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,

James Bruce McMath, #75090
Neil Chamberlin, #93222
MCMATH WOODS, P.A.
711 W. Third Street
Little Rock, AR 72201
(501) 396-5400

Attorneys for Petitioners

TABLE OF CONTENTS

POINTS ON APPEAL

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.

TABLE OF AUTHORITIES

CASES

Statutes/Rules

Other Authorities

Books and Treatises

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. Add. 2. At the time of the incident, Johnson was working on an electrical product commonly known as a "starter bucket." Add. 2. The starter bucket was designed, manufactured, and supplied by the respondents. Add. 2. 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. Add. 2. 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. Add. 2-3. 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. Add. 3.

Respondent Rockwell Automation, Inc. ("Rockwell") pled in its answer that the fault of all parties should be apportioned in accordance with Act 649 of 2003. Add. 3. Rockwell further pled "all defenses" available to it under the Act, including "restriction of liability to its percentage share of actual liability" and "the right to name nonparties at fault." Add. 3.

Rockwell filed a "Notice of Nonparty Fault," pursuant to the Act, Ark. Code Ann. § 16-55-202, designating Johnson's employer, Eastman, as a nonparty at fault, for a list of alleged reasons. Add. 3-4. The petitioners contend that the nonparty fault (or "phantom defendant") provision of the Act violates the Arkansas Constitution under the facts of this case.

Johnson received medical care, treatment, or services (collectively "medical care") which the petitioners allege were necessary due to the incident and injuries described herein. Add. 4. Johnson's employee medical plan paid costs for the medical care. Add. 4. The amount of costs paid by the plan was less than the full amount of the costs incurred for the medical care. Add. 4. The petitioners seek to present evidence at trial of the full amount of the costs of necessary medical care received by Johnson. Add. 4-5. The respondents seek to enforce the terms of the Act, Ark. Code Ann. § 16-55-212(b), such that the 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. Add. 5. The petitioners contend that such an interpretation and application of the Act 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. Add. 1. The Arkansas Supreme Court accepted certification of the two questions of law.

The statutory provisions in question here were enacted by Act 649 of 2003. The Act was introduced prior to the legislative session with a show of force from its beneficiaries. Its stated purpose was to transform an "out-of-control" justice system by diminishing recoveries. Standing

on the steps of the state Capitol with more than 200 business leaders and doctors behind him, sponsor 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."[1]

Proponents of the bill made it clear that "high-dollar lawsuit awards"[2] and "big damage awards in lawsuits"[3] would be curtailed by the bill, revealing their intention to diminish recoveries.[4] 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 adjust a justice system that the Act's proponents viewed as being unacceptably "in favor" of plaintiffs:

---

[1] Add. 133 (David Smith, *Legislators seek to reform "out-of-control" tort system*, Arkansas Democrat-Gazette, January 9, 2003).

[2] Add. 135 (Michael Rowett, *Judiciary panel plans day-long huddle to tackle bill limiting lawsuit damages*, Arkansas Democrat-Gazette, Friday, January 17, 2003, quoting Rep. Danny Ferguson).

[3] Add. 137 (Michael R. Wickline, *Tort-reform opponents want bigger room, more meetings*, Arkansas Democrat-Gazette, Friday, January 24, 2003). *See also* Wickline, *Lawmakers set to argue caps on lawsuit damages*, Arkansas Democrat-Gazette, Sunday, January 26, 2003; Rowett, *House Approves Tort Reform, 71-28 Vote Sends Bill To Senate*, Arkansas Democrat-Gazette, Saturday, February 1, 2003.

[4] 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.").

> [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.[5]

In actions for personal injury, property damage, or wrongful death, Section 1 of the Act, codified at A.C.A. § 16-55-201, eliminates joint and several liability for all practical purposes.[6] 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.

Section 2 of the Act, codified at A.C.A. § 16-55-202, the so called "phantom defendant" provision, works hand in hand with Section 1. Section 2 requires courts to adjudicate the fault of persons not parties to the action, while precluding recovery against named defendants based upon any fault assigned to nonparties. *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.

---

[5] Add. 74 at lines 4-24 (transcript of debate on House Bill 1038, Friday, January 31, 2003).

[6] 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.

In this case, the phantom defendant is Johnson's employer, Eastman, immune under the exclusive remedy provision of the Worker's Compensation Act, A.C.A. § 11-9-105. No effort is made in the Act to modify the exclusive remedy provision of the Worker's Compensation Act to harmonize it with proportionate liability. A reduction in an actual defendant's liability cannot be recovered from the employer. Likewise, A.C.A. § 11-9-410, which gives an employer a lien on a third-party recovery, was left unchanged. Thus, a recovery by an injured worker from a third party defendant is subject to a lien for benefits paid under the Worker's Compensation Act, even though the recovery has been reduced by fault assigned to that employer.

Section 15, of the Act, codified at A.C.A. § 16-55-212, limits the admissibility of evidence relative to the actual value of medical care rendered to an injured party, again to hold down damages.

Several trial courts have ruled that the provisions of the Act challenged herein are unconstitutional, for some of the same reasons discussed herein. Included in the attached addendum are decisions of six trial courts holding the Act's "phantom defendant" (or "nonparty defendant") provision, codified at A.C.A. § 16-55-202, unconstitutional. Add. 162. Also included are the decisions of 34 trial courts holding the Act's medical expense provision, codified at A.C.A. § 16-55-212, unconstitutional. Add. 204. Each attached decision was filed of record with the U.S. District Court in this case as of August 11, 2008, when the parties herein jointly moved that court to certify the questions of law addressed herein to the Arkansas Supreme Court, although additional decisions may exist.

ARGUMENT

I. NONPARTY DEFENDANT CONCEPT 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. That is 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. Arkansas Constitution, Article 2, Section 8 (Due Process)

The Arkansas Constitution, Article 2, § 8, provides both substantive and procedural protections for a person's rights to life, liberty and property. A substantive challenge questions whether the state has a sufficient reason to infringe the rights in question. A procedural challenge questions the adequacy of the process employed. Anything of value, even and expectancy, is protected. *Regents vs. Roth*, 408 U.S. 564, 577 (1972). Petitioner Darrell Johnson's right to compensation for personal injury existed at common law and is also affirmed and separately protected by Article 2, § 13, and Article 5, § 32, of the Arkansas Constitution.

1. Substantive Due Process

A statute is unconstitutional under Article 2, § 8, if it lacks a rational basis connected

with achieving a legitimate governmental purpose. *Arkansas Hospital Ass'n. v. Arkansas State Board of Pharmacy*, 297 Ark. 454, 763 S.W.2d 73 (1989). Moreover, a statute may be constitutional in some respects but lack a rational basis when applied to a particular case. *See, 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) (each explaining the difference between a facial and an "as applied" challenge to an ordinance or legislation). This is an "as applied" challenge.

The proponents of Act 649 offer a supposed justification for the Act in Section 26 thereof, the emergency clause, which states that the Act is necessary to hold down the costs of medical malpractice liability insurance, stem the tide of medical malpractice liability insurers leaving the state, and to improve health care. Add. 152-153. No mention is made of the need to "reform" general tort law. Even assuming the statute to be justified in a medical negligence case, on its face, Act 649 lacks any justification (or rational basis) as applied to this case.

The rationality flaw goes deeper, as the very mechanism of the law being altered was not understood by the legislature, as the Act conflates the critical distinction between fault and causation. Section 26 of the Act asserts that "existing conditions" cause a litany of horrors. Add. 152. The only illustration of "existing conditions" is "the application of joint and several liability regardless of the percentage of fault." Add. 152. This statement demonstrates a lack of understanding of joint and several liability, which is further demonstrated by statements made by the Act's co-sponsors on the House floor.[7]

[7] *See* Add. 13-14 (co-sponsor Rep. 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). *See also* Add. 86 (co-sponsor Rep. Biggs'

This miscomprehension is further reflected in the language of the Act. Section 1 reads that "the liability of each defendant for compensatory or punitive damages shall be several only and shall not be joint." (Emphasis added.) Literally read, this creates separate liability for each defendant for the entire harm (the meaning of several liability) and precludes joinder of concurrent tortfeasors. This is essentially the polar opposite of the operation of the Act, which ends several liability and replaces it with "proportionate" liability (limited to apportioned fault) while expanding joinder to include non-parties. *See* Wright, *Logic and Fairness* at 70 (explaining meaning of "joint and several liability"). This is more than a linguistic error. It evidences a substantive confusion promoted by those who would "reform" tort law, by developing the idea that joint and several liability results in defendants paying for damages they did not cause. *See* Peck, *The Development of the Law of Joint and Several Liability*, 55 FDCC Quarterly 469 (2005).

"Fault," as that term is used in the Comparative Fault statute, A.C.A §16-55-216, and in the Contribution Among Tortfeasors Act, A.C.A §16-61-202, is not synonymous with cause, but involves assessment of culpability. Its function is to allocate damages between parties

---

statement on the House floor: "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."). Such statements make one appreciative of the need for constitutional limitations on legislative authority in the area of civil remedies.

responsible for a single indivisible harm to avoid double recovery. 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). The law is not so flawed as to work as alleged.

Act 649, then, rests on a flawed understanding of the legal concept it seeks to annul (joint and several), assumes a problem that does not exist (liability without cause), all to achieve a purpose that does not relate to this case or any other non-healthcare related action the statute is nevertheless made applicable to. While a statute is entitled to a presumption of constitutionality, such a presumption should yield when it is apparent the legislation rests on a wholly-flawed foundation. *Golden v. Westark Community College*, 333 Ark. 41, 51-52, 969 S.W.2d 154, 159 (1998). If the core assumptions of an Act are objectively erroneous, what basis is there to confer a presumption of rationality? Constitutionally protected rights of civil justice should not be so flimsily protected.

The Arkansas legislature has not been alone in being sold on such an illusion. 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 violated principles of substantive due process, noting 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 1018-20. It 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 nonparty defendant 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.

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. In striking the abolition of joint and several liability, the court also invalidated the statute's nonparty defendant provision. *Id.* at 1064, 1088-1089. It did so by finding that the "tort reform" statute violated the state's prohibition against special legislation. *Id.* at 1089. The court applied the reasonable basis test, the same standard this court has applied to a due process challenge. *Id.* at 1069-1070.

Implicit in *Plumb* is that there is no rational justification for a nonparty process. If a nonparty is amenable to suit, it should be brought in. If not, there is no just reason to bring it in. The only purpose for such a provision is to handicap the injured plaintiff by creating red-herring "defendants" and a plethora of collateral issues. The point is to obstruct and impede justice, not to facilitate it. This legislation was created in the same spirit as the pre-suit notice requirement previously mandated in medical malpractice actions under A.C.A §16-114-204. This procedural "trap" was struck down by this court in *Weidrick v. Arnold*, 310 Ark. 138, 835 S.W.2d 843 (1992), holding that the provision was "manifestly harsh" and "an obvious hardship, the equal of which may not exist elsewhere in the law." The instant phantom defendant concept eclipses it.

Here, the phantom is an immune employer. Some states allow a third party defendant to interplead the employer to gain a set off for worker's compensation benefits, at the expense of

the employer's lien, if the employer's fault is determined to have been a factor in causing the injury. Such a process avoids the dubious phantom defendant processes and works no injustice to the injured worker. Hence, if such a goal were the purpose, it could be achieved without the phantom defendant concept**.** The adoption of a phantom defendant concept, without changing related statutes (governing exclusive remedy and employer liens), reveals a superficial approach in the Act, perhaps even a hostility to injured parties' rights. It certainly does not reflect a constructive interest in achieving justice or efficiency. The Act is not rationally based to achieve a legitimate purpose and certainly does not do so in this case or cases like it.

2. Procedural Due Process

While a legislative body has the power to raise taxes on all similarly situated without providing procedural due process, *Metallic Investment Co. vs. State Board of Equalization*, 239 U.S. 441 (1915), it has no power to take property on an individual basis without doing so. *See Londoner vs. Denver*, 210 U.S. 373 (1908).

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, the nature of the process required is inherently a constitutional issue, to be decided by the court. *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.

Procedural due process implicates a different standard of review. The United States Supreme Court, in *Mathews vs. Eldridge*, 424 U.S. 319 (1976), set forth four 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.

The interest here is clearly an important one, being separately protected by three constitutional provisions, as discussed below. Under the procedures established by the subject statute, a plaintiff's rights are determined through judgments made about the conduct of others who are only "represented" in court through the plaintiff, making the plaintiff a surrogate defendant. In this case, 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 harvested from such arms-length discovery as the court and law allows from a nonparty, as no other means for discovery from phantom defendants is provided for in the Act.

One cannot assume information will be cooperatively extended by nonparty defendants, especially in the absence of any privilege to protect such a transfer of information to a plaintiff's counsel. In many cases, where the defendants and the nonparty have long-standing economic relationships, as here, the nonparty may be hostile to the plaintiff's claim. For all these reasons, the petitioners here will not have the facts, resources or effective benefit of counsel in representing the conduct of Eastman. In civil proceedings of this importance, due process requires effective representation of counsel. *See Gilliam v. State*, 305 Ark. 438 (Ark. 1991). Certainly, due process would not tolerate handicapping Eastman's counsel in such a manner if it were a party.

Adequate notice is a key element in procedural due process. *McCrory, supra., at 240* (prejudgment attachment code unconstitutional where "procedures were inadequate to prevent erroneous deprivation"). The only notice requirement in the Act, however, is to give 120 days' notice prior to trial that provides a name, last known address, and "the best identification" possible of the nonparty, 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 provided to facilitate access to information from nonparties, to motivate the cooperation of nonparties in their own surrogate defense, or to provide a privilege for communication of information to the plaintiffs' counsel. In many instances, even a named party could not mount a defense in 120 days, most of which may be after a discovery cut off, let alone mount a defense through a plaintiff/surrogate that does not have ready access to the nonparty's information. Continuances might be granted, but that works against judicial efficiency and speedy resolution, and additional nonparties could still be named within 120 days of the continued trial date. The required notice of the nonparty is not adequate either as to time or information content.

Beyond all the foregoing, the phantom defendant 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 adversarial process foundational to 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 and have standing to properly speak to the issues involved. *See Pulaski County v. Arkansas Democrat-Gazette, Inc.*,

371 Ark. 217, 220, 264 S.W.3d 465 (2007). So little is required of a defendant to invoke the phantom defendant process, it is highly subject to being abused.[8]

In sum, the Act presents the plaintiff with the difficult, perhaps impossible, task of defending someone else's conduct without providing reasonable access to necessary information, and while providing fewer procedural safeguards, process and notice than are afforded an actual party. It is an open invitation to create delays and inflict procedural abuse on the plaintiff, all while creating a significant and obvious risk of erroneous results through dubious assignments of fault to absent and unrepresented parties to no apparent legitimate purpose. The phantom defendant concept cannot withstand scrutiny under the criteria of *Mathews, supra.*

B. 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, Article 4, § 2, and is unconstitutional. *Wells v. Purcell*, 267 Ark. 456, 462, 592 S.W.2d 100, 104 (1979). "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).

This basic concept of constitutional structure is buttressed by Amendment 80, § 3, to the Arkansas Constitution, providing that the Arkansas Supreme Court shall prescribe the rules of pleading, practice, and procedure for all courts. The Arkansas Supreme Court established those rules by adopting the Arkansas Rules of Civil Procedure. *See* Publisher's Note to ARCP 1.

[8] In one case involving a workplace injury, a defendant recently nominated 35 phantom defendants. Add. 154.

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, supra.*[9]

None of the rules adopted by the Arkansas Supreme Court contemplates or allows for adjudicating the conduct of a party *in absentia*. Such a concept is fundamentally at odds with the foundational principles of the Arkansas Rules of Civil Procedure, which rely upon an adversarial process and carefully crafted procedures to achieve the discovery of truth and an adjudication based thereon in a fair and economic manner. By establishing a whole new type of party, defining a procedure, a new pleading form, and notice requirements to invoke their participation *in abstencia*, A.C.A. § 16-55-202 conflicts with the procedures established in the Rules, starting with 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 heard, by a simple notice of nonparty fault that need not be served on the nonparties charged with fault. This violates Rule 2 (one form of action), Rule 3 (commencement), Rule 4 (summons), Rule 5 (service), Rule 7 (pleadings), and Rule 10 (form of pleadings). The statute defines an entirely new concept for joining nonparties and adjudicating their conduct that in no way resembles the Rules of Civil Procedure. The process creates an alternative process to Rule 14 for 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

[9] Similarly, state law conflicts with the federal rules of civil procedure are deemed procedural for purposes of the *Erie* doctrine and the federal rules prevail. *Hanna v. Plumer*, 380 U.S. 460, 470-471 (1965).

around Rule 19 (joinder of necessary parties), Rule 20 (permissive joinder), Rule 21 (mis and nonjoinder), and Rule 22 (interpleader). A more complete invasion of judicial power or effective violation of Amendment 80, § 3, could hardly be conceived. The "medical affidavit" requirement of the same Act, a far less overreaching requirement than the phantom defendant concept, has already been held unconstitutional on these grounds. *Summerville v. Thrower,* 369 Ark. 231, 253 S.W.3d 415, 234-235 (2007).

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 and is unconstitutional. If it represents a valid process, this court, rather than the legislature, should adopt it. If not, it must be stricken.

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

Inherent in the concept of constitutional government is a recognition that a representative democracy is capable of trampling individual rights. How to grant discretionary power, while at the same time precluding abuse, is a central challenge in framing any constitution. All American constitutions contain explicit limitations on governmental power where abuse is deemed most likely or pernicious. The states are the primary source of law governing private wrongs. Originally sourced in the common law, such rights to remedies have historically been abridged by legislatures under the duress of concentrated political power.

Article 2, § 13, and Article 5, §32, of the Arkansas Constitution were adopted precisely to protect civil justice from the "strong arm" of concentrated political power that was behind the

Act.[10] The existence of these constitutional provisions is an expression of the framers' commitment to the conservative principle that the individual right to a just remedy for private wrongs should not hang in the balance of political expediency.

1. Article 2, §13

Most states have "open court" or "right to a remedy" clauses, such as Article 2, § 13, of the Arkansas Constitution. *See* Add. 176 (listing state open court constitutional provisions). Such clauses have not benefited from the unifying guidance that the federal courts provide with regard to common constitutional protections. Thus, treatment of these provisions has varied over time and between jurisdictions. At times, the historical context and purpose has seemed to be lost. Their historical roots reach back to the Magna Carta, which contains a vow that the King of England would not impede his subjects' ability to obtain justice through the courts. William S. McKechnie, Magna Carta: A Commentary 122 (2d ed. 1914). *See also* William C. Koch, Jr., Reopening Tennessee's Open Courts Clause, 27 U. Memphis L. Rev. 333, 349-57 (1997).

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, state legislatures picked 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-

[10] *See* Add. 50 (Rep. Verkamp, stating on the House floor "It's the strong arm of certain interest groups that makes it to where you've got to vote for it.").

452 (1967) (quoting Thomas Jefferson, Notes on the State of Virginia 120 (1781; W. Peden ed., 1954)). These offenses included "depriving people of common law causes of action for damages." William E. Nelson, Americanization of the Common Law 91-92 (1975). In response, state constitutions began to include explicit guarantees to access courts and 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 states, 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, this court engaged in contortions of logic to allow seemingly acceptable legislative action. *See Robertson v. Robertson*, 193 Ark 669, 101 S.W. 2nd 961 (1937). *See also* Justice George Rose Smith's dissenting opinion in *Emberson v. Buffington*, 228 Ark. 120, 306 S.W.2d 326 (1957).

Justice Smith argued in *Emberson*, that interpreting Article 2, § 13, to preclude 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 the constructive evolution of civil law should be prohibited. 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). This does not mean that all such legislation will or should survive scrutiny under Article 2, § 13, however. *See White, supra*, at 326 Ark. at 671. *White* only determined what Article 2, §13, did not preclude automatically.[11] 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.

[11] For a scholarly discourse on the relevant doctrine, see *Smothers v. Gresham Transfer, Inc., 332 Or. 83, 23 P.3d 333 (2001).*

2. Article 5, § 32

Article 5, § 32, of the Arkansas Constitution 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. As with Article 2, § 13, however, it was incorporated in reaction to abuses of legislative power motivated by political expediency.[12]

This court first had occasion to interpret Article 5, § 32, in *Little Rock and Fort Smith Railway Co. v. Barker and Wife*, 39 Ark. 491, 511-512 (1882). It concluded that the article necessarily left the determination of damages to "juries and the courts" and that the regulation of excessive awards was the sole responsibility of the judiciary. The drafters of the constitution did not trust the legislature to make broad rules limiting recovery in civil wrongs. They left this power, to adapt the general rules of the law to particular cases, solely in the judiciary, which includes both jurors and judges. The article bars legislative actions that specifically limit recovery, as well as actions that *in effect* limit recovery. *Standard Pipe Line Company v. Burnett*, 188 Ark. 491, 501-03 (1933).

Due in part to this article, it was necessary to adopt Amendment 26 to the constitution to establish a Workman's Compensation System. *Brothers v. Dierks Lumber & Coal Co.*, 217 Ark. 632, 639-640 (1950). Amendment 26 itself reinforces the limitation of Article 5, §32, by providing that no other law may be passed that limits recoveries in personal injury cases. *Young v. Tarlton*, 204 Ark. 283, 288 (1942). *See also Baldwin Company v. Maner, Judge*, 224 Ark. 348, 351 (1954).

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

[12] Substantial treatment of the history of Article 5, §32, is deferred to Amicus briefs.

Article 5 defines legislative authority. As such, Article 5, §32, is an elaboration on separation of powers and requires unqualified construction. This Court has spoken in terms of constitutional absolutes on many occasions. Where an absolute constitutional duty or limitation is created, any legislation that conflicts with it is void. *See Lake View School District No. 25 of Phillips County v. Huckabee*, 351 Ark. 31, 71, 91 S.W.3d 472, 495 (2002) (discussing absolute constitutional duty to educate children).

This court has held that separation of powers is an absolute mandate and that 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). *See also 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).

The attempt to require the allocation of damages to "phantoms" under the Act is precisely for the purpose of limiting an injured party's ability to recover full compensation for his damages proximately caused by any named defendant's conduct. It offends the peculiar species of separation of powers found in Article 5, § 32. The Act 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 immune employers, from whom recovery may not be had. Such is an impermissible "overruling influence" that directly seeks to limit the ability and rights of a person injured 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 petitioners' recovery.

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

Article 2 of the Arkansas Constitution is set forth in the declaration of "general" rights and thus a directive to the government as a whole. Not being a direct limitation on legislative authority *per se*, Article 2, §13, is not necessarily violated by legislation that alters extant common law, while Article 5, §32, is (within the limits defined). That does not mean, however, that Article 2, § 13, does not provide an absolute right. *See Lake View, infra.* It does.

While it is obvious that there can be no absolute right to life, liberty and property, equal protection and many other general rights, the same cannot be said about the right to a complete remedy for a private wrong to person or property. Such a guarantee is a conservative principle, not a radical one, and history evidences that precise intention. 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, supra,* 351 Ark. at 89, 91 S.W.3d at 506; *Frank v. Barker*, 341 Ark. 577, 20 S.W.3d 293 (2000); *Hoyle v. Faucher*, 334 Ark. 529, 975 S.W.2d 843 (1998).

The existence of this absolute right does not mean that the legislature may not pass or alter laws dealing with civil wrongs and remedies. The limitation here is not on authority to act, as with Article 5, §32, 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. *Lake View, supra*¸351 Ark. at 71, 91 S.W.3d at 495. 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.

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. Article 2, § 13, requires a deeper reach, to measure an act against the fundamental concepts of justice that would otherwise inform the common law in the absence of the legislation. How else can one define "wrong" and "remedy" than in terms of the prevailing social norms and the judgment and sensibilities of society as to what justice reasonably requires?

If Article 2, § 13, is to be given its plain meaning, 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 substantive law as relates to private wrongs, so long as the result is to constructively evolve the law in ways that promote justice without denying a complete remedy for what should be actionable wrongs. There is no other rational conclusion. This best threads the needle, 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.

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. *See Higgins v. General Motors Corp.*, 250 Ark. 551, 465 S.W.2d 898 (1971) (discussing possible judicial adoption of product liability provisions in *Restatement of Torts* 402A, and A.C.A. § 16-116-101, *et seq.*, doing so legislatively). It could 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. Such need not offend Article 2, § 13, though they alter the common law, as they 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 legislation is to abdicate the judicial role of safeguarding and enforcing constitutional protections. *Lake View, supra.* A holding that the subject rights are not absolute is necessarily a finding that the constitution does not mean what it says. Thus read, Article 2, § 13, would mean that every person is entitled to a "certain" and "complete" remedy for injuries to his person – unless the legislature says otherwise. In conjunction with a presumption of constitutionality, such an approach would deny the provision its very purpose, leaving legislatures largely free to roll over the rights to be protected and rendering the provision largely or entirely redundant to Article 2, § 8 (due process).

A lesser level of scrutiny is not favored by necessity or reason. An absolute face value application of Article 2, § 13, provides all the discretionary input the legislature needs to play a legitimate role in forming and evolving civil law (with limits of Article 5, §32). It is a role limited only in the way intended, *i.e.*, that legislation not result in manifest injustice to an individual's right to a complete remedy for a civil wrong. Such a limitation is reasonable on its face, presenting no grounds for complaint in a society where foundational concepts of justice are intended to prevail over those of political expediency.

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 tortious conduct a portion of compensation, and hence an incomplete remedy, otherwise legally and justly owed by a defendant which caused or contributed to an indivisible harm. Thus, it cannot survive the prohibitions of Article 2, § 13.

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

If it is determined that the rights protected under Article 2, § 13, are not absolute, it is necessary to determine the level of scrutiny that must be employed. If it protects "fundamental" rights, strict scrutiny is called for. *Lake View, supra*. Under such a review, a statute fails 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). This burden is on the state to justify the infringement.

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). Rights may be fundamental that are not expressly protected in constitutional language. 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 (1803). The fact that the subject rights arise three times in our state's constitution supports their fundamental nature.

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). Other courts have employed an intermediate level of scrutiny in connection with other constitutional provisions as a means of protecting the civil justice system from undue political assault. *See Arneson v. Olson*, 270 N.W. 2d 125 (N.D. 1978) (due process and equal protection); and *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.1d 399 (1976).

However, the phantom defendant concept cannot survive even against the rational basis test under Article 2, § 8, for all the same reasons noted above in regards to substantive due process. This case has nothing to do with accomplishing the stated purpose of Act 649. The "harm" Act 649 seeks to remedy 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 governmental purpose. There is no rational need for phantom defendants.

II. MEDICAL EXPENSE PROVISION IS UNCONSTITUTIONAL

A. Collateral Source Rule

Section 15 of Act 649, codified at A.C.A. § 16-55-212, purports to "not limit compensatory damages." Add. 146. This statement is a case of a hit dog hollering, as Section 15 then does what it claims to not be doing. That is, Section 15 prevents a plaintiff from recovering the full value of medical 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." Add. 146. Section 19, concerning damage awards for medical injury, contains the same limiting language. Add. 149. Under this scheme, a plaintiff may not recover for the actual cost or value of medical services rendered when his insurance company negotiates a reduced rate with a provider or a public system of coverage mandates a lower rate as a condition of payment. 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) (collateral source rule prohibited evidence of agreed-to discount of hospital bill).

"The collateral source rule operates both as a substantive rule of damages and as a rule of evidence." *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); Comment to Arkansas Model Jury Instruction 2215. Each of these two roles of the collateral source rule is important and each is violated by the Act.

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." *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., supra; Bell, supra*; *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.

As a substantive rule of the law of damages, the rule 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." *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 576 (Ky. 1995) (emphasis original). 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*, *supra*, 318 Ark. at 490, 885 S.W.2d at 880-881 (quoting F. Harper, *et al*., The Law of Torts 25.22, at 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.'" *Montgomery Ward & Co.*, *supra*, 334 Ark. at 566-567, 976 S.W.2d at 385 (quoting Restatement (Second) Torts, § 920A cmt. b). The collateral-source rule was well established in American tort jurisprudence, as both a rule of evidence and a rule of substantive law, even before the enactment of the constitutional provisions Section 15 offends. *See 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, § 3, providing that the Arkansas Supreme Court shall prescribe the rules of pleading, practice, and procedure for all courts. 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 Arkansas Supreme Court. The Supreme Court of Kentucky reached this precise result when it examined

the validity of its legislature's similar attempt to abrogate the collateral source rule. *See O'Bryan, supra.*

In *O'Bryan*, the Kentucky Supreme Court held that, under the Kentucky constitution's separation of powers provision, no department of the government could exercise the powers vested in another department. *See id.* at 576. It then noted that Section 116 of Kentucky's constitution vests the Kentucky Supreme Court with the power to prescribe "rules of practice and procedure for the Court of Justice." *Ibid.* 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.* The statute therefore offended the separation of powers doctrine and was unconstitutional.

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

C. 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, forbidding laws limiting the amount to be recovered for injuries, which is on its face an absolute limitation on legislative authority. Section 15 is plainly a legislative effort to overturn judicial precedent holding an opposite result. *Montgomery Ward & Co., supra*. 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.

O'Bryan is again useful, as 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.

III. CONCLUSION

Providing just remedies for private wrongs is a primary responsibility of any sovereign. The individual states are the repositories and guardians of this responsibility. History reveals that political expediency can be corrosive to civil justice. The framers of state constitutions have therefore interposed both general and specific provisions protective of the civil law. The Arkansas Constitution contains such provisions. The purpose is to preserve the integrity of the civil justice system from undue political dilution. It is the responsibility of this court to give those provisions voice, lest justice suffer at the hands of "elective Despotism."

Act 649 is not budgetary legislation or regulation of commerce. The Arkansas Constitution clearly envisions justice as primarily a judicial function, apparently with the view that the judicial branch will be more jealous of preserving its fidelity. This Court has previously deferred to intrusive legislative action, only to later recognize the "manifestly harsh" result.

Weidrick, supra. Deference to legislative prerogatives must not blind the Court to the essential character of an act like this. There are distinct differences between constructive, informed legislative initiatives aimed at promoting justice and those like Act 649, aimed at hobbling it.

The sponsors' own words condemn Act 649, revealing the intent to shackle justice with false concepts and errant procedures. The record reveals a hostile intent, a lack of relevant knowledge (or even care) on the part of those responsible for the Act. The Act is condemned by its failure to reconcile its radical concepts with prior legislation and its flippant departure from long standing, well reasoned concepts of justice that have been fundamental to Anglo/American tort law for centuries. The Act is condemned by the overt lack of any effort to mitigate the procedural challenges and the potential for abuse inherent in the procedures adopted. These things define a politically motivated initiative to which justice is an irrelevant consideration.

Condoning this legislation would not only do a disservice to the law and victims of private wrongs, but to public policy in general. The tort system does not cause harm, it reflects it. Denying compensation to victims of tortious conduct, as a solution to some problem, is like shutting the fire alarm off in response to a fire. "Tort reform" such as this is a distraction from real solutions, a political palliative to mask real problems. There is no basis to conclude that Arkansas juries and courts are holding persons liable that should not be or that injured parties are being overly compensated. To accept that charge is by definition to find the Arkansas judiciary failing in its role. If that is not true, then this legislation has no rational basis for such profound intrusions into objectively rational concepts of the civil justice system.

The challenged portions of Act 649 are a clear abridgement of the petitioners' rights under the Arkansas Constitution and the judiciary's prerogative to manage the civil justice system. The Court should so hold.

Respectfully submitted,

James Bruce McMath, #75090
Neil Chamberlin, #93222
MCMATH WOODS, P.A.
711 W. Third Street
Little Rock, AR 72201
(501) 396-5400

Attorneys for Petitioners

By: _____
James Bruce McMath

CERTIFICATE OF SERVICE

I certify that on November ___, 2008, a copy of the foregoing was served on the following by U. S. mail:

David M. Donovan
Thomas J. Diaz
WATTS, DONOVAN & TILLEY, P.A.
200 S. Commerce Street, Suite 200
Little Rock, Arkansas 72201-1769
Attorneys for Respondents

_____
James Bruce McMath