686, 488 S.W.2d 34 (1972).

106. *See* NationsBank, N.A. v. Murray Guard, Inc., 343 Ark. 437, 451, 36 S.W.3d 291, 299-300 (2001) (Thornton, J. dissenting).

107. *Id.* at 443, 36 S.W.3d at 295.

108. For thorough coverage of this issue, see Falasco, *supra* note 99, and Crystal Tessaro, Note, NationsBank, N.A. v. Murray Guard, Inc.*: Lawyers Can No Longer Bank on Arkansas's Application of Comparative Fault in Multi-Tortfeasor Cases*, 55 ARK. L. REV. 659 (2002).

109. Falasco, *supra* note 99, at 297. *Compare* ARK. CODE ANN. § 16-55-202(a) (Repl. 2005) ("In assessing percentages of fault, the fact finder shall consider the fault of all persons . . . who contributed to the alleged injury . . . regardless of whether the person or entity was or could have been named as a party to the suit."), *invalidated by* Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, __ S.W.3d __, *with* ARK. CODE ANN. § 16-64-122 (Repl. 2005) ("[L]iability 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.").

110. *See* Falasco, *supra* note 99, at 297.

111. *See* ARK. CODE ANN. § 16-55-216 (Repl. 2005).

1. *The Plaintiff-focused Fault Bar:* Riddell v. Little

Riddell v. Little governed Arkansas comparative fault law from 1972 to 2001.[112] Darrell Riddell flew a crop-duster airplane without a license.[113] He not only lacked a required license to spread the chemical he was hired to apply, he lacked the commercial pilot's license required of any crop-duster pilot.[114] In fact, he had a student pilot's license only.[115] Because the farmer who hired Riddell did not adequately inquire as to these qualifications, he was assessed ten percent of the liability when Riddell flew his airplane too low, striking and killing Little, a flagger who marked the end of Riddell's spray run.[116] Little's estate sued. The jury assessed Little twenty percent of fault for failing to duck, with the balance to Riddell.[117]

Under then-applicable joint-and-several liability, the combined negligence of the farmer and Riddell made them joint tortfeasors.[118] The opinion implied that Riddell's share of fault was uncollectible, leaving McGraw, the farmer, to pay the full eighty percent of the jury's award.[119] McGraw contended that Little's twenty-percent fault share barred recovery against McGraw, to whom the jury had assessed only ten percent of fault.[120]

The court did not linger in rejecting this argument. In 1972, the comparative-fault statute pertinently read, "[C]ontributory negligence shall not prevent a recovery where any negligence of the person so injured, damaged, or killed is of less degree than any negligence of the person, firm, or corporation causing such damage."[121] With respect to this language, the supreme court in *Riddell* repeated its view, expressed in 1962's

112. *See* 253 Ark. 686, 488 S.W.2d 34 (1972); *see also* Tessaro, *supra* note 108, at 671.

113. *Riddell*, 253 Ark. at 688, 488 S.W.2d at 35-36.

114. *Id.*

115. *Id.* at 688, 488 S.W.2d at 36 (1972).

116. *Id.* at 688-89, 488 S.W.2d at 36.

117. *Id.* at 688, 488 S.W.2d at 36.

118. *Riddell*, 253 Ark. at 688-89, 488 S.W.2d at 36.

119. *Id.* at 688, 488 S.W.2d at 36.

120. *Id.* at 689, 488 S.W.2d at 36.

121. Act 296, 1957 Ark. Acts 874 (Extraordinary Session).

Walton v. Tull,[122] that the legislature had only intended to bar recovery to plaintiffs preponderantly at fault for their own injuries.[123] Because Little's fault was less than fifty percent, he could recover from a joint tortfeasor assessed a lesser individual share of fault.[124] A minor subsequent revision of the comparative-fault statute led the court in *NationsBank* to a very different conclusion.[125]

2. *The Filing-focused Fault Bar:* NationsBank, N.A. v. Murray Guard, Inc.

A fire the night of January 24, 1994, caused more than one million dollars in damage to a Little Rock high-rise and sparked an explosion of litigation among the companies that owned, occupied, managed, serviced, and secured the building.[126] Besides NationsBank, N.A., (NationsBank), which owned the building, the fire damaged the offices of lessees KPMG Peat Marwick (KPMG), an accounting firm, and Wright Lindsey Jennings (Wright), a law firm.[127] These parties brought suit against Murray Guard, Inc., a security service, among others.[128]

Most claims related to the fire were resolved in mediation.[129] Remaining were claims by NationsBank, KPMG, and Wright against Murray Guard for negligently reporting the fire,[130] and Murray Guard's counterclaims for contribution from NationsBank and KPMG for helping cause the fire and the damage.[131] In mediation, KPMG settled any contribution liability to NationsBank by paying $22,535.[132]

The remaining parties proceeded to trial to apportion fault, and a jury assessed twenty-one percent of fault to KPMG, thirty-two percent to Murray Guard, and forty-seven percent to

122. 234 Ark. 882, 356 S.W.2d 20.

123. *Riddell*, 253 Ark. at 689, 488 S.W.2d at 36.

124. *See id.*

125. *See* NationsBank, N.A. v. Murray Guard, Inc., 343 Ark. 437, 444, 36 S.W.3d 291, 295 (2001) (citing ARK. CODE ANN. § 16-64-122 (Repl. 2005)).

126. *Id.* at 440-41, 36 S.W.3d at 293-94.

127. *Id.*

128. *Id.*

129. *Id.* at 441, 36 S.W.3d at 294.

130. *NationsBank*, 343 Ark. at 441, 36 S.W.3d at 294.

131. *Id.*

132. *Id.*

NationsBank.[133] The trial court interpreted the balance of fault between NationsBank and Murray Guard to bar NationBank's recovery per Arkansas's comparative-fault statute.[134] The supreme court agreed.[135] The pre-*Riddell* comparative-fault statute had compared the plaintiff's fault with the fault of the "person, firm, or corporation causing such damage."[136] The revised 1975 statute compared the plaintiff's fault with "the party or parties from whom the claiming party seeks to recover damages."[137] Because NationsBank never filed a claim against KPMG in the action, KPMG was not such a party.[138]

NationsBank seemingly held that a plaintiff's fault was not to be balanced against all other parties, as in *Riddell*,[139] but only against parties from whom the plaintiff sought damages.[140] "Seeking to recover damages" from a person appears to require, at minimum, filing a complaint against him.[141] *NationsBank* gives plaintiffs no guide for when they must bring their claims or how long they must maintain them. One reading is that NationsBank could have recovered against Murray Guard if it had settled an actual claim against KPMG instead of a potential one—it would suffice that NationsBank had claimed against KPMG at any point in the action. The other reading would count the plaintiff's claims remaining at the end of trial. It is unclear which theory would more uselessly multiply litigation or discourage settlement. Fortunately, we need never learn.

133. *Id.*

134. *Id.* at 442, 36 S.W.3d at 294.

135. *NationsBank*, 343 Ark. at 441, 36 S.W.3d at 294 (citing ARK. CODE ANN. § 16-64-122 (Repl. 2005)). Justice Thornton strongly dissented from the opinion and took issue with the majority's view that KPMG was not a party from whom NationsBank sought damages. *Id.* at 451-52, 36 S.W.3d at 300 (Thornton, J., dissenting). According to Justice Thornton, NationsBank had settled its potential claim against KPMG in mediation and could not thereafter have added it as a defendant. *Id.* But this meant it had not only sought damages from KPMG—it had gotten them. *Id.*

136. Act 296, 1957 Ark. Acts 874, 874-75 (Extraordinary Session).

137. ARK. CODE ANN. § 16-64-122 (Repl. 2005).

138. *NationsBank*, 343 Ark. at 444, 36 S.W.3d at 295 (citing ARK. CODE ANN. § 16-64-122).

139. *See* Riddell v. Little, 253 Ark. 686, 689, 488 S.W.2d 34, 36 (1972).

140. *NationsBank*, 343 Ark. at 442, 36 S.W.3d at 294.

141. *Id.* at 444, 36 S.W.3d at 295 ("At no time did NationsBank and KPMG claim damages from one another.").

3. *Back to* Riddell

NationsBank was the Arkansas Supreme Court's attempt to discern the legislative intent behind section 16-64-122.[142] The General Assembly has since made clear that the *NationsBank* court was wrong. Section 16-55-216 of the Arkansas Code, passed as part of the CJRA and titled "Comparative fault," provides that enumerated sections of the CJRA "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."[143]

Principles of statutory interpretation require reading this as a legislative reaffirmation of the fault bar in *Riddell*. The supreme court presumes the General Assembly to act with purpose, intending each enactment to have substantive effect.[144] Indisputably, one purpose of section 216 was to ensure that the comparative-fault bar in section 16-64-122 would operate notwithstanding the CJRA's several-liability scheme.[145] As a characterization of that bar, however, section 216 accords with the pre-*NationsBank* understanding that the bar would be absolute, not proportioned to the fault shares only of the parties against whom the plaintiff had filed claims.[146] When the General Assembly passes legislation, the supreme court presumes that it both knows of and acts with reference to the existing statutory and decisional law.[147] Three justices in *NationsBank* strongly favored an objective fifty-percent comparative-fault bar, and section 216 is most sensibly read to agree.[148]

142. *See NationsBank*, 343 Ark. at 443-44, 36 S.W.3d at 295.

143. ARK. CODE ANN. § 16-55-216 (Repl. 2005).

144. Wells v. State, 337 Ark. 586, 589, 991 S.W.2d 114, 116 (1999).

145. *See* ARK. CODE ANN. §§ 16-55-201 to -203 (Repl. 2005).

146. *See* Riddell v. Little, 253 Ark. 686, 689, 488 S.W.2d 34, 36 (1972).

147. *Wells*, 337 Ark. at 589, 991 S.W.2d at 116 (1999).

148. *See* ARK. CODE ANN. § 16-55-216; NationsBank, N.A. v. Murray Guard, Inc., 343 Ark. 437, 449-52, 36 S.W.3d 291, 299-300 (2001) (citing ARK. CODE ANN. § 16-64-122 (Repl. 2005)) (Thornton, J., dissenting). Moreover, a subsequent enactment directs that sections 16-55-216 and 16-64-122 be used in tandem to determine comparative fault. *See* Act 1156, 2005 Ark. Acts 3556, 3557 (codified at ARK. CODE ANN. § 27-101-201(b)(2)(B) (Supp. 2009)).

IV. *JOHNSON* AS A SEPARATION OF POWERS CASE

Johnson brought huge changes in Arkansas tort law. But even if it had decided smaller issues, its statement of the proper separation of powers would have made it a landmark case. The Arkansas Constitution of 1874 decreed that governmental powers be divided into three distinct departments,[149] each forbidden to exercise the powers of another.[150] To the judiciary went "general superintending control over all courts of the state,"[151] a grant that would enlarge through judicial reinterpretation[152] and legislative largess.[153] After an early attitude of accommodation,[154] in the 1980s the Arkansas Supreme Court began to push back against legislative incursions into courtroom procedure.[155] While the court had asserted judicial primacy where statutory court rules conflicted with judicially issued ones, *Johnson* held for the first time that such legislatively issued rules could be unconstitutional even without a conflict: "[W]e take this opportunity to note that so long as a legislative provision dictates procedure, that provision need not directly conflict with our procedural rules to be unconstitutional. This is because rules regarding pleading, practice, and procedure are solely the responsibility of this court."[156] Amendment 80 had made the court's procedural authority explicit;[157] *Johnson* made

149. ARK. CONST. art. 4, § 1.

150. ARK. CONST. art. 4, § 2.

151. ARK. CONST. art. 7, *amended by* ARK. CONST. amend. 80, § 4.

152. *See, e.g.*, Ricarte v. State, 290 Ark. 100, 103, 717 S.W.2d 488, 489 (1986) (adopting the Uniform Rules of Evidence as Arkansas law on the court's own authority).

153. *See, e.g.*, Act 38, 1973 Ark. Acts 89 (codified at ARK. CODE ANN. § 16-11-302 (repealed 2003)). The statute was repealed in 2003 after similar language in amendment 80 made it redundant. ARK. CODE ANN. § 16-11-302 (repealed 2003); *see also* 2 DAVID NEWBERN & JOHN WATKINS, ARKANSAS CIVIL PRACTICE & PROCEDURE § 1:2, at 4 n.10 (4th ed. 2009).

154. *See* Jackson v. Ozment, 283 Ark. 100, 101, 671 S.W.2d 736, 737-38 (1984) ("These sections of the Constitution do not expressly or by implication confer on this Court exclusive authority to set rules of court procedure.").

155. *See, e.g.*, Dawson v. Gerritsen, 290 Ark. 499, 502, 720 S.W.2d 714, 716 (1986) (announcing the court's intent to reconsider its holding in *Jackson*).

156. Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, at 7, __ S.W.3d __, __.

157. *See* ARK. CONST. amend. 80, § 3. ("The Supreme Court shall prescribe the rules of pleading, practice and procedure for all courts; provided these rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as declared in this Constitution.")

it exclusive.[158] *Johnson* capped a line of cases in which the Arkansas Supreme Court had developed a muscular interpretation of its constitutional authority over the courts.[159]

A. The Evolution of Arkansas's Pre-*Johnson* Separation of Powers Jurisprudence

Johnson's tremors shook every courthouse in Arkansas. But as with many real earthquakes, *Johnson* was the predictable release of strain that had built for years. The court's new stance was merely the capstone of a line of cases dating back to 1984 and *Jackson v. Ozment.*[160]

1. The Early Cases

The Arkansas Supreme Court has not always repelled legislative incursions as forcefully as it did in *Johnson.* In *Jackson* the court virtually invited them.[161] That case involved a plaintiff who responded to a hospital's debt-collection activities by alleging she had suffered malpractice there.[162] The defendant surgeons replied that the plaintiff had failed to give them sixty days' notice of her intent to sue as then required by statute.[163]

After the court noted and rejected plaintiff Jackson's arguments that the notice statute was substantively unconstitutional, it considered her contention that the statute violated the Arkansas Supreme Court's constitutional grant of superintending power over the state's inferior courts.[164] The court declined Jackson's invitation to assume purview over procedural rules, holding that the constitutional sections plaintiff cited "[did] not expressly or by implication confer on this Court exclusive

158. *Johnson*, 2009 Ark. 241, at 7, __ S.W.3d at __.

159. *See infra* Part IV. Part IV discusses the evolution of the separation-of-powers philosophy expressed in *Johnson.* The cases demonstrate the impossibility of maintaining a clear separation of powers while accommodating substantively defensible legislative enactments. *See, e.g.*, State v. Sypult, 304 Ark. 5, 800 S.W.2d 402 (1990).

160. 283 Ark. 100, 671 S.W.2d 736 (1984).

161. *See id.* at 101, 671 S.W.2d at 737-38.

162. *Id.* at 100, 671 S.W.2d at 737.

163. *Id.* at 100-01, 671 S.W.2d at 737.

164. *Id.* at 101, 671 S.W.2d at 737-38. The provisions in question—sections 1 and 4 of article 7—were supplanted but unchanged by amendment 80 in 2000. *See* ARK. CONST. amend. 80, § 22(a) (repealing enumerated sections of article 7).

authority to set rules of court procedure."[165] Jackson argued that the notice provision directly conflicted with the rule governing the commencement of a civil action,[166] but the court disagreed again.[167] The court concluded that the notice provision merely added "an additional step to the proper commencement of a medical injury case provided under [Arkansas Rule of Civil Procedure] 3."[168]

The court almost immediately regretted *Jackson*,[169] and in 1986 a legislative error provided the court an opportunity to salvage its rulemaking authority. The case, *Ricarte v. State*,[170] involved a criminal appeal that turned on the admissibility of spousal testimony.[171] Three days before his trial for burglary, Ricarte married a woman the State was to call as a witness against him.[172] When the State called Mrs. Ricarte to the stand, the defense objected that under Arkansas law the State could not call one spouse to testify against the other.[173] The prosecution responded that the Uniform Rules of Evidence (URE), legislatively adopted in 1975, exempted confidential spousal communications only.[174] In an inspired bit of lawyering, the defense argued that the URE did not govern in Arkansas, as the rules had been adopted during an unlawfully extended session of the General Assembly.[175] The Arkansas Supreme Court agreed, holding that the URE had never become law and that the older, broader spousal-immunity statute governed Mr. Ricarte's trial.[176]

Having resolved Mr. Ricarte's issue by holding the URE inapplicable, the court expressed concern at the "topsy-turvy condition" that would result from abandoning the URE:[177]

165. *Jackson*, 283 Ark. at 101, 671 S.W.2d at 738.
166. ARK. R. CIV. P. 3.
167. *Jackson*, 283 Ark. at 101-02, 671 S.W.2d at 738.
168. *Id.*
169. *See infra* text accompanying notes 184-95.
170. 290 Ark. 100, 717 S.W.2d 488 (1986).
171. *Id.* at 103, 717 S.W.2d at 489.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Ricarte*, 290 Ark. at 103, 717 S.W.2d at 489.
176. *Id.* The court noted that it was legally immaterial that the marriage may have been entered into for the purpose of precluding the newlywed's testimony. *Id.* at 103-04, 717 S.W.2d at 489.
177. *Id.* at 104, 717 S.W.2d at 489.

"There would be great confusion. Judges and lawyers would have to relearn the older, inferior rules of evidence. Many trial errors would occur."[178] To prevent this chaos, the court elected to adopt the URE judicially in the same opinion that invalidated the legislative adoption.[179]

Justice George Rose Smith, writing for the court, buttressed the decision with statutory support. The Arkansas Constitution, he noted, conferred upon the supreme court "a general superintending control over all inferior courts of law and equity."[180] The Arkansas Legislature had reinforced this authority with statutes declaring that the court should have the power to prescribe "rules of pleading, practice, and procedure with respect to any or all proceedings" in criminal and civil cases.[181] Presaging the court's reluctance to rest its power on a specific grant, Justice Smith traced the court's procedural authority to its own inherent power.[182] Litigants were slow to invoke this authority, however.

In *Dawson v. Gerritsen*,[183] the court again addressed the constitutionality of the sixty-day notice requirement for medical-malpractice actions. Six days before the statute of limitations would have lapsed, Mary Francis Dawson's husband filed suit, on behalf of her estate, against a surgeon who had allegedly caused her death.[184] In doing so, he omitted to give the defendant doctor sixty days' notice of his intent to sue.[185] Attempting to remedy this omission, the plaintiff took a voluntary nonsuit

178. *Id.*

179. *Id.* ("Under our own rule-making power and under existing statutory authority, as of this date we adopt the Uniform Rules of Evidence as the law in Arkansas.").

180. *Ricarte*, 290 Ark. at 104, 717 S.W.2d at 490 (citing ARK. CONST. art. 7, § 4).

181. *Id.* at 105, 717 S.W.2d at 490.

182. *Id.* ("That action [the purported statutory grant of authority to set the rules of pleading, practice, and procedure] was not an improper delegation of legislative power; it merely recognized the court's inherent power.") (citing Miller v. State, 262 Ark. 223, 555 S.W.2d 563 (1977)). The court in *Miller* characterized an earlier case, *In re Ark. Criminal Code Revision Comm'n*, 259 Ark. 863, 530 S.W.2d 672 (1975), as implicitly rejecting the argument that the criminal-rules-enabling statute had conferred a new rulemaking authority. *Miller*, 262 Ark. at 226, 555 S.W.2d at 564. "The enabling act here merely recognizes and is harmonious with this court's inherent powers rather than conferring an express power." *Id.*

183. 290 Ark. 499, 720 S.W.2d 714 (1986).

184. *Id.* at 500, 720 S.W.2d at 715.

185. *Id.*

sixty-five days after the initial filing.[186] He re-filed four days later.[187] The trial court declined to accept this as the statutory notice and granted the defendant's motion to dismiss.[188]

The plaintiff in *Dawson* challenged the constitutionality of the sixty-day notice requirement, but on fewer grounds than the plaintiff in *Jackson* had.[189] While Mr. Dawson alleged that the requirement violated due process and the prohibition against special legislation,[190] he omitted a separation-of-powers challenge.[191] This was a fatal, if understandable, error—the court had come to regret its holding in *Jackson*, decided only two years earlier.[192] The *Dawson* court implied as much as it floated the unraised supersession argument.[193] The court concluded, "By this opinion we announce an intention to reexamine the decision in *Jackson v. Ozment* at the next opportunity."[194] These waters would muddy further before they cleared, however.

2. 1990, a Year for Hard Facts

Hard facts are said to make bad law.[195] In 1990 the court addressed *Curtis v. State*[196] and *St. Clair v. State*,[197] both involving special treatment for child testimony in sex-abuse cases. In *Curtis*, the defendant challenged a statute[198] that allowed an alleged victim's videotaped deposition to be admitted in lieu of in-person testimony at trial.[199] Curtis argued that the statute promulgated a rule of courtroom procedure,

186. *Id.*
187. *Id.*
188. *Dawson*, 290 Ark. at 500, 720 S.W.2d at 715.
189. *Id.* at 500-01, 720 S.W.2d at 715.
190. *Id.* at 501, 720 S.W.2d at 715.
191. *Id.* at 502, 720 S.W.2d at 716.
192. *Id.*
193. *Dawson*, 290 Ark. at 502, 720 S.W.2d at 716.
194. *Id.*
195. *See* N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) ("Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.").
196. 301 Ark. 208, 783 S.W.2d 47 (1990).
197. 301 Ark. 223, 783 S.W.2d 835 (1990).
198. ARK. CODE ANN. § 16-44-203 (Repl. 1999).
199. *Curtis*, 301 Ark. at 209-10, 783 S.W.2d at 48.

violating the separation of powers.[200] *St. Clair* centered on a hearsay exception the General Assembly had expressly incorporated into the Arkansas Rules of Evidence, admitting pre-trial statements inconsistent with a victim's eventual testimony if those statements were found trustworthy.[201] In decisions handed down on the same day, the Arkansas Supreme Court upheld both statutes.[202]

In *Curtis*, the court professed that the scope of its rulemaking power depended on the purpose of the questioned rule.[203] The court would exercise supreme power over a rule of court function "unless its impact conflicts with a fixed public policy which has been legislatively or constitutionally adopted and has at its basis something other than court administration."[204] While the court provided that rules relating only to the efficient administration of judicial business were within the courts' exclusive power, it declared that "until an area of practice or procedure is preempted by rules of court, we will give full effect to legislation."[205] The court dealt better with hard facts in *State v. Sypult*, another child sex-abuse case. At issue in *Sypult* was another legislative evidentiary exception, this time a statutory abolishment of the spousal and professional testamentary privileges in child sex-abuse cases.[206] That statute expressly overrode conflicting provisions of the Arkansas Rules of Evidence.[207]

After noting that it had reaffirmed its inherent rulemaking power in *Ricarte*, the court declared its "retreat" from its

200. *Id.*

201. ARK. R. EVID. 803(25); *St. Clair*, 301 Ark. at 224-25, 783 S.W.2d at 835. The rule applies to children under ten years of age. ARK. R. EVID. 803(25).

202. *St. Clair*, 301 Ark. at 225, 783 S.W.2d at 835 ("We hold the separation of powers doctrine does not preclude the general assembly from enacting a rule such as the one in question here."); *Curtis*, 301 Ark. at 212, 783 S.W.2d at 49 ("The statute at issue involves procedure and evidence, but it deals with a subject which we have not preempted, videotape depositions of young victims of sexual crimes. Accordingly, the statute is not an unconstitutional violation of the separation of powers doctrine.").

203. *Curtis*, 301 Ark. at 212, 783 S.W.2d at 49.

204. *Id.*

205. *Id.*

206. *Id.* The statute was ARK. CODE ANN. § 12-12-511(a), *invalidated by Sypult*, 304 Ark. 5, 800 S.W.2d 402. The statute did not curtail the attorney-client and clergy-penitent privileges. ARK. CODE ANN. § 12-12-511(a).

207. ARK. CODE ANN. § 12-12-511(a). It begins, "Any provision of the Arkansas Uniform Rules of Evidence notwithstanding . . . ." ARK. CODE ANN. § 12-12-511(a).

holdings earlier that year in *Curtis* and *St. Clair*.[208] It would "redefine the parameters of [its] 'shared' rule making power with the legislature."[209] Literally applying those deferential holdings could "open the door to total abrogation of the rules of evidence and procedure we deem vital to the interests and policies inherent in the judicial process."[210] The court continued, "To protect what we hold inviolate we now declare that we will defer to the General Assembly, when conflicts arise, only to the extent that the conflicting court rule's primary purpose and effectiveness are not compromised; otherwise, our rules remain supreme."[211]

3. The Modern Cases

Two years after *Sypult*, a petitioner accepted the *Dawson* court's invitation for a renewed separation-of-powers challenge to the notice requirement for medical-malpractice actions.[212] The court had already called the sixty-day notice provision "manifestly harsh" and "an obvious hardship, the equal of which may not exist elsewhere in the law."[213] The defendant-appellee cannot have been optimistic.

The defendant had performed knee surgery on Brian Weidrick, allegedly resulting in a debilitating deep-pocket open-wound infection.[214] Exactly two years after the injury, and without providing notice of his intent to sue, Weidrick filed a medical-malpractice claim against the defendant.[215] His claim was dismissed.[216] Weidrick appealed on the sole grounds that Rule 3 of the Arkansas Rules of Civil Procedure governed the commencement of a civil action and that the sixty-day notice requirement in section 16-114-204 of the Arkansas Code

208. *Sypult*, 304 Ark. at 7, 800 S.W.2d at 404.

209. *Id.*

210. *Id.*

211. *Id.*

212. Weidrick v. Arnold, 310 Ark. 138, 140, 835 S.W.2d 843, 844 (1992).

213. Dawson v. Gerritsen, 295 Ark. 206, 211, 748 S.W.2d 33, 35 (1988). The case, denominated *Dawson II* by the *Weidrick* court, involved a claim brought by the minor sons of the decedent. *Id.* at 207, 748 S.W.2d at 33. While the *Dawson II* court dismissed the claim as res judicata, it declined to charge costs to the plaintiffs for attempting to escape the hardship the notice provision had imposed. *Id.* at 209, 211, 748 S.W.2d at 34-35.

214. *Weidrick*, 310 Ark. at 139, 835 S.W.2d at 844.

215. *Id.* at 139-40, 835 S.W.2d at 844.

216. *Id.* at 139, 835 S.W.2d at 844.

improperly altered that process in medical-malpractice cases.[217] The court broadly agreed:

> [I]t is manifest and clear that we intended for Rule 3 to govern commencement of all civil actions. These actions are commenced by filing a complaint with the clerk of the proper court. The sixty-day notice requirement adds an additional condition for commencing a civil action for medical injury and is directly at odds with Rule 3.[218]

Holding that the statute interfered with the court's own rules did not resolve the case, however. The defendants argued that the statute fit an exception for a statutorily created "right, remedy, or proceeding," for which the legislature could properly dictate procedure.[219] The court disagreed, observing that actions for medical malpractice—far from being a legislatively created remedy—had a 600-year common-law pedigree.[220] The court cited medical-malpractice cases from as early as 1925, well before any statutory allowance, to prove that a medical-malpractice action was not a "special proceeding."[221] The court said: "The Arkansas Rules of Civil Procedure apply to civil actions. A civil action is an ordinary proceeding by one party against another for the enforcement or protection of a private right or redress or prevention of a private wrong. Every other remedy is a special proceeding."[222] As the court had never intended to "accede to the General Assembly on matters of civil procedure for civil actions,"[223] the legislature violated the separation of powers when it added a sixty-day notice requirement to Rule 3's requirements for filing a medical-malpractice complaint.[224]

Eleven years passed between the Arkansas Supreme Court's decision in *Weidrick* and the Civil Justice Reform Act of

217. *Id.* at 140, 835 S.W.2d at 844.

218. *Id.* at 142, 835 S.W.2d at 845.

219. ARK. R. CIV. P. 81(a); *Weidrick*, 310 Ark. at 143, 835 S.W.2d at 846.

220. *Weidrick*, 310 Ark. at 143, 835 S.W.2d at 846.

221. *Id.* at 144, 835 S.W.2d at 846 (citing Lanier v. Trammell, 207 Ark. 372 180 S.W.2d 818 (1944); Gray v. McDermott, 188 Ark. 1, 64 S.W.2d 94 (1933); Plunkett v. Hays, 180 Ark. 505, 21 S.W.2d 851 (1929); Dorr v. Fike, 177 Ark. 907, 9 S.W.2d 318 (1928); Spears v. McKinnon, 168 Ark. 357, 270 S.W. 524 (1925)).

222. *Id.* (quoting Reed v. Baker, 254 Ark. 631, 638, 495 S.W.2d 849, 854 (1973)) (internal citations omitted).

223. *Id.* at 146, 835 S.W.2d at 847.

224. ARK. R. CIV. P. 3; *Weidrick*, 310 Ark. at 146, 835 S.W.2d at 848.

2003.[225] In the interim, the people of Arkansas passed amendment 80, making explicit the Arkansas Supreme Court's privilege to prescribe the rules of pleading, practice, and procedure in the state's courts.[226] Despite this boost to the court's power and more than a decade of notice that civil procedure was the court's sole province, lawmakers larded the CJRA with a procedural impediment like the one struck down in *Weidrick*.[227] Section 16-114-209(b) required a plaintiff to produce, within thirty days of filing suit for medical malpractice, a medical expert's affidavit supporting the allegations of breached medical duty.[228] Noncompliance meant mandatory dismissal.[229]

The *Summerville* court saw the parallels to *Weidrick* and declared that it could not distinguish between *Weidrick*'s pre-suit notice requirement and the post-suit affidavit requirement at bar.[230] The court declined to hold the affidavit requirement itself unconstitutional: "The constitutional infirmity in [subsection] 16-114-209(b) is the provision for dismissal if the affidavit does not accompany a complaint within thirty days. We do not hold today that the balance of [subsection] 16-114-209(b), requiring a reasonable-cause affidavit, is constitutionally infirm."[231] But invalidating the dismissal provision made the rest of the provision moot.[232]

B. *Johnson* and *Cato v. Craighead County Circuit Court*

The separation-of-powers philosophy set forth in *Johnson* has the potential to scrub the Arkansas Code of decades of legislative adventures in courtroom procedure; accordingly, Appendix I lists some threatened statutes. *Johnson* may not

225. *See* Act 649, 2003 Ark. Acts 2130 (codified at ARK. CODE ANN. §§ 16-55-201 to -220 (Repl. 2005 & Supp. 2009)). Act 649 also added provisions to the statutory scheme governing actions for medical injury. Act 649, 2003 Ark. Acts 2130 (codified at ARK. CODE ANN. §§ 16-114-201 to -212 (Repl. 2006 & Supp. 2009)).

226. ARK. CONST. amend. 80, § 3.

227. *See* ARK. CODE ANN. § 16-114-209(b); Summerville v. Thrower, 369 Ark. 231, 239, 253 S.W.3d 415, 421 (2007).

228. ARK. CODE ANN. § 16-114-209(b)(3)(A).

229. ARK. CODE ANN. § 16-114-209(b)(3)(B).

230. *Summerville*, 369 Ark. at 239, 253 S.W.3d at 420-21.

231. *Id.* at 239, 253 S.W.3d at 421.

232. *Id.*

have the impact it promised, however. In it the court established a "bright-line rule" that asks only "whether the challenged legislation dictates procedure."[233] But before the ink was dry on that bright line, the court smudged it.

To understand *Johnson* as a separation-of-powers case requires understanding *Cato v. Craighead County Circuit Court*,[234] the first supreme court case to interpret *Johnson*. In *Cato*, the supreme court followed *Johnson* in saying that the constitutional separation of powers foreclosed legislation that bypassed the court's rules of pleading, practice and procedure and instituted its own.[235] The court, however, did not then practice what it had preached.

The statute at issue in *Cato* exempted service members from civil process during military activities and transit thereto.[236] The court read that statute to create a substantive right to be free from service of process.[237] Because it merely barred the application of a rule without creating an alternative procedure, it did not violate the separation of powers.[238] This seems to conflict with precedent as old as the court's 1990 decision in *State v. Sypult*.[239] In *Sypult*, the court invalidated a statute that abrogated the physician- and psychotherapist-patient privilege in child sex-abuse trials.[240] The respective statutes in *Cato* and *Sypult* each provided that a judicially promulgated rule would be void in a legislatively defined circumstance.[241] The cases' divergent outcomes deserve close analysis.

233. Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, at 7, __ S.W.3d __, __; Cato v. Craighead County Circuit Court, 2009 Ark. 334, at 8, __ S.W.3d __, __. In *Cato*, the court explained the substantive/procedural distinction as being between "[t]he part of the law that creates, defines, and regulates the rights, duties, and powers of parties" and "[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves." *Id.* at 8, __ S.W.3d at __ (quoting BLACK'S LAW DICTIONARY 1241, 1470 (8th ed. 2004)).

234. 2009 Ark. 334, __ S.W.3d __.

235. *Id.* at 8, __ S.W.3d at __.

236. *Id.* at 8, __ S.W.3d at __ (discussing ARK. CODE ANN. § 12-62-403 (Repl. 2003)).

237. *Id.* at 8, __ S.W.3d at __.

238. *Id.* at 8-9, __ S.W.3d at __.

239. 304 Ark. 5, 800 S.W.2d 402 (1990).

240. *Id.* at 8, 800 S.W.2d at 404; *see also* ARK. R. EVID. 503.

241. *See* ARK. CODE ANN. § 12-62-403; ARK. CODE ANN. § 12-12-511(a) (repealed 2009). In *Cato*, ARK. CODE ANN. § 12-62-403; in *Sypult*, ARK. CODE ANN. § 12-12-511(a) (repealed 2009).

Both cases discussed the role public policy should play in separation-of-powers considerations. In *Sypult*, the court refused to uphold a statute "clearly grounded in strong public policy" because it would nonetheless "open the door to total abrogation of the rules of evidence and procedure [the court] deem[ed] vital to the interests and policies inherent in the judicial process."[242] The *Cato* court, in a seemingly retrograde move, upheld an analogous statute with discussion that must distress anyone seeking clear guidance on the separation of powers. The court explained:

> [T]his court has long held that matters of public policy are generally within the purview of the legislature.... We hold that the statute at issue here, insofar as it provides for members of the organized militia a right not granted to those to whom the statute does not apply, is rooted in public policy.... To hold that the General Assembly's enactment of section 12-62-403 was an impediment to this court's rulemaking authority would be to impede upon the legislature's policy-making authority. This we will not do.[243]

Given that amendment 80 conferred clear legitimacy on the court's supreme power to promulgate rules of procedure[244] and that barely a month had passed since the court had drawn a "bright-line rule" with *Johnson*,[245] *Cato*'s deference to the General Assembly is surprising. These apparently contradictory outcomes can be explained one of two ways: first, that the court defends the purpose, not the text, of its rules; second, that the court condones procedural intrusions when they further policies the court favors.

C. Resolving the Bright Line

The case law could support either theory. In *Sypult*, the court declared that it would defer to the General Assembly in conflicts "only to the extent that [a] conflicting court rule's primary purpose and effectiveness are not compromised."[246] In

242. 304 Ark. at 7, 800 S.W.2d at 404.
243. *See Cato*, 2009 Ark. 334, at 9, __ S.W.3d at __.
244. *See* ARK. CONST. amend. 80, § 3.
245. *Cato*, 2009 Ark. 334, at 8, __ S.W.3d at __.
246. State v. Sypult, 304 Ark. 5, 7, 800 S.W.2d 402, 404 (1990).

Sypult, the invalidated statute had compromised the longstanding judicial policy to foster candid medical and psychotherapeutic discussions by privileging those discussions from revelation in court.[247] In *Cato*, some facts mitigated any harm to the fairness principles underlying the court's civil-process rules.[248] Although the challenged statute provided no alternative means of serving process on those it protected,[249] the subsequently enacted Arkansas Soldiers' and Airmen's Civil Relief Act tolled the statute of limitations for civil claims involving a servicemember for the period of his or her active duty.[250] Accordingly, the plaintiff in such an action would not be prejudiced in his ability to timely file suit.[251] Upholding the process-exemption statute as substantive preserved the privilege for servicemembers without disadvantaging other litigants, a result consistent with the court's own rules.

Some language in *Johnson* supports this theory. The *Johnson* court held that the nonparty-fault provision bypassed the court's rules by "setting up a procedure to determine the fault of a nonparty and mandating the consideration of that nonparty's fault."[252] One consistent reading is that, independently of the procedural packaging in subsection 202(b), subsection 202(a) violated the adversarial principles that must rank first among the "interests and policies inherent in the judicial process" the court vowed in *Sypult* to defend.[253]

A second possibility is the court has a consistent standard for divining the substantive or procedural nature of a statute, but licenses as "public policy" those statutes the court would

247. *Id.* at 8, 800 S.W.2d at 404.

248. *See Cato*, 2009 Ark. 334, at 2-6, __ S.W.3d at __.

249. ARK. CODE ANN. § 12-62-403 (Repl. 2003).

250. *Cato*, 2009 Ark. 334, at 9, __ S.W.3d at __. The law applies to any claim brought by or against a member of the Arkansas National Guard who is ordered into active duty service for more than 180 days. ARK. CODE ANN. § 12-62-704 (Repl. 2003). Such a claim is tolled whether it accrued before or during the member's service, and applies to claims brought by or against the member's administrator, executor, heirs or assigns. ARK. CODE ANN. § 12-62-712 (Repl. 2003).

251. *Cato*, 2009 Ark. 334, at 10, __ S.W.3d at __.

252. Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, at 8, __ S.W.3d __, __.

253. *See* State v. Sypult, 304 Ark. 5, 7, 800 S.W.2d at 402, 404 (1990); *see also* Billings v. Aeropres Corp., 522 F. Supp. 2d 1121, 1131 (E.D. Ark. 2007) ("Allowing a jury to make specific findings concerning the conduct of an entity or person who is not in the courtroom undermines the purpose of the adversarial process.").

approve on its own.[254] As with *Ricarte*, where the court adopted the Uniform Rules of Evidence on its own authority,[255] the court's power to dictate procedure includes the power to adopt procedures imposed by the General Assembly. This is the only sensible way to interpret the court's occasional invocation[256] of a procedural statute's public-policy grounding because, as Justice Turner noted in Sypult, "[A]ll enactments of the General Assembly become matters of 'public policy.'"[257]

With *Cato*, the court skyhooked the public-policy exception over amendment 80 and across *Johnson*'s "bright line," perhaps as an apology to the General Assembly for *Johnson*. The resulting separation-of-powers test is so vague as to admit virtually any result. Consequently, cases decided with it will have almost no value as precedent.

The court could have avoided setting and abandoning a bright-line separation-of-powers rule if it had decided *Johnson* with one of the substantive constitutional provisions the plaintiff had alleged the CJRA provisions had violated.[258] Johnson had alleged that the nonparty-fault statute violated, among others, article 2, section 13 of the Arkansas Constitution.[259] That provision guarantees "a certain remedy in the laws for all injuries or wrongs he may receive in his person, property, or character; he ought to obtain justice freely . . . completely, and

254. Professor Stephen M. Sheppard offered this interpretation, likening it to a "deadline" in the original sense: a boundary past which a guard was licensed—but not obligated—to shoot and kill an escaping prisoner. Personal interview with Stephen M. Sheppard, William H. Enfield Professor of Law, University of Arkansas School of Law (Mar. 12, 2010).

255. Ricarte v. State, 290 Ark. 100, 104, 717 S.W.2d 488, 489 (1986).

256. *See Sypult*, 304 Ark. at 7, 800 S.W.2d at 404. The court in *Sypult* both declared its "retreat" from the public-policy test in *Curtis* and *St. Clair* and construed its holding as a "new position." *Id.* at 7-8, 800 S.W. 2d at 404 ("Giving complete deference to the legislature would, in this instance, completely abolish the purpose and policy behind the rule. We cannot permit this. The trial court's finding in the present case reflects our new position."). Unhelpfully, the court has continued to cite *Curtis* on occasion. *See* Citizens for a Safer Carroll County v. Epley, 338 Ark. 61, 64, 991 S.W.2d 562, 564 (1999). In *Citizens*, the court went so far as to construe *Curtis* as an exception to the general rule set down in *Sypult*. *Id.* (citing Hill v. State, 381 Ark. 408, 887 S.W.2d 275 (1994), not *Sypult*, for the *Sypult* principle.)

257. 304 Ark. at 13, 800 S.W.3d at 407 (Turner, J., concurring).

258. *See* Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, at 5, __ S.W.3d __, __.

259. *Id.* at 5, __ S.W.3d at __.

without denial."[260] A remedy of damages cannot be complete if it is discounted by fault that is assessed to a person not obliged to defend her case or to pay a judgment.

Although article 2, section 7 was not raised in *Johnson*, the nonparty-fault provision may also have violated the constitutional guarantee that "[t]he right to jury trial shall remain inviolate."[261] In March 2010, the Georgia Supreme Court construed a substantively identical clause in Georgia's Constitution to forbid legislative caps on noneconomic damages.[262] The right to jury trial did not merely dictate the form of trial, but "but the right of trial by jury *in all its essential elements* as it existed at common law and as it obtained in [Georgia] at the date of the adoption of [its] earliest constitution."[263] The Arkansas Supreme Court has noted that article 2, section 7 and article 2, section 13 had operated to require a constitutional amendment providing for exclusive-remedy Workers' Compensation laws.[264] If Johnson had invoked article 2, section 7, the court could have concluded that reducing the plaintiff's damage award for the fault of nonparties abrogated the right to jury trial as it existed at common law.[265]

260. ARK. CONST. art. 2, § 13.

261. ARK. CONST. art. 2, § 7.

262. Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, No. S09A1432, (Ga. Mar. 22, 2010), 2010 WL 1004996, at *5-6. *Compare* GA. CONST. art. I, § I, para. XI(a) ("The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party. In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; and the jury shall be the judges of the law and the facts."), *with* ARK. CONST. art. 2, § 7 ("The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law; and in all jury trials in civil cases, where as many as nine of the jurors agree upon a verdict, the verdict so agreed upon shall be returned as the verdict of such jury, provided, however, that where a verdict is returned by less than twelve jurors all the jurors consenting to such verdict shall sign the same.").

263. *Atlanta Oculoplastic Surgery*, No. S09A1432, 2010 WL 1004996, at *3 (quoting Pollard v. State, 96 S.E. 997, 1000 (Ga. 1918)).

264. Craven v. Fulton Sanitation Serv., Inc., 361 Ark. 390, 398, 206 S.W.3d 842, 847 (2005). That amendment made the Workers' Compensation system the only textually sanctioned limit on recovery for personal injuries. ARK. CONST. art. 5, § 32 ("[O]therwise no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property . . . .").

265. This is doubtful if the court follows its reasoning in *White v. City of Newport*, 326 Ark. 667, 933 S.W.2d 800 (1996), in which the court held that neither article 2, section 13 nor article 5, section 32 meant precisely what it said. *White*, 326 Ark. at 672, 933

V. CONCLUSION

Johnson abolished nonparty fault and restored the common-law collateral-source rule. It operated to return Arkansas comparative-fault law to a state not seen since *NationsBank*. These effects were straightforward.

As a separation-of-powers case, *Johnson*'s effect is less certain. *Johnson* purported to give judges, litigants, and the General Assembly clear notice that Arkansas's Constitution forbids any legislative adventuring in courtroom procedure.[266] At least a dozen statutes[267] exceed the permissible boundaries of legislative power drawn by *Johnson*, and if the court holds that line, litigants could use the case to scour them from the Arkansas Code.

Unfortunately, the supreme court has since handed down *Cato*.[268] Biopsied for a consistent separation-of-powers principle, *Cato* yields none. The *Cato* court explained *Johnson*'s clear separation-of-powers test, then ignored the test it had explained.[269] From a more muscular position the court reached a more deferential result. If this was intended to assuage the General Assembly, it did more harm than good. Considered together, *Johnson* and *Cato* suggest that a statute becomes procedural when the court dislikes its substance. If the court intends to guide litigants and constrain future courts, it should walk back *Cato* and set *Johnson*'s bright line in stone.

The CJRA's nonparty-fault provision[270] delivered the abuses it had threatened. It subverted the truth-seeking function served by assessing fault among adversary parties, and some

S.W.2d at 803. *White* reaffirmed that municipalities in Arkansas enjoy sovereign immunity, without which they risked bankruptcy from tort judgments. *Id.* The *White* court applied intermediate scrutiny to the immunity statute, holding that it was a "reasonable means of achieving a permissible public-policy objective." *Id.* Strict scrutiny would have yielded the same result, and may be the appropriate standard when legislation implicates rights anchored in three sections of the Arkansas Constitution. *See* Billings v. Aeropres Corp., 522 F. Supp. 2d 1121, 1126 (E.D. Ark. 2007).

266. Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, at 7, __ S.W.3d __, __.

267. *See infra* Appendix I for some examples. With respect to evidentiary rules alone, a Westlaw© search of the Arkansas Code returns more than 100 statutes purporting to render certain evidence admissible or inadmissible.

268. Cato v. Craighead County Circuit Court, 2009 Ark. 334, __ S.W.3d __.

269. *See generally id.*

270. ARK. CODE ANN. § 16-55-202(a) (Repl. 2005), *invalidated by Johnson*, 2009 Ark. 241, __ S.W.3d __.

defendants proved as much by asserting nonparty fault when joinder was possible.[271] The provision violated more than the separation of powers—it unconstitutionally curtailed a plaintiff's remedy and violated her right to jury trial.

Where substantive constitutional arguments accompanying a separation-of-powers challenge would yield the same result, the supreme court should decide the case on substantive grounds. Only by doing so can the court meaningfully put judges, legislators, and litigants on notice of the law. Moreover, the Arkansas Supreme Court construes statutes to give effect to each word, leaving none "void, superfluous, or insignificant."[272] It should give no lesser treatment to the rights guaranteed by the Arkansas Constitution.

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271. McMath & Chamberlin, *supra* note 16. Nonparty-fault allocation reduces defendants' incentives to join all responsible parties. Mark M. Hager, *What's (Not!) in a Restatement? ALI Issue-Dodging on Liability Apportionment*, 33 CONN. L. REV. 77, 121 (2000). The risk of "strategic nonjoinder" may best be reduced for both plaintiffs and defendants by forbidding nonparty apportionment but requiring a plaintiff to join all answerable parties in a single action. *Id.*

272. *See, e.g.*, Rose v. State Plant Bd., 363 Ark. 281, 289, 213 S.W.3d 607, 614 (2005) (citing Ark. Tobacco Control Bd. v. Santa Fe Natural Tobacco Co., Inc., 360 Ark. 32, 199 S.W.3d 656 (2004)).

APPENDIX I: SOME IMPERILED STATUTES

Johnson is important not only for its immediate effects, but for its potential prospective effects as a new statement of the separation of powers. The court expressly held that the rules of practice, pleading, and procedure were its exclusive province,[273] and notwithstanding *Cato* it may maintain that view. This appendix identifies some statutes likely to face close separation-of-powers scrutiny as *Johnson*-based challenges begin to filter up from the trial courts. Because *Johnson*'s immediate impact was on tort law, trial lawyers for both plaintiffs and defendants should prove the most alert to opportunities to apply *Johnson* in the future. They may start with the rest of Act 649, two sections of which the *Johnson* court struck down.[274]

A. The Civil Justice Reform Act

Most of Act 649 was codified at sections 16-55-201 through -220 of the Arkansas Code as the Civil Justice Reform Act of 2003.[275] While many of these seem substantive in nature, at least one infirmity remains.

Section 16-55-211. Sections 16-55-207 and -208 respectively raised a plaintiff's burden for proving punitive damages and imposed a cap on those damages for all but intentional torts.[276] In section 16-55-211 the General Assembly took a further step. When a complainant seeks punitive damages, section 211 entitles any party to demand, at least ten days before trial, to bifurcate the trial into compensatory- and punitive-damages stages.[277]

Section 211 is constitutionally troublesome in two respects. First, subsection 211(a) directs that bifurcation is mandatory upon timely demand in a punitive-damages case.[278] This removes a trial court's discretionary power to consolidate or

273. *Johnson*, 2009 Ark. 241, at 7, __ S.W.3d at __.

274. Act 649, 2003 Ark. Acts 2130, 2131-32, 2137 (codified at ARK. CODE ANN. §§ 16-55-202, -212(b) (Repl. 2005)).

275. *See* Act 649, 2003 Ark. Acts 2130 (codified at ARK. CODE ANN. §§ 16-55-201 to -220 (Repl. 2005)).

276. *See* Act 649, 2003 Ark. Acts 2130, 2134-35 (codified at ARK. CODE ANN. §§ 16-55-207 to -208).

277. ARK. CODE ANN. § 16-55-211.

278. *See* ARK. CODE ANN. § 16-55-211(a).

bifurcate actions and issues and it may violate the separation of powers.[279] Second, the *Johnson* court disposed of subsection 16-55-212(b) by noting that its plain language limited what compensatory-damage evidence would be admissible at trial.[280] Subsection 211(b) reads, "*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.*"[281] The emphasized text plainly makes 211(b) a rule of evidence—one unconstitutional because legislatively imposed.[282]

B. The Medical Malpractice Act

With rising medical-malpractice premiums a key stated motive for passing the CJRA,[283] the Act also imposed new obstacles to redressing medical injury.[284] Most were codified with the Medical Malpractice Act, sections 16-114-201 through -212 of the Arkansas Code.

Section 16-114-205. Although section 3 of amendment 80 cemented the supreme court's purview over rules of "pleading, practice, and procedure,"[285] the court has invoked only the last element of the triad.[286] Subsection 16-114-205(a) of the Arkansas Code, forbidding a medical-injury complainant to specify a damage amount in her pleadings, infringes the first element: rules of pleading.[287] The defendant, may demand the amount by special interrogatory any time after the pleadings are filed,

279. *See* ARK. CODE ANN. § 16-55-211(a); ARK. R. CIV. P. 42(a).

280. Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, at 10, __ S.W.3d __, __. "Because rules regarding the admissibility of evidence are within [the court's] province," the provision violated the separation of powers. *Id.* at 10, __ S.W.3d at __.

281. ARK. CODE ANN. § 16-55-211(b) (emphasis added).

282. *See* ARK. CODE ANN. § 16-55-211(b) (emphasis added); *Johnson*, 2009 Ark. 241, at __, __ S.W.3d at __.

283. Act 649, 2003 Ark. Acts 2130, 2144 ("Emergency Clause").

284. *See, e.g.*, Act 649, 2003 Ark. Acts 2130, 2141 (imposing the expert-affidavit prerequisite struck down in *Summerville v. Thrower*, 369 Ark. 233, 239, 253 S.W.3d 415, 421 (2007)).

285. ARK. CONST. amend. 80, § 3.

286. *See, e.g.*, Cato v. Craighead County Circuit Court, 2009 Ark. 334, at 8, __ S.W.3d __, __ ("Under our holding in *Johnson*, the only question that need be asked is whether the challenged legislation dictates procedure."). "Pleading" and "practice" may rarely be mentioned because they are subsumed by "procedure."

287. ARK. CODE ANN. § 16-114-205(a) (Repl. 2006).

obliging the complainant to answer within thirty days.[288]

Section 205 infringes the court's sole authority to set pleading standards in inferior courts, then adds a procedural mechanism for the defendant to retrieve the proscribed information.[289] Despite the clear separation-of-powers problem, this provision may survive; ironically, for a procedural reason—a plaintiff could only challenge section 205 after suffering injury for noncompliance.[290] Few plaintiffs' attorneys would risk a malpractice suit for failing to comply with a rule that negligbly disadvantages them simply to preserve a separation-of-powers claim.

Subsection 16-114-207(3). In *Sypult*, the supreme court rejected a legislative attempt to abolish certain testamentary privileges in child sex-abuse cases.[291] To accede would have invited the wholesale abrogation of the court's rules of procedure and evidence.[292] *Sypult* restored a legislatively displaced evidentiary bar,[293] and *Johnson* dismantled a legislatively erected one.[294] This spells trouble for subsection 207(3), which says that a medical professional may not be asked at trial about his compliance with or violation of the medical standard of care.[295] Subsection 207(3), which predated the CJRA, faced constitutional challenges, including a separation-of-powers challenge, in *Whorton v. Dixon*.[296] While the court concluded that subsection 207(3) did not violate equal protection,[297] it did not reach the merits of the plaintiff's separation-of-powers challenge, as the challenge had not been made at trial.[298] Under *Sypult* and *Johnson*, a properly raised challenge could bear fruit.

Section 16-114-208(a)(1)(B). The *Johnson* court actually

288. ARK. CODE ANN. § 16-114-205(b).

289. *See* ARK. CODE ANN. § 16-114-205.

290. *See* Goodwin v. Harrison, 300 Ark. 474, 483, 780 S.W.2d 518, 522 (1989) ("Appellant . . . contends that the . . . act is unconstitutional. She does not explain how [it] has adversely impacted upon her, a necessary prerequisite to standing . . . ." (internal citations omitted)).

291. State v. Sypult, 304 Ark. 5, 7, 800 S.W.2d 402, 404 (1990).

292. *Id.*

293. *Id.*

294. Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, at 10, __ S.W.3d __, __.

295. ARK. CODE ANN. § 16-114-207(3) (Repl. 2006).

296. *See* Whorton v. Dixon, 363 Ark. 330, 214 S.W.3d 225 (2005).

297. *Id.* at 337, 214 S.W.3d at 230-31.

298. *Id.* at 338-39, 214 S.W.3d at 231-32.

invalidated one more statutory provision than it listed. The text of subsection 16-55-212(b), characterized in *Johnson* as comprising an unconstitutional rule of evidence, was inserted in the Arkansas Code twice per Act 649.[299] The court in *Johnson* addressed only the codification at subsection 212(b),[300] rendering subsection 16-114-208(a)(1)(B) a sort of zombie statute. Vanquished once in the codified CJRA, subsection 212(b) may yet shamble into a medical-injury lawsuit as subsection 208(a)(1)(B) to set upon an unwary plain-tiff's-attorney and create malpractice exposure. The General Assembly would do well to deliver a legislative headshot in the 2011 regular session.

Section 16-114-208(c)(3). In *Cato*, the supreme court distinguished substantive and procedural law as being "[t]he part of the law that creates, defines, and regulates the rights, duties, and powers of parties," versus "[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves."[301] Although the court has often noted specific con-flicts between legislative enactments and the court's published procedural rules,[302] *Cato* follows *Johnson* in stating that the dispositive question in separation-of-powers challenges is whether legislation dictates procedure.[303]

Section 16-114-208 imposes a procedure by which trial courts must calculate and disburse medical-malpractice awards that exceed a statutory amount.[304] Malpractice awards of more than $100,000 must be disbursed in periodic increments, with payments for pain and suffering and for future care terminating at the plaintiff's death.[305] Subsection 208(c) interferes with a

299. Act 649, 2003 Ark. Acts 2130, 2137, 2140 (codified at ARK. CODE ANN. §§ 16-55-212b, 16-114-208(a)(1)(B) (Repl. 2005)).

300. Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, at 10, __ S.W.3d __, __.

301. Cato v. Craighead County Circuit Court, 2009 Ark. 334, at 8, __ S.W.3d __, __ (quoting Summerville v. Thrower, 369 Ark. 231, 237, 253 S.W.3d 415, 419-20 (2007)).

302. *See, e.g.*, *Summerville*, 369 Ark. at 239, 253 S.W.3d at 421 ("We reverse . . . with respect to the thirty-day dismissal set out in § 16-114-209(b)(3)(A) and strike that provision as directly in conflict with Rule 3 of our Civil Rules of Procedure . . . .").

303. *Cato*, 2009 Ark. 334, at 8, __ S.W.3d at __.

304. ARK. CODE ANN. § 16-114-208(c)(1) (Repl. 2006).

305. ARK. CODE ANN. § 16-114-208(c)(3). Subsection 208(c)(3) allows the payments to be structured at the court's discretion to "protect a plaintiff's right to future payments," and provides that the balance of the payments, less the award for pain and suffering and the cost of future care, be paid into the plaintiff's estate. ARK. CODE ANN.

court's discretion to structure awards. It does so unfairly, because an award is reduced when a plaintiff dies early but does not increase when a plaintiff outlives a fact-finder's expectations.[306] It ensures that medical-malpractice defendants in aggregate will consistently pay less than the sum of the judgments they suffer.

Its procedural impositions aside, this requirement may make section 208 the rare tort statute to be vulnerable under the Arkansas Constitution's prohibition against special legislation.[307] Legislation is unconstitutional if it inherently "*arbitrarily* separates some person, place, or thing from those upon which, but for such separation, it would operate."[308] This test applies both to special-legislation and equal-protection challenges.[309] Both require the person challenging the statute to show that such legislation is *not* "rationally related to achieving any legitimate governmental objective under any reasonably con-ceivable fact situation."[310] Under section 208, negligent doctors benefit financially from the early deaths of their victims, a constitutionally dubious arrangement.

Section 16-114-211. *Johnson*'s second holding struck down subsection 16-55-212(b) because it limited what evidence of a plaintiff's damages could be admitted at trial.[311] Section 16-114-211 is a similar intrusion;[312] it purports that "surveys or inspections by state or federal regulators, or by accrediting organizations" are only admissible in a medical action if relevant to a plaintiff's injury.[313] Though possibly toothless given the broad definition of relevance in the Rules,[314] it is a legislatively promulgated rule of evidence, unconstitutional per *Johnson*.

§ 16-114-208(c)(3).

306. *See* ARK. CODE ANN. § 16-114-208(c)(3).

307. *See* ARK. CONST. amend. 14.

308. Eady v. Lansford, 351 Ark. 249, 256, 92 S.W.3d 57, 61 (2002) (quoting Fayetteville Sch. Dist. v. Ark. State Bd. of Educ., 313 Ark. 1, 852 S.W.2d 122 (1993)).

309. *Id.*

310. *Id.*

311. Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, at 10, __ S.W.3d __, __.

312. *See* ARK. CODE ANN. § 16-114-211 (Repl. 2006).

313. ARK. CODE ANN. § 16-114-211.

314. *See* ARK. R. CIV. P. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

Limitation on Punitive Damages Struck Down as Unconstitutional by Arkansas Supreme Court

Posted by lawreview on March 4, 2012 at 22:28 pm

By: Rachel A. Orr, Research Editor

Arkansas Law Review

Bayer Cropscience LP v. Schafer, 2011 Ark. 518, ___ S.W.3d ___ (Dec. 8, 2011).

The Arkansas Supreme Court found the General Assembly exceeded its authority under article 5, section 32 of the Arkansas Constitution by limiting recoverable punitive damages in the Arkansas Tort Reform Act. The plaintiff rice farmers were awarded nearly $6 million in compensatory and $42 million in punitive damages after a jury trial in Lonoke County. On appeal, the Bayer defendants (Bayer) argued that the trial court erred in ruling that section 16-55-208 of the Arkansas Code is unconstitutional.

The rice farmers alleged that Bayer had negligently permitted a genetically-engineered rice seed to enter the United States long-grain rice supply. Because of this contamination, two traditional rice seed varieties were banned from use for the 2007-2008 crop year. Additionally, the rice farmers were required to adopt and implement a seed plan in an effort to remove the genetically-engineered rice from their fields and machinery. The use of genetically-modified rice had not been approved by the USDA or endorsed for human consumption by any foreign government. Exports of long-grain rice from the United States decreased by 622,972 metric tons as a result of the contamination.

In affirming the circuit court's decision, the Arkansas Supreme Court acknowledged that the Arkansas General Assembly is permitted to alter the common law in order to advance reasonable policy objectives. However, this authority must be exercised within the constraints imposed by the Arkansas Constitution. Article 5, section 32 provides that "no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property . . . ." Excepted from this legislative limitation is an exclusive grant of power to the General Assembly "to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of employees . . . ." It follows that the General Assembly is without authority to limit damages for injuries to persons or property outside of the employment relationship context. Therefore, Section 16-55-208 is in contravention of the Arkansas Constitution.

In a concurring opinion, Justice Karen Baker held that the constitutional question addressed by the court had not been preserved for appeal by Bayer. The circuit court had ruled on the constitutionality of Section 16-55-208 from the bench, but had failed to address the ruling in its written order. As a consequence, the decision was incapable of being reviewed for error by the court on appeal.

February 16, 2012

Arkansas high court further dismantles tort 'reform' law

Matthew Malamud

After chipping away at parts of Arkansas's Civil Justice Reform Act, the state's high court has struck down a provision that restricts who may testify as plaintiffs' expert witnesses in medical malpractice cases. It "reaffirms the proper role for the legislature and the courts under the Arkansas constitution," said Gerry Schulze of Little Rock, Arkansas.

A month after **nixing** a cap on punitive damages, the Arkansas Supreme Court has **voided** another provision of the state's Civil Justice Reform Act, approved by the General Assembly in 2003, that restricts who may testify as plaintiffs' expert witnesses in medical malpractice cases. (*Broussard v. St. Edward Mercy Med. Ctr.*, 2012 WL 149761 (Ark. Jan. 19, 2012).)

That provision states that plaintiffs' expert testimony shall be "provided only by a medical care provider of the same specialty as the defendant" who can speak to "the degree of skill and learning ordinarily possessed and used by members of the profession of the [defendant] in good standing, engaged in the same type of practice or specialty in the locality in which he or she practices or in a similar locality" and can attest that the defendant "failed to act in accordance with that standard."

The state's constitution, however, says that the "Supreme Court shall prescribe the rules of pleading, practice, and procedure for all courts." Dubbing the provision a procedural rule because it dictates the qualifications expert witnesses must possess, the supreme court said, "The authority to decide who may testify and under what conditions is a procedural matter solely within the province of the courts." As a result of this conclusion, the court voided the provision.

The decision stems from a case in which plaintiff Teresa Broussard sustained burns on her neck and chest while undergoing surgery in 2006 to remove her parathyroid glands. She had to have additional surgery to remove the damaged skin and receive skin grafts. Broussard sued several parties, including the surgeon who performed her parathyroidectomy, the hospital where it took place, and a nephrologist who treated her for subsequent, but unrelated, renal failure.

A trial court granted the defendants summary judgment because Broussard's medical expert witness was not board certified in general surgery or nephrology. Broussard appealed, but the

circuit court upheld the trial court's ruling, concluding that the witness requirement is substantive and therefore is constitutional.

Gerry Schulze of Little Rock, Arkansas, who represented Broussard, said the supreme court's reversal "reaffirms the proper role for the legislature and the courts under the Arkansas constitution."

"The courts have rules of evidence that have been interpreted and used and hammered out over decades," he said, "and when the legislature comes in and creates something new, it throws everything into a state of confusion. Confusion is not good for the law. It's not good for defendants or plaintiffs."

The witness requirement has affected the cost of litigation, but not in the way its backers had hoped. In Broussard's case, for example, Schulze would have had to retain three separate medical experts to comply. "All that does is raise the cost of litigation for everybody. If we had three separate experts, then the defense would have brought in three separate experts, and there you go," he said.

After *Broussard*, there's little left of Arkansas's Civil Justice Reform Act that dictates court procedure in medical malpractice cases, said Schulze.

In 2009, the Arkansas Supreme Court in *Johnson v. Rockwell Automation, Inc.* struck down a provision that required the fact-finder to consider nonparties' degree of fault in determining defendants' liability, and another provision that limited plaintiffs' recovery of the full value of their medical care.

In 2007, the court in *Summerville v. Thrower* struck down a provision that required plaintiffs to furnish the court with an affidavit within 30 days of filing suit by a medical expert witness of the same specialty as the defendant, attesting to how the defendant breached the applicable standard of care and how his or her actions resulted in injury.

The Civil Justice Reform Act and the Empty Chair

Robert B Leflar *Arkansas Bar Foundation Professor of Law*

I. Introduction

The nationwide tort reform movement finally reached Arkansas in 2003. Similar in many respects to laws recently adopted in other states but with a few unique twists, the Civil Justice Reform Act of 2003[1] will profoundly affect tort law practice in Arkansas.

The new legislation was largely promoted as aimed at protecting health care providers from increases in liability premiums. In the forefront of the proponents of the bill were the Arkansas Medical Society and the Arkansas Hospital Association.[2] The chief effects of the Arkansas edition of tort reform, however, are not likely to be confined to the health care liability arena. Rather, the effects will be felt throughout tort law practice, in personal injury and property damage litigation of all sorts. Health care providers were the poster children of the tort reform campaign, but the chief beneficiaries will be defendants generally, and their liability insurers.

The most significant aspect of the legislation is the abolition of traditional joint and several tortfeasor liability as developed by common-law courts, and its replacement by a new system whereby in most cases defendants are liable for only their own share of responsibility for a plaintiff's harm as determined by the trier of fact.[3] A crucial change from prior law is that the finder of fact may now allocate responsibility for the plaintiff's injury to persons not before the court.[4] The new rule creates powerful new incentives for defendants to point accusing fingers at the "empty chair." This article will explore the consequences of this historic shift in the allocation of liability for tortious conduct.

1. 2003 Ark. Acts 649, ARK. CODE ANN. §§ 16-55-201 to -220 (Michie Supp. 2003).

2. *See, e.g.*, Carlton Chambers, *Protect Access to Health Care,* ARK. DEMOCRAT GAZETTE, Feb. 1, 2003, at 5B (op-ed favoring the tort reform bill, HB 1038, by the president of the Arkansas Medical Society); Wesley Brown, *State Lawmakers Tout Tort Reform,* MORNING NEWS OF N.W. ARK., Jan. 10, 2003, at 6A (reporting support by hospital and physician leaders for tort reform bill); Elizabeth Caldwell, *Big Business, Doctors Join to Limit Jury Awards,* MORNING NEWS OF N.W. ARK., Dec. 20, 2002, at 14A. Another key proponent of the bill was the Committee to Save Arkansas Jobs, a group of business organizations including the state Chamber of Commerce. *See* Michael R. Wickline, *Lawmakers Set to Argue Caps on Lawsuit Damages,* ARK. DEMOCRAT GAZETTE, Jan. 26, 2003, at 1A.

3. 2003 Ark. Acts 649 § 1, ARK. CODE ANN. § 16-55-201 (Michie Supp. 2003).

4. 2003 Ark. Acts 649 § 2(a), ARK. CODE ANN. § 16-55-202(a) (Michie Supp. 2003).

The article first briefly sets out the traditional rule of tortfeasors' joint and several liability as it has been developed in the common-law courts in Arkansas and elsewhere, and notes the problems of fairness sometimes associated with the traditional rule. The article then explores how Arkansas courts have addressed the interaction between the doctrines of joint and several liability and comparative fault. The article discusses the modifications of joint and several liability promulgated in 2002 by the National Conference of Commissioners on Uniform State Laws in the Uniform Apportionment of Tort Responsibility Act (UATRA).[5] The article next analyzes selected provisions[6] of the new Arkansas law and their effects on the apportionment of legal responsibility, and the ways they promote the use of the "empty chair" tactic by defendants. The article spotlights a particular way the "empty chair" tactic creates injustice: when the "emptiness of the chair" is itself attributable to defendants' acts or omissions. Finally, the article recommends consideration of UATRA as a model for future corrections of inequities created by the new law.

II. Joint and Several Liability and Comparative Fault in Arkansas

At common law, if two or more tortfeasors contributed to a plaintiff's indivisible injury, each tortfeasor was liable for the full judgment, though the plaintiff could collect it but once. In cases of defendants acting in concert, or defendants where one of which was vicariously liable for the other's wrong, each defendant was likewise responsible for the entire judgment, whether or not the plaintiff's injury was indivisible. The effect was that if one tortfeasor lacked sufficient assets and insurance to satisfy a judgment, the plaintiff could recover full satisfaction from other tortfeasors with greater resources.[7]

Objections have been raised to the operation of joint tortfeasor liability on the ground that a defendant only slightly at fault may be charged with liability far out of proportion to its fault, when another tortfeasor whose fault is far greater is unable to pay. "Deep pocket" defendants, in this view, are easy targets for jury findings of (for example) merely five percent negligence on slim evidence of culpability, and those rich but minimally culpable defendants may wind up bearing full responsibility for plaintiffs' injuries. This specter may impel asset-rich defendants to settle marginal cases for fear of crushing liability. Additionally, it has been argued that if the law serves to protect some tortfeasors with effective tort immunities, such as the negligent driver with only the statutory minimum liability insurance or the negligent employer afforded tort immunity by the workers' compensation system, it is "unfair to saddle other solvent tortfeasors with the full brunt of damages substantially caused by conduct which society immunized."[8] Strong arguments have been raised in defense of traditional joint tortfeasor liability, particularly when the plaintiff is without fault,[9] but most states have now altered the traditional rule, at least for many classes of cases and types of damages.[10]

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5. UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT, 12 U.L.A. 5-21 (Supp. 2003) [hereinafter UATRA].

6. This article does not address a number of controversial aspects of the Civil Justice Reform Act. Some parts of the Civil Justice Reform Act may be subject to constitutional challenge under, for example, article 5, § 32 of the state constitution or under the constitution's separation of powers doctrine. Cf. Ark. Att'y-Gen. Op. 2001-058 (Mar. 7, 2001) (opining that § 13 of HB 1382 of 2001, setting damage caps on actions by nursing home residents, is unconstitutional); Nancy A. Costello, Note, *Allocating Fault to the Empty Chair: Tort Reform or Deform?* 76 U. DET. MERCY L. REV. 571, 580-95 (1999) (surveying constitutional challenges to analogous legislation in various states). Other issues have been raised about the propriety of aspects of Arkansas's new law relating to special protections for health care defendants and other provisions. Such matters are outside the scope of this article.

7. DAN B. DOBBS, THE LAW OF TORTS 1077-78 (2000).

8. Aaron D. Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 U.C. DAVIS L. REV. 1125, 1132-33 (1989). The arguments heard today are essentially a rehash of the arguments rehearsed by Professor Twerski and others almost fifteen years ago.

9. *See, e.g.*, DOBBS, *supra* note 7, at 1086-87.

10. *Id.* at 1087.

Both the doctrine of joint and several liability of tortfeasors and the doctrine of comparative fault have a long history in Arkansas. Judicial recognition of joint and several tortfeasor liability dates back at least to 1895,[11] while explicit legislative recognition of the concept came in 1941.[12] Arkansas was among the nation's leaders in adopting comparative fault in 1955,[13] rejecting the former rule of contributory negligence whereby plaintiffs at fault were, with some exceptions, totally barred from recovery.[14]

The adoption of comparative fault required our courts to sort out the interaction between that doctrine and joint tortfeasor liability. The Arkansas Supreme Court did so in two multi-tortfeasor cases, *Walton v. Tull*[15] and *Riddell v. Little*.[16] In both cases the court held that Arkansas' equal-fault-bar modified comparative fault rule would not prevent a plaintiff whose fault was less than 50% from recovering against even a joint tortfeasor whose fault was less than or equal to the plaintiff's, since defendants' combined fault exceeded plaintiff's. In *Riddell*, for example, a farmer hired an improperly licensed pilot to spray his fields; the cropduster, swooping low, hit and killed a flagman, whose estate sued the pilot and the farmer. The jury found the pilot 70% at fault, for flying too low; the farmer 10%, for poor pilot selection; and the flagman 20%, for not ducking.[17] The court's 1972 decision upheld the judgment against the farmer despite his relatively minimal fault, ensconcing Arkansas among the jurisdictions taking a traditional view of joint and several liability.

A closely divided court limited *Riddell*'s reach, without overruling it, in the 2001 case of *NationsBank v. Murray Guard*.[18] In *NationsBank* the court held that in comparing a plaintiff's fault to the combined fault of defendant joint tortfeasors for purposes of assessing plaintiff's entitlement to recovery under the equal-fault-bar comparative fault rule, the fault of a joint tortfeasor with whom the plaintiff had settled out before trial should be excluded from the comparison.[19] The court reasoned that under a post-*Riddell* revision of the Arkansas comparative fault statute,[20] a tortfeasor

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11. City Elec. Street-Ry. Co. v. Conery, 61 Ark. 381, 33 S.W. 426 (1895). *See also* Van Troop v. Dew, 150 Ark. 560, 234 S.W. 992 (1921) and Applegate v. Riggall, 229 Ark. 773, 318 S.W.2d 596 (1958) (both cases explicating scope of joint and several liability as not confined to tortfeasors acting in concert).

12. 1941 Ark. Acts 315 § 1 (now codified as ARK. CODE ANN. § 16-61-201 (Michie 1987)). The 1941 law adopted the original 1939 version of the Uniform Contribution Among Tortfeasors Act.

13. 1955 Ark. Acts 191. This pioneering law was drafted by Dean Prosser and enacted on the initiative of legislators who heard Prosser's talk on the subject at this law school in 1954. *See* ROBERT A. LEFLAR, ONE LIFE IN THE LAW 185 (1985). The law was thoroughly discussed in Dan Byron Dobbs, *Act 191 Comparative Negligence*, 9 ARK. L. REV. 357 (1955), and more briefly explained in Robert A. Leflar, *Comparative Negligence: A Survey for Arkansas Lawyers*, 10 ARK. L. REV. 54 (1955). For the history of subsequent revisions to the law, *see* Crystal Tessaro, Case Note, *NationsBank, N.A. v. Murray Guard, Inc.: Lawyers Can No Longer Bank on Arkansas's Application of Comparative Fault in Multi-Tortfeasor Cases*, 55 ARK. L. REV. 659, 665-68 (2002).

14. *See generally* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7, Reporter's Note, comment a (2000) (summarizing history of adoption of comparative fault).

15. 234 Ark. 882, 356 S.W.2d 20 (1962).

16. 253 Ark. 686, 488 S.W.2d 34 (1972).

17. *Id.*

18. 343 Ark. 437, 36 S.W.3d 291 (2001).

19. The settling tortfeasor was brought back into the case through a third-party complaint by another defendant, and thus received an assessment of fault by the jury.

20. Arkansas's comparative fault law, 1975 Ark. Acts 367 §§ 1-3 (codified as ARK. CODE ANN. § 16-64-122 (Michie 1987)), provides:

> (a) In all actions for damages for personal injuries or wrongful death or injury to property in which recovery is predicated upon fault, liability shall be determined by comparing the fault chargeable to a claiming party with

that settled with plaintiff before trial was not a "party from whom the claiming party seeks to recover damages"[21] and that therefore "the statute in its current form no longer provides for a comparison of fault among all those responsible for the harm."[22] While the court's reasoning may have been, as the dissent suggested, somewhat tortured,[23] nevertheless the decision had the effect of preserving the doctrine of joint and several liability in the face of substantial criticism, while somewhat restricting the scope of the doctrine's operation.

III. The Uniform Apportionment of Tort Responsibility Act and Its Reception in the 2003 General Assembly

Mindful of the criticisms noted above of the traditional joint and several liability doctrine, and wishing to advance the idea of fair reallocation of responsibility for an unreachable tortfeasor's fault, the National Conference of Commissioners on Uniform State Laws in 2002 promulgated the Uniform Apportionment of Tort Responsibility Act (UATRA).[24] UATRA solves the problem of the insolvent or effectively immune tortfeasor in the following way.

UATRA requires the court to consider the fault of the parties to the action as well as the fault of "released persons."[25] Joint and several liability of tortfeasor defendants is restricted to five situations: (1) parties acting in concert[26] or (2) acting intentionally;[27] (3) parties liable for failing to prevent intentional injury;[28] (4) parties with a vicarious liability relationship;[29] and (5) parties other wise made jointly and severally liable by statute (typically in the area of environmental harm).[30] In all other situations, defendants' liability is several only.[31]

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the fault chargeable to the party or parties from whom the claiming party seeks to recover damages.

(b) (1) If the fault chargeable to a party claiming damages is of a lesser degree than the fault chargeable to the party or parties from whom the claiming party seeks to recover damages, then the claiming party is entitled to recover the amount of his damages after they have been diminished in proportion to the degree of his own fault.

(2) If the fault chargeable to a party claiming damages is equal to or greater in degree than any fault chargeable to the party or parties from whom the claiming party seeks to recover damages, then the claiming party is not entitled to recover such damages.

(c) The word "fault" as used in this section includes any act, omission, conduct, risk assumed, breach of warranty, or breach of any legal duty which is a proximate cause of any damages sustained by any party.

21. *Id.*

22. *NationsBank*, 343 Ark. at 443, 36 S.W.3d at 295.

23. *NationsBank*, 343 Ark. at 448, 36 S.W.3d at 298 (Thornton, J., dissenting). *See also* Tessaro, *supra* note 13 (criticizing *NationsBank*).

24. 12 U.L.A. 10 (Supp. 2003).

25. UATRA § 4(a)(2) and comments thereto, 12 U.L.A. 13 (Supp. 2003). "Released persons" are defined as those who are legally free from tort liability to claimants either through settlements or by virtue of their status as employers protected by workers' compensation with subrogation rights in employees' third-party actions. *Id.* § 2(3) and comments thereto, 12 U.L.A. 10-11 (Supp. 2003).

26. *Id.* § 6(1), 12 U.L.A. 16 (Supp. 2003).

27. *Id.*

28. *Id.* § 6(2).

29. *Id.* §§ 4(c) & 6(3) and comments thereto, 12 U.L.A. 13-14, 16-17 (Supp. 2003).

30. *Id.* § 6(4) and comment thereto, 12 U.L.A. 16-17 (Supp. 2003).

31. *Id.* § 6 (first clause), 12 U.L.A. 16 (Supp. 2003).

Under UATRA, if the court finds that the several share for which any party is liable is not reasonably collectible, the court is to reallocate that uncollectible share among the other parties and released persons in accordance with their respective percentages of responsibility.[32] For example, suppose P settles with R for $5,000 pretrial, releasing R from liability. The factfinder at trial determines that P was injured in the amount of $100,000, and that responsibility should be allocated 20% to P, 10% to R, 50% to D1, 10% to D2, and 10% to D3. The court determines that D1 is insolvent and its $50,000 share is uncollectible. The court would reallocate D1's $50,000 among P, R, D2, and D3 in a 2/1/1/1 proportion in accordance with their respective fault shares: $20,000 to P, and $10,000 each to R, D2 and D3. The ultimate result would be that of the $80,000 damages for which P herself was not responsible, P would collect $20,000 each from D2 and D3 ($10,000 for their direct shares and $10,000 for their shares reallocated from D1), nothing from R since she has already released R in a $5,000 settlement,[33] and nothing from D1 (although P, D2 and D3 could seek to recover their reallocated shares from D1 should D1 later become solvent).[34] In this fashion, unlike traditional joint and several liability, under UATRA plaintiffs who are at fault share with asset-rich defendant tortfeasors the burden of uncollectible judgments against tortfeasors lacking assets.[35]

The UATRA approach, balanced though it may seem, did not fare well in the 2003 General Assembly. In hearings on the originally proposed tort reform bill (HB 1038) before the 20-member House Judiciary Committee, the seven attorney members of that committee[36] proposed a bipartisan amendment to HB 1038 based on UATRA. In what some might regard as a display of the anti-lawyer sentiment prevailing on that committee, the attorney members' proposal gained the support of only one other committee member and was defeated by a vote of 11-8.[37]

IV. Allocation of Responsibility under the Civil Justice Reform Act

The Civil Justice Reform Act of 2003 goes much farther than UATRA in restricting the scope of joint tortfeasor liability and in permitting shares of fault to be assessed against nonparties. These features of the new law are likely to have the most impact on future tort litigation in Arkansas.

The fundamental principle of the new law is stated in section 1:

> (a) In any action for personal injury, medical injury, property damage, or wrongful death, the liability of each defendant for compensatory or punitive damages shall be several only and shall not be joint.
>
> (b) Each defendant shall be liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a sepa-

32. *Id.* § 5(b), 12 U.L.A. 14 (Supp. 2003).

33. *Id.* § 8, 12 U.L.A. 18-19 (Supp. 2003).

34. *Id.* § 5(c), 12 U.L.A. 14 (Supp. 2003).

35. A comparison of the results of the application to this suppositious case of (a) traditional common law, (b) UATRA, and (c) the Civil Justice Reform Act is set out in Part V-D *infra*.

36. The attorneys on the committee were Mike Hathorn (D), chair; Sam Ledbetter (D), vice-chair; Chaney Taylor, Jr. (R); John Paul Verkamp (R); Marvin Childers (R); Chris Thyer (D); and Michael Lamoureux (R). In their daily practices, some predominantly represent plaintiffs and others defendants.

37. Doug Smith, *Committee Sides with Corporations, Physicians on "Tort Reform,"* ARK. TIMES, Jan. 31, 2003, at 12, 35; Michael Rowett, *House Panel Favors Bill to Cap Lawsuits*, ARK. DEMOCRAT GAZETTE, Jan. 29, 2003, at 1A (reporting vote as 12-8).

rate several judgment shall be rendered against that defendant for that amount.[38]

Joint tortfeasor liability is preserved in only two situations (in contrast to the five situations in which it is preserved under UATRA[39]). Under the new law, a party is responsible for another's fault only (1) when there exists a vicarious liability relationship such that the other person or entity is "acting as an agent or servant" of the party, or (2) when the party is "acting in concert" with the other person or entity.[40] "Acting in concert" is defined more strictly than at common law, as "entering into a conscious agreement to pursue a common plan or design to commit an *intentional tort* and actively taking part in that intentional tort."[41] Negligent or even reckless conduct cannot subject a party to joint tortfeasor liability for "acting in concert" with an intentional or negligent tortfeasor, nor can substantial assistance to the tortfeasor absent conscious agreement to commit an intentional tort.[42]

The new act also transforms Arkansas law by requiring the fact finder to consider assessing fault against "all persons or entities who contributed to the alleged injury . . . regardless of whether the person or entity was, or could have been, named as a party to the suit."[43] This provision permits the attribution of fault to settling tortfeasors, as previously allowed in Arkansas.[44] The provision also permits the attribution of fault to negligent employers, who are immune from tort liability for workplace injuries under the workers' compensation laws but who retain subrogation rights in employees' third-party actions against non-employer persons (such as product manufacturers) proximately contributing to employees' injuries.[45] This attribution of fault to negligent employers was not previously allowable under Arkansas law,[46] but is recognized under UATRA.[47] More radically, the

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38. 2003 Ark. Acts 649 § 1(a)-(b), ARK. CODE ANN. § 16-55-201 (a)-(b) (Michie Supp. 2003). The new law does not apply to tort cases not involving personal injury or property damage, such as cases brought on theories of defamation, privacy violation, trespass, nuisance, interference with contractual relationships, malicious prosecution, abuse of process, fraud or deceit, conversion, nonmedical professional malpractice, slander of title, and unfair competition, to name a few. Whether the law applies to claims of outrage, breach of warranty, false imprisonment, and other actions bordering on personal injury may depend on the facts of the case and will require judicial interpretation.

39. *See supra* notes 26-31 and accompanying text.

40. 2003 Ark. Acts 649 § 5(a), ARK. CODE ANN. § 16-55-205(a) (Michie Supp. 2003).

41. *Id.* § 5(b)(1), ARK. CODE ANN. § 16-55-205(b)(1) (Michie Supp. 2003)(emphasis added). At common law, concerted action is defined, typically in connection with civil conspiracy, in reference to the accomplishment of "an unlawful purpose, or . . . some purpose not in itself unlawful by unlawful means." Southwestern Publishing Co. v. Ney, 227 Ark. 852, 860, 302 S.W.2d 538, 542 (1957). These acts may be intentional or negligent. DOBBS, *supra* note 7, at 936-38.

42. 2003 Ark. Acts 649 § 5(b)(2), ARK. CODE ANN. § 16-55-205(b)(2) (Michie Supp. 2003).

43. *Id.* § 2(a), ARK. CODE ANN. § 16-55-202(a) (Michie Supp. 2003).

44. *See* Giem v. Williams, 215 Ark. 705, 711, 222 S.W.2d 800, 804 (1949); HENRY WOODS & BETH DEERE, COMPARATIVE FAULT §§ 13:15 at 285-86 (3d ed. 1996); *id.* § 13:19 at 300-01 (describing Arkansas practice). The new law must be read alongside the part of the Arkansas version of the Uniform Contribution Among Tortfeasors Act that provides for a *pro tanto* reduction in the amount of defendants' liability by "the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid." ARK. CODE ANN. § 16-61-204 (Michie 1987). *See generally* Douglas Lee, Case Note, *McDermott, Inc. v. AmClyde: Arkansas's Wake-Up Call in Accounting for Settlements in Multi-Defendant Litigation?* 48 ARK. L. REV. 1027 (1995) (helpful discussion of problems of settlements and contribution).

45. *See* ARK. CODE ANN. § 11-9-410 (Michie 2002 Repl.) (third-party actions by employees and employers' subrogation rights).

46. *See id.*; Robertson v. Norton Co., 148 F.3d 905, 909-10 (8th Cir. 1998) (interpreting §§ 11-9-410 and 16-64-122(a) to prohibit attributing fault to employer due to exclusivity of workers' compensation remedy).

47. UATRA §§ 2(3) & 4(a)(2), 12 U.L.A. 10, 13 (Supp. 2003).

new act permits the attribution of fault to other nonparties: foreign entities that cannot be sued for lack of personal jurisdiction, persons or entities protected by sovereign, charitable, or intrafamily immunities, persons or entities without assets from which a recovery might be obtained, and apparently even criminals on the lam whose identity and location are unknown.[48]

Like UATRA, the Civil Justice Reform Act has a mechanism by which fault attributed to an insolvent tortfeasor defendant can be reallocated to other defendants, although the fault percentage to be reallocated is generally less than under UATRA. If the court determines after entry of judgment that a defendant's several share of liability will not be reasonably collectible, the court is to increase the share of a defendant found to be at least 50% at fault by up to 20%, and the share of a defendant found to be more than 10% but less than 50% at fault by up to 10%. The fault share of a defendant found to be 10% at fault or less is not to be increased.[49]

This reallocation of uncollectible fault shares, however, applies only to the fault shares of "defendants," not to fault shares attributed to nonparties.[50] Tortfeasor defendants, even if their fault is substantial, will not have their liability increased if the factfinder attributes fault to a nonparty settling tortfeasor, a negligent employer, or a person or entity beyond the reach of judicial process or otherwise immune.

Beyond question, the Civil Justice Reform Act creates powerful new incentives for defendants to dilute their potential liability by claiming that nonparties are responsible for some or all of plaintiffs' injuries. Blame shifting has always been a favored tactic in tort litigation. But under the new law, that art form is raised to a new level. The targets of the attempted blame shifts are limited only by defendants' counsels' imaginations. Those targets – the "empty chairs" – will not be present in the courtroom to defend themselves. The only one in the courtroom to whom the new law gives an incentive to minimize those targets' fault is someone who may in fact have been injured by the very targets she must defend, and who may not even know who or where the targets are: the plaintiff.

V. The Odd Practical Consequences of the Civil Justice Reform Act

To illustrate the strange workings of the Civil Justice Reform Act of 2003, consider the following four situations. The first is a classic torts hypothetical; the second and third are based on cases recently litigated in other parts of the country that

48. The fault of such nonparties must be considered if a defending party gives notice at least 120 days prior to the trial that a nonparty was wholly or partially at fault. The notice is to set forth "the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault." 2003 Ark. Acts 649 § 2(b), ARK. CODE ANN. § 16-55-202(b) (Michie Supp. 2003). Even a skimpy description of an unknown assailant might be viewed as sufficing to constitute a proper notice under the statute. *See* Pedge v. RM Holdings, Inc., ___ P.3d ____, 2002 WL 31834684 (Colo. App. 2002), *cert. denied*, 2003 WL 22038816 (Colo. 2003) (allowing apportionment of fault to unknown assailant). *But see* Field v. Boyer Co., 952 P.2d 1078 (Utah 1998) (contrary result based on statutory interpretation); Plumb v. Fourth Judicial Dist. Ct., 927 P.2d 1011, 1016-21 (Mont. 1996) (striking part of analogous statute on state and federal due process grounds); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § B19, comment f (2000) ("A nonparty who is not sufficiently identified to be either subject to service of process or discovery ordinarily should not be submitted to the factfinder for assignment of responsibility.").

The new law is not explicit about who bears the burdens of production and persuasion regarding the fault of nonparties, but § 6 will probably be read as placing those burdens on defendants. That section states: "This act does not amend the existing law that provides that the burden of alleging and proving fault is upon the person who seeks to establish fault." ARK. CODE ANN. § 16-55-206 (Michie Supp. 2003).Defendants will be the persons seeking to charge nonparties with fault.

The attribution of fault to nonparties in one action is not binding on them in any future actions, and may not be introduced into evidence in future actions. 2003 Ark. Acts 649 § 2(c)(3), ARK. CODE ANN. § 16-55-202(c)(3) (Michie Supp. 2003).

49. *Id.* § 3, ARK. CODE ANN. § 16-55-203 (Michie Supp. 2003).

50. *Id.* The new law is not explicit with regard to whether an uncollectible fault share is to be reallocated if attributed to a *plaintiff* against whom a counterclaim is filed by a defendant. Since in such a case the plaintiff may functionally be considered also to be a defendant for purposes of fault allocation, the law should be interpreted to reallocate such a plaintiff's uncollectible fault share in the same fashion as defendants' uncollectible fault shares.

could easily occur in Arkansas; and the fourth is the suppositious case posed above.[51] In each of these situations, under the new law defendants are likely to escape substantial liability that would clearly be fixed upon them under generally accepted principles of traditional tort law.

A. The Drag Racers

A staple of first-year torts is the illustration of the joint and several liability of two drag racers. "A and B engage in an automobile race on a public street and A runs over the plaintiff. B will be liable to the plaintiff just as much as A, although B did not actually hit the plaintiff."[52] Every law student understands the essential justice of this result: both A and B have engaged in negligent or reckless conduct that endangers the general public, and if a member of the public is injured as a result but A has no assets or insurance, it is proper for B to compensate the injured plaintiff. The innocent party recovers her loss from a culpable defendant, and would-be drag racers are in theory deterred from engaging in such conduct in the future.

The Civil Justice Reform Act appears to reverse this result. Under the act, B is not jointly liable for the injury of the plaintiff hit by A's car, unless A was either "acting in concert" with B or "acting as an agent or servant" of B.[53] The latter is implausible in this situation. Under the new law's strict definition of "acting in concert," B's negligence or recklessness is not enough: A and B must "enter[] into a conscious agreement to pursue a common plan or design to commit an intentional tort."[54] But neither A nor B intended to harm the plaintiff, so B is not jointly liable for the injury A caused. To be sure, under standard negligence principles, it is within the realm of possibility that B might be *directly* liable to P (as opposed to jointly liable for A's negligence) if B's negligent or reckless driving was itself a proximate cause of P's injury. But that inquiry involves often-vexed questions of proximate causation, which are easily avoided by simple application of the principle of joint and several liability.

B. The Immolated Infant

Suppose an Arkansas retailer purchases children's sleepwear from a Chinese manufacturer for resale to Arkansas consumers. The sleepwear meets the lax flammability standards of the federal Flammable Fabrics Act.[55] The child of a purchaser, wearing the sleepwear, comes into accidental contact with an open flame and is badly burned when the sleepwear catches on fire. The Chinese manufacturer is not subject to personal jurisdiction in Arkansas courts.

Under standard products liability law, the retailer is strictly liable to the injured child and family if the product is found to have been sold while in a "defective condition unreasonably dangerous to the user or consumer."[56] (The fact that the product met federal safety standards is nonconclusive evidence of nondefectiveness, but the factfinder may still find the product defective.[57]) The retailer, in addition to any contractual indemnity rights it may have against the manufacturer, also has a statutory right of indemnity for its lia-

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51. *See supra* notes 32-35 and accompanying text.

52. JAMES A. HENDERSON ET AL., THE TORTS PROCESS 128 (6th ed. 2003). *See also* RESTATEMENT (SECOND) OF TORTS § 876, illus. 2 (1965).

53. 2003 Ark. Acts 649 § 5(a), ARK. CODE ANN. § 16-55-205(a) (Michie Supp. 2003).

54. *Id.* § 5(b)(1), ARK. CODE ANN. § 16-55-205(b)(1) (Michie Supp. 2003). *See supra* notes 41-42 and accompanying text.

55. 15 U.S.C. §§ 1191 et seq. Flammability standards under this law are industry-derived minimum standards, and do not serve as a shield to tort liability under state law. *See, e.g.*, Perez v. Mini-Max Stores, 661 N.Y.S.2d 659 (N.Y. App. Div. 1997); Wilson v. Bradlees of New England, 96 F.3d 552 (1st Cir. 1996), *cert. denied*, 519 U.S. 1149 (1997).

56. ARK. CODE ANN. § 4-86-102(a) (Michie 2001 Repl.).

57. *Id.* § 16-116-105(a) (Michie 1987).

bility to the plaintiffs.[58] This is a sensible arrangement: if the product is found defective, the injured child receives compensation (with a deduction for plaintiff fault, if any) from the retailer; the retailer, which has a contractual relationship with the manufacturer, is in a good position to recoup its liability, less costs of collection from the manufacturer; and both the retailer and the manufacturer have an incentive to deal in clothing products with safer flammability characteristics in the future.

The Civil Justice Reform Act changes the calculus. Under the new law, the factfinder is required to consider the fault[59] not only of the retailer for selling an allegedly defective product and of the plaintiff for possibly using the product unsafely, but also the fault of the foreign manufacturer for improper selection of fabric, design, and so on. A factfinder might well consider that the retailer had received assurance that the product met federal safety standards, and might assess the absent foreign tortfeasor with the lion's share of the responsibility for the accident. That share is uncollectible, but under the new law the retailer shoulders no part of the uncollectible damages since the manufacturer is not a defendant.[60] The retailer benefits at trial from pointing to the empty chair.

In effect, under the new regime, by choosing to contract with a foreign manufacturer not subject to the jurisdiction of Arkansas courts – by bringing in an "empty chair" – the Arkansas retailer will have shifted the responsibility for the lion's share of plaintiff's damages in such a case from the defective product's distributive chain to the plaintiff herself. This is so whether the plaintiff has contributed to her own injury or not. The effect is to give an advantage to foreign manufacturers at the expense of injured Arkansas citizens, while diminishing incentives for providing safe products – perhaps not exactly what the General Assembly had in mind in passing the Civil Justice Reform Act.

C. The Rape in the Mall Parking Lot

Suppose a privately owned Arkansas shopping mall maintains an inadequate security force, despite knowledge of numerous recent assaults and robberies on the premises. A customer leaving the mall one night is raped in the parking lot. The perpetrator is never apprehended. The rape victim brings an action against the mall owner and the private security firm with which the mall has contracted, alleging that their negligent failure to protect customers was a proximate cause of her injury.

A trend is evident among state supreme courts to recognize that owners of businesses, apartment complexes, and the like have a duty to implement reasonable measures to protect their patrons and tenants from foreseeable criminal acts.[61] Although the Arkansas Supreme Court has not yet explicitly joined these courts in recognizing such a duty, it has indicated that if the business were aware of numerous recent prior similar incidents such that criminal acts to patrons are reasonably foreseeable, the business might be found liable for not taking reasonable measures to prevent harm to its patrons.[62]

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58. *Id.* § 16-116-107 (Michie 1987).

59. "Fault" in this context includes non-negligent breach of legal duty, such as breach of warranty and supplying of a product in a defective condition. *See id.* § 16-64-122(c) (Michie 1987).

60. 2003 Ark. Acts 649 § 3, ARK. CODE ANN. § 16-55-203 (Michie Supp. 2003). Nor would joint and several liability apply, since the foreign manufacturer would not likely be viewed as an "agent or servant" of the retailer, and the retailer and manufacturer were not "acting in concert." *Id.* § 5, ARK. CODE ANN. § 16-55-205 (Michie Supp. 2003).

61. *See, e.g.*, Sturbridge Partners, Ltd. v. Walker, 482 S.E.2d 339, 341 (Ga. 1997); Delta Tau Delta v. Johnson, 712 N.E.2d 968, 973 (Ind. 1999); Posecai v. Wal-Mart Stores, Inc., 752 So.2d 762, 766 (La. 1999); Doe v. Gunny's Ltd. Partnership, 593 N.W.2d 284, 289 (Neb. 1999); McClung v. Delta Square Ltd. Partnership, 937 S.W.2d 891 (Tenn. 1996); Timberwalk Apts. v. Cain, 972 S.W.2d 749, 756 (Tex. 1998); RESTATEMENT (SECOND) OF TORTS § 344 & comment f (1965); David A. Roodman, Note, *Business Owners' Duty to Protect Invitees from Third Party Criminal Attacks*, 54 MO. L. REV. 443 (1989).

62. *See* Boren v. Worthen Nat'l Bank, 324 Ark. 416, 423-27, 921 S.W.2d 934, 939-41 (1996). *See also* Willmon v. Wal-Mart Stores, Inc., 143 F.3d 1148, 1150-51 (8th Cir. 1998) (discussing *Boren*).

If, in our parking lot rape case, the plaintiff established a prima facie case of breach of duty on the part of the mall owner and the private security firm, under the Civil Justice Reform Act the jury would be instructed to apportion liability among nonparties as well as the parties.[63] Assuming that the party defendants gave proper notice under the statute "setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances,"[64] the unknown perpetrator of the rape might be one of those persons whose "fault" the jury would be required to consider.[65] Since the heinousness of the perpetrator's intentional act would typically seem to outweigh by far the merely negligent culpability of the mall and security firm, it is likely that the jury would assess a substantial share of responsibility to the rapist – in whose share of responsibility neither the mall nor the security firm would be required to participate, since the rapist is not a defendant.[66] Thus, despite the fact that the failure to provide adequate security was a *sine qua non* of the rape, the mall and security firm would likely escape liability for most of the plaintiff's damages. Instead, she would bear the "empty chair" rapist's share of responsibility herself.

This perverse result, that the rape victim and not the negligent mall owner and security firm shoulders the responsibility for most of her own damages even though the "emptiness of the chair" is in a sense attributable to the defendants' negligence, has been condemned by the great weight of modern authority. The National Conference of Commissioners on Uniform State Laws determined that "joint and several liability should be retained where a defendant breaches a duty to protect another person from an intentional tort of a third party," since the incentives of owners of commercial premises to protect those on their premises "would be significantly undercut were liability to be apportioned on a several only basis."[67] Likewise, the new Restatement of Apportionment proposes to solve the problem in this fashion:

> A person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share of comparative responsibility assigned to the person.[68]

Professor Dobbs, viewing the escape from significant liability of the premises owner who negligently fails to protect against foreseeable criminal attacks as "a morally unacceptable result," favors the new Restatement's position.[69] But it seems doubtful that an Arkansas court could adopt this expanded view of joint and several liability, however meritorious it may be, in light of the specific language of §§ 1 and 5 of the Civil Justice Reform Act.

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63. 2003 Ark. Acts 649 § 2(a), ARK. CODE ANN. § 16-55-202(a) (Michie Supp. 2003).

64. *Id.* § 2(b), ARK. CODE ANN. § 16-55-202(b) (Michie Supp. 2003).

65. *See supra* note 48. A separate issue, beyond the scope of this article, is whether it is proper under our comparative fault law to compare the intentional acts of a nonparty with the negligent acts of a party for purposes of assessing fault. Some courts refuse to do so, while others permit it. *See generally* Ellen M. Bublick, *The End Game of Tort Reform: Comparative Apportionment and Intentional Torts*, 78 NOTRE DAME L. REV. 355 (2003). Two Arkansas decisions have held it improper to diminish a plaintiff's recovery for a *defendant's intentional* tort by reference to the *plaintiff's* own negligence: Whitlock v. Smith, 297 Ark. 399, 762 S.W.2d 782 (1989), and Kellerman v. Zeno, 64 Ark. App. 79, 89, 983 S.W.2d 136, 141 (1998). However, these cases do not address the problem of diminishing a plaintiff's recovery for a *defendant's negligent* tort by reference to a *nonparty's intentional* tort.

66. 2003 Ark. Acts 649 § 3, ARK. CODE ANN § 16-55-203 (Michie Supp. 2003).

67. UATRA § 6(2) and comment thereto, 12 U.L.A. 16-17 (Supp. 2003).

68. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14 (2000).

69. *See* DOBBS, *supra* note 7, at 937.

D. Differences Among Traditional Joint and Several Liability, UATRA, and the Civil Justice Reform Act: An Example

To illustrate the practical differences among traditional joint and several liability, the Uniform Act (UATRA), and the Civil Justice Reform Act, let us return to the suppositious case posed in Part III of this article: P has suffered $100,000 in harm. P settles with R for $5,000 pretrial, releasing R from liability. The factfinder at trial determines that responsibility should be allocated 20% to P, 10% to R, 50% to D1, 10% to D2, and 10% to D3. The court determines that D1 is insolvent and its $50,000 share is uncollectible.

Under traditional common-law principles of joint and several liability as established in *Riddell v. Little*[70] and *Watson v. Tull*,[71] P would be entitled to recover all of her damages except the 20% for which she herself was responsible and the 10% allocated to R.[72] D1's uncollectible fault share would be absorbed by D2 and D3. P's recovery would be $70,000, in addition to the $5,000 she received in the pretrial settlement with R.

Under UATRA's intermediate position, as explained above,[73] D1's uncollectible fault share would be reallocated among P, R, D2, and D3 in proportion to their respective fault shares. P's recovery would total $40,000, plus the $5,000 received in the settlement with R.

Under the Civil Justice Reform Act, defendants' liability is several only. Presumably *Riddell v. Little* and *Walton v. Tull* still live, in the sense that P can recover *something* from the available defendants D2 and D3, even though each of their individual fault shares is less than P's, since all defendants' aggregated fault shares exceed plaintiff's.[74] But D1's uncollectible fault share is not reallocated in any part to D2 or D3, since neither D2's nor D3's fault exceeds the 10% threshold for participating in a reallocation.[75] As a result, P winds up absorbing the full burden of D1's insolvency. P's recovery is limited to $20,000 – $10,000 each from D2 and D3 – plus the $5,000 received in settlement.

VI. Conclusion

The aspects of the Civil Justice Reform Act addressed in this article are entirely one-sided, moving Arkansas tort law decidedly in the direction of protecting tortfeasor defendants and their insurers from liability. Whether some movement, at least, in that direction was advisable is a matter upon which reasonable people can disagree. But as the examples set out in this article illustrate, in many cases the new law's drastic restrictions on joint and several liability and its provisions allowing responsibility for injury to be shifted to persons not before the court create serious inequities and undercut important safety incentives.

The full implications of the new law remain to be worked out over the course of time. But as cases of injustice accumulate, legislators should be alert to the importance of revising the most troublesome provisions of the law. In that regard, the Uniform Apportionment of Tort Responsibility Act is a suitable model for reference.

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70. 253 Ark. 686, 488 S.W.2d 34 (1972). *See supra* notes 16-17 and accompanying text.

71. 234 Ark. 882, 356 S.W.2d 20 (1962).

72. *See* WOODS & DEERE, *supra* note 44, at 285-86. This assumes the nonsettling tortfeasor defendants crossclaimed against R, who thereby received an apportionment of fault. Had they not done so, or had R been dismissed from the case, the nonsettling defendants would receive credit only for the $5,000 paid by R for his release. *Id.* at 286; Woodard v. Holliday, 235 Ark. 744, 361 S.W.2d 744 (1962).

73. *See supra* notes 32-35 and accompanying text.

74. *See* 2003 Ark. Acts 649 § 7, ARK. CODE ANN. § 16-55-207 (Michie Supp. 2003) (preserving 50% equal-fault-bar comparative fault rule). If the legislature had intended to overturn this aspect of *Riddell* and *Walton* it could have done so explicitly in this provision, but it did not.

D1's, D2's, and D3's fault shares are aggregated for purposes of the equal-fault-bar comparative fault rule, since all three defendants are "parties from whom the claiming party seeks to recover damages." ARK. CODE ANN. § 16-64-122 (Michie 1987); NationsBank v. Murray Guard, 343 Ark. 437, 443, 36 S.W.3d 291, 295 (2001). *See supra* notes 18-22 and accompanying text.

75. 2003 Ark. Acts 649 § 3(c)(1), ARK. CODE ANN. § 16-55-203(a)(3)(A) (Michie Supp. 2003).

Negotiating Arkansas's Law of Several Liability

by Joseph Falasco

Life intersects art, sometimes. As a practicing lawyer, I have tried to employ rules, statutes, and laws in service of a defined and client-oriented goal. As a potter, I work to form a lump of clay into a functional piece of art. When the Arkansas General Assembly enacted the Civil Justice Reform Act in 2003, it provided a moist ball of clay. Tort reform is by nature controversial. We all knew that some of its provisions were going to be challenged—one way or another—in Arkansas's courts. Regardless of how you feel about the Act, we can all agree that the General Assembly presented Arkansas lawyers with a new set of statutes to mold into a functional body of law. After some years of kneading by lawyers and the Arkansas Supreme Court, the Act as it exists today looks different than it did eight years ago. Yet, what remains of the Act must be further applied in a way so that it functions in a meaningful manner and does real work for all litigants. This writing provides background information on some lingering issues and suggests how the remaining clay can be put to good use by the legal potters–whether they be lawyers or judges.

Through the Arkansas Civil Justice Reform Act, the Arkansas General Assembly eliminated joint-and-several liability and, subject to some minor exceptions, replaced it with several liability.[1] In 2009, the Arkansas Supreme Court held in *Johnson* that the procedure created by the General Assembly for assessing non-party fault was unconstitutional.[2] In the wake of *Johnson*, courts and lawyers have struggled to apply Arkansas's law of several liability. What follows are some suggestions on how to negotiate Arkansas's law of several liability within the confines of *Johnson* and the Arkansas Rules of Civil Procedure.

A. Joint Tortfeasors Are Severally Liable In Arkansas.

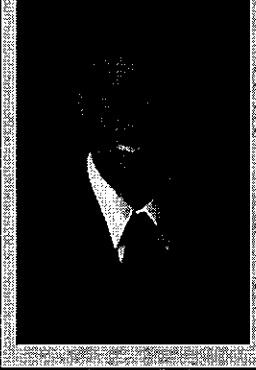
The Arkansas Civil Justice Reform Act ("ACJRA")[3] changed the legal landscape for cases involving a personal injury, medical injury, property damage, or wrongful death. A central part of the ACJRA is the elimination of joint-and-several liability.[4] Under the ACJRA, a defendant's liability is several. As used by the General Assembly, this means that any judgment is calculated with reference to the particularized fault assessed by the fact finder to each separate defendant.[5]

B. A Brief Developmental History Of Joint-And-Several Liability In Arkansas.

At their core, the doctrines of joint liability and several liability create the legal mechanism for attributing liability between plaintiffs, defendants, and third parties. The historical trails of joint liability and several liability flow naturally from the doctrines of contributory negligence, comparative fault, and contribution. Conceptually, joint liability is the legal recognition that certain kinds of harm—like a wrongful death—cannot be divided; therefore, if Party A is a substantial contributing factor of the harm then Party A is liable for the entire harm, regardless of whether Party B, C, or D may have substantially contributed to the harm.[6] In those cases of joint liability, Arkansas solved the inequities of holding one liable beyond its apportioned fault by creating a cause of action for contribution.[7]

The doctrine of contributory negligence provided a complete defense to an action in tort at common law.[8] In 1955, Arkansas replaced contributory negligence with pure comparative fault.[9] In 1957, Arkansas converted from pure comparative fault to a form of modified comparative fault.[10] From 1957 through the enactment of the ACJRA the statutory language embodying Arkansas's version of comparative fault changed slightly.[11] These changes mattered.

The Arkansas Supreme Court has interpreted the minor language changes in the statute as providing significant changes in the law of comparative fault. For example, in *Nations Bank, N.A. v. Murray Guard, Inc.*, the Arkansas Supreme Court held that cases decided under the 1973 Act did not apply to cases decided under the 1975 Act.[12] More specifically, under the 1973 Act, fault could be



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compared "among all those responsible for the harm" but, under the 1975 Act, fault could only be compared with those from whom the plaintiffs sought to recover damages.[13]

With the ACJRA, the General Assembly moved from joint-and-several liability to several liability. The ACJRA makes two things clear: (1) a defendant is liable only for damages allocated to that defendant in direct proportion to that defendant's percentage of fault; and (2) a plaintiff's recovery is barred if a fact finder determines that the plaintiff's fault is fifty percent or greater.[14] Thus, while Arkansas still embraces modified comparative fault between a plaintiff and defendant, it also recognizes that a defendant's liability is limited by the fault specifically apportioned to that defendant.

C. Giving Substance To Several Liability

The substance-versus-procedure debate surfaced in *Johnson v. Rockwell Automation, Inc.*[15] There, the Arkansas Supreme Court ruled that the procedure provided in Ark. Code Ann. § 16-55-202(b) for assessing non-party fault was unconstitutional because it violated the doctrine of separation of powers.[16] The Arkansas Supreme Court did not rule unconstitutional the General Assembly's decision to replace joint-and-several liability with several liability. If several liability is to have substance, the fault of all those responsible for the harm must be considered. And, although the Arkansas Supreme Court held the procedure unconstitutional, § 202(b) makes undeniable that the General Assembly intended fact finders to assess non-party fault. The legislative branch endorsed the policy of giving to the jury the right to assess fault based on the actions of all persons or entities, regardless of whether they were, or could have been, named in an action by a plaintiff.[17] The point stressed here is that only the mechanism for assessing fault to all potential tortfeasors is missing in the light of *Johnson*. That an assessment of non-party fault can and should be done was not decided by *Johnson*.

In *McCoy v. Augusta Fiberglass Coatings, Inc.*,[18] the Eighth Circuit Court of Appeals questioned Arkansas's law of several liability. In that case, the Eighth Circuit relied on *Johnson* and held that a jury is not allowed to assess fault to any non-party.[19] *McCoy* was briefed by the parties before *Johnson* was decided but was handed down after *Johnson*. The Eighth Circuit did not have the benefit of briefing to address the sure and practical effect of *Johnson*. Moreover, the Eighth Circuit did not consider § 201(a) of the ACJRA—the substantive provision of Arkansas's law on several liability. Relying on *Belz-Burrows, L.P. v. Cameron Constr. Co.*,[20] the panel merely stated that, after *Johnson*, "the law reverts back to what it was prior to the passage of the Civil Justice Reform Act, under which the jury could not apportion the fault of non-parties."[21] In short, the analysis in *McCoy* falls short of establishing the law in Arkansas post-*Johnson*.

A complete analysis requires *Belz-Burrows* to be put into context. That case was decided before the ACJRA was enacted, when Arkansas law provided that "a jury should not be permitted to assign a percentage of fault to a person who is not a party to the suit."[22] The Arkansas Court of Appeals explained that this rule derived "from Arkansas's comparative-fault statute, which provides that a plaintiff's fault may be compared with the fault chargeable to 'the party or parties *from whom [he] seeks to recover damages*.' Ark. Code Ann. § 16-64-122 (emphasis added)."[23] Indeed, before the ACJRA, the Arkansas Supreme Court narrowly construed Arkansas's comparative fault statute[24] as limiting the comparison of fault only between those parties from whom the plaintiff sought to recover damages; according to the Arkansas Supreme Court, a party with which a plaintiff settled was not a party from which the plaintiff sought damages.[25]

In 2003, the General Assembly changed the statutory language providing for assessment of fault to allow fault to be assessed to all potentially responsible persons or entities.[26] It follows that the statutory basis for denying a jury the opportunity to assess fault to all responsible persons or entities—the language in Ark. Code Ann. § 16-64-122—no longer exists. The ACJRA has changed that law in sections that are presumed constitutional. Those provisions allow a fact finder to apportion fault to all potentially responsible persons or entities. While the Eighth Circuit's decision in *McCoy* properly ruled that the law reverts back to what it was prior to the passage of Ark. Code Ann. § 16-55-202, the Eighth Circuit was not asked to consider that, even without § 202, Arkansas follows the law of several liability.

D. Procedures And Rules Forcing The Assessment Of Fault Of All Those Responsible.

Johnson held that the procedure in § 202 was unconstitutional because it conflicted with the Arkansas Supreme Court's rule making authority. Today, trial courts and lawyers should look first to the Arkansas Rules of Civil Procedure to fill the procedural void.

> "Laws change. Just as it takes a potter to turn some mud into a useful mug, it takes lawyers to transform the stagnant words of rules, statutes, and cases into a valuable tool to effect the policies of the state of Arkansas as decided by the General Assembly."

1. Rule 19

Rule 19 of the Arkansas Rules of Civil Procedure speaks to necessary and indispensable parties:

> **(a) Persons to Be Joined if Feasible.** A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties . . . .
> **(b) Determination by Court Whenever Joinder Not Feasible.** If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.[27]

Section 19(a) addresses the issue of "necessary" parties while section 19(b) deals with whether a necessary party is an "indispensable" party.[28] The provisions of Rule 19(a), which are the same as its federal counterpart, are mandatory.[29]

Under Arkansas or Federal Rule 19, one

mechanism for ensuring that fault is apportioned among all those responsible is to hold that all potential tortfeasors are necessary and indispensable parties.[30] For example, in *Leick v. Schnellpressenfabrik AG Heidelberg*,[31] the district court was confronted with a similar issue where a plaintiff failed to name a potentially responsible party under the Iowa Comparative Fault Act, which limited fault attribution to parties in the action. The district court explained that, because a jury could not assess fault of a non-party, the named parties may be assessed fault for which they were not responsible.[32] Accordingly, absence of potential tortfeasors would prejudice the named defendants because they could be allocated fault for which they were not responsible.[33]

2. Third Party Practice—Rule 14

Rule 14(a) of the Arkansas Rules of Civil Procedure provides the mechanism for a defendant to sue a third party. It says:

> At any time after commencement of the action a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action **who is or may be liable to him** for all or part of the plaintiff's claim against him.[34]

Before the ACJRA modified joint and several liability, a defendant could file a claim for contribution against a third party even before discharging a common liability or paying more than his or her *pro rata* share of liability.[35]

However, contribution is a creature of statute and exists only where there is joint liability. Under Arkansas's Uniform Contribution Among Torfeasors Act, a joint tortfeasor is not entitled to contribution until he or she has discharged the common liability by payment or has paid more than his or her *pro rata* share of the common liability.[36] Under the ACJRA, however, a defendant is only liable for the amount of damages allocated in direct proportion to that defendant's percentage of fault.[37] Accordingly, a defendant held to several liability only will never pay the common liability or more than his or her *pro rata* share of liability. As a result, the enactment of several liability under § 16-55-201 arguably precludes any potential claim for contribution under § 16-61-202. It follows that, because a typical claim of contribution will not result in a third-party being liable to a **defendant** for all or a part of the plaintiff's claim against that defendant, the plain language of Rule 14(a) fails to provide a mechanism to bring into the action a third-party tortfeasor.[38]

It may be time for Rule 14 to do more work. Faced with a similar problem created by the conflict between several liability and contribution, Alaska developed a theory of equitable apportionment under Rule 14.[39] In fact, the Alaska Rules of Civil Procedure were amended to provide for a third-party claim of equitable apportionment.[40] Although Arkansas has not endorsed a claim of equitable apportionment, it can be argued as a basis for asserting a third-party claim and as a solution to the conflict between Arkansas's contribution statute and several-liability statute.

3. Rule 81

As a third potential tool for assessing fault to all responsible, a defendant may ask the trial court to develop a mechanism to allow a fact finder to apportion fault to a non-party. Because the Arkansas Supreme Court only held unconstitutional the procedure provided by the General Assembly for assessing non-party fault, a party is conceptually free to ask a circuit court to carry out, in some manner, the substantive provisions of Ark. Code Ann. § 16-55-201 under the Arkansas Rules of Civil Procedure.[41] The Arkansas Rules of Civil Procedure "govern the procedure in the circuit court in all suits or action of a civil nature with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy and inexpensive determination of every action."[42] In addition, "when no procedure is specifically prescribed by [the Rules], the court shall proceed in any lawful manner not inconsistent with the Constitution of this State, these rules, or any applicable statute."[43] Our circuit courts are empowered to carry out the substantive provisions of Ark. Code Ann. § 16-55-201 by employing a procedural mechanism to assesses fault. As a guide, trial courts may look to the procedure set in Ark. Code Ann. § 16-55-202.

4. Jury Instructions

Proper jury instructions and arguments of counsel may also provide an adequate method to apportion several liability under Ark. Code Ann. § 16-55-201. In *Reed v. Malone*, for example, the United States District Court for the Western District of Arkansas explained that the issues of allocating non-party fault "are best addressed by properly drafted jury instructions."[44]

Arkansas Model Jury Instructions provide an illustrative instruction for apportioning fault in a multiparty action:

> Using 100% to represent the total responsibility for the occurrence and any injuries or damages resulting from it, apportion the responsibility between the parties whom you have found to be responsible.[45]

To animate Arkansas's law of several liability, the jury should be instructed that the total responsibility need not total 100%. The model illustrative instruction could be modified to provide:

> If you have determined that any one of [the defendants] was the proximate cause of damages to [the plaintiff], then, understanding that the total fault cannot exceed 100%, but can be less than 100%, apportion the fault between the parties that you have found to be responsible.

Following this model allows the jury to assign fault directly to the parties before them without creating the artificial paradigm of requiring allocation of 100% responsibility. And, when a court sits as the fact finder, AMIs also act as guide.

Conclusion

Laws change. Just as it takes a potter to turn some mud into a useful mug, it takes lawyers to transform the stagnant words of rules, statutes, and cases into a valuable tool to effect the policies of the state of Arkansas as decided by the General Assembly. As a policy-making body, the General Assembly concluded years ago that liability in Arkansas should be several and that, in rendering a fair verdict, a fact-finder must be able to consider the fault of all potential responsible tortfeasors. Given the Arkansas Supreme Court's holding in *Johnson*—that the General Assembly overstepped its bounds in creating the procedure for assessing non-party fault—lawyers must now help reform the law using the Arkansas Rules of Civil Procedure, ACJRA, and *Johnson*. Whatever form it ultimately takes, Arkansas law should allow several liability and the concomitant ability of a fact finder to assess fault to parties and non-parties.

Endnotes

1. *See* Ark. Code Ann. § 16-55-201.
2. *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135.
3. Ark. Code Ann. §§ 16-55-201 et. seq.
4. *See* Ark. Code Ann. § 16-55-201.
5. Ark. Code Ann. § 16-55-201(b)-(c).
6. *See, e.g.*, Restatement (Second) of Torts § 433A.
7. *See* Ark. Code Ann. § 16-61-202.
8. *See Miller v. Hometown Propane Gas, Inc.*, 86 Ark. App. 189, 199, 167 S.W.3d 172, 179, n.3 (2004).

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9. 1955 ARK. ACTS 191.
10. 1957 ARK. ACTS 296.
11. *Compare* 1957 ARK. ACTS 296 with 1973 ARK. ACTS 303 with 1975 ARK. ACTS 367 codified at ARK. CODE ANN. § 16-64-122.
12. 343 Ark. 437, 36 S.W.3d 291 (2001) (*distinguishing Riddell v. Little*, 253 Ark. 686, 488 S.W.2d 34 (1972)).
13. *Id.*
14. *See* ARK. CODE ANN. §§ 16-55-201 and 216.
15. 2009 Ark. 241, 308 S.W.3d 135.
16. *Id.*
17. *See, e.g.*, 2003 ARK. ACTS 649, § 26 ("It is found and determined by the General Assembly of the State of Arkansas that in this state, existing conditions, such as the application of joint and several liability regardless of percentage of fault, are adversely impacting [the State.]").
18. 593 F.3d 737 (8th Cir. 2010).
19. *Id.*
20. 78 Ark. App. 84, 78 S.W.3d 126, 129 (2002).
21. *Id.* at 744.
22. 78 Ark. App. at 89, 78 S.W.3d at 129.
23. *Id.*
24. ARK. CODE ANN. § 16-64-122.
25. *See Nations Bank, N.A. v. Murray Guard, Inc.*, 343 Ark. 437, 36 S.W.3d 291 (2001).
26. *See* Ark. Code Ann. § 16-55-201.
27. ARK. R. CIV. P. 19.
28. *See* Reporter's Notes to Rule 19 (citing *Wright v. First Nat'l Bank*, 483 F.2d 73 (10th Cir. 1973)).
29. *Arkansas State Med. Bd. v. Bolding*, 324 Ark. 238, 920 S.W.2d 825 (1996); *see also* Reporter's Notes to ARK. R. CIV. P. 19.
30. *See, e.g., Estate v. Alvarez v. Donaldson Co., Inc.*, 213 F.3d 993 (7th Cir. 2000) (holding that tortfeasors were indispensable under Indiana's Comparative Fault Act because nonparties must be assessed fault).
31. 128 F.R.D. 106 (S.D. Iowa 1989).
32. *Id.*
33. *Id; see also Stat-Rite Indus., Inc. v. Allstate Ins. Co.*, 96 F.3d 281 (7th Cir. 1996) (holding that, under Rule 19, a responsible party must be joined in the absence of joint and several liability "to fully and accurately allocate liability").
34. ARK. R. CIV. 14(a) (emphasis added).
35. *See* ARK. CODE ANN. § 16-61-207.
36. ARK. CODE ANN. § 16-61-202.
37. ARK. CODE ANN. § 16-55-201.
38. *See also Reed v. Malone*, Case No. 09-2061, W.D. Ark., Docs. # 37, 57 (June 4 and July 8, 2010).
39. *See McLaughlin v. Lougee*, 137 P.3d 267 (Alaska 2006).
40. *See* ALASKA R. CIV. P. 14(c); *see also Benner v. Wichman*, 874 P.2d 949, 956 (Alaska 1994) ("Now that the voters have eliminated contribution through the [modification of joint and several liability], equity requires that defendants have an avenue for bringing in others who may be liable to the plaintiff.").
41. *See, e.g., Mercury Marketing Technologies of Delaware, Inc. v. State ex rel. Beebe*, 358 Ark. 319, 189 S.W.3d 414 (2004) (Hannah, J., dissenting) (explaining that circuit courts follow judicially created procedure when no rule or statutory procedure exists).
42. ARK. R. CIV. P. 1.
43. ARK. R. CIV. P. 81(c).
44. *Reed v. Malone*, Case No. 09-2061, W.D. Ark., Doc. 57 (July 8, 2010) (Dawson, J.).
45. *See* AMI-Civil, Ch. 36 § II at Interogatory 5. ■