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**

PETITIONERS' REPLY BRIEF

Respectfully submitted,

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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.

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ARGUMENT

I. NON-PARTY FAULT IS UNCONSTITUTIONAL

A. RATIONAL BASIS TEST HAS LITTLE OR NO ROLE IN THIS CASE.

Respondents ignore Petitioners' arguments on elevated standards of review, citing such cases as *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983) (tax exemptions); and *Arkansas Hosp. Assoc. v. Board of Pharmacy*, 297 Ark. 454, 763 S.W.2d 73 (1989) (pharmacy permits). These cases involve qualified rights (substantive due process, equal protection, special legislation) that cannot be protected in absolute terms but rather must be balanced against pragmatic governmental interests. The rational basis test finds its principle application in connection with such qualified rights, providing the deference necessary to facilitate the legislative balancing process. That a right is qualified does not mean it is not important and so as not to unduly dilute such rights, through the extreme deferential quality of the rational basis test, other more demanding tests have been developed for application in suspect situations that red flag where inappropriate motivation may be at work. Such a two-tiered approach allows an effective implementation of a qualified right, like equal protection, when circumstance warrant a more meaningful review, while maintaining a minimum profile for the courts in non-suspect circumstances.

However, except for substantive due process, the rights urged here are neither qualified in nature nor can their implementation be categorized into suspect and non-suspect situations. The right to a complete remedy for a civil wrong, for example, is everywhere and at all times of equal importance and its compromise at all times equally suspect. In the absence of some type of trip-wire, to evoke a more rigorous review, a rational basis standard as the sole form of

review, risks effectively reading such a right out of the constitution. As such, more aggressive forms of review have been adopted for rights of the subject nature by other courts. (*See*, p. 1-20 Pt.'s Br.) However, petitioner believes that the non-qualified rights here in issue are best applied as absolutes rights for reasons stated previously and reaffirmed herein below.

The respondents cite *Davis v. Parham*, 362 Ark. 352, 208 S.W.3d 162 (2005) (challenging the two-year statute of limitations in medical negligence cases). In *Davis*, three arguments were advanced to challenge the statute, two relating to qualified rights (due process and equal protection) and one relating to Article 2, § 13. *Davis* applied the rational basis test, but without discussion as to whether another standard of review should be applicable.

Respondents cite *Simpson v. Fuller*, 281 Ark. 471, 665 S.W.2d 269 (1984); and *Gay v. Rabon*, 280 Ark. 5, 652 S.W.2d 836 (1983). In *Gay,* the Medical Malpractice Act, Act 709 of 1979, was challenged under several qualified rights and Art. 2, § 13 (but not Art 5, § 32). Having not been raised below, this Court did not consider any separation of powers arguments, nor an elevated standard of review. Analogizing the Act's sixty-day pre-suit notice requirement to a statute of limitations, a "reasonableness" standard was applied without much elaboration. *Id., 280 Ark.* at 7. In *Simpson*, the plaintiffs challenged the same Act, urging a fundamental right requiring strict scrutiny. This Court dismissed the argument in three short paragraphs containing no analysis of the issues raised, demurring instead to its decision in *Gay*. Later, in *Jackson* v. *Ozment*, 283 Ark. 100, 671 S.W.2d 736 (1984), this Court took up the separation of powers issue, again holding the Act constitutional.

However, in *Weidrick v. Arnold*, 310 Ark. 138, 835 S.W.2d 843 (1992), this Court reversed *Simpson* and its progeny, observing that, "the sixty-day notice requirement was 'manifestly harsh' and 'an obvious hardship, the equal of which may not exist elsewhere in the

law.'" This Court applied an absolute standard of review, finding that the statute conflicted with the Arkansas Rules of Civil Procedure and violated the constitutional separation of powers. The same standard was applied in *Summerville v. Thrower*, 369 Ark. 231, 253 S.W.3d 415 (2007) (striking a pre-suit affidavit requirement in medical negligence cases). These cases represent a turn in constitutional review that should be carried through in this matter.

1. ART. 5, § 32 IS AN ABSOLUTE CONSTITUTIONAL PROVISION.

No court applies a rational basis test to determine if the legislature has unconstitutionally infringed on the power of the judicial branch. *See Legislative Research Com. by Prather v. Brown*, 664 S.W.2d 907 (Ky. 1984) ("any statute subject to the scrutiny of the separation of powers doctrine should be judged by a strict construction of those provisions."). Constitutional challenges involving separation of powers (which includes Art. 5, § 32 and Amend. 80, § 3) are necessarily absolute, and the rational basis test has no role in their application. *Weidrick and Summerville, supra*. *See also Spradlin v. Arkansas Ethics Comm'n*, 314 Ark. 108, 115, 858 S.W.2d 684, 688 (1993).

By its very placement in Article 5, Art. 5, § 32 is a separation of powers provision. It nature and language also confirm its absolute nature unequivocally. "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'. . . ." *Standard Pipe Line Company v. Burnett*, 188 Ark. 491, 501-03, 66 S.W.2d 637, 641 (1933).

Legislation either does or does not limit recovery and hence is or is not constitutional. Testing legislation against this provision using a rational basis test is the same as reading it to say that the legislature may not restrict recovery in a personal injury action *unless there is a*

conceivably rational basis to do so. The provision on its face does not admit of such a qualification nor does its history support it. (See, ATLA Amicus Curie, p. 4-18) Art. 5, §32 means what it says and must be so applied. *Walmsley, infra*.

2. ART. 2, § 13 IS AN ABSOLUTE AND IMPORTANT RIGHT.

Art. 2, § 13, although not necessarily a separation of powers limitation, should also be viewed as absolute. Absolute application is not limited to separation of powers provisions. *Lake View School District No. 25 v. Huckabee*, 351 Ark. 31, 71, 91 S.W.3d 472, 495 (2002) (enforcing "absolute constitutional duty to educate our children"); *Walmsley v. McCuen*, 318 Ark. 269, 885 S.W.2d 10 (1994). Again, legislation either does or does not infringe upon the rights protected, *i.e.,* it either does or does not deny a complete remedy for what should be an actionable wrong. As an education is either adequate or not, a remedy is either complete or not.

Tax exemptions, pharmacy regulation and the like are inherently legislative functions. But, civil justice in default form is defined by the common law and is the direct business of this Court. Statutes in derogation of the common law are narrowly construed, a rule inconsistent with deference. *See Thompson v. Bank of Am.*, 356 Ark. 576, 584, 157 S.W.3d 174, 179 (2004). Civil justice is an area where two branches of government share a voice. The courts have the first word, the legislature a second voice -- subject however, under our constitution, to a limitation that the legislative voice cannot offend the fundamental goals of justice by compromising a complete remedy. That is the plain purpose of Art. 2, §13, justified by history, the need for it is now vindicated by the subject provisions of the CJRA.

Choosing the right standard of review is as important to the Court's job in a constitutional review, as choosing the right screw driver is for a mechanic. It is imperative that

the standard of review adopted be sufficient to vindicate the intent of the provision. As, Art. 2, §13, concerns matters of primary concern to the courts (as with the adequacy of procedural due process) its application should be judged without deference to the legislative branch. *See Cleveland Board of Education v Loudermill,* 470 U.S. 532, 105 S.Ct. 1487 (1985). *See also*, *Constitutional Law*, Erwin Chemerinsky, Aspen Publications, § 7.4.2. It is a judicial determination whether a statute is consistent with Art. 2, § 13. There being no trip wires applicable to this right, there can be only one standard of review. A strict or intermediate standard of review is a minimal alternative to absolute application. (*See*, p. 1-20 Pt.'s Br. – all cites post date *Gay*) There is no rational for the extreme deference of the rational basis test, previously employed by default only.

B. §§ 16-55-202(a) & 16-55-201(b)(1) ARE PROCEEDURAL.

Before Amendment 80, this Court found that it had the inherent authority to enact rules of pleading, practice and procedure from its "general superintending control over all inferior courts of law and equity." *See* Ark. Const. art. 7, § 4 (repealed); *Ricarte v. State*, 290 Ark. 100, 717 S.W.2d 488 (1986). Under this inherent authority, this Court enacted the Uniform Rules of Evidence. *State v. Sypult*, 304 Ark. 5, 800 S.W.2d 402 (1990). This Court found that it shared its inherent authority with "the General Assembly, [but] when conflict [with rules of pleading, practice and procedure] arose, only to the extent that the conflict court rule's primary purpose and effectiveness are not compromised; otherwise, our rules remain supreme." *Id.,* 304 Ark. at 7. This Court used its implicit power (and the conflict test) to strike down statutory provisions that directly conflicted with the Court's procedural rules. *See also Price v. Price*, 341 Ark. 311, 16 S.W.3d 248 (2000) (holding Rule 58 of the Arkansas Rules of Civil Procedure controlled effective date of judgment) and *Weidrick v. Arnold*, 310 Ark. 138, *supra*.

Amendment 80 became effective on July 1, 2001, and made it "clear that rules of pleading, practice, and procedures for [Arkansas Courts] fall within the domain of [the Arkansas Supreme Court]." *Summerville, supra*. Amendment 80 was not made retroactive. *See* Ark. Const., amend. 80, § 22, repealer. Thus today the plain text of the constitution does not allow this Court to share this power with the legislature. The balance with the legislature's and this Court's authority is struck by the language of the amendment, with this Court granted the constitutional power to "prescribe the rules of pleading, practice and procedure for all courts." This Court has cautioned against the blending of explicit constitutional authority. *See Lake View, supra, 362 Ark. at 531.* This Court has also held that legislative invasion into the province of the judicial branch is an unconstitutional violation of the separation of powers. *See State v. Lester*, 343 Ark. 662, 38 S.W.3d 313 (2001).

If requiring a sixty-day notice or an affidavit prior to commencement of a suit is procedural, then establishing a scheme for trying the conduct of non-parties (a process not contemplated under the ARCP) by means of a new pleading (Notice of Non-Party fault), within a specified time table (120 days prior to trial) and mandating what must be in that pleading is obviously also procedural. The CJRA establishes a concurrent parallel process for determining fault of persons not in a lawsuit. The very concept up-ends the entire concept of the ARCP and represents a revolution in civil procedure. Some constitutions allow legislatures to alter civil process. *See* Alabama Const. Art. VI, Sec. 150 (2008). Arkansas's does not.

Respondents attempt to analogize the challenged provisions of the CJRA to the Comparative Fault Statute and the Uniform Contribution Among Tortfeasors Act. But these modernize the substantive law and expanded rights. They altered the issues addressed in court proceedings, but in no way reach into the processes of the courts.

Adjudication of the fault of immune parties (if justifiable) could be achieved without violence to established procedure by revoking immunity from suit of otherwise immune parties, bringing them before the court to defend their conduct. Such a procedure is no more innovative than the concept of proportionate liability and non-party fault, indeed less so. If we are going to dock an injured party for the conduct of others, those others should be made a part of the proceedings. The CJRA transforms a plaintiff into a defendant.

C. §§ 16-55-202(a) & 16-55-201(b)(1) LIMITS RECOVERY, PREVENTS COMPETE RECOVERY AND FAILS RATIONALITY TEST.

The respondents have tacitly conceded the lack of a rational connection with the formally stated purpose of the CJRA in its application to this case, noting instead that this Court need not confine itself to the stated purpose. However, that a point may not be dispositive does not mean it is not relevant. If legislation fails to connect to the stated purpose, if it plainly evidences on its face ignorance of the common law that it is abrogating and if the record reflects that sponsors have articulated constitutionally offensive purposes (*i.e.,* to limit recovery for injured plaintiffs as expressly prohibited by the constitution) it would seem unlikely that this Court can find a "rational" connection to a "legitimate" state purpose -- stated or unstated.

The respondents state at p. 5 of their brief, "A party marginally *responsible* for and accident could be held 100 percent liable." This is an intentional effort to conflate "fault" and "cause" by substituting the word "responsible" to bridge and blur the conceptual gap between them. This is the same rhetorical ploy used to promote the Act. The respondents know the distinction, as demonstrated by the statement on p. 6 of their brief: "Whether the 1 percent fault 'caused' 100 percent of the damages is a ***theoretical discussion*** which the Court need not engage in." (Emphasis added). The distinction between fault and proximate cause is not

theoretical but logically based upon foundational concepts of justice.[1] This invitation to the Court to ignore that fault is *not* cause is an admission that the point is beyond logical dispute.

Fault is a relative measure of *culpability* employed for the purpose of avoiding double recovery where more than one defendant has caused a single harm. Valid between defendants, its rational is lost when applied between plaintiff and defendant. Proportionate liability seeks to misemploy "fault" as cause, so as to justify limiting an injured party's recovery from one who has caused his injuries. Joint and several liability does not hold anyone responsible for damages they did not legally cause. However, proportionate liability can relieve a party of responsibility for damages they did cause.

Three men go hunting. One hunter fails to safety his gun, trips and discharges a fatal shot striking the second hunter. The third hunter, not anticipating the accident, but intent upon dispatching the second hunter, simultaneously fires an equally fatal shot at the second hunter. The third hunter may reasonably be found more at fault, perhaps 99% so, his conduct being more culpable. However, the first hunter's negligence was a sufficient cause of the death. That the third hunter intentionally killed is not a basis to relieve the negligent hunter of civil liability any more than his negligence should relieve the third of his criminal responsibility. Fault, which is a mixture of cause and culpability is a logical means to apportion payment between them, but is not a logical foundation to limit their liability to the injured party.

In this hypothetical, proportionate liability clearly violates the limitations of Art. 5, § 32. It diminishes the injured party's right to recover from each defendant that caused his harm. In the case of an injured worker, it does so by effectively *sharing the employer's constitutionally licensed immunity with the nonemployer tortfeasor!* The obvious intent of the

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[1] Joint and several liability, Brief of *Amicus Curiae* Public Justice, P.C., at pp. 6-15.

CJRA is to spread liability through the artifice of fault to immune non-parties, such as petitioner Darrell Johnson's employer, not so that they will become responsible for their share (an expressly precluded outcome and admission of the unreliability of the process, §16-55-202(c)(3)) but to diminish the named defendant's liability, which necessarily reduces the injured party's recovery to something less than his damages caused by the named defendant.

The injustice is obvious and undeniable, wholly apart from the dubious reliability inherent in a process that assigns fault, *in absentia*, to parties who in many cases may be immune or insolvent. The affront could not be more offensive, given the history of Art. 5, § 32 and a total rejection of the complete remedy requirement of Art. 2, § 13. The key word used in Art. 5, § 32 is "recovered." This Court has made it clear that effective limitations of recovery are barred by Article 5, § 32. "When the remedy is lessened, the liability to that extent is destroyed." *Standard Pipe Line, supra*, 188 Ark. at 501-03. Art. 2, § 13 requires a "complete" remedy for every wrong. Being unconstitutional, reducing an injured party's recovery or denying a complete recovery cannot be a legitimate state purpose and without that purpose there can be not rationality to the Act.

Under prior law a non-party's fault was relevant (if at all) only to avoid proximate causation relative to the named party's conduct. Non-party fault that involves assigning fault for purposes of allocating liability is not the same thing as trying the "empty chair." Nor is it "intellectual honesty," as the respondents contend (*see* Respondents' Brief at Arg 10), to allow assignment of liability to absent, immune or insolvent parties based upon a determination of "fault" rather than cause.

D. NON-PARTY FAULT HAS NOT FOUND GENERAL ACCEPTANCE.

After asking this Court to ignore the crucial fundamental merits of the CJRA, *i.e.* the difference between cause and fault, the respondents resort to every miscreant's last resort: "others have done it." First, while many states have passed statutes modifying the operation of joint and several liability, they do not necessarily allow apportionment to non-parties. The challenge here is not about the constitutionality of proportionate liability *per se*, but the combination of it with a phantom defendant procedure that includes immune non-parties, like an employer.

Secondly, the fact that another legislature has done something similar does not answer the question of constitutionality. Petitioners have cited the Court to two cases holding statutes like the subject one unconstitutional, as well as cases holding other similarly motivated "tort reform" statutes unconstitutional. Thirdly, state constitutions are not generic. The last point is of particular moment in considering the respondents' cited cases.

A review of the respondents' cases reveals the respondents' assertion of constitutional acceptance to be largely an illusion. None of the following cases involves a constitutional challenge, and some do not even involve an application of nonparty fault: *Ozaki v. Assn. of Apt. Owners*, 954 P.2d 644 (Haw. 1998) (comparative fault statute that does not allow a plaintiff to recover against a defendant whose fault is less than his own); *Yslava v. Hughes Aircraft Co.*, 936 P.2d 1274 (Ariz. 1997) (held that personal injury and wrongful death arising from pollution fell within in pollution exception to proportionate liability statute); *Donner v. Kearse*, 662 A.2d 1269 (Conn. 1995) (court noted as history that legislature had adopted a phantom defendant concept that "did not provide the plaintiff with a means of securing payment of damages unless that person was also a party," but repealed it a year later, making it a non-issue in the case); *Gouty v. Schnepel*, 795 So.2d 959 (Fla. 2001) (whether the defendant

was entitled to a credit for a settlement reached with another party); *In re Unitec Elevator Servs. Co.*, 178 S.W.3d 53 (Tex. 2005) (denied *writ of mandamus* seeking to require trial court to allow filing of a non-party fault notice); *Stanley v. Aeroquip Corp.*, 1999 U.S. App. Lexis 8034 (6th Cir. 1999) (held payment of worker's compensation benefits under the statute constituted a settlement allowing fault allocation to employer as settling party).

As it turns out, only three of the cases cited by the respondents actually address the constitutionality of a law altering joint and several liability in some manner, and all three have meaningful distinctions. In *Haff v. Hettich*, 593 N.W.2d 383 (N.D. 1999), the only argument advanced was substantive due process (and not procedural due process or constitutional provision analogous to Art. 2, § 13 or Art. 5, § 32), and nothing to suggest that the missing party could not have been made a party or was immune or insolvent. *Salazar v. Am. Sterilizer Co.*, 5 P.3d 357 (Colo. App. 2000), involved an immune employer being made a nonparty defendant and considered substantive and procedural due process, but did not consider any of the other issues raised here, including a higher standard of review.

Evans v. State, 56 P.3d 1046 (Alaska 2002), likewise addressed only due process. This decision was more in-depth on the limited challenges addressed. It differentiated the Alaska statute from the Montana statute struck down in *Plumb v. Missoula County Dist. Ct.,* 927 P.2d 1011 (Mont. 1996), noting a number of safeguards in the Alaska statute missing from the Montana statute, including that no apportionment would be allowed to a non-party that could have been made a party. The court also ducked the issue of immune employers (central here) on grounds that the challenge was facial in nature and that situation was hypothetical. *Id.* at 1063 n.105.

Thus, there is no compelling ratification of non-party fault in the case law. At best, there is a split in the case law related to statutory concepts that modify joint and several liability when the challenge is based upon due process arguments and the standard of review is conceded to be a rational basis test. The more rigorously reasoned cases have tossed non-party fault provisions.

II. ARK. CODE ANN. § 16-55-212(b) IS AN UNCONSTITUTIONAL.

A. LEGISLATIVELY PRESCRIBED RULE OF PRACTICE AND PROCEDURE.

Applying the strict standard required by the separation of powers shows that Ark. Code Ann. § 16-55-212(b) is an unconstitutional legislative attempt to "prescribe" a rule of practice and procedure. Ark. Code Ann. § 16-55-212(b) explicitly limits the "***evidence*** of damages for the cost of any necessary medical care, treatment or services received." The common thread through the pre-Amendment 80 cases is that "rules of evidence are rules of practice and procedure and not substantive law." *See Sypult*, *supra,* 304 Ark. at 9 (Newbern, J., concurring).

Because this Court's power to prescribe rules of pleading, practice and procedure is no longer implicit, due to the passage of Amendment 80, this Court must interpret the judiciary's power that flows from Amendment 80, § 3 as written, giving each word its obvious and common meaning, and neither rules of construction nor rules of interpretation may be used to defeat its clear and certain meaning. *Frank v. Barker*, 341 Ark. 577, 582, 20 S.W.3d 293 (2000). Amendment 80, § 3 does not contemplate that the power of pleading, practice and procedure is shared with the legislative branch. If that were the case, Amendment 80, § 3 would have to include language giving this Court the power to "defer to the General Assembly, when conflicts arise." *Sypult, supra,* 304 Ark. at 7. Article 4, § 2 of the Arkansas Constitution

prohibits the exercise of power “belonging to” another branch. Whether or not the power has actually been exercised by this Court is irrelevant to the Court’s analysis. Amendment 80 and the separation of powers prohibit “legislative incursion into the *sphere* of judicial authority.” *Billings v. Aeropres Corp.*, 522 F.Supp.2d 1121, 1128 (E.D. Ark. 2007) (emphasis supplied). Thus, the pre-Amendment 80 precedent allowing a limited sharing of between the legislative and judicial branch would now be an unconstitutional blending of explicit constitutional authority.

Even under the pre-Amendment 80 conflict test, Ark. Code Ann. § 16-55-212(b) directly conflicts with the collateral source rule, along with Rule 401 of the Arkansas Rules of Evidence and AMI 2215. *Montgomery Ward & Co. v. Anderson*, 334 Ark. 561, 976 S.W.2d 382 (Ark. 1998) (collateral source rule); *O’Bryan v. Hedgespeth*, 892 S.W.2d 571, 576 (Ky. 1995) (finding medical bills statute conflicted with Kentucky Rule of Evidence 401, defining relevant evidence); AMI 2215 (instructing the jury to not reduce the amount of damages “by any (*e.g.* worker’s compensation benefits, insurance benefits, insurance payments) received or to be received by, or on behalf of (plaintiff).”).

The only case to squarely address a medical bills statute on grounds similar to that presently before the Court is *O’Bryan*, *supra,* where the court found that the statute violated the separation of powers. The only other case to consider a medical bills statute on separation of powers grounds is *Marsh v. Green*, 782 So.2d 223 (Ala. 2000). This case is distinguishable from *Marsh* because the Alabama Supreme Court’s powers to enact procedural rules “may be changed by a general act of statewide application.” *Id.* at 232. That is not the case in Arkansas.

Bernier v. Burris, 113 Ill.2d 219 (1986), only involved a challenge to the abrogation of the collateral source rule on due process and equal protection grounds. Other courts have found similar legislation invalid. *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980) (violation of equal protection); *State ex. rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999) (violation of due process). The respondents cite *Pinillos v. Cedars of Leb. Hosp. Corp.*, 403 So.2d 365 (Fla. 1981). But there, the court did not consider whether the abrogation of the collateral source rule was a "procedural" rule. In *Grabau v. Dep't of Health*, 816 So.2d 701 (Fla. 2002), the Florida statute did not deal with the admissibility of evidence, but required a post-judgment court-reduction of damages. The unpublished case of *Fleming v. International Transport, Inc.*, 1992 WL 310591 (Conn. Super. 1992), is equally unpersuasive because it (like *Grabau*) involved a post-judgment reduction and did not implicate practice and procedure.

Further, it is incorrect to say, as the respondents do, that policy decisions are exclusively within the purview of the legislature. All rules of pleading, practice and procedure involve policy. The Arkansas Rules of Civil Procedure are to be interpreted and administered to "secure the just, speedy and inexpensive determination of every action." *See* ARCP 1. The Arkansas Rules of Evidence are "construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence, to the end that the truth may be ascertained and proceedings justly determined." *See* ARE 102. These are certainly statements of policy.

B. A.C.A. § 16-55-212(b) LIMITS DAMAGES.

U.S. District Judge Jimm Hendren noted, "The Arkansas Supreme Court has squarely held . . . that a personal injury plaintiff is entitled – assuming a successful showing of liability –

to recover the amount of payments made (or written off) on her behalf by a collateral source . . . yet ACA § 16-55-212(b) would prevent her from doing precisely that." *Burns v. Ford Motor Co.*, 549 F.Supp.2d 1081, 1085 (W.D. Ark. 2008). Judge Hendren found "that the Arkansas Supreme Court would, if presented with the issues raised by the motion now under consideration, find that A.C.A. § 16-55-212(b) violates Article 5 § 32." Because Ark. Code Ann. § 16-55-212(b) effectively limits the damages a plaintiff can recover by precluding their introduction into evidence, this is an additional ground for its unconstitutionality. As stated with respect to the non-party fault provisions, Article 5, § 32 provides a real right given to the people of Arkansas.

CONCLUSION

The CJRA is a direct affront to longstanding fundamental concepts of civil justice. It boldly violates constitutional provisions drafted expressly to preclude such legislation and plainly violates this Court's prerogatives to regulate civil procedure. The avowed purpose of the CJRA, publicly acknowledged by it proponents, is to limit remedies for personal injury victims. Immunity for wrong doers is injustice for the individual, and injustice is never a public good or valid state purpose.

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