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Twists and Turns in Arkansas

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November 2015

The Federalist Society

1776 I St., N.W., Suite 300
Washington, DC 20006
fedsoc.org

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Civil Justice Reform: *Twists and Turns in Arkansas*

Mark A. Behrens & Christopher Casolaro[1]

With the enactment of the Civil Justice Reform Act of 2003 ("CJRA"),[2] Arkansas joined the many states that have enacted comprehensive civil justice reform legislation. The CJRA replaced "deep pocket" joint and several liability with "fair share" liability, limited outlier punitive damages awards, and protected the right to an appeal, among other reforms. Additional reforms in the CJRA built on the Medical Malpractice Act of 1979[3] and aimed to promote access to health care for all Arkansans.[4] The CJRA passed with overwhelming bipartisan support and was signed by Governor Mike Huckabee. The legislation was significant, but "did not transform Arkansas tort law beyond recognition."[5]

Over the last decade, the Arkansas Supreme Court has struck down several key provisions of the CJRA.[6] More recently, the court has overseen a process to restore or preserve some of the gains that had been made in the CJRA through amendments to the Arkansas Rules of Civil and Appellate Procedure.

This paper will discuss the CJRA and the Arkansas Supreme Court cases that have addressed major provisions of the legislation. It will also touch on some of the recent rule changes implemented in Arkansas to fill in some of the gaps that were created by the court's decisions.

I. The Civil Justice Reform Act of 2003

The CJRA made important changes to Arkansas law regarding (1) joint and several liability, (2) punitive damages, (3) protecting the right to an appeal, (4) "phantom damages" (collateral source), and (4) medical liability.[7]

A. Joint and Several Liability

The rule of joint liability, commonly called joint and several liability, provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant may be held liable for a plaintiff's entire compensatory damages award.

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2 2003 Ark. Acts 649 (effective Mar. 25, 2003) (codified at Ark. Code. Ann. §§ 16-55-201 to -220, 16-114-206, and 16-114-208 to -212).

3 1979 Ark. Acts 709 (codified as amended at Ark. Code. Ann. §§ 16-114-201 to -209); *see also Whorton v. Dixon*, 214 S.W.3d 225 (Ark. 2005) (statute was rationally related to policy of trying to control rapidly rising health care costs).

4 *See* 2003 Ark. Acts 649, § 26 (effective Mar. 25, 2003), *available at* http://www.arkleg.state.ar.us/assembly/2003/R/Acts/Act649.pdf.

5 Robert B. Leflar, *How The Civil Justice Act Changes Arkansas Tort Law*, 38-Fall Ark. Law. 26, 27 (2003). In addition to the CJRA, Arkansas has enacted other civil justice reforms including the Medical Malpractice Act of 1979, *supra*, Product Liability Act of 1979, *see* 1979 Ark. Acts 511 (codified as amended at Ark. Code. Ann. §§ 16-116-101 to -107), Volunteer Immunity Act, *see* Ark. Code. Ann. §§ 16-6-101 to -105, and laws addressing volunteer fire fighter liability, *see* Ark. Code. Ann. §§ 16-6-101 to -102, firearm, nonpowder gun, and ammunition manufacturer liability, Ark. Code. Ann. § 16-116-201, equine and livestock activity liability, *see* Ark. Code. Ann. § 16-120-202, liability for suppliers of specialized equipment and personnel responding to emergency agency requests, *see* Ark. Code. Ann. § 16-120-401, successor corporation asbestos-related liability, *see* Ark. Code §§ 16-120-601 to 16-120-606, and transparency in private attorney contracts entered into by the state, *see* Ark. Code §§ 25-16-714 to -715.

6 *See Summerville v. Thrower*, 253 S.W.3d 415 (Ark. 2007) (striking down CJRA's 30-day affidavit of merit requirement in medical malpractice actions); *Johnson v. Rockwell Automation, Inc.*, 308 S.W.3d 135 (Ark. 2009) (striking down CJRA's nonparty-fault and medical costs provisions); *Bayer CropScience LP v. Schafer*, 385 S.W.3d 822 (Ark. 2011) (striking down CJRA's punitive damages cap); *Broussard v. St. Edward Mercy Health Sys., Inc.*, 386 S.W.3d 385 (Ark. 2012) (striking down CJRA's requirement that medical malpractice plaintiff's expert must be in the same specialty as the defendant).

7 The CJRA also contained venue reform. *See* Ark. Code. Ann. § 16-55-213; *see also Clark v. Johnson Reg'l Med. Ctr.*, 362 S.W.3d 311 (Ark. 2010) (statute governing venue in medical malpractice action did not violate separation of powers under Arkansas Constitution); Kelly W. McNulty, *Ark. Code Ann. § 16-55-213: Tort Reform Brings Sweeping Changes to Venue Law in Arkansas*, 44-Winter Ark. Law. 10 (2009). This section was repealed by 2015 Ark. Acts 830.

Thus, a jury's finding that a particular defendant may have been only one percent at fault is overridden and that defendant may be forced to pay the entire award if other responsible defendants are insolvent or unable to pay their share of the judgment.

The doctrine of joint and several liability is tied to the all-or-nothing doctrine of contributory negligence. Under the contributory negligence doctrine, a plaintiff had to be blameless or was barred from any recovery. Over time, however, virtually all states moved away from contributory negligence and began to adopt comparative fault. Under comparative fault, a plaintiff who is partially to blame for her own injury is not barred from recovery; instead, that person's recovery is reduced in proportion to his or her share of fault for the harm (e.g., a plaintiff who is found to be forty percent at fault will have her award reduced by forty percent). Arkansas was a pioneer in adopting comparative fault in 1955.[8] In 1957, Arkansas moved from pure comparative fault to a form of modified comparative fault.[9]

The advent of comparative fault has enabled many more plaintiffs to win their cases. Most states, including Arkansas, will permit a plaintiff to recover in this manner unless the jury decides that the plaintiff was principally at fault for his own harm.[10] This approach encourages responsible behavior by not rewarding highly negligent plaintiffs, and reflects the view that it is morally wrong to award damages to a plaintiff who is more at fault than all of the defendants.

With the advent of comparative fault in Arkansas, as elsewhere, the justification for requiring solvent defendants to bear a disproportionate burden was lost. Courts no longer had the assurance that imposition of joint and several liability would pit a morally blameless plaintiff against a morally blameworthy defendant. Today's plaintiff can recover damages even when he or she is not completely innocent.[11] Furthermore, joint and several liability is unfair because it puts full responsibility on those who may have been only marginally at fault, and it blunts incentives for safety because it allows negligent actors to underinsure.

For these reasons, the clear trend over the past few decades has been a move away from joint and several liability.[12] In Arkansas, the CJRA generally replaced traditional joint and several liability with "fair share"

8 *See* 1955 Ark. Acts 191.

9 *See* 1957 Ark. Acts 296.

10 *See* Ark. Code. Ann. § 16-55-216 ("a plaintiff may not recover any amount of damages if the plaintiff's own fault is determined to be fifty percent (50%) or greater.").

11 As the Tennessee Supreme Court explained in *McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn. 1992):

> Our adoption of comparative fault is due largely to considerations of fairness: the contributory negligence doctrine unjustly allowed the entire loss to be borne by a negligent plaintiff, notwithstanding that the plaintiff's fault was minor in comparison to defendant's. Having thus adopted a rule more closely linking liability and fault, it would be inconsistent to simultaneously retain a rule, joint and several liability, which may fortuitously impose a degree of liability that is out of all proportion to fault.

See also Dix & Assocs. Pipeline Contractors, Inc. v. Key, 799 S.W.2d 24, 27 (Ky. 1999) ("Whereas it is fundamentally unfair for a plaintiff who is only 5 percent at fault to be absolutely barred from recovery from a defendant who is 95 percent at fault, it is equally and fundamentally unfair to require one joint tort-feasor to bear the entire loss when another tort-feasor has caused 95 percent of the loss.").

12 Most states have modified or abolished joint and several liability, at least with respect to many types of cases. *See* Alaska Stat. § 09.17.080(d); Ariz. Rev. Stat. § 12-2506(A); Ark. Code Ann. § 16-55-201; Cal. Civ. Code § 1431.2; Colo. Rev. Stat. § 13-21-111.5; Conn. Gen. Stat. Ann. § 52-572h ; Fla. Stat. Ann. § 768.81; Ga. Code Ann. § 51-12-33; Haw. Rev. Stat. § 663-10.9; Idaho Code Ann. § 6-803; 735 Ill. Comp. Stat. Ann. 5/2-1117; Ind. Code Ann. § 34-20-7-1; Iowa Code Ann. § 668.4; Kan. Stat. Ann. § 60-258a(d); Ky. Rev. Stat. Ann. § 411.182(3); Mass. Gen. Laws ch. 231B §§ 1-2; Mich. Comp. Laws §§ 600.6304(4), 600.6312; Minn. Stat. Ann. § 604.02; Miss. Code Ann. § 85-5-7; Mo. Rev. Stat. § 537.067(3); Mont. Code Ann. § 27-1-703; Neb. Rev. Stat. § 25-21,185.10; Nev. Rev. Stat. Ann § 41.141; N.H. Rev. Stat. Ann. § 507:7-e; N.J. Stat. Ann. § 2A:15-5.3; N.M. Stat. Ann. § 41-3A-1; N.Y. Civ. Prac. L. & R. §§ 1601-1602; N.D. Cent Code § 3203.202 ; Ohio Rev. Code Ann. § 2307.22; Okla. Stat. tit. 23, § 15.1; Or. Rev. Stat. § 31.610(4); 42 Pa. Consol. Stat. § 7102; S.C. Code Ann. § 15-38-15; S.D. Codified Laws Ann. § 15-8-15.1; Tenn. Code Ann. § 29-11-107; Tex. Civ. Prac. & Rem. Code Ann. § 33.013; Utah Code Ann. §§ 78-27-39(2), 78-27-40(1); Vt. Stat. Ann. tit. 12, § 1036; Wash. Rev. Code Ann. § 4.22.070(1)(b); W. Va. Code § 55-17-13c; W. Va. Code Ann. § 55-7B-9; Wis. Stat. Ann. §§ 895.045(1), 895.85(5); Wyo. Stat. § 1-1-109(e); *see also* R.*L. Mc Coy v. Jack*, 772 N.E.2d 987 (Ind. 2002); *Brown v. Keill*, 580 P.2d 867 (Kan. 1978); *Prudential Life Ins. Co. v. Moody*, 696 S.W.2d 503 (Ky. 1985); *Howard v. Spafford*, 321 A.2d 74 (Vt. 1974); *Washburn v. Beatt Equip. Co.*, 840 P.2d 860 (Wash. 1992).

liability.[13] Under the CJRA, "[e]ach defendant shall be liable only for amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault."[14]

To give substance to this reform, the CJRA provided that "the fact finder shall consider the fault of 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."[15] This provision permitted the attribution of fault to settling tortfeasors, "as previously allowed in Arkansas."[16] It also permitted fault to be allocated to other nonparties including entities that are immune (e.g., negligent employers in cases brought against product manufacturers for workplace injuries), insolvent, or beyond the court's jurisdiction.

To allow the plaintiff to prepare for a trial in which nonparty fault may be at issue, the CJRA provided that the defendant must provide notice of its intent to raise the issue of nonparty fault at least 120 days before trial by filing a pleading that identifies the nonparty and stating the basis for believing the nonparty to be at fault.[17]

Lastly, the CJRA provided a mechanism to potentially reapportion the several share of any defendant that is not reasonably collectible.[18]

B. Punitive Damages

The General Assembly also responded to "concerns about large punitive damages in Arkansas and elsewhere"[19] by tightening the burden of proof for punitive damages, establishing a cap to restrain outlier awards, and allowing parties to request bifurcated trials in punitive damages cases.[20]

In order to recover punitive damages under the CJRA, a plaintiff must prove that the defendant is liable for compensatory damages and that either (1) "[t]he 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) [t]he defendant intentionally pursued a course of conduct for the purpose of causing injury or damage."[21] The CJRA's standard for punitive damages liability "codifie[d] existing precedent."[22]

Evidence that the defendant engaged in either of the above classes of conduct must be "clear and convincing" under the CJRA.[23] Reflecting the quasi-criminal nature of punitive damages, the "clear convincing evidence" burden of proof falls between the preponderance of evidence standard ordinarily used in civil cases and the criminal law standard of proof beyond a reasonable doubt. The clear and convincing evidence standard is the law in a majority of states, has enjoyed widespread support in the legal community,[24] and was

13 *See* Ark. Code. Ann. § 16-55-201; *see also Johnson v. Rockwell Automation, Inc.*, 308 S.W.3d 135 (Ark. 2009) (finding the switch from joint and several to pure several liability to be substantive and, therefore, not a violation of amendment 80 § 3 to the Arkansas Constitution). Joint and several liability continues to apply to persons acting in concert. *See* Ark. Code. Ann. § 16-55-205.

14 Ark. Code. Ann. § 16-55-201(b)(1).

15 Ark. Code. Ann. § 16-55-202(a).

16 Robert B. Leflar, *The Civil Justice Reform Act and The Empty Chair*, 2003 Ark. L. Notes 67, 72 (2003).

17 Ark. Code. Ann. § 16-55-202(b).

18 Ark. Code. Ann. § 16-55-203. The reallocation of uncollectible fault shares "applies only to the fault shares of 'defendants,' not to fault shares attributed to nonparties." Leflar, *The Civil Justice Reform Act and The Empty Chair*, 2003 Ark. L. Notes 67 at 73.

19 Leflar, *How The Civil Justice Act Changes Arkansas Tort Law*, 38-Fall Ark. Law. at 26-27.

20 *See* Ark. Code. Ann. §§ 16-55-206 to -208, § 16-55-206-211.

21 Ark. Code. Ann. § 16-55-206.

22 Leflar, *How The Civil Justice Act Changes Arkansas Tort Law*, 38-Fall Ark. Law. at 26-27.

23 *See* Ark. Code. Ann. § 16-55-207.

24 *See* Victor E. Schwartz et al., *Reining In Punitive Damages "Run Wild": Proposals For Reform By Courts And Legislatures*, 65 Brook. L. Rev. 1003, 1014 (2000) (citing Am. Bar Ass'n, Special Committee on Punitive Damages of the Am. Bar Ass'n, Section on Litig., Punitive Damages: A Constructive Examination 19 (1986); Am. College of Trial Lawyers, Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice 15-16 (1989); Nat'l Conf. of Commissioners On Uniform State Laws, Uniform Law Commissioners' Model Punitive Damages Act § 5 (approved July 18, 1996); Am. L. Inst., 2 Enterprise Responsibility for Personal Injury Reporters' Study 248-

endorsed by the Supreme Court of the United States.[25]

The CJRA addressed the problem of unpredictable outlier awards through a cap, as many states have done. Nationally, about half of the states limit[26] or bar[27] punitive damages. The CJRA capped punitive damages at the greater of $250,000 or three times the amount of compensatory damages (not to exceed $1 million)[28]—adjusted triannually for inflation.[29] The cap would not apply if the finder of fact determined that by "clear and convincing evidence that . . . the defendant intentionally pursued his course of conduct for the purpose of causing injury or damage" and "did, in fact, harm the plaintiff."[30]

Finally, the CJRA provided that any party may request a bifurcated trial so that proceedings on punitive damages are separate from and subsequent to proceedings on compensatory damages before the same jury.[31] The request must be made at least ten days before trial to give other parties time to prepare for trial.[32] Bifurcated trials prevent evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by jurors and improperly considered when they are determining liability for compensatory damages.[33] Bifurcation also helps jurors "compartmentalize" a trial, allowing them to more easily separate the burden of proof that is required for compensatory damage awards from the higher burden of proof required for punitive damages (i.e., clear and convincing evidence). For these reasons, bifurcation of punitive damages trials has been widely adopted nationwide[34] and has been supported by leading legal groups.[35]

49 (1991)).

25 *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 n.11 (1991) ("There is much to be said in favor of a state's requiring, as many do, injury, . . a standard of 'clear and convincing evidence.'").

26 *See* Ala. Code § 6-11-21; Alaska Stat. § 9.17.020(f)-(h); Colo. Rev. Stat. § 13-21-102(1)(a); Conn. Gen. Stat. Ann. § 52-240; Fla. Stat. Ann. § 768.73; Ga. Code Ann. § 51-12-5.1(f), (g); Idaho Code Ann. § 6-1604; Ind. Code Ann. § 34-51-3-4; Kan. Stat. Ann. § 60-3702; Me. Rev. Stat. Ann. tit.28-A § 2-804(b) (wrongful death); Miss. Code Ann. § 11-1-65; Mont. Code Ann. § 27-1-220(3); Nev. Rev. Stat. Ann. § 42.005; N.J. Stat. Ann. § 2A:155.14; N.C. Gen. Stat. § 1D-25; N.D. Cent. Code § 32.03.2-11(4); Ohio Rev. Code Ann. § 2315.21; Okla. Stat. Ann. tit. 23, § 9.1; 40 Pa. Cons. Stat. Ann. § 1303.505 (healthcare providers); S.C. Code Ann. § 15-32-530; Tenn. Code Ann. § 29-39-104; Tex. Civ. Prac. & Rem. Code Ann. § 41.008; Va. Code Ann. § 8.01-38.1; W. Va. Code § 55-7-29; Wis. Stat. § 895.043(6).

27 Nebraska bars punitive damages on state constitutional grounds. Louisiana, Massachusetts, and Washington, and New Hampshire permit punitive damages only when authorized by statute. Michigan recognizes exemplary damages as compensatory, rather than truly punitive. Connecticut has limited what they call punitive recovery to the expenses of bringing the action. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 495 (2008).

28 Ark. Code. Ann. § 16-55-208(a).

29 Ark. Code. Ann. § 16-55-208(c). Many states limit punitive damages to a fixed amount or a certain multiple of compensatory damages. *See, e.g.*, Ala. Code § 6-11-21(d) (limiting punitive damages in cases involving physical injuries to the greater of three times compensatory damages or $1.5 million, indexed to inflation); Fla. Stat. Ann. § 768.725 (limiting punitive damages to the greater of three times compensatory damages or $500,000 subject to certain exceptions); Ga. Code Ann. § 51-12-5.1(f), (g) (limiting punitive damages to $250,000 unless the plaintiff demonstrated that the defendant acted with a specific intent to harm); Okla. Stat. Ann. tit. 23, § 9.1 (limiting punitive damages to the greater of $100,000 or compensatory damages, or greater of $500,000 or two times compensatory damages or the amount of the increased financial gain where the jury finds by clear and convincing evidence that the defendant acted with malice or an insurer intentionally acted in bad faith, and lifting limit when there is evidence beyond a reasonable doubt that the defendant or insurer acted intentionally and with malice and engaged in life-threatening conduct); Tenn. Code Ann. § 29-39-104 (limiting punitive damages to the greater of two times compensatory damages or $500,000 subject to certain exceptions); Tex. Civ. Prac. & Rem. Code Ann. § 41.008 (limiting punitive damages to the greater of two times economic damages plus amount equal to noneconomic damages up to $750,000, or $200,000).

30 Ark. Code. Ann. § 16-55-208(b).

31 Ark. Code. Ann. § 16-55-211(a)(2).

32 Ark. Code. Ann. § 16-55-211(a)(1).

33 *See* Ark. Code. Ann. § 16-55-211(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.").

34 *See, e.g.,* Cal. Civ. Code § 3295(d); Minn. Stat. Ann. § 549.20(4); Miss Code Ann. § 11-1-65(1)(b)-(d).

35 *See* Victor E. Schwartz et al., *Reining In Punitive Damages "Run Wild": Proposals For Reform By Courts And Legislatures*, 65 Brook. L. Rev. 1003, 1019 (2000) ("Bifurcation of punitive damages trials is supported by the American Bar Association, the American College of Trial Lawyers, and the National Conference

C. Protecting the Right to Appeal

A civil defendant that loses at trial must post a supersedeas bond (commonly called an appeal bond) to secure its right to appeal and stay the judgment. Appeal bond statutes were initially adopted in an era when judgments were generally smaller in scale—before the emergence of government-sponsored lawsuits and class actions that aim to reach into the deep pockets of corporate defendants. It the modern era, appeal bond requirements are often roadblocks to appellate review.[36]

Many states have adopted appeal bond caps to protect a defendant's right to appeal.[37] The CJRA provided that the maximum appeal bond that may be required in any civil action under any legal theory shall be limited to $25 million, regardless of the amount of the judgment.[38] The CJRA protected plaintiffs from unscrupulous defendants by providing that if the plaintiff proves that the defendant that posted the bond 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."[39]

D. "Phantom Damages" or Collateral Source Reform

Plaintiffs in personal injury lawsuits often seek inflated recoveries by introducing evidence of the amounts billed by health care providers for medical treatment, even though the amount actually paid by the plaintiff or that person's insurer may have been much less. "Phantom damages" reflect awards for medical expenses that were written off by the medical provider and never paid by the plaintiff or his or her insurer. A growing number of courts and legislatures are rejecting phantom damages. For example, Texas enacted a law in 2003 to provide that the amounts paid for medical expenses are admissible at trial, not the amounts billed for treatment.[40]

Before the CJRA, Arkansas allowed plaintiffs to introduce evidence of the full amount of billed medical expenses and recover that amount, even if the healthcare provider accepted a significantly discounted rate as full payment and wrote off the remainder of the bill.[41] The CJRA, however, provided that "[a]ny 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."[42]

E. Medical Liability

In the years prior to the CJRA, many malpractice insurers left Arkansas, ceased writing new policies in the state, or increased their rates. The CJRA contained a

of Commissioners on Uniform State Laws, among other well-known organizations.").

36 *See* Mark A. Behrens & Donald J. Kochan, *Protecting the Right to Appellate Review in the New Era of Civil Actions: A Call for Bonding Fairness*, 29:21 Prod. Safety & Liab. Rptr. (BNA) 515 (May 21, 2001). The problem of oppressive bonding requirements first became evident during the state attorneys general litigation against the tobacco industry. As one law professor observed, "if multi-billion dollar judgments had been entered against the tobacco manufacturers in the states' lawsuits, the manufacturers likely would have lacked the resources to immediately pay the judgments (or even to post an appeal bond), and may have been forced into bankruptcy." Richard L. Cupp, *State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect For Lead Paint Manufacturers And Others Fair Game?*, 27 Pepp. L. Rev. 685, 689-90 (2000).

37 *See, e.g.,* Ark. Code § 16-55-214; Ariz. Rev. Stat. § 12-2108; Colo. Rev. Stat. § 13-16-125; Ga. Code Ann. § 5-6-46; Haw. Rev. Stat. Ann. § 607-26; Ind. Code Ann. § 34-49-5-3; Mich. Comp. Laws § 600.2607(1); N.C. Gen. Stat. § 1-289; N.D. Cent. Code § 28-21-25; Okla. Stat. Ann. tit. 12 § 990.4(B)(5); S.C. Code Ann. § 18-9-130(A)(1); S.D. Codified Laws § 15-26A-26; Tenn. Code Ann. § 27-1-124; Va. Code Ann. § 8.01-676.1; Wyo. Stat. § 1-17-201; *see also* Mont. Code Ann. § 25-12-103 ($50 million).

38 *See* Ark. Code. Ann. § 16-55-214(a).

39 *See* Ark. Code. Ann. § 16-55-214(b).

40 *See* Tex. Civ. Prac. & Rem. Code § 41.0105 ("recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.").

41 *See Montgomery Ward & Co., Inc. v. Anderson*, 976 S.W.2d 382, 385 (Ark. 1998) ("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.").

42 *See* Ark. Code. Ann. § 16-55-212(b); *see also* Ark. Code. Ann. § 16-114-208(a)(1)(B) (applicable to medical liability actions).

number of reforms to address the state's medical liability climate, help curb frivolous lawsuits, and promote access to care. These reforms included:

Expert witness requirements: The CJRA required that a plaintiff's expert testimony in a medical malpractice case must come from a medical care provider "of the same specialty as the defendant."[43]

Periodic payment of future damages: The CJRA provided that in any medical malpractice action in which the award for future damages exceeds $100,000, the court shall order, at the request of either party, that the amount of future damages exceeding $100,000 shall 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."[44] One commentator noted that "[t]his change[d] the prior statute giving the court discretion in the matter."[45] Furthermore, "[a]s 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."[46]

Expert medical affidavit: Reflecting the legislature's concern about "frivolous medical malpractice actions," the CJRA "beefed up existing deterrents against 'false and unreasonable pleadings.'"[47] Under the CJRA, a plaintiff in a medical malpractice case in which expert testimony is required must file an affidavit signed by an expert engaged in the same type of medical care as the defendant and include details as to the expert's qualifications, familiarity with the case, and opinion as to how the defendant's alleged breach of the appropriate standard of care resulted in the plaintiff's harm.[48] The CJRA also provided that if the expert affidavit is not filed within thirty days after the complaint is filed, "the complaint shall be dismissed by the court."[49]

Vicarious liability: The CJRA provided that if "the only reason" for naming a medical care facility as a defendant is that a codefendant medical care provider practices in the facility, the plaintiff must prove that the medical care provider is the facility's employee before the facility may be liable for the medical care provider's negligence.[50] The CJRA preempted theories adopted in other jurisdictions that permit "vicarious liability actions against a hospital for negligence committed at the hospital by non-employee physicians with staff privileges to use the hospital's facilities and personnel in treating their patients."[51]

Survey and inspection report admissibility: The CJRA limited a plaintiff's ability to admit the results of surveys and inspections by state or federal regulators against a medical care provider. Such reports are only admissible if "relevant to the plaintiff's injury."[52]

II. The Arkansas Supreme Court and the CJRA

The CJRA showed signs of success following its implementation. For example, the legislation reduced the number of medical malpractice filings in the Arkansas:

> Records of the Administrative Office of the Courts show 383 malpractice cases filed in 2001, another 383 in 2002, 385 in 2003. In 2004, the first year the effect of [CJRA] was felt, the number dropped to 305. It dropped again in 2005, to 282, and yet again in 2006, to 255. It rose slightly in 2007, to 285, but remained far below the pre-[CJRA] levels.[53]

Furthermore, the Arkansas Insurance Commissioner reported that "new insurance companies were coming in because they found a friendlier and more stable climate

43 *See* Ark. Code. Ann. § 16-114-206(a).

44 Ark. Code. Ann. § 16-114-208(c)(1).

45 Leflar, *How The Civil Justice Act Changes Arkansas Tort Law*, 38-Fall Ark. Law. at 26.

46 Ark. Code. Ann. § 16-114-208(c)(2).

47 Leflar, *How The Civil Justice Act Changes Arkansas Tort Law*, 38- Fall Ark. Law. at 28.

48 *See* Ark. Code. Ann. § 16-114-209(b)(1)-(2).

49 *See* Ark. Code. Ann. § 16-114-209(b)(3).

50 *See* Ark. Code. Ann. § 16-114-210.

51 Leflar, *How The Civil Justice Act Changes Arkansas Tort Law*, 38- Fall Ark. Law. at 28.

52 *See* Ark. Code. Ann. § 16-114-211.

53 Doug Smith, *Fewer Medical Malpractice Suits*, Ark. Times, Nov. 6, 2008, *available at* http://www.arktimes.com/arkansas/fewer-medical-malpractice-suits/Content?oid=1013626.

since passage of [the CJRA.]"[54] Over time, however, several of the CJRA's key provisions have been struck down by the Arkansas Supreme Court.

In 2007, in *Summerville v. Thrower*,[55] the Arkansas Supreme Court struck down the CJRA's requirement that medical malpractice actions be dismissed when plaintiffs fail to file affidavits of reasonable cause within thirty days of filing the complaint. The court held that this provision was "directly in conflict" with Rule 3 of the Arkansas Rules of Civil Procedure and the court's authority under amendment 80 of the Arkansas Constitution.[56] The court noted that a pre-amendment 80 case, 1992's *Weidrick v. Arnold*,[57] held that a mandatory sixty-day notice prefatory to filing a medical malpractice action directly conflicted with Rule 3, which superseded it. The court in *Summerville* found little, if any, practical difference between "a 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."[58] The court said that "[b]oth procedures add a legislative encumbrance to commencing a cause of action that is not found in Rule 3 of our civil rules."[59]

Two years later, in *Johnson v. Rockwell Automation, Inc.*,[60] the Arkansas Supreme Court struck down the nonparty-fault allocation and medical costs evidence provisions of the CJRA. The court said, "[a]s was the case in *Summerville* and *Weidrick*, the nonparty-fault provision . . . conflicts with our 'rules of pleading, practice and procedure.'"[61] In response to the defendants' argument that the non-party fault provision did not directly conflict with the Arkansas Rules of Civil Procedure (as the legislative requirements did in in *Summerville* and *Weidrick*), the court in *Johnson* said "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."[62] The court determined that the nonparty-fault allocation provision unconstitutionally created a "procedure by which the fault of a nonparty shall be litigated."[63] In addition, the court held, the CJRA's requirement of "a pleading" giving notice of a defendant's intent to raise nonparty fault at trial was "in direct conflict" with Arkansas Rule of Civil Procedure 7.[64] Thus, post-*Johnson*, a defendant "possessed a substantive right to a fair-share apportionment of fault; yet, a mechanism did not exist to protect this right when a nonparty contributed to the plaintiff's injury."[65]

Next, the court in *Johnson* concluded that

54 *Id.*

55 253 S.W.3d 415 (Ark. 2007).

56 *Id.* at 421. Section 3 of Amendment 80 to the Arkansas Constitution, which was approved by voters in November 2000 and became effective in July 2001, provides: "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."

57 835 S.W.2d 843 (Ark 1992).

58 *Summerville,* 253 S.W.3d at 421.

59 *Id.*

60 308 S.W.3d 135 (Ark. 2009).

61 *Id.* at 141 *see also Burns v. Ford Motor Co.*, 549 F. Supp. 2d 1081, 1085 (W.D. Ark. 2008); *cf. McMullin v. United States*, 515 F. Supp. 2d 904 (E.D. Ark. 2007).

62 *Johnson*, 308 S.W.3d at 141 (citing Ark. Const. amend. 80, § 3).

63 *Id.*

64 *Id.*

65 Samuel T. Waddell, *Examining The Evolution of Nonparty Fault Apportionment in Arkansas: Must A Defendant Pay More Than Its Fair Share*, 66 Ark. L. Rev. 485, 487 (2013); *see also* Scott M. Strauss, *The Arkansas Several Liability 'Catch-22': The Civil Justice Reform Act Post Johnson*, 46-Fall Ark. Law. 10, 10 (2011) ("with all due apologies to Marie Antoinette," post-*Johnson*, "in the absence of a procedural change we may have our cake, but we may not eat it."); *but see* James Bruce McMath, *The Arkansas Civil Reform Act of 2003 and Johnson v. Rockwell Automation, Inc.*, 46-Fall Ark. Law. 14 (2011). Post-*Johnson* rulings created additional hurdles for defendants. *See Proassurance Indem. Co., Inc. v. Metheny*, 425 S.W.3d 689 (Ark. 2012); *St. Vincent Infirmary Med. Ctr. v. Shelton*, 425 S.W.3d 761 (Ark. 2013), *overruled by statute as recognized in J-McDaniel Constr. Co. v. Dale E. Peters Plumbing Ltd.*, 436 S.W.3d 458 (Ark. 2014). Act 1116 of 2013 "demonstrates the General Assembly's commitment to a several-only liability scheme," Waddell, *supra*, at 520, while the procedure for accomplishing the General Assembly's intent remained "exclusively within the province of the Arkansas Supreme Court's rule-making authority." *Id.*

the medical costs evidence provision of the CJRA "promulgates a rule of evidence."[66] As it had proclaimed with respect to court procedures, the court stated that "rules regarding the admissibility of evidence are within our providence."[67] Thus, the court held, "the medical-costs provision also violates separation of powers under article 4, § 2, and amendment 80, § 3 of the Arkansas Constitution."[68]

Two years after *Johnson*, the Arkansas Supreme Court addressed another centerpiece of the CJRA—the cap on punitive damages. In *Bayer CropScience LP v. Schafer*,[69] the court held that the cap conflicted with a provision in the Arkansas Constitution which prohibits limits on the amount to be recovered for personal injury or death or property damage outside the employment relationship.[70] The court acknowledged that "compensatory damages are awarded for the purpose of making the injured party whole, as nearly as possible," while "the function of punitive damages is not to compensate but to punish the defendant for this wrong."[71] Nevertheless, the court said that the constitutional prohibition applied to the CJRA's punitive damages cap, finding that an award of punitive damages is "an integrant part of 'the amount to be recovered for injuries resulting in death or for injuries to persons or property.'"[72]

In 2012, the Arkansas Supreme Court in *Broussard v. St. Edward Mercy Health System, Inc*.[73] struck down the CJRA's requirement that expert testimony in malpractice actions be given by providers of the same specialty as the defendant. The court reaffirmed its position that "[p]rocedural matters lie solely within the province of this court."[74] The court added, "[t]he General Assembly lacks authority to create procedural rules, and this is true even where the procedure it creates does not conflict with already existing court procedure."[75] Turning to the CJRA provision at issue, the court held that "[t]he 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."[76]

III. Recent Rule Changes

In 2013, the Arkansas Supreme Court commissioned a special task force to consider potential changes to the Arkansas Rules of Civil Procedure to address issues of damages and liability in civil litigation.[77] In January 2014, the Arkansas Supreme Court published the special task force's recommendations in two per curiam opinions and invited public comment.[78]

In August 2014, the Arkansas Supreme Court adopted amended Arkansas Rules of Civil Procedure 9, 49, and 52, effective January 1, 2015.[79] These changes addressed allocation of fault, including nonparty fault, and sought to "fill the procedural void resulting from procedural aspects of [the CJRA] that were struck on separation-of-powers grounds."[80] The court also adopted

66 *Johnson*, 308 S.W.3d at 142.

67 *Id*.

68 *Id*.

69 385 S.W.3d 822 (Ark. 2011).

70 *Id*. at 831 (citing Ark. Const. art. 5, § 32).

71 *Id*. (citations omitted).

72 *Id*. (quoting Ark. Const. art. 5, § 32).

73 386 S.W.3d 385 (Ark. 2012).

74 *Id.* at 389 (citing *Johnson*, 308 S.W.3d at 141).

75 *Id.* (citing *Johnson*, 308 S.W.3d at 141).

76 *Id.*

77 *See In re The Appointment of a Special Task Force on Practice and Procedure in Civil Cases*, 2013 Ark. 303 (Aug. 2, 2013) (per curiam) ("The extended debate in the recent session of the Arkansas General Assembly over both the substance of court rules and changes to this court's constitutional power and authority to promulgate those rules, coupled with the debate surrounding recent cases involving issues of damages and liability in civil litigation, has revealed the need for review and/or revision of some sections of the Arkansas Rules of Civil Procedure."); *see also* Austin A. King, *A Problematic Procedure: The Struggle for Control of Procedural Rulemaking Power*, 67 Ark. L. Rev. 759 (2014); Sevawn Foster, *Arkansas's Current Procedural Rulemaking Conundrum: Attempting to Quell the Political Discord*, 37 U. Ark. Little Rock L. Rev. 105 (2014); Mark James Chanay, *Recent Developments*, 67 Ark. L. Rev. 193 (2014).

78 *See In re Special Task Force on Practice and Procedure in Civil Cases*, 2014 Ark. 5 (Jan. 10, 2014) (per curiam); *In re Special Task Force on Practice and Procedure in Civil Cases—Final Report*, 2014 Ark. 47 (Jan. 30, 2014) (per curiam).

79 *See In re Special Task Force on Practice and Procedure in Civil Cases- Ark. R. Civ. P. 9, 49, 52, and Ark. R. App. P.-Civ. 8*, 2014 Ark. 340 (Aug. 7, 2014) (per curiam).

80 *Id.; see generally* Joseph Falasco, *Negotiating Arkansas's Law of Several Liability*, 46- Fall Ark. Law. 22, 24 (2011); Brian G.

amended Arkansas Rule of Appellate Procedure-Civil 8, governing supersedeas bonds on appeal. The amendment, which became effective immediately, superseded the CJRA's appeal bond cap, but kept the maximum civil bond requirement at $25 million.[81] The court declined to adopt proposed amendments to Arkansas Rule of Evidence 702 to include a "same specialty" requirement for experts in medical malpractice actions.

In February 2015, the Arkansas Supreme Court adopted amendments to Arkansas Rules of Civil Procedure 11 and 42, effective April 1, 2015.[82] Amended Rule 11 "replaces the affidavit requirement for medical injury cases invalidated in *Summerville v. Thrower*, . . . but is not limited to cases of that type."[83] Amended Rule 42 supersedes the CJRA's bifurcated punitive damages trial provision.[84] The court also adopted amended Arkansas Rule of Civil Procedure 3 to provide a sixty-day presuit notice requirement for medical malpractice actions (effective upon enactment of a companion limitations-tolling provision), resolving the separation of powers issue at the core of *Weidrick v. Arnold*.[85]

IV. Future Reform Proposals

Given the Arkansas Supreme Court's rulings, it is likely that the most far-reaching reforms would require a constitutional amendment. But, in the interim, policymakers could consider reforms that do not involve court pleadings, practice, or procedure, and that do not limit damages for personal injury and property damages outside the employment relationship. Recent examples include laws signed by Governor Asa Hutchinson in 2015 to provide transparency in private attorney contracts entered into by the state[86] and to rein in consumer lawsuit lending abuses.[87]

In the future, the General Assembly could consider amendments to the Arkansas Deceptive Trade Practices Act,[88] such as to address the issue of private causes of action. The General Assembly also could address the high post-judgment interest rate in Arkansas.[89] In addition, the General Assembly could consider reforms to strengthen the jury system and improve the representativeness of juries, as other states have done.[90]

V. Conclusion

The Civil Justice Reform Act of 2003 altered several important areas of Arkansas law. The core components of the CJRA reflected mainstream changes that have been made in many other states. In the post-amendment 80 environment, however, the Arkansas Supreme Court has declared rules regarding pleading, practice, and procedure to be beyond the General Assembly's authority. The court has also used the Arkansas Constitution's prohibition against limits on personal injury and property damages outside the employment relationship to strike down a punitive damages cap. Some of those issues have been addressed by the Arkansas Supreme Court, which has used the rules amendment process to address procedural aspects of the CJRA that were struck down and to supersede

Brooks, *Act 649 of 2003, Act 1116 of 2013, Shelton, Methany, and a Special Task Force Later, Where Are We on Allocation of Fault?*, 50-Winter Ark. Law. 18 (2015).

81 *See In re Special Task Force on Practice and Procedure in Civil Cases- Ark. R. Civ. P. 9, 49, 52, and Ark. R. App. P.-Civ. 8*, 2014 Ark. 340 (Aug. 7, 2014) (per curiam).

82 *See In re Special Task Force on Practice and Procedure in Civil Cases- Ark. R. Civ. P. 11 and 42*, 2015 Ark. 88 (Feb. 26, 2015) (per curiam) (the amended rule is effective "upon the General Assembly's enactment of a companion limitations-tolling provision.").

83 *Id.*

84 *See id.*

85 *See In re Special Task Force on Practice and Procedure in Civil Cases- Ark. R. Civ. P. 3*, 2015 Ark. 89 (Feb. 26, 2015) (per curiam) (the amended rule is effective "upon the General Assembly's enactment of a companion limitations-tolling provision.").

86 *See* Ark. Code §§ 25-16-714 to -715.

87 *See* Ark. Code § 4-57-109.

88 *See* Ark. Code §§ 4-88-101 to -210.

89 *See* Ark. Code § 16-65-114 (the greater of 10% per annum or the rate provided in the contract in an action on a contract; on all other judgments, 10% per annum; but not more than the maximum rate permitted under Arkansas Constitution, Amendment 89, § 3 (the maximum rate of interest permissible is 17% per annum)).

90 *See generally* Cary Silverman, *ALEC's Jury Patriotism Act Reduces Hardship for Thousands of Jurors and Ensures Representative Juries on Complex Cases,* Inside ALEC (Am. Legislative Exch. Council, Apr. 2012).

other procedural elements of the CJRA. The General Assembly, however, can continue to identify reforms that would pass constitutional muster in Arkansas, including permissible changes to the Arkansas Deceptive Trade Practices Act, the state's post-judgment interest rate statute, and jury service improvements.

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