SUPREME COURT OF ARKANSAS

DARRELL JOHNSON AND A. JAN THOMAS, JR., BANKRUPTCY TRUSTEE IN THE MATTER OF DARRELL W. JOHNSON AND JANET K. JOHNSON, DEBTORS **PETITIONERS**

VS. **NO. 08-1009**

ROCKWELL AUTOMATION, INC.; CONSOLIDATED ELECTRICAL DISTRIBUTORS, INC. D/B/A KEATHLEY-PATTERSON ELECTRIC; AND JOHN DOES 1-5 **RESPONDENTS**

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

Respectfully submitted,

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QUESTIONS OF LAW CERTIFIED TO THE SUPREME COURT

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, that allow 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, as codified at Ark. Code Ann. § 16-55-201.

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

STATEMENT OF THE CASE

On February 24, 2004, petitioner Darrell Johnson was injured in an electrical explosion while working as a control systems mechanic for his employer, Eastman Chemical Company ("Eastman"), at its plant near Batesville, Arkansas. [Cite.] At the time of the incident, Johnson was working on an electrical product commonly known as a "starter bucket." [Cite.] The starter bucket was designed, manufactured, and supplied by the respondents. [Cite.] Johnson received no benefits under the Workers' Compensation Act, A.C.A. § 11-9-101, *et seq*.

The petitioners allege the starter bucket was designed, manufactured, and supplied in a defective condition which rendered it unreasonably dangerous and which was an actual and proximate cause of the incident and Johnson's injuries. [Cite.] More specifically, the petitioners allege that the safety interlock on the starter bucket failed to prevent the starter bucket from becoming electrically powered at the time in question, and that the lack of phase barriers between the fuse clips in the starter bucket failed to prevent the electrical explosion, each of which was an actual and proximate cause of the incident and Johnson's injuries. [Cite.] The petitioners allege that the respondents are strictly liable for Johnson's damages based on the defective and unreasonably dangerous condition of the starter bucket, and that the respondents are further liable for their negligence in providing the starter bucket in the above-described condition and failing to warn Johnson and Eastman concerning the risks inherent in the design. [Cite.]

Respondent Rockwell Automation, Inc. ("Rockwell") pled in its answer that the fault of all parties should be apportioned in accordance with the Civil Justice Reform Act of 2003 (Act 649 of 2003 or CJRA), Ark. Code Ann. § 16-55-201, *et seq*. [Cite.] Rockwell further pled "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." [Cite.] Rockwell filed a "Notice of Nonparty Fault," pursuant to the CJRA, Ark. Code Ann. § 16-55-202, designating Johnson's employer, Eastman, as a nonparty at fault, for a list of alleged reasons. [Cite.] The petitioners contend that the nonparty fault (or "phantom defendant") provisions of the CJRA violate the Arkansas Constitution under the facts of this case.

Johnson received medical care, treatment, or services which the petitioners allege were necessary due to the incident and injuries described herein. Johnson's employee medical plan paid costs for the medical care, treatment, or services. The amount of costs paid by the plan was less than the full amount of the costs incurred for the medical care, treatment, or services. The petitioners seek to present evidence at trial of the full amount of the costs of necessary medical care, treatment, or services received by Johnson. The respondents seek to enforce the terms of the CJRA, Ark. Code Ann. § 16-55-212(b), such that petitioners may introduce as evidence only those costs actually paid by or on behalf of Johnson or which remain unpaid and for which Johnson or any third party is legally responsible. The petitioners contend that such an interpretation and application of the CJRA is a limitation on damages and a violation of the Arkansas Constitution under the facts of this case.

The petitioners and respondents filed, before the U.S. District Court, a joint motion to certify the two questions of law addressed herein to the Arkansas Supreme Court. The U.S. District Court granted that motion. [Cite.] The Arkansas Supreme Court accepted certification of the two questions of law. [Cite.]

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ARGUMENT

I. INTRODUCTION

In 2003, the Arkansas General Assembly enacted Act 649, commonly known as the "Civil Justice Reform Act" (CJRA). The obvious purpose of the Act was to limit personal injury recoveries. The legislation casually overturns foundational concepts of civil justice that have evolved literally over centuries, ignores explicit constitutional rights and limitations, fails to address other inconsistent legislation and tramples over separation of powers by explicitly establishing novel judicial procedures. This court has already stricken one provision of the Act on the latter grounds. *Summerville, infra.*

In this brief, the petitioners challenge the constitutionality of Section 15 (A.C.A. § 16-55-212(b)) which seeks to alter the collateral source rule and limit the admissibility of evidence related to recovery of medical bills incurred, as well as Section 2 (A.C.A. § 16-55-202) which operates to limit an injured plaintiff's ability to recover from a defendant whose actions were a proximate cause of his/her indivisible damages by allocating liability to nonparties or "phantom defendants" from whom no recovery may be had under the act.

II. FACTUAL OVERVIEW AND APPLICATION OF THE CJRA

This is a personal injury product liability case. The petitioners allege that the respondents' wrongful acts were a joint and proximate cause of a single indivisible personal injury suffered by petitioner Darrell Johnson ("Johnson"). More specifically, the respondents negligently designed, manufactured, and/or supplied a piece of electrical equipment known as a "starter bucket" with a defective and unreasonably dangerous interlock system, and without protective phase barriers, which allowed the starter bucket to inadvertently become energized

during a routine maintenance procedure, resulting in an electrical explosion and injuries to Johnson.

Respondent Rockwell Automation, Inc. filed a "notice of non-party fault" pursuant to A.C.A. § 16-55-202, designating Johnson's employer, Eastman Chemical Company ("Eastman"), as a nonparty at fault. Johnson has received no benefits under the Workers' Compensation Act, A.C.A. § 11-9-101, *et seq*.

Johnson's medical bills were partially paid by his group health carrier based upon discounted terms negotiated between said carrier and the providers. Such sums were less than the total amount that would have been incurred in the absence of such negotiated discounts. Order of Certification, Addendum Exhibit 1.

III. THE NONPARTY "PHANTOM DEFENDANT" CONCEPT AS APPLIED IS UNCONSTITUTIONAL

Operating in conjunction with A.C.A. § 16-55-201 (replacing joint and several liability with "proportionate" liability), A.C.A. § 11-9-105 (worker's compensation exclusive remedy against an employer) and A.C.A. § 11-9-410 (providing an employer with a lien on a third party recovery without regard to employer fault), Ark Code Ann. § 16-55-202 (phantom defendant provision of Act 649) is unconstitutional when applied to this case because: (1) it violates Article 2, § 8, of the Arkansas Constitution, which guarantees due process; (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.

A. Operation of the Phantom Defendant Provision, Section 2 of Act 649 2003.

In actions for personal injury, property damage, or wrongful death, Section 1 of Act 649, codified at A.C.A. § 16-55-201, eliminates joint and several liability for all practical purposes.[1] It substitutes instead what has been referred to as proportionate liability. Under proportionate liability a defendant's liability is no longer coextensive with the harm it caused or contributed to cause but is limited based upon its proportion of allocated fault.

The elimination of joint and several liability raises constitutional questions in its own right, especially in light of Article 2, § 13, and Article 5, § 32, discussed herein below.[2] The challenge here though is to A.C.A. § 16-55-202, the phantom defendant provision, which works hand in hand with Sections 1, 3 and 5. This provision requires courts to adjudicate the fault of persons who have not or could not be made parties to the action, but precludes any recovery by a plaintiff based upon any fault assigned to such parties. *See* A.C.A. § 16-55-202(2)&(3). The end effect is to work a mathematical reduction in a plaintiff's recovery by relieving an actual party defendant of liability for a portion of plaintiff's damages for which the defendant's conduct was a proximate cause.

In this instance, the nominated phantom defendant is Johnson's employer, immune under the exclusive remedy provisions of the Worker's Compensation Act, A.C.A. § 11-9-105. No effort is made in the CJRA to modify the exclusive remedy provision of the Worker's

[1] Section 3, A.C.A. § 16-55-203, allows a minimal reallocation of liability. Section 5, A.C.A. § 16-55-205, maintains joint and several liability where persons cooperate to commit an intentional tort.

[2] The issue will arise in this case only if the two named defendants are both found liable and one or the other is unable to satisfy the judgment.

Compensation Act so as to harmonize it with proportionate liability and thus a third party defendant's liability can be reduced under the Act without any possibility of recovery from the employer. Likewise, A.C.A. § 11-9-410, which gives an employer a lien on a third-party recovery, was left unchanged, meaning that an injured worker is subject to fully restoring to his employer benefits paid under the Worker's Compensation act, even though the amount of his recovery has been reduced by an assignment of fault to that employer.

B. Arkansas Constitution, Article 2, Section 8 (Due Process)

The phantom defendant statute, A.C.A. § 16-55-202, is unconstitutional and void because it violates the due process clause found in the Arkansas Constitution, which provides that no person shall "be deprived of life, liberty or property, without due process of law." Arkansas Constitution, Article 2, § 8.

This provision provides both substantive and procedural protections for a person's rights to life, liberty and property. A substantive due process challenge raises questions regarding whether the state has a sufficient reason to infringe the rights in question, while a procedural challenge raises questions about the adequacy of the process employed in taking the interest.

Anything of value to which a person has a reasonable expectancy or is entitled to under the law is a protected property interest. *Regents vs. Roth*, 408 U.S. 564, 577 (1972). Entitlement need not arise from the constitution but from any applicable law. *Id.* In this instance, Johnson's entitlement to compensation for a private wrong and personal injury exist at common law and are clearly acknowledged and guaranteed separately from the common law by Article 2, § 13, and Article 5, § 32, of the Arkansas Constitution.

1. Substantive Due Process

A challenge to a statute under Article 2, § 8, of the Arkansas Constitution on substantive due process grounds must overcome a presumption of validity and may be stricken only if the infringement of the protected rights does not bear a rational basis to a legitimate government interest. While the level of scrutiny called for with regard to substantive due process is thus restrained, nevertheless, a statute must be stricken if it lacks a rational basis connected with achieving a legitimate governmental purpose. *Arkansas Hospital Assn. v. Arkansas State Board of Pharmacy*, 297 Ark. 454, 763 S.W.2d 73 (1989).[3] Moreover, a statute may be constitutional in some respects but lack a rational basis in other applications. *E.g.*, *United States v. Booker*, 543 U.S. 220, 314 (2005) (Thomas, J., dissenting in part); *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990); *WMX Technologies, Inc. v. Gasconade County*, 105 F.3d 1195, 1198 n.3 (8th Cir. 1997) (all explaining the difference between an as-applied and facial challenge to an ordinance or legislation). This last element is important to an as applied challenge.

We have already summarized what the "phantom defendant provision" of the CJRA does. The question then is whether there is a rational basis between the rights and interests being sacrificed and a legitimate state purpose. The proponents of Act 649 offer a supposed justification in Section 26, the emergency clause. That purpose is vitally important to the petitioners' as-applied-to-this-case challenge. It reads:

> SECTION 26. EMERGENCY CLAUSE. 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 the percentage of fault, are adversely impacting the availability and affordability of medical liability insurance; that those existing conditions recently have caused several medical

[3] The Due Process challenge is presented first because it serves to develop the operation of the statute, the arbitrary nature of its restrictions on plaintiffs' rights and lack of connection with the stated purpose of the act, which will also be informative relative to other challenges.

> liability carriers to stop offering coverage in the state and have caused some medical care providers to curtail or end their practices; that the decreasing availability and affordability of medical liability insurance is adversely affecting the accessibility and affordability of medical care and of health insurance coverage in this state; that long term care facilities are having great difficulty hiring qualified medical directors because physicians could be held liable for an entire judgment even if they are found to be minimally at fault; and that there is a need to improve access to the courts for deserving claimants; and that this act is immediately necessary in order to remedy these conditions and improve access to health care in this state. Therefore, an emergency is declared to exist . . . .

In other words, according to the legislature, Act 649 in general, and the abandonment of joint and several liability in particular, as well inclusion of "phantom defendants" when apportioning fault, is needed to hold down the costs of medical malpractice liability insurance, so as to stem the tide of medical malpractice liability insurers leaving the state and to improve health care. No mention at all is made of the need to "reform" the general tort law outside of the medical malpractice context. Thus, even assuming that a sacrifice of the subject rights could be justified in medical negligence claims, on its face the application of Act 649 to any other case lacks any justification (or rational basis) at all.

The rational basis flaw revealed in the emergency clause goes deeper. Not only is the scope of the legislation clearly misaligned with the stated purpose, but the very mechanism of the law being altered is not understood, as the legislature did not understand the critical distinction between fault and causation. Section 26 asserts that "existing conditions" cause a litany of horrors. The only illustration of "existing conditions" is "the application of joint and several liability regardless of the percentage of fault." Such a statement demonstrates a complete lack of

understanding of the operation of joint and several liability.[4] This ignorance goes to the very language used in the Act.

Professor Wright provides the following cogent summary of the common law with respect to the terms "joint" and "several":

> Originally under the common law, the term "several liability" referred to the individual full liability of each tortfeasor for the entirety of the damages that were an actual and proximate result of her tortious conduct, whereas the terms "joint liability" and "joint tortfeasors" referred to the procedural permissibility of a plaintiff's joining multiple tortfeasors together for suit in the same action. Initially in the United States, and still in England, only tortfeasors acting in concert could be joined together procedurally for suit in the same action.

Logic and Fairness at 70.

At common law, each one of multiple tortfeasors who combined to injure a plaintiff would be held liable for the entire harm. Or, as the courts have put it, the defendant is liable for all consequences proximately caused by his wrongful act. *Ibid.* *Phantom Parties* at 438 (citing Restatement (Third) of Torts: Apportionment of Liability § A18 cmt. A reporter's note (2000)).

With this background, Act 649's language rationalizing the Act makes no sense. Section 1 reads that "the liability of each defendant for compensatory or punitive damages shall be several only and shall not be joint." Literally read, this creates separate liability for each defendant for the entire harm and precludes joinder of concurrent tortfeasors. This linguistic misunderstanding lends itself to the common lay misconception that joint and several liability results in defendants being held liable for damages they did not cause.

[4] See also, Representative Ferguson's explanation of the Act on the house floor, representing the Act as necessary to limit liability to damages "you caused" and comparing current law to requiring one to pay another's taxes. Addendum 2, House debate transcript, pp. 7-8.

"Fault" as that term is used in the Comparative Fault statute, A.C.A §16-55-216, and Contribution Among Tortfeasors Act, A.C.A §16-61-202, is not synonymous with cause but involves assessment of culpability. Its sole function in the law is to fairly allocate as between responsible parties a single harm that all contributed to causing in its entirety. A.C.A §16-61-201. Apportionment of fault allows the burden of a single harm to be divided, based upon culpability, to avoid double recovery. Thus, a defendant is never held responsible for damages not arising from its own actions, but may pay less than the total damages caused pursuant to an allocation of fault if others contributed to the injury. The burden is on the defendant to request apportionment. *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. First National Bank*, 774 F2d 909 (8th Cir. 1985).

In other words, joint and several liability only holds a defendant responsible for harm caused by that defendant's actions. *See City Electric v. Conery*, 61 Ark. 381, 33 S.W. 426 (1895). *See also Troop v. Dew*, 150 Ark. 560, 234 S.W. 992 (1921); *McGraw v. Meeks*, 326 Ark. 285, 930 S.W.2d 365 (1996); and *Applegate v. Riggall*, 229 Ark. 773, 318 S.W.2d 596 (1958).

Thus, Act 649 rests on a fatally flawed understanding of the very legal concept it purports to be correcting and states as a goal the elimination of a problem that does not exist, all to achieve a purpose that does not relate to this case or any other non-healthcare related action to which the statute is nevertheless made applicable. The problem envisioned by the Act is not in the law but in the legislature's misconception of the law. While a statute is entitled to a presumption of constitutionality, which implies a presumption of a rational connection to a legitimate state interest, surely such a presumption is lost when it is apparent that the legislation is operating on a wholly-flawed foundation. A presumption in the law cannot stand in the face of

contrary evidence. *St. Louis, Iron Mountain & Southern Railroad Co. v. Armbrust*, 121 Ark. 351, 181 S.W. 131 (1915).

In *Plumb v. Missoula County Dist. Ct.*, 927 P.2d 1011 (Mont. 1996), the Montana Supreme Court struck down a similar phantom defendant statute on grounds that it violates principles of substantive due process as guaranteed by that state's constitution. The court noted that a guarantee of due process requires that "a law shall not be unreasonable, arbitrary, or capricious." *Id.* (quoting *Nebbia v. New York*, 291 U.S. 502 (1934)).

The court found that the law unfairly allowed a tortfeasor to assess blame against a nonparty who was not represented in a case and could not defend himself. *Plumb*, 927 P.2d at 1018. It also found no reasonable basis for requiring plaintiffs to "examine jury instructions, marshal evidence, make objections, argue the case, and examine witnesses from the standpoint of the unrepresented parties, and requiring the plaintiff's attorney to serve in such a dual capacity is actually antithetical to his or her primary obligation, which is to represent the plaintiff by proving the plaintiff's case." *Id.* at 1020. It applied the rational basis standard to assess the law's constitutionality and found that, while allocating fault fairly was a legitimate governmental concern, the empty chair provision was not rationally related to that concern because fault could be allocated to a nonparty in a manner that would not be reliable. *Id.* at 1016-1019. The court also noted that the nonparty defendant (a physician accused of malpractice) was faced with a potential smear of his name and reputation without an opportunity to represent himself in the action and that his due process rights were clearly threatened. *Id.* at 1020.

In *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997), the Illinois Supreme Court struck down as unconstitutional a "tort reform" act similar to Act 649. While the focus in the case was on the abolition of joint and several liability the court also invalidated the state's

phantom defendant provision in the process. *Id.* at 1064, 1088-1089. It did so finding that the "tort reform" statute violated the state's prohibition against special legislation. *Id.* at 1089. The special legislation clause prohibited the Illinois legislature from enacting a law that conferred a special benefit or exclusive privilege upon a person or group and excluded others who were similarly situated, unless it had a reasonable basis to do so, the same standard this court applies to a due process challenge. *Id.* at 1069-1070.

Cutting to the chase, there can be no rational justification for a nonparty process where the nonparties are amenable to suit. The only possible purpose in such a provision is to handicap injured plaintiffs by providing defendants with a tool to create red-herring defendants and a plethora of collateral issues for a plaintiff to deal with.

Some states allow a third party defendant in a workplace injury to interplead the employer to gain a contribution for worker's compensation benefits paid to the extent that the employer's fault is determined, by traditional adversarial processes, to have been a factor in causing the injury. Such a process avoids the dubious phantom defendant processes, and if the employer's lien is reduced accordingly, works no unnecessary injustice to the injured worker.

The phantom defendant concept is without rational merit, disregards procedural fairness and undermines reliability. Its unnecessary adoption, without making changes in other related statutes, such as the employer's exclusive remedy and lien, reflects a hostility to the rights of injured parties rather than a constructive interest in achieving balanced justice.

While this legislation is not rationally related to the stated government purpose, it is a clear abridgement of Johnson's property rights as well as his rights to a complete recovery for damages arising from a private wrong and personal injury protected separately under Article 2, § 13, and Article 5, §32. Allowing the respondents to inject Johnson's immune employer's

conduct into the analysis of its own liability and reduce that liability based not on causation but on concepts of fault, which are logically relevant to apportioning liability not finding it, is clearly a statutory scheme that would deny Johnson a complete remedy for a wrong done to his person. In the absence of any rational connection to the legislative purpose, such legislation should not stand.

2. Procedural Due Process

A procedural due process challenge implicates a different standard of review. First, while a legislative body has the power to take property, such as in levying a tax from everyone similarly situated without providing procedural due process, it has no power to take property on an individual basis without doing so. *See, Metallic Investment Co. vs. State Board of Equalization,* 239 U.S. 441 (1915) (holding no hearing required to raise all taxable property values in Denver by 40%); *see also, Londoner vs. Denver*, 210 U.S. 373 (1908) (holding due process required notice and a hearing before individual property owners could be assessed for the cost of local improvements).

Fundamental to procedural due process are notice and an opportunity to be heard, which must be appropriate to the nature of the case and issues at hand. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Moreover and very critical to a proper analysis of a procedural due process challenge, the nature of the process required is inherently a constitutional issue, to be decided by the court, not a statutory issue for the legislature. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). This necessarily means there is no presumption of validity to a legislatively created process challenged on procedural grounds.

The United States Supreme Court, in *Mathews vs. Eldridge*, 424 U.S. 319 (1976), set forth factors for guidance in determining the adequacy of procedural due process under the

federal constitution, adopted by this court in *McCrory v. Johnson*, 296 Ark. 231, 238 (Ark. 1988):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Under the procedures established by the subject statute, Eastman will have no attorney to advocate on its behalf before the jury, as it is not a party. Eastman is not guaranteed an opportunity to respond to false statements or inaccurate characterizations in open court, *i.e.*, to confront its accusers, which is a violation of its due process rights. Eastman, by damaged reputation, and the petitioners herein, by inadequate recovery, stand to bear the harm of that violation.

The statute effectively merges the petitioners' interest with any number of nonparties that might be named by respondents as being potentially at fault. The petitioners' rights are determined through judgments made about the conduct of others who are only "represented" in court through the petitioners. Were Eastman a party, its counsel would have open and ready access to all sources of information known to Eastman, provided by a motivated and cooperative client and facilitated by the attorney-client privilege. The petitioners' counsel, though effectively representing Eastman, will be confined to such information as might be externally harvested from such arms-length discovery as the Court might allow from the nonparty. Such information cannot reasonably be expected to be extended in an open and cooperative manner, especially so in the absence of any privilege to protect the transfer of information.

In many cases, especially in a situation like this, where the respondents and the nonparty have long-standing economic relationships, the nonparty may well, in fact, be hostile to the claim

of the petitioners, especially being immune from liability itself, as an employer. It is, therefore, apparent that the petitioners, standing in the shoes of the nonparty, will not have the effective benefit of counsel in representing the conduct of the nonparty. In many civil proceedings, including this one, due process is clearly undermined by an absence of effective representation. *See Gilliam v. State*, 305 Ark. 438 (Ark. 1991).

Adequate notice is a key element in procedural due process. *McCrory, supra., at 240* (holding prejudgment attachment code unconstitutional where "procedures were inadequate to prevent erroneous deprivation"). The only requirement in the Act is to give 120 days' notice prior to trial. The notice need only provide a name, last known address and "the best identification" possible, along with a "brief statement of the basis for believing the nonparty to be at fault." A.C.A. § 16-55-202(2). No special provisions are made to facilitate access to information from any such nonparty, to motivate such a nonparty to cooperate in its own defense, or to provide a privilege for communication of information to the petitioners' counsel. In many instances, even a named party could not mount a defense in 120 days, let alone a plaintiff that does not have ready access to the nonparty's information. Given these inherent handicaps, 120 days, most of which may well be after a discovery cut off, is clearly not adequate notice to mount an effective surrogate defense.

Setting all the forgoing aside and assuming access to all relevant information, the empty chair concept places an improbable burden on a plaintiff to wear as many hats in a proceeding as there are nonparties. *Plumb, supra*. It flies in the face of the fundamental concepts of the adversarial process that forms the very foundation of all modern Anglo/American judicial proceedings. Every judicial proceeding starts with defining the parties, and litigation may not proceed unless the court is satisfied that the parties are truly adversarial, one to the other, and

have standing to properly represent the issues involved. *See Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 371 Ark. 217, 220, 264 S.W.3d 465 (2007) ("Only a claimant who has a personal stake in the outcome of a controversy has standing.").

Finally, so little is required of a defendant to invoke the phantom defendant process that it is highly subject to being abused, each such nomination potentially requiring a scramble to discover and present defenses for any number of potential nonparty defendants in the final four months prior to trial.[5] The statute, therefore, presents the plaintiff with the difficult task of defending someone else's conduct while at the same time providing the plaintiff with fewer procedural safeguards and processes, as well as with less notice, than would be afforded the nonparty where it an actual party.

Under the criteria in *Mathews, supra,* it should be obvious that the risk of an erroneous determination of fault is high in the procedure defined in this Act and that there is no offsetting justification for it, certainly not with a phantom defendant employer that is immune and has a lien that operates regardless of the employer's fault. The phantom defendant concept is not rational and as presented in the CJRA is not coherent or sincerely formulated to do justice in any form.

C. **Arkansas Constitution, Amendment 80 (Pleading, Practice and Procedure)** and **Arkansas Constitution, Article 4, § 2 (Separation of Powers)**

Any attempt by the General Assembly to invade the powers granted to the judiciary by the Arkansas Constitution violates the separation of powers clause of the Arkansas Constitution, which states that "[n]o person or collection of persons, being of one of these departments, shall

[5] In one case involving a workplace injury, a defendant recently nominated 35 phantom defendants. Addendum exhibit 6.

exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted." Arkansas Constitution, Article 4, § 2.

"The doctrine of separation of powers, stated in Art. 4, § 2 of our constitution, has properly been the barrier to attempts to extend the reach of the writ to the legislature." *Wells v. Purcell*, 267 Ark. 456, 462, 592 S.W.2d 100, 104 (1979). "Neither of the three separate departments of government is subordinate to the other and neither can arrogate to itself any control over either one of the others in matters which have been confided by the constitution to such other department." *Id.*

"It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments." *Oates v. Rogers*, 201 Ark. 335, 144 S.W.2d 457, 459 (1940) (quoting Madison, Federalist, No. 48). "It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the other, in the administration of their respective powers." *Id.* "It will not be denied that power is of an encroaching nature, and that it ought to be effectively restrained from passing the limits assigned to it." *Id.*

This basic concept of constitutional structure is buttressed by Amendment 80 to the Arkansas Constitution. "*The [Arkansas] Supreme Court shall proscribe 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 the Constitution." Ark. Const., Amdmt. 80, § 3 (emphasis added).

The Arkansas Supreme Court established the rules of pleading, practice, and procedure by adopting the Arkansas Rules of Civil Procedure. *See* Publisher's Note to ARCP 1 (noting that, by *per curiam* order dated December 18, 1978, the Arkansas Supreme Court adopted the

Arkansas Rules of Civil Procedure). Where the legislature attempts to add to or vary the procedural requirements of civil proceedings, the Arkansas Rules of Civil Procedure control. *Smith v. Sidney Moncrief Pontiac, Buick, GMC Company*, 353 Ark. 701, 712, 120 S.W.3d 525, 531-532 (2003); *Weidrick v. Arnold*, 310 Ark. 138, 835 S.W.2d 843 (1992).[6]

Article 3 of the Arkansas Rules of Civil Procedure governs pleadings. Article 4 governs parties. Article 4 governs trials. None of the rules adopted by the Arkansas Supreme Court contemplates or allows for adjudicating the conduct of a party *in absentia*. Clearly, in fact, such a concept is fundamentally at odds with the foundational principle of the Arkansas Rules of Civil Procedure, which rely upon adversarial processes evolved over centuries of Anglo-American jurisprudence, carefully balanced to achieve discovery of truth in as fair and economic manner as possible. The phantom defendant concept throws these concepts out and violates essentially every rule of the Arkansas Rules of Civil Procedure starting with Rule 1, which provides that the Rules "Shall govern the procedure in the circuit courts in all suits or actions of a civil nature…to secure the just, speedy and inexpensive determination of every action." By establishing a whole new type of party, a nonparty, to an action, defining a procedures and pleading form, content and notice requirements, all aimed at bringing non party conduct under the scrutiny of the proceedings *in absentia*, A.C.A. § 16-55-202 works directly against Rule 1's goal of a "just, speedy and inexpensive determination of every action."

Under A.C.A. § 16-55-202, a civil action is effectively brought against unrepresented nonparties, whose actions will be judged as noted in *Plumb, supra,* without an opportunity to be

[6] Similarly, in diversity cases a state law that conflicts with the Federal Rules of Civil Procedure is deemed procedural for purposes of the *Erie v. Tompkins* doctrine and the Federal Rules prevail. *Hanna v. Plumer*, 380 U.S. 460, 470-471 (1965).

heard, by a simple notice of nonparty fault that need not be served on the accused and without a complaint, violating Rule 2, Rule 3, Rule 4, Rule 5, Rule 7, and Rule 10. The statute defines an entirely new concept for joining non parties and adjudicating their conduct that in no way resembles the Rules of Civil Procedure. The process creates an alternative process to Rule 14 for effectively bringing in third party defendants. There is no need to state a cause of action and no means to move for a dismissal of a phantom defendant on the pleadings. An end run is done around Rules 19, 20, 21 and 22. If issues can be joined and efficiently and fairly adjudicated with such a simple process as that defined for the joining of phantom defendants under the CJRA one wonders why the Rules of Civil Procedure are so much more involved?

A more complete invasion of judicial power or effective violation of Amendment 80 could not be conceived than a legislatively imposed procedure for judging the conduct of nonparties. The phantom defendant provision does exactly that. The "medical affidavit" requirement of the Civil Justice Reform Act, a far less reaching and more restrained requirement than the phantom defendant concept, has already been held unconstitutional on these grounds.

In *Summerville v. Thrower,* 369 Ark. 231, ___ S.W.3d ___ (2007), this court stated that Amendment 80, § 3, makes "clear that rules of pleading, practice, and procedures for [Arkansas] courts fall within the domain of [the Arkansas Supreme Court]," and the affidavit requirement violated the court's authority to proscribe the process for commencing a civil action. *Id.* at 234-235. The prohibition against infringement on judicial authority is absolute, meaning that legislation either does or does not violate separation of powers and/or Amendment 80. If it does infringe, it is unconstitutional no matter how compelling a state interest may be. The phantom defendant provision rewrites the entire concept of civil adjudication.

D. Arkansas Constitution, Article 5, § 32 (Actions for Personal Injuries) and Article 2, § 13 (Redress of Wrongs)

Arkansas's constitution has three separate provisions that limit the legislature's ability to deny an injured party complete compensation for personal injuries. Addendem exhibit 7. Inherent in the very concept of a constitutional form of government is recognition that even a representative democracy is capable of trampling individual rights. How to repose necessary discretionary power in government, while at the same time minimizing the risks of abuse of such power, has been a consideration for all constitutional framers in America.

In all American constitutions structural safeguards have been supplemented with explicit limitations on government power where abuse was deemed most likely or particularly pernicious. Such limitations are intended to set explicit limits to the exercise of discretionary power in order preserve critical rights, liberties and concepts of justice from abridgment by political interests. Article 2, § 13, and Article 5, §32, as we will see, were adopted precisely to prevent the type of abusive use of concentrated political power that was behind Act 649 of 2003. The existence of these constitutional provisions is an expression of the framer's commitment to the conservative principle that the individual right to recompense for private wrongs should not traded for reasons of political expediency. They reflect a recognition that the public's interest is best served by maintaining the courts open and private persons fully accountable for their wrongs.

While we have reviewed the stated purpose of the CJRA and shown the absence of any possible connection to this case, we have not yet reviewed the actual purpose, a relevant consideration under Article 2, §13, and Article 5, §32, which is to alter practice and procedure in the courts so as to limit the recovery of damages for personal injury. Representative J. Taylor, a sponsor of the House legislation that became Act 649, made it clear in legislative hearings immediately prior to passage that the purpose of the Act was to limit recoveries by plaintiffs:

> [I]f this bill, let's just say that this bill might go a little too far. I don't think it does. I mean it's been compromised and amended and so forth. But let's say that it does go just a little too far. You know, that pendulum that's hanging there, that's been measuring this for all these years has been way out of level. It's been hanging over here, it's been way in favor of the trial lawyers, *and in favor of the plaintiffs*….
>
> Now, what our job is to get that pendulum hanging plumb, straight up and down. Now, let's just say they're right and let's say we've got it a couple of degrees too far over. What's wrong with that? For all these years, it's been over here. We can fix it in two years if that's the case.[7]

Act 649 was introduced prior to the 2003 legislative session with a show of force from its beneficiaries and a statement from a sponsor that his purpose was to diminish recoveries. Standing on the steps of the state Capitol with more than 200 business leaders and doctors behind him, Rep. Danny Ferguson, D-Forrest City, said:

> "Arkansas has a legal liability system that has become burdensome and inaccessible to the very Arkansans it is supposed to serve," Ferguson said. "This out-of-control system is costing Arkansans money by contributing to the skyrocketing health, homeowners, automobile and liability insurance premiums."[8]

Likewise, proponents of the bill made clear that "high-dollar lawsuit awards"[9] and "big damage awards in lawsuits"[10] and "high-dollar jury awards"[11] would be curtailed by the bill, revealing their intention to diminish recoveries.[12]

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[7] Transcript of Debate on House Bill 1038, Friday, January 31, 2003, p. 68, lines 4-24 (attached as Addendum Exhibit 2).

[8] David Smith, *Legislators seek to reform "out-of-control" tort system*, Arkansas Democrat-Gazette, January 9, 2003.

[9] Michael Rowett, *Proponents hope to score committee vote at meeting's end*, Arkansas Democrat-Gazette, Friday, January 17, 2003.

In the face of implicit denigration of the work of jurors (the authors of "high-dollar jury awards"),[13] Representative Sam Ledbetter cogently explained the importance of the independent functioning of these wielders of judicial[14] power:

> I was with Sid McMath, the former Governor of Arkansas last Saturday night and he was talking to me about this and he said, Sam, I can't believe what I'm hearing and what's getting ready to happen. He said that there are two things that guarantee our liberty in this country, one of them is the ballot box and the other is the jury box.[15]

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[10] Michael R. Wickline, *Tort-reform opponents want bigger room, more meetings*, Arkansas Democrat-Gazette, Friday, January 24, 2003.

[11] Michael R. Wickline, *Lawmakers set to argue caps on lawsuit damages*, Arkansas Democrat-Gazette, Sunday, January 26, 2003.

[12] Michael Rowett, *House Approves Tort Reform, 71-28 Vote Sends Bill To Senate*, Arkansas Democrat-Gazette, Saturday, February 1, 2003 ("Legislators who spoke in favor of HB1038 during House debate Friday said it would discourage unmerited lawsuits and high-dollar jury awards.").

[13] Michael Rowett, *House Approves Tort Reform, 71-28 Vote Sends Bill To Senate*, Arkansas Democrat-Gazette, Saturday, February 1, 2003.

[14] Jurors function as part of the judicial branch. *See*, *e.g.*, *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922) (Taft, C.J., for the Court) ("The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire. One of its greatest benefits is in the security it gives the people that they, as jurors, actual or possible, *being part of the judicial system of the country*, can prevent its arbitrary use or abuse.")(emphasis supplied).

[15] Addendum 2, p. 75, lines 12-25; p. 76, lines 1-4.

Simply put, the entire purpose behind the enactment of Act 649 is to limit recoveries in personal-injury lawsuits at least in part by altering rules of practice and procedure. Moreover the rationality or fairness of it was of secondary concern by those pushing the Act.[16]

1. Article 2, §13

Most states have "open court" or "right to a remedy" clauses.[17] Such provisions are uniquely applicable to state government because the states are the source of substantive law

[16] Co-sponsor Biggs: "When you get to talking about all this judicial stuff, like I said, I'm not attorney, don't want to be one, don't want to play one on television, and I know everybody is ready to go. So with that said, I guess that I would appreciate a vote for House Bill 1038 as it stands today. The only problem I have with it deep in my heart it's like Mr. Jackson said awhile ago, I hate to send the stuff to the Senate to fix the House's problems. But with my limited knowledge, that's about all I can add, so I thank you for a vote on the bill today." Addendum 2, p. 80.

[17] Ala. Const., art 1, § 13; Ark. Const., art. 2, § 13; Colo. Const., art. 2, § 6; Conn. Const., art. 1, § 10; Del. Const., art. 1, § 9; Fla. Const., art. I, § 21; Idaho Const., art. 1, § 18; Ill Const., art 1 , §12; Ind. Const., art. 1, § 12; Kan. Const., Bill of Rights § 18; Ky. Bill of Rights, § 14; La. Const., art. 1, §22; Me. Const., art 1, § 19; Md. Declaration of Rights, art. 19; Mass. Const., Pt. 1, art. 1, § 8; Miss. Const., art. 3, § 24; Mo. Const., art. 1 § 14; Mont. Const., art. 2, § 16; Neb. Const., art. 1, § 13; N.H. Const., pt. 1, art. 14; N.C. Const., art I, § 18; N.D. Const., art. I, § 9; Ohio Const., art. I, § 16; Okla. Const., art. 2, § 6; Or. Const., art. 1, § 10; P.A. Const., art. 1, § 11; R.I. Const., art. 1. § 5; S.C. Const., art. I, § 9; S.D. Const., art. 6, § 20; Tenn. Const., art. 1, §

governing the private rights and obligations of individuals. Accordingly, the application and interpretation of such clauses has not benefited from the unifying guidance that the federal courts provide with regard to common constitutional protections. In consequence, case law has been varied over time and across geography and at times the historical context and purpose of these provisions has seemed to be lost.

Open court provisions, such as Article 2, § 13, have deep historical roots. State constitutional remedy guarantees were adopted against a backdrop of centuries of concern about governmental interference with people's ability to obtain justice in the courts. *See, e.g.*, William C. Koch, Jr., Reopening Tennessee's Open Courts Clause, 27 U. Memphis L. Rev. 333, 349-57 (1997). The heritage of these guarantees reaches back to the Magna Carta of 1215, which contains a vow that the King would not impede his subjects' ability to obtain justice through the courts. William S. McKechnie, Magna Carta: A Commentary 122 (2d ed. 1914).

American colonists were adamant in claiming the protections of the Common Law, urging that their Common Law rights as British subjects "followed the flag." William F. Swindler, Magna Carta: legend and legacy 216 (1965). The American Revolution was perceived as an effort to preserve such rights from undue Parliamentary infringement. Morton Horwitz, *Transformation of American Law: 1780-1860* (1977).

After Independence, the first state legislatures seemed to pick up where Parliament left off, abrogating the common law at whim and prompting Jefferson and Madison to decry the "elective Despotism" of state legislatures. Gordon S. Wood, *The Creation of the American Republic: 1776-1787*, 451-452 (1967) (quoting Thomas Jefferson, Notes on the State of Virginia

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17; Tex. Const., art. 1, § 13; Utah Const., art. 1, § 11; Vt. Const., ch. 1, art. 4; W. Va. Const., art. 3, § 17; Wis. Const., art. 1, § 9; Wyo. Const., art. I, § 18. See also Ga. Const., art. I, ¶12.

120 (1781; W. Peden ed., 1954)). These offensive legislative acts included abridgement of common law rights including, "depriving people of common law causes of action for damages." William E. Nelson, *Americanization of the Common Law 91-92* (1975).

In response, in the late eighteenth century, state constitutions began to include explicit substantive restrictions on legislative power to deny individuals remedies for private wrongs. Gordon S. Wood, *The Creation of the American Republic: 1776-1787*, 460-643 (1967). *See also Smothers v. Gresham Transfer, Inc.*, 332 Or. 83, 23 P.3d 333, 346 (2001).

Arkansas, like many jurisdictions initially took the position that Article 2, § 13, should be read to preclude legislative annulment of common law remedies. Unwilling, however, to follow that premise to its logical conclusion, the Arkansas Supreme Court engaged in contortions of logic to allow seemingly acceptable legislative action. In *Robertson v. Robertson*, 193 Ark 669, 101 S.W. 2nd 961 (1937), the court held constitutional a guest statute that denied a family member a right of recovery against a negligent driver in the absence of aggravated fault, on the rationale it did not deny any remedy but rather only limited the circumstances in which there would be a remedy. Such decisions meet with justified criticism. *See* Justice George Rose Smith's dissenting opinion in *Emberson v. Buffington*, 228 Ark. 120, 306 S.W.2d 326 (1957).

Ultimately, as Justice Smith argued in *Emberson*, most courts came to the view that interpreting "open court" as precluding legislative alteration of the common law *per se* was going too far. The common law itself was not a fixed entity, and there was no reason that constructive legislation aimed at contributing constructively to the evolution of civil law should be prohibited. As most legislation would prove to be valid rather than invalid, it would be more elegant to acknowledge legislative authority to alter common law and work from the opposite direction to define what kind of legislation was in fact inconsistent with the constitutional

mandate. Citing the dissent in *Emberson, supra,* this position was adopted in *White v. City of Newport*, 326 Ark. 667, 671, 933 S.W. 2d 800 (1996).

Acknowledging legislative authority to amend the common law, relative to remedies available for private wrongs, does not mean that all such legislation will or should survive scrutiny under Article 2, § 13, however. *See White, supra*, at 671. *White* only determined what Article 2, §13, did not preclude automatically. Modern courts continue to recognize that explicit constitutional text derived from the Magna Carta, such as Article 2, Section 13 of the Arkansas Constitution, substantively limits certain legislative incursions on common law rights of recovery. *See Smothers v. Gresham Transfer, Inc.,* 332 Or. 83, 23 P.3d 333 (2001), for a scholarly discourse on the relevant doctrine.

Unless the provision is to be read out of the Constitution, it remains to be decided, then, what it does preclude and what level of scrutiny is required to vindicate the purposes and intent of the provision.[18]

2. Article 5, § 32.

Article 5, § 32, precludes the passage of any law "limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property." It is, therefore, more specific than Article 2, §13. It was copied from a provision of the Pennsylvania Constitution. The history of the Pennsylvania and Arkansas provisions makes clear that, as with Article 2, § 13, it

[18] The challenge advanced in *White* did not require the Court to go beyond the finding it made -- *i.e*. that Article 2, § 13, did not *per se* preclude altering the common law. *See also* FN 20 *infra.*

was incorporated in reactions to abuses of legislative power motivated not by a desire to enhance justice but rather to satisfy raw political expediency.[19]

The Arkansas Supreme Court first had occasion to interpret Article 5, § 32, in a railroad case:

> We noticed . . . that in some of the States, statutes limited the amount of damages to be recovered, where the death of a human being is the subject of an action. But our Constitution provides that "no act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, etc." (Art. 5, sec. 32.) *The matter of damages is therefore left to juries and the courts. *** The amount of damages to be recovered is not limited by the statute, and could not be under the constitutional provision above cited.* But a jury is not left without restraint in the matter of assessing damages for the death of a minor, or in any other case. If the damages assessed are so enormous as to shock the sense of justice, and to indicate that the verdict is the result of passion or prejudice, the trial judge may set it aside, and if he refuse, this court, on appeal or writ of error, may do so. *It was in the exercise of this judicial power,* that this court set aside the verdict on the former appeal, because in its judgment the damages awarded were excessive.

Little Rock and Fort Smith Railway Co. v. Barker and Wife, 39 Ark. 491, 511-512 (1882) (emphasis supplied).

The contemporary Court first interpreting the article announced both the breadth of the article and its limiting principle. The article constrained only *legislative* attempts to limit recoveries; *judicial* control of recoveries was left intact.[20] The people did not trust the

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[19] Substantial treatment of the history of Article 5, §32, is deferred to Amicus briefs to reduce duplication and should not be read to reflect the petitioners' views on the importance of the provision relative to Article 2, §13 .

[20] *White v. City of Newport*, 326 Ark. 667, 933 S.W.2d 800 (1996), holds that Article 2, §13, and Article 5, § 32, do not trump sovereign immunity, thus leaving claims against public entities

legislature to make broad rules limiting recovery arising from civil wrongs. They left this power, to adapt the general rules of the law to particular cases, solely in the judiciary, which includes jurors as well as judges.[21] This holding was simply the preservation of what is, by definition, judicial.

The Arkansas Supreme Court has adhered to the policies of deterrence and full compensation in interpreting constitutional liability barriers to bar not only actions that specifically limit recovery, but also actions that *in effect* limit recovery. In 1930, prior to the enactment of a workers' compensation scheme in Arkansas, an Arkansas employee of a Louisiana corporation had signed a contract to be bound by and to accept compensation under

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within legislative control. Legislative limits on recovery from public entities are not "limits" for purposes of the article, whose drafters presumed sovereign immunity to be in place; they expand the remedies that were available at common law. *White* does not condone legislative action limiting private claims, and it was not cited as authority in a subsequent case, *Stapleton v. M.D. Limbaugh Construction Co*., 333 Ark. 381, 969 S.W.2d 648 (1998), rejecting such legislative authority.

[21] The doctrine of Article 5, § 32 can be construed as merely codifying a common law understanding of the appropriate division of power between the judiciary and the legislature in regulating common law causes of action for personal injury. That was precisely how the Pennsylvania Court viewed the question in *Cleveland and Pittsburg Railroad Co. v. Rowan and Wife*, 66 Pa. 393, 1870 WL 8820, 5 (Pa.), *supra*: common law causes of action were constitutionally insulated from legislative incursion; wrongful death being a statutory claim, it was within legislative purview. *See also Louisville & N.R.R. v. Kelly's Adm'x*, 100 Ky. 421, 19 Ky. L. Rptr. 69, 38 S.W. 852 (1897) (similar result interpreting similar text).

the Louisiana [Workers'] Compensation Act for injuries received in Arkansas. The Arkansas Supreme Court held the contract void under Article 5, § 32, because its *effect* was to exempt the employer of a part of his liability by limiting the amount of recovery, without regard to any arbitrary measure of damages.

> When the remedy is lessened, the liability to that extent is destroyed. This is an arbitrary fixing of compensation, which, in many instances, would be so much less than the damages to which the employee is justly entitled as to amount to a denial of liability. Our Constitution, by § 32, art. 5, has asserted as basic law, and as further declaratory of our settled policy, that "no act of the General Assembly shall limit the amount to be recovered for injuries resulting in death or injuries to persons or property". . . . If, then, the General Assembly could not limit the amount to be recovered for personal injuries received, it follows that a [foreign corporation] which owes its existence to a legal birth and operates within the State by its permission, under legal restrictions, may not do that which the law-making body itself cannot do. . . ."

Standard Pipe Line Company v. Burnett, 188 Ark. 491, 501-03 (1933).

[Neil stopped here.]

When Arkansas eventually sought to implement its own workers' compensation program, the process began with a constitutional amendment to overcome the prohibition of Article 5, § 32. The 1937 General Assembly referred a proposed amendment to the people at the 1938 general elections, and it was approved as Amendment 26. The next General Assembly then enacted Act 319 of 1939, the Workmen's Compensation Act, which was subsequently referred to and approved by the voters at the 1940 general election, becoming effective on December 5, 1940.

This Court made it clear that the constitutional amendment permits legislative enactment of liability limitations *only* in the workers' compensation context:

> It was pursuant to this amendment, and under the authority there conferred, that Act 319 was passed and became a law. The amendment provides that otherwise, that is, *except in cases arising between employer and employee, no law shall be*

> *passed* limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property.

Young v. Tarlton, 204 Ark. 283, 288 (1942) (emphasis supplied). *See also Baldwin Company v. Maner, Judge*, 224 Ark. 348, 351 (1954) ("It is clear that Amendment 26 gives to the legislature the power to limit the amount of recovery *only* in cases where there is an employer-employee relationship.") (emphasis supplied).

In other areas, the remedies known to the common law are to be preserved, to be administered by the judiciary, not the legislature:

> Prior to the adoption of Amendment 26 in 1938, the old Art. 5, § 32 of our Constitution provided that 'No act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property.' This prevented the enactment of a general workmen's compensation law *because such a law would put a limit on the pre-existent common law liabilities of employers to their employees for personal injuries*.

Brothers v. Dierks Lumber & Coal Co., 217 Ark. 632, 639-640 (1950) (emphasis supplied).

Article 5, § 32, therefore, expressly denies power to the legislature to limit recovery in personal-injury actions, necessarily preserving such matters to the common law. It bars both the purposeful and effective limitation of recovery. It does not render the State powerless to bar unjust remedies, but it simply leaves the task of policing them to the judiciary instead of the legislature.

3. **Application, Article 5, §32 an Absolute Right.**

We have already discussed the operation of the phantom defendant provisions of the CJRA in this case. If fault is assigned to Johnson's employer, the result will be a diminution in his recovery below that caused by the defendant's actions. This necessarily means that the statute also will limit Johnson's recovery to something less than the total harm caused by the defendants' conduct**,** which is prohibited by Article 5, §32.

In petitioners' view Article 5, §32 sets forth an absolute prohibition. As previously briefed, general statements of rights, such as contained in Article 2, § 8 are so broad in scope that they necessarily come with implicit qualifications. They are a statement of general rules to which it is understood exceptions will be applied by the state acting through the legislative branch, which it is presumed will itself duly recognize and respect the rights enumerated. The presumption of constitutionality is in this sense nothing more than the judicial branch assuming the legislative has acted in accord with constitutional limitations and respected the enumerated rights of the state's citizens.

Article 5, §32, however, is not set forth in Article 2 but in Article 5, defining legislative authority. It prohibits the legislature from acting to limit damages recoverable for personal injury and preserves that issue as a judicial function. As such Article 5, §32 should be viewed as a provision further elaborating the separation of powers and therefore requiring absolute construction.

This Court has spoken in terms of constitutional absolutes on many occasions. Where an absolute constitutional duty or limitation is created by a constitutional provision, any legislation that conflicts with it is void. In *Lake View School District No. 25 of Phillips County v. Huckabee*, 351 Ark. 31, 91 S.W.3d 472 (2002), the Arkansas Supreme Court faced the question of whether the Education Article of the Arkansas Constitution, Article 14, created a fundamental right to an adequate education, thus subjecting legislation affecting education to strict scrutiny, or whether rational-basis review was appropriate. Following a detailed analysis, this Court held,

> Because we conclude that the clear language of Article 14 imposes upon the State an absolute constitutional duty to educate our children, we conclude that it is unnecessary to reach the issue of whether a fundamental right is also implied. Many states, as we have already discussed, appear to get lost in a morass of legal

> analysis when discussing the issue of fundamental right and the level of judicial scrutiny. This court is convinced that much of the debate over whether education is a fundamental right is unnecessary. The critical point is that the State has an absolute duty under our constitution to provide an adequate education to each school child. Like the Vermont and Arizona Supreme Courts, we are persuaded that that duty on the part of the State is the essential focal point of our Education Article and that performance of that duty is an absolute constitutional requirement. . . . When the State fails in that duty, which we hold today is the case, our entire system of public education is placed in legal jeopardy. Should the State continue to fail in the performance of its duty, judicial scrutiny in subsequent litigation will, no doubt, be as exact as it has been in the case before us.

Id. at 72, 91 S.W.3d 472 (internal citations omitted).

Walmsley v. McCuen, 318 Ark. 269, 885 S.W.2d 10 (1994), is another example of a constitutional absolute. That case concerned a statute that attempted to alter the publication requirement for proposed constitutional amendments referred by the legislature contained in Article 19, § 22 of the Arkansas Constitution. The Constitution requires publication of the text of the proposed amendment for six months immediately preceding the election in at least one newspaper in each county. The statute did not require publication of the full text each time. This Court held that the statute was unconstitutional in spite of the presumption of constitutionality.

The absolute nature of the limitations of Article 5, § 32 is reinforced by Amendment 26, which was made necessary in part at least by Article 5, § 32. It reads:

> …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.)

The attempt to require allocation of damages to "phantoms" is precisely for the purpose of limiting an injured party's ability to recover full compensation for his damages incurred as a proximate result of a given defendant's conduct. It offends the peculiar species of separation of powers found in Article 5, § 32.

The Arkansas Supreme Court noted early on that separation of powers "lies at the very foundation, and constitutes the groundwork of all American Constitutions." *State v. Hutt*, 1840 WL 266 (Ark.), 2 Ark. 282, 286 (1839). Since separation of powers provisions appeared in the Constitution of 1836, the Arkansas Supreme Court has held steadfast to an "uncompromising interpretation of the separation of powers doctrine." Note, *Spradlin v. Arkansas Ethics Commission: A Hard-Line Approach to Separation of Powers*, 48 Ark. L. Rev. 755 (1995). Separation is meant to check the exercise by any one branch of power "of an encroaching nature… [T]he powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the other, in the administration of their respective powers." *Oates v. Rogers*, 201 Ark 335, 144 S.W.2d 457, 459 (1940) (quoting Madison, Federalist, No. 48). Absent this separation, there is "a tyrannical concentration of all of the power of government in the same hands."

This separation is absolute, and any legislation that infringes upon it is invalid irrespective of any presumption of constitutionality or the weightiness of any interest supporting it. *Spradlin v. Arkansas Ethics Comm'n*, 314 Ark. 108, 115, 858 S.W.2d 684 (1993) (internal citation and quotations omitted). *See als,o Luebbers v. The Money Store*, 344 Ark. 232, 237-38, 40 S.W.3d 745 (2001); *State Bd. of Workforce Educ. v. King*, 336 Ark. 409, 985 S.W.2d 731 (1999).

Act 649 attempts to "overrule" the common-law understanding that each tortfeasor is liable for all of the harm he causes when more than one tortfeasor is so liable, and through that to dilute a defendant's liability and hence the plaintiff's recovery, by allocating fault to nonparties, including an immune employer and limiting liability based upon concepts of fault rather than

cause. Such is an impermissible "overruling influence" that directly seeks to limit the ability and rights of a person injured in his person to recover full compensation in violation of the express intent of Article 5, §32. *Oates v. Rogers*, 201 Ark 335, 144 S.W.2d 457, 459 (1940) (quoting Madison, Federalist, No. 48). Therefore, it is unconstitutional, and it must not be used in this case to limit the plaintiffs' damages.

4. **Application, Article 2, §13 an Absolute Right.**

Article 2, § 13, unlike Article 5, §32 is contained in the general right portion of the constitution, and therefore, its limitation is aimed at the government as a whole rather than the legislative branch specifically.[22] However, that alone does not mean that it does not provide an absolute right. *Lake View, infra*. While it is obvious that there can be no absolute right to life, liberty and property and many other general rights, the same cannot be said about the right to a complete remedy for a private wrong against person or property. Indeed, such a guarantee is a conservative principle, not a radical one, and the history of the provision and others like it clearly evidence that precise intention. Moreover, unlike Article 2, § 8, which comes with its own built in qualifier, *i.e.* "without due process of law," Article 2, § 13 has no qualification.

This Court has said many times that constitutional provisions should be given their plain meaning. *See, Lake View School District No. 25 of Phillips County v. Huckabee*, 351 Ark. 31, 91 S.W.3d 472 (2002); *Frank v. Barker*, 341 Ark. 577, 20 S.W.3d 293 (2000); *Hoyle v. Faucher*, 334 Ark. 529, 975 S.W.2d 843 (1998).

[22] This is the reason that Article 2, §13 is not necessarily violated by legislation that alters extant common law, while Article 5, §32 is where the result is to reduce damages recoverable for such injuries.

Being an absolute right does not mean that the legislature may not pass or alter laws dealing with civil wrongs and remedies any more than an absolute right to an education means that the legislature does not have authority to legislate on such matters. The limitation here is not on authority to act but on the effect of that action. As with education, it adds nothing to become bogged down in a "morass" of legal confusion sorting out issues of scrutiny. The Constitution plainly requires that the law afford a certain and complete remedy for private wrongs. Legislation either does or does not conflict with that, in the same way that a funding scheme either does or does not afford an education, or conflict with the Rules of Civil Procedure.

Taking an absolute approach focuses the issue where it belongs, *i.e.* is there a "wrong." If so, is there a "remedy" and is it "complete" within the meaning of Article 2, §13? *White, supra,* tells us that we cannot look to the extant common law for an automatic answer to those questions in relation to Article 2, §13 as we can with Article 5, §32. The mandate of Article 2, § 13, then, is to reach deeper than the extant common law and measure an act against the fundamental concepts of justice that would otherwise inform the common law in the absence of legislation. How else can one define "wrong" and "remedy" in Article 2, § 13 other than in terms of the prevailing social norms and judgment and sensibilities of society as to what justice reasonably requires, what is an actionable wrong and what is a complete remedy? The common law has never claimed perfection. It is an evolving creature. *MacPherson v. Buick Motor Co.*, L.R.A. 1916F, 696, 217 N.Y. 382, 111 N.E. 1050 (1916). If what is actionable can be changed in the common law without offending Article 2, § 13, then it can also be changed by legislation. What can't happen is to create a law that denies a complete and effective civil remedy in a way that offends fundamental concepts of justice.

If Article 2, § 13 is to be given its plain meaning then, there is an absolute prohibition against any law that would materially operate to deny a fair and complete remedy for a private wrong. The legislature may act to facilitate, accelerate, evolve or otherwise modify the law as relates to private wrongs so long as the result is to promote justice without denying a complete remedy for what should be actionable wrongs. Reading the plain language, especially in light of the history of such provisions, can lead to no other conclusion. This interpretation best threads the eye of the needle between allowing a legislative role in evolving and reforming the civil law, while at the same time providing protection for individual rights to redress of wrongs as undeniably intended by the subject provision.

Under Article 2, §13, the legislature can do away with arcane causes of action which no longer resonate as actionable in modern society, such as alienation of affections. It could create new causes of action where changes in society require them, such as has been done relative to product liability. *See, Higgins v. General Motors Corp.*, 250 Ark. 551, 465 S.W.2d 898 (1971) (referring to the possible judicial adoption of *Restatement of Torts* 402A, and A.C.A. § 16-116-101, *et seq.*, doing so legislatively). It can adopt consensus views evolved in uniform law initiatives such as the Uniform Contribution Among Tortfeasors Act A.C.A. § 16-61-202 and adopt comparative fault concepts A.C.A. § 16-64-122. All these are examples of changes in the law that need not offend Article 2, § 13, even though they alter the common law. Each of these represent an evolution of law, not an abrogation of the rights protected by Article 2, § 13.

Whether an absolute right is abridged by legislation is a question that involves a direct judicial determination. In such circumstance, deference to the legislature is to abdicate the judicial role of safeguarding and enforcing constitutional protections. *Lake View, supra.* A holding that the subjects protected rights are not absolute is necessarily a finding that the

constitution does not mean what it literally says. It is a holding that we should read Article 2, § 13 to mean that there should be a "right to a remedy" unless the legislature says otherwise. This is especially so if one adopts a rational basis level of scrutiny. In conjunction with a presumption of constitutionality, such an approach clearly would largely deny the provision its very purpose, leaving legislatures largely free to roll over individual rights and interest in remedies for private wrongs in response to special interest pressures. [23] It also renders the provision essentially redundant, as it adds nothing not already guaranteed more generally by Article 2, § 8.

A weaker interpretation is also not favored by necessity or reason, as holding that the legislature has a seat at the table in defining what justice is, as argued above, provides all the discretionary input the legislature needs to play a legitimate and constructive role in forming and evolving civil law. It is a role limited only in the way intended, *i.e.* that such legislation cannot result in manifest injustice to individuals right so as to deny a complete remedy for a wrong. Such a limitation is a conservative one, reasonable on its face, presenting no grounds for complaint in a fair well ordered society where concepts of justice are intended to prevail over those of political expediency and privilege, the obvious intent of Article 2, §13.

It is manifestly clear that the operation of the "phantom defendant" concept, indeed its very purpose, is to mathematically and definitively deny a wronged victim of tortuous conduct a portion of compensation otherwise legally and properly understood justly owed by a defendant which caused or contributed to his entire indivisible harm, it cannot survive the prohibitions of Article 2, § 13.

[23] See Addendum 2, p. 44 (Representative Verkamp stating, "It's the strong arm of certain interest groups that makes it to where you've got to vote for it.").

5. Article 2, §13, Other Levels of Scrutiny.

If it is determined that the rights protected under Article 2, § 13 are not absolute, it then becomes necessary to determine the level of scrutiny that must be employed in its application. If it protects "fundamental" rights, a heightened standard of review or strict scrutiny is called for. *Lake View, supra*. Statutes infringing fundamental rights cannot survive unless a "compelling state interest is advanced by the statute and the statute is the least restrictive method available to carry out the state interest." *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002). Such a strict scrutiny requires that proponent of the statute carries this burden and justify the infringement by demonstrating that there is no other reasonable means to achieve the public purpose than to infringe the right in question.

It has been held that fundamental rights are those "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). Many "rights" have been found to be fundamental even when not expressly protected in constitutional language. As noted above, the rights here in question are the subject of express protection in most state constitutions going back to the very founding of the nation and have roots in the Magna Carta. The very case that establishes the judiciary's role in scrutinizing legislation for constitutionality observed that, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. 137, 163, 2 L.Ed. 60 (1803). The fact that the subject rights arise three times in our state's constitution in the two sections and Amendment 26 support the fundamental nature of the rights.

Other courts have found the rights protected by "right to a remedy" or "open court" provisions to be of sufficient importance to require an intermediate standard of review. Under

such a review the burden remains on the government to show a compelling or important purpose, though it may not be necessary, as with strict scrutiny, to show that achieving the purpose can be done by no other reasonable means, *i.e.* necessity. *See, Smith v. Department of Ins.*, 507 So.2d 1080 (Fla. 1987); *Horton v. Goldminer's Daughter*, 785 P.2d 1087 (Utah 1989); *Thayer v. Phillips Petroleum Co.*, 613 P.2d 1041 (Okl. 1980); *Trovato v. DeVeau*, 143 N.H. 523, 736 A.2d 1212 (N.H. 1999).

Even if the Court rejects that the rights in question as being absolute or entitled to a higher level of scrutiny than a presumption of constitutionality would involve, the statute still must be stricken for the very same reasons advanced above under Article 2, § 8, *i.e*. there being no rational basis for the infringement. This case has nothing to do with accomplishing the stated purpose of Act 649. The "harm" Act 649 seeks to remedy, relative to joint and several liability, is not present in this case. No one is going to be held liable for harm he did not cause in the absence of this statute. Correcting a non-existent error in the law is not a legitimate government purpose.

IV. THE MEDICAL EXPENSE PROVISION AS APPLIED IS UNCONSTITUTIONAL

Both Section 15 and Section 19 of Act 649 commit the same wrong. They variously purport not to "limit compensatory damages" and allow the recovery of "the cost of reasonable and necessary medical services." Each section then removes what it bestows by preventing any recovery for the full value of those services by limiting the "evidence" to the amount "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." Under this scheme, a plaintiff may not recover for the actual cost or value of medical care rendered when his insurance company negotiates a reduced rate with a provider. This is a significant change in the law of evidence and the law of damages

because, prior to the passage of Act 649, the precise opposite result would obtain. *See Montgomery Ward & Co. v. Anderson*, 334 Ark. 561, 976 S.W.2d 382 (Ark. 1998).

A. The Collateral Source Rule

"The collateral source rule operates both as a substantive rule of damages and as a rule of evidence." *See Arambula v. Wells*, 72 Cal. App. 4th 1006, 1015 (Cal. Ct. App. 1999). *See also Younts v. Baldor Electric Co., Inc.*, 310 Ark. 86, 832 S.W.2d 832 (1992); *and* Comments, Arkansas Model Jury Instruction 2215. Understanding this dichotomy of purpose is central to understanding how Section 15 violates two separate provisions of the Arkansas Constitution. Each purpose is as important as the other, and each violation is fatal.

As a rule of evidence, "the rule operates to exclude evidence of payments received by an injured party from resources 'collateral to' (other than) the wrongdoer, such as private insurance or government benefits." *See Bell v. Estate of Bell*, 318 Ark. 483, 490, 885 S.W.2d 877 (1994). The rule recognizes that tortfeasors should not benefit from the foresight of the plaintiff who obtains insurance coverage, the assistance of government benefits or the gift given by charity or kinship. Therefore, when an injured plaintiff's medical bills are paid by an insurer, by a government program, or by charity, or where those medical costs are absorbed in whole or in part by the provider as a matter of contract, as a gift or simply because the plaintiff cannot pay them, evidence of those payments or write-offs is inadmissible in a case assessing the tortfeasor's liability. *See Montgomery Ward & Co. v. Anderson*, 334 Ark. 561, 976 S.W.2d 382 (1998); *Bell v. Estate of Bell*, 318 Ark. 483, 885 S.W.2d 877 (1994); *Green Forest Public Schools v. Herrington*, 278 Ark. 43, 696 S.W.2d 714 (1985); *Patton v. Williams*, 284 Ark. 187, 680 S.W.2d 707 (1984); *Amos, Adminstratrix v. Stroud & Salmon*, 252 Ark. 1100, 482 S.W.2d 592 (1972); *Pekin Stave & Mfg. Co. v. Ramey*, 104 Ark. 1; 147 S.W. 83 (1912). Conversely, the

value of the services, which is represented by the amount billed by medical-care providers before any reductions, is admissible whether or not that amount is actually paid by or on behalf of the plaintiff.

At this point, the rule becomes a substantive rule of the law of damages. It recognizes that "[c]ollateral source benefits may relate to the plaintiff's ***need*** to recover damages from the wrongdoer, but they have no bearing on the plaintiff's ***right*** to recover such damages." *See O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 576 (Ky. 1995). Stated otherwise, as Justice Corbin noted in *Bell*, the cases measure the compensation due the plaintiff by the amount of harm done, even if some of the harm was repaired by a collateral source. *See Bell*, 318 Ark. at 490, 885 S.W.2d 877 (quoting F. Harper, *et al*., The Law of Torts 25.22, p. 651 (2d ed. 1986)). Justice Newbern furthered this idea by quoting the Restatement (Second) of Torts' holding that "'it is the tortfeasor's responsibility to compensate for all harm that he causes, not confined to the net loss that the injured party receives.'" *See Montgomery Ward & Co.*, 334 Ark. at 566-67, 976 S.W.2d 382 (1998) (quoting Restatement (Second) Torts, § 920A cmt. b). Thus, again, this time substantively, the rule holds that the value of the services represented by the amount billed before any reductions is the amount the plaintiff has been damaged and may recover.

The collateral-source rule was well established in American tort jurisprudence as both a rule of evidence and a rule of substantive law before the enactment of the constitutional provisions Section 15 offends. *The Propeller Monticello v. Mollison*, 58 U.S. 152 (1854).

B. The Separation of Powers Doctrine

As previously reviewed, Arkansas law has adhered to a strict separation of powers doctrine, particularly as relates to encroachments on judicial authority. This has been buttressed by the adoption of Amendment 80. Section 15 is such an encroachment. As written previously,

the collateral-source rule is a "rule of practice and procedure" in the courts of this state, and as such, can only be amended by the Supreme Court. Therefore, Act 649's attempt to alter the rule is an invalid exercise by the legislature of a power given exclusively to the Supreme Court.

The Supreme Court of Kentucky reached this precise result when it examined the validity of its legislature's attempt to abrogate the collateral-source rule. *See O'Bryan v. Hedgespeth*, 892 S.W.2d 571 (Ky. 1995). In response to a so-called insurance crisis in the 1980s,[24] the Kentucky Legislature passed House Bill 551, a general tort-reform measure. *See* Note, *Restoration of the Collateral Source Rule in Kentucky: A Review of O'Bryan v. Hedgespeth*, 23 N. Ky. L.Rev. 357 (1996).

In *O'Bryan*, the Kentucky Supreme Court held that this portion of the 1988 tort reform measures was constitutionally deficient. Its reasons for doing so are directly relevant. The Kentucky Court noted first that under the Kentucky constitution's separation-of-powers doctrine, no department of the government could exercise the powers vested in another department. *See Id.* at 576. It then noted that Section 116 of that constitution vests the Kentucky Supreme Court with the power to prescribe "rules of practice and procedure for the Court of Justice." *Ibid.*

[24] While the insurance crisis was apparently legitimate, even the task force that recommended the reform was unable to link it to any litigation explosion, Legislative Research Commission, Report of the Kentucky Insurance and Liability Task Force, Research Report No. 232, 1-2 (1988), thus the measure's rational basis is very questionable. Act 649 suffers the same defect, although that argument must wait for another day. The evidence, or lack of thereof, supporting the supposed reasons for the Act does not matter to this motion. Section 15 fails whether the reasoning underlying it is legitimate or not.

Turning to the question at hand, the Kentucky Court held that "[r]esponsibility for deciding when evidence is relevant to an issue of fact which must be judicially determined, such as the medical expenses incurred for treatment of personal injuries, falls squarely within the parameters of 'practice and procedure' assigned to the judicial branch by the separation of powers doctrine and Section 116." *Ibid.* Prior to the passage of the statute at issue, payments by collateral sources were irrelevant because the collateral-source rule recognized that "such payments have no bearing on the issue to be judicially decided, the amount of damages the plaintiff has incurred and is entitled to recover from the wrongdoer . . . ." *Ibid.* The statute therefore offended the separation-of-powers doctrine and was unconstitutional.[25]

The same result should follow here. The relevant Arkansas constitutional provisions are remarkably similar to those in the Kentucky constitution. Both documents vest distinct powers in the various departments of government. Both documents hold those powers to be exclusive. Both documents vest the Supreme Courts with the authority to determine rules of practice and procedure. The Arkansas legislature's attempt to abrogate the collateral-source rule is every bit as much an offense to this state's constitution as the Kentucky legislature's actions were to the Kentucky constitution. Any argument that Section 15 is anything other than a rule of evidence is betrayed by its very language. It specifically purports not to alter the substantive law of torts and only to limit the evidence of damage. Section 15 is a legislative determination of what evidence

[25]Under Kentucky law, the doctrine of "comity" would allow the Court to "adopt" the "unconstitutionally-enacted" rule out of "deference and respect." The Court held that "comity" did not save this rule. Moreover, no such concept exists in Arkansas law. Violations of the separation-of-powers doctrine are invalid.

is relevant and what evidence is not. As such, it offends separation of powers and is unconstitutional.

C. Section 15 is a Violation of Article 5, § 32

Clearly, Section 15 limits the amount that can be recovered for injury or death by commanding that only amounts actually paid by or on behalf of a plaintiff, or for which the plaintiff is legally responsible, may be admitted into evidence and recovered. This is plainly and unambiguously prohibited by Article 5, §32 which is on its face an absolute limitation on legislative authority.

This offense is even more apparent when one realizes that the Arkansas Supreme Court has previously determined the precise opposite of what Section 15 holds. In *Montgomery Ward & Co., supra*, the Court was asked to decide whether "gratuitous or discounted medical services are a collateral source in assessing the damages due a personal-injury plaintiff." *Montgomery Ward & Co.*, 334 Ark. at 567, 976 S.W.2d 382. It held that they were. To uphold Section 15 would be to allow the legislature to exercise "an overruling influence" over an area of law left exclusively to the courts. That result cannot stand.

The Kentucky Supreme Court's opinion in *O'Bryan* is again useful. As set forth above, Kentucky's constitution contains a provision virtually identical to Article 5, § 32. In *O'Bryan*, the Kentucky Court wrote that, if the statute its legislature passed "intends a substantive rule limiting the damages recoverable in a civil action, the statute is constitutionally defective" under that provision. *O'Bryan*, 892 S.W.2d at 578. While the "statute was not so written as to express a substantive limitation in damages," that Court was clearly prepared to strike it down if it had been. *Ibid.*

Section 15, on the other hand, does "intend a substantive rule limiting the damages recoverable" in a personal-injury case. By its very language, it defines what the damages are, and reduces them to an amount below that allowed by the Arkansas Supreme Court's precedents. Under our Constitution, the legislature may not act in this manner.

Section 15 as a rule of evidence is unconstitutional as a violation of the separation of powers doctrine and Amendment 80 and as a substantive law intended to reduce recoverable damages in a personal injury action a violation of limits on its authority articulated in Article 5, § 32. Both rules, as stated above are and should be applied as absolute constitution limitation.

V. CONCLUSION

A legislative abridgement of fundamentally sound common law concept of justice with roots literally hundreds of years deep, which permeates the entire body of tort law in the way joint and several and the collateral source rule do, cannot on its face be rationally connected to a legitimate state purpose, especially when married to a concept so alien to procedural due process as phantom parties and when so little is done to rationalize the end result with other related statutory provisions. Such legislation is not a reasoned and conscientiously constructed effort to evolve tort law but a frank assault upon it and the concepts of justice that underpin it, obviously undertaken without adequate understanding of what was being done, indeed misunderstanding. Such legislation cannot be said to be rationally connected to a legitimate government purpose when on its very purpose is antithetical to one of the most fundamental responsibilities of government, i.e. to provide effective and adequate remedies for private wrongs. Such legislation is a clear abridgement of the petitioners' rights under the Arkansas Constitution, rights created precisely to preclude just such an assault on the power of the courts to do fundamental justice,

driven precisely by the type of short term political duress that drove this ill advised and unworkable legislation. The Court should so hold.

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