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A TWILIGHT ZONE NO MORE: THE ARKANSAS SUPREME COURT PROVIDES TORT REFORM DRAFTING TIPS WHILE DISTANCING ITSELF FROM DEFERENCE TO THE GENERAL ASSEMBLY IN *JOHNSON v. ROCKWELL AUTOMATION, INC.*

Jodie L. Hill\*

I. INTRODUCTION

Tort reform has generated national controversy since its inception in the late 1960s.<sup>1</sup> The tort reform movement did not begin in Arkansas, however, until 1979 with the passage of the Medical Malpractice Act.<sup>2</sup> The topic of tort reform continues to inspire heated debate, both nationally and locally, which has recently included discussion of federally mandated tort reform to combat the rising cost of health care.<sup>3</sup> The Arkansas General Assembly's latest foray into tort reform, the Civil Justice Reform Act of 2003 (CJRA),<sup>4</sup> has encountered its fair share of scorn with its constitutionality being continuously tested in state and federal trial courts and a spate of articles criticizing it for a multitude of reasons.<sup>5</sup>

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1. Courtney A. Nelson, Note, *To Truly Reform We Must Be Informed: Davis v. Parham, the Separation of Powers Doctrine, and the Constitutionality of Tort Reform in Arkansas*, 59 ARK. L. REV. 781, 787–90 (2006). See generally Kimberly J. Frazier, Note, *Arkansas's Civil Justice Reform Act of 2003: Who's Cheating Who?*, 57 ARK. L. REV. 651, 653–58 (2004) (discussing factors that contributed to a national movement towards tort reform).

2. See Nelson, *supra* note 1, at 790–91.

3. Ceci Connolly, *Obama to Speed Up Tort Reform Tests, but Doctors Want More*, WASH. POST, Sept. 18, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/17/AR2009091704676.html?hpid=topnews>.

4. 2003 Ark. Acts 649 (codified as amended in ARK. CODE ANN. §§ 16-55-201 to -220).

5. Brian G. Brooks, *Phantoms, Empty Chairs, and Diminished Recoveries: Why the "Empty-Chair" Provision of Act 649 Violates the Arkansas Constitution*, ARKANSAS LAWYER, Winter 2009, at 14. See Joseph R. Falasco, *Sizing up a Multi-Party Tortfeasor Suit in Arkansas: A Tale of Two Laws—How Fault Is, and Should Be, Distributed*, 26 U. ARK. LITTLE ROCK L. REV. 251 (2004); Frazier, *supra* note 1; Nancy C. Marcus, *Phantom Parties and Other Practical Problems with the Attempted Abolition of Joint and Several Liability*, 60 ARK. L. REV. 437 (2007); Nelson, *supra* note 1. *Contra* Jason W. Earley, *I Ain't Afraid of No Ghost: Why the Arkansas Supreme Court of Arkansas Should Uphold Fair Share Liability and Non-Party Apportionment*, ARKANSAS LAWYER, Winter 2009, at 18. See also Hamilton

The Arkansas Supreme Court recently issued a decision striking down two of the CJRA's provisions as unconstitutional. In that case, *Johnson v. Rockwell Automation, Inc.*,<sup>6</sup> the court held that the two statutes at issue, Arkansas Code sections 16-55-202 and 16-55-212(b), violated separation of powers.<sup>7</sup> This article will focus solely on the separation of powers as it was the argument relied upon by the court in *Johnson*. This article will begin with a review of the court's movement from deference to nondeference to the General Assembly in regard to rule-making related to public policy,<sup>8</sup> followed by a summary of the facts of *Johnson* and the court's holdings.<sup>9</sup> The article will next outline the problems with the substantive-procedural distinction relied upon by the court in *Johnson*<sup>10</sup> and provide an analysis of Arkansas Code sections 16-55-202 and -212(b) under prior separation of powers precedent for rule-making related to public policy.<sup>11</sup> The article will then include proposed revisions of Arkansas Code sections 16-55-202 and -212(b) to comply with the directives of *Johnson*.<sup>12</sup> The article will conclude with a call for the Arkansas Supreme Court to return to an attitude of cooperation with the General Assembly to "allow a healthy and orderly development of procedural reform" for rule-making regarding public policy.<sup>13</sup>

## II. THE ARKANSAS SUPREME COURT'S JOURNEY FROM DEFERENCE TO NONDEFERENCE TO THE GENERAL ASSEMBLY IN RULE-MAKING RELATED TO PUBLIC POLICY

Prior to the adoption of amendment 80 to the Arkansas Constitution by general election in November 2000,<sup>14</sup> the Arkansas Supreme Court had inherent authority over rules of practice and procedure, including rules of

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v. Allen, 100 Ark. App. 240, 253–56, 267 S.W.3d 627, 637–39 (2007) (Baker, J. dissenting) (arguing that the CJRA should have no impact on standard of review for orders granting motions for summary judgment in medical malpractice cases).

6. 2009 Ark. 241, \_\_\_ S.W.3d \_\_\_.

7. *Id.* at 8, \_\_\_ S.W.3d at \_\_\_.

8. See discussion *infra* Part II.

9. See discussion *infra* Part III.

10. See discussion *infra* Part IV.

11. See discussion *infra* Part IV.

12. See discussion *infra* Part V.

13. *Curtis v. State*, 301 Ark. 208, 783 S.W.2d 47, 48 (1990); see discussion *infra* Part V.

14. <http://www.sos.arkansas.gov/ar-constitution/arcamend80/arcamend80.htm>. Some have suggested that Amendment 80 eliminated any ambiguity over the court's supreme authority over rule-making. Brooks, *supra* note 5, at 42. However, the Arkansas Supreme Court continued to show deference to the General Assembly in rule-making related to public policy even after the enactment of Amendment 80. See *infra* notes 30, 31, and 37. See also *Cato v. Craighead County Cir. Ct.*, 2009 Ark. 334, \_\_\_ S.W.3d \_\_\_.

evidence, under article 7, section 4 of the Constitution of 1874.<sup>15</sup> Rules of court had existed from as far back as 1457,<sup>16</sup> and authority for such rule-making existed because of (1) inherent power under separation of powers, (2) express constitutional grant, or (3) enabling legislation.<sup>17</sup> From the early 1940s, the trend throughout courts in the United States favored court regulation of its practice and procedure as part and parcel of separation of powers.<sup>18</sup> The Arkansas Supreme Court shared this viewpoint.<sup>19</sup> In the 1970s, the court adopted several sets of procedural rules including the Arkansas Rules of Civil Procedure and the Supersession Rule, which provides as follows: “All laws in conflict with the Arkansas Rules of Civil Procedure, Rules of Appellate Procedure and Rules for Inferior Courts shall be deemed superseded as of the effective dates of these rules.”<sup>20</sup> Each of these rules became effective on July 1, 1979.<sup>21</sup>

The Arkansas Supreme Court also understood, however, that complete delineation of rule-making authority to the judiciary was impracticable and impossible because of the overlap between the everyday governmental functions of the General Assembly and the courts.<sup>22</sup> The court noted that a twi-

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15. *Ricarte v. State*, 290 Ark. 100, 104–05, 717 S.W.2d 488, 489–90 (1986) (citing John H. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928)). See also Thomas F. Green, Jr., *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A. J. 482 (1940); Edmund J. Morgan, *Rules of Evidence—Substantive or Procedural?*, 10 VAND. L. REV. 467 (1957); Charles W. Joiner & Oscar J. Miller, *Rules of Practice & Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623 (1957). In *Ricarte*, the Arkansas Supreme Court formally adopted the Uniform Rules of Evidence under its inherent rule-making authority. *Ricarte*, 290 at 104, 717 S.W.2d at 489. Interestingly, all of article 7 was repealed by amendment 80, which became effective July 1, 2001. <http://www.sos.arkansas.gov/ar-constitution/arcart7/arcart7-1.htm>.

16. *Curtis*, 301 Ark. at 210, 783 S.W.2d at 48 (citing Joiner & Miller, *supra* note 15).

17. *Id.* at 210, 783 S.W.2d at 48.

18. See *Ricarte*, 290 Ark. at 104–05, 717 S.W.2d at 489–90 (citing Wigmore, *supra* note 15; Green, *supra* note 15; Morgan, *supra* note 15). See also *Curtis*, 301 Ark. at 210, 783 S.W.2d at 48 (citing Joiner & Miller, *supra* note 15).

19. *Ricarte*, 290 Ark. at 104, 717 S.W.2d at 490. Arkansas’s separation of powers doctrine is contained in its Constitution:

The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to-wit: Those which are legislative, to one, those which are executive, to another, and those which are judicial, to another.

No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

ARK. CONST. art. IV, §§ 1–2.

20. 2 ARKANSAS RULES ANNOTATED 12.3 (2009).

21. *Weidrick v. Arnold*, 310 Ark. 138, 141, 835 S.W.2d 843, 845 (1992).

22. *Curtis*, 301 Ark. at 210, 783 S.W.2d at 48.

light zone existed between the powers of the court and the powers of the General Assembly in determining which entity should establish some procedures: "[T]here is a crepuscular, or twilight, zone which makes it difficult to determine whether the legislature or the judiciary should establish some procedures."<sup>23</sup>

Of course, the court agreed that—theoretically—all rules of practice and procedure were governed by the court:

[I]f every power exercisable in government must go exclusively and as a whole into one of the three categories, [executive, legislative, or judicial,] the power of making detailed rules of legal procedure is analytically judicial—it is inherent in the exercise of the power committed to the judiciary of determining controversies and applying laws.<sup>24</sup>

Nevertheless, such rigorous delineation was unrealistic in the day-to-day operation of government and the courts.<sup>25</sup> Because this area of indefiniteness<sup>26</sup> exists between the functions and activities of the judiciary and the General Assembly, conflicts between the rule-making functions of these bodies necessarily occur and can be resolved only through cooperation between them.<sup>27</sup>

One such conflict occurred in *Curtis v. State*,<sup>28</sup> in which the defendant challenged his rape conviction of his girlfriend's seven-year-old daughter because the conviction had been based on the child's videotaped testimony.<sup>29</sup> The General Assembly had enacted Arkansas Code section 16-44-203, a statute that authorized the prosecution to videotape a young victim's testimony outside of the jury's presence and then show the videotaped testimony to the jury.<sup>30</sup> This process was followed in *Curtis*.<sup>31</sup> With this back-

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23. *Id.* at 210, 783 S.W.2d at 48.

24. *Id.* at 211, 783 S.W.2d at 48 (quoting Roscoe Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 37 (1952)).

25. *Id.* at 211-12, 783 S.W.2d at 49 (quoting Joiner & Miller, *supra* note 15). Even political scientists have discarded "the theory of complete and exclusive authority over precisely delineated spheres of activity." *Id.* at 211, 783 S.W.2d at 49 (quoting Joiner & Miller, *supra* note 15).

26. Joiner and Miller described this overlap as "a twilight zone of indefiniteness."

It is well established that the operational areas of everyday governmental functions are not defined with precision and are not capable of assignment to distinctive categories; instead there is and always has been a twilight zone of indefiniteness, wherein the functions and activities of the three branches overlap and conflict, and wherein cooperation among the three branches has been key to the resolution of the conceptual puzzle.

Joiner & Miller, *supra* note 15, at 629.

27. *Curtis*, 301 Ark. at 211, 783 S.W.2d at 49 (quoting Joiner & Miller, *supra* note 15).

28. 301 Ark. 208, 783 S.W.2d 47 (1990).

29. *Id.* at 209-10, 783 S.W.2d at 48.

30. *Id.*

drop—and in order to allow for development of procedural reform between the judiciary and the General Assembly in this twilight zone—the Arkansas Supreme Court established the following purpose-focused framework to facilitate cooperation with the General Assembly:

If the purpose of the rule is to permit a court to function efficiently, the [court's] rule-making power is supreme unless its impact conflicts with a fixed public policy which has been legislatively or constitutionally adopted and has at its basis something other than court administration. When the purpose of the rule is to provide for the establishment or maintenance of the efficient administration of judicial business, and it does only that, the scope of the power vested in the courts is complete and supreme. However, until an area of practice or procedure is preempted by rules of court, we will give full effect to legislation. This will allow a healthy and orderly development of procedural reform.<sup>32</sup>

From this pronouncement, two bright-line rules regarding legislatively enacted rules of practice and procedure can be derived: (1) any rule related solely to court functionality or administration—and not public policy—is unconstitutional as a violation of separation of powers,<sup>33</sup> and (2) any rule related to an area of practice or procedure<sup>34</sup> for which the Arkansas Supreme Court has not previously adopted a rule is constitutional because the court has not yet asserted its power in that area.<sup>35</sup> Relying on the second rule, the *Curtis* court held that, because the Arkansas Supreme Court had yet to deal with videotaping a young victim's testimony outside of the jury's presence, the statute was not unconstitutional even though it dealt with procedure and evidence.<sup>36</sup> Because the statute dealt with an area of practice and procedure for which the court had not asserted its rule-making authority, the court found no need to clarify the third, less clear rule regarding

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31. *Id.*

32. *Id.* at 212, 783 S.W.2d at 49.

33. *Id.* The court relied upon this rule in *Price v. Price*, in which it held Arkansas Code section 16-65-121 unconstitutional because the statute dealt with when a court's decision became effective. 341 Ark. 311, 315–16, 16 S.W.3d 248, 251 (2000). Likewise, the court held unconstitutional Arkansas Code section 16-67-201, which provided a six-month deadline to appeal a county court order. *Pike Ave. Dev. Co. v. Pulaski County*, 343 Ark. 338, 341, 37 S.W.3d 177, 178 (2001).

34. While not necessarily synonymous, the phrases “court functionality or administration” and “practice and procedure” are used interchangeably in this article. Any distinction between the two phrases has not been relied upon by the Arkansas Supreme Court in its decisions related to separation of powers.

35. *Curtis*, 301 Ark. at 212, 783 S.W.2d at 49. The Arkansas Supreme Court later relied upon this rule in *Sera v. State* to uphold the rape-shield statute, ARK. CODE ANN. § 16-42-101(b), as constitutional. 341 Ark. 415, 443, 17 S.W.3d 61, 78 (2000), *cert. denied*, 531 U.S. 998 (2000).

36. *Curtis*, 301 Ark. at 212, 783 S.W.2d at 49.

rule-making that touched upon functionality or administration of courts, but also related to "a fixed public policy which has been legislatively or constitutionally adopted"—or the twilight zone between the judiciary and the General Assembly.<sup>37</sup>

The Arkansas Supreme Court provided a clearer formulation of the third rule in *State v. Sypult*.<sup>38</sup> In that case, the statute at issue, Arkansas Code section 12-12-511(a), provided that confidential statements by a patient to a physician or psychotherapist were admissible as evidence in "any proceeding regarding child abuse, sexual abuse, or neglect of a child or the cause thereof."<sup>39</sup> The court noted that the General Assembly's exception contradicted the court's previously established rule of evidence, the physician- and psychotherapist-patient privilege.<sup>40</sup> The court then explained that, if the General Assembly enacted a rule that conflicts with a court rule, then the court would defer to the General Assembly only if the court rule's "primary purpose and effectiveness is not compromised."<sup>41</sup> The court noted that the privilege at issue existed to encourage patients to communicate openly with these medical care providers without fear of disclosure, and the General Assembly's rule completely defeated this purpose in certain instances.<sup>42</sup> The court thus held the statute unconstitutional.<sup>43</sup>

After *Sypult*, Arkansas courts and the General Assembly had a clear framework to follow in determining whether the General Assembly's rule-making violated separation of powers:

- (1) A General Assembly rule dealing only with court functionality or administration—and not public policy—is unconstitutional.<sup>44</sup>
- (2) A General Assembly rule for an area of practice or procedure for which the Arkansas Supreme Court has never adopted a rule is constitutional.<sup>45</sup>

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37. *Id.*

38. 304 Ark. 5, 800 S.W.2d 402 (1990).

39. *Id.* at 6, 800 S.W.2d at 403-04 (quoting ARK. CODE ANN. § 12-12-511(a)).

40. *Id.* at 6-7, 800 S.W.2d at 404.

41. *Id.* at 7, 800 S.W.2d at 404. The court followed the same rule in *Casement v. State*, in which it held unconstitutional a statute regulating bond procedures for post-conviction appeals. 318 Ark. 225, 230, 884 S.W.2d 593, 595-96 (1994). The court followed a similar framework in *White v. Newport*, in which it upheld the municipal tort immunity statute, Arkansas Code section 21-9-301. 326 Ark. 667, 672, 933 S.W.2d 800, 803 (1996). Likewise, the court upheld the timeline for adjudication hearings set forth in the juvenile code, even though the statute conflicted with Rule 40(b) of the Arkansas Rules of Civil Procedure. *Hathcock v. Ark. Dep't of Human Servs.*, 347 Ark. 819, 824, 69 S.W.3d 6, 9 (2002).

42. *Sypult*, 304 Ark. at 8, 800 S.W.2d at 404.

43. *Id.*

44. *Curtis*, 301 Ark. at 212, 783 S.W.2d at 49.

45. *Id.*

(3) A General Assembly rule dealing with either court administration or practice and procedure that implements a legislative public policy and conflicts with a court rule is constitutional only if it does not compromise the primary purpose and effectiveness of the conflicting court rule.<sup>46</sup>

The Arkansas Supreme Court has consistently followed these rules with two notable exceptions, *Weidrick v. Arnold*<sup>47</sup> and *Summerville v. Thrower*.<sup>48</sup>

*Weidrick* concerned the constitutionality of the sixty-day notice requirement prior to filing a medical malpractice complaint contained in Arkansas Code section 16-114-204(a).<sup>49</sup> The court had previously held that the statute did not conflict with Rule 3 of the Arkansas Rules of Civil Procedure<sup>50</sup> despite adding an additional step for a plaintiff wishing to file a medical malpractice complaint.<sup>51</sup> In *Weidrick*, however, the court reversed course and concluded that such a conflict did exist, overruling its previous holdings.<sup>52</sup> Based on this conflict, the court held the statute unconstitutional.<sup>53</sup> Similarly, the *Summerville* case dealt with the constitutionality of Arkansas Code section 16-114-209(b), which required a medical malpractice plaintiff to file an affidavit of reasonable cause by an expert within thirty days of filing suit.<sup>54</sup> Relying on *Weidrick*, the court struck down the statute as conflicting with Rule 3.<sup>55</sup>

After determining a conflict existed, neither the *Weidrick* nor *Summerville* courts attempted to determine whether the General Assembly's rule-making compromised Rule 3's primary purpose and effectiveness as required by the third *Sypult* rule. Additionally, neither court considered the public policy behind the General Assembly's rule-making.<sup>56</sup> Instead,

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46. *Sypult*, 304 Ark. at 7, 800 S.W.2d at 404.

47. 310 Ark. 138, 835 S.W.2d 843 (1992).

48. 369 Ark. 231, 253 S.W.3d 415 (2007).

49. *Weidrick*, 310 Ark. at 140–41, 835 S.W.2d at 844.

50. Rule 3 of the Arkansas Rules of Civil Procedure deals with commencement of a lawsuit. In addition to filing a complaint with the clerk of court, Arkansas Code section 16-114-204(a) also required a potential medical malpractice plaintiff to provide a medical provider with sixty days' notice prior to filing suit.

51. *Jackson v. Ozment*, 283 Ark. 100, 101–02, 671 S.W.2d 736, 738 (1984).

52. *Weidrick* at 141–42, 835 S.W.2d at 845 (citing *Simpson v. Fuller*, 281 Ark. 471, 665 S.W.2d 269 (1984); *Jackson v. Ozment*, 283 Ark. 100, 671 S.W.2d 736 (1984)).

53. *Id.* at 146–47, 835 S.W.2d at 848.

54. *Summerville*, 369 Ark. at 232, 253 S.W.3d at 416.

55. *Id.* at 239, 253 S.W.3d at 420.

56. The *Weidrick* court merely noted that the sixty-day notice statute had been enacted as part of a statutory scheme “to help control the spiraling cost of health care.” 310 Ark. at 140–41, 835 S.W.2d at 844 (quoting 1979 Ark. Acts 709, § 11). Similarly, the *Summerville* court observed that the affidavit requirement was enacted to lower medical-malpractice insurance costs. 369 Ark. at 238, 253 S.W.3d at 420. In 1996, approximately eighty insurance companies provided medical malpractice insurance coverage for Arkansas doctors. Frazier,



through these cases, the Arkansas Supreme Court focused solely on whether the General Assembly's rule was substantive or procedural in nature. In *Weidrick*, the court noted the distinction in relation to the Supersession Rule,<sup>57</sup> but provided little discussion about the distinction.<sup>58</sup> In *Summerville*, however, the court finally provided some detail for the substantive-procedural division.<sup>59</sup> Quoting from Black's Law Dictionary, the court outlined the differences between substantive and procedural law:

The boilerplate definition of substantive law is "the part of the law that creates, defines, and regulates the rights, duties, and powers of parties," while procedural law is defined as "[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves."<sup>60</sup>

In his dissent in *Weidrick*, Justice Steele Hayes foresaw problems with making such a stark distinction.<sup>61</sup> When determining whether a provision is substantive or procedural, the court looked only at the specific provision at issue instead of the whole statutory scheme.<sup>62</sup> As Justice Hayes noted, Arkansas Code section 16-114-204(a) was part "of a series of substantive laws [intended to] completely supplant the common-law medical malpractice action."<sup>63</sup> He believed that by striking down one provision, the court placed the whole statutory scheme in danger.<sup>64</sup> Further, some procedural issues, such as statutes of limitations, are outside of the court's rule-making powers, making the distinction meaningless.<sup>65</sup>

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*supra* note 1, at 660-61. By 2004, that number had dropped to eleven. *Id.*

57. See *supra* Part II for additional discussion regarding the Supersession Rule. None of the cases following *Weidrick* contained any discussion of the Supersession Rule.

58. *Weidrick*, 310 Ark. at 144, 835 S.W.2d at 846.

59. *Summerville*, 369 Ark. at 237, 253 S.W.3d at 419-20.

60. *Id.* at 327, 253 S.W.3d at 419-20 (quoting BLACK'S LAW DICTIONARY 1443, 121 (7th ed. 1999)).

61. *Weidrick*, 310 Ark. at 147-53, 835 S.W.2d at 848-51.

62. *Id.* at 149, 835 S.W.2d at 849.

63. *Id.*

64. *Id.* at 151, 835 S.W.2d at 850. Specifically, Justice Hayes noted that the sixty-day notice requirement should have been read in conjunction with Arkansas Code section 16-114-204, the statute of limitations clause, and Arkansas Code section 16-114-205, which eliminated the requirement for any allegation of damages in the complaint. *Weidrick*, 310 Ark. at 149, 835 S.W.2d at 849. Without the sixty-day notice, a defendant would have no information regarding a plaintiff's damages until discovery was completed. *Id.* at 151, 835 S.W.2d at 850. In addition, the sixty-day notice prolonged the statute of limitations for medical malpractice actions until as much as two years and five months. *Id.*

65. *Weidrick*, 310 Ark. at 152, 835 S.W.2d at 850-51. The *Summerville* court, however, attempted to explain away this conundrum:

"[A] true statute of limitations, one that will be considered procedural in nature, extinguishes only the right to *enforce the remedy* and not the substantive right it-

Before and between the 1992 *Weidrick* decision and 2007 *Summerville* decision, the Arkansas Supreme Court applied the separation of powers analysis it had set forth in *Curtis* and its progeny.<sup>66</sup> With its decision in *Johnson v. Rockwell Automation, Inc.*,<sup>67</sup> however, the court signaled its intent to forgo any of the *Curtis* rules and apply only the procedural—substantive distinction from *Weidrick* and *Summerville*.<sup>68</sup>

### III. JOHNSON V. ROCKWELL AUTOMATION, INC.<sup>69</sup>

Following the enactment of the CJRA in 2003, its constitutionality was challenged frequently in state and federal trial courts. In 2007, the Arkansas Supreme Court refused to address the constitutionality of the CRJA because those issues were moot on appeal.<sup>70</sup> The next opportunity the court had to consider those arguments was *Johnson*.

#### A. Facts and Procedural History

According to the complaint filed in federal court, Darrell Johnson was injured on February 24, 2004, while he was working as a control systems mechanic for Eastman Chemical Company (“Eastman”).<sup>71</sup> At the time of the accident, Johnson was working in an Allen–Bradley “starter bucket,” which

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self.” . . . [I]f the statute extinguished the right to bring the lawsuit itself, rather than the right to enforce the remedy, then it would be substantive. *Summerville*, 369 Ark. at 238, 253 S.W.3d at 420 (quoting *Middleton v. Lockhart*, 355 Ark. 434, 438, 139 S.W.3d 500, 502–03 (2003)). Unfortunately, the difference between substantive and procedural law is easily stated, but difficult to fully explain. How could a plaintiff ever enforce a remedy without bringing a lawsuit?

66. See *supra* notes 35, 37, and 40–45 and accompanying text.

67. 2009 Ark. 241, \_\_\_ S.W.3d \_\_\_\_.

68. Since *Johnson*, the Arkansas Supreme Court followed the new rule in *Cato v. Craighead County Circuit Court* upholding Arkansas Code section 12-62-403, which restricts service upon military personnel during service. 2009 Ark. 234, at 1, \_\_\_ S.W.3d \_\_\_, \_\_\_. The court stated the following in *Cato*: “Under our holding in *Johnson*, the only question that need be asked is whether the challenged legislation dictates procedure. If the legislature bypasses our rules of pleading, practice, and procedure by setting up a procedure of its own, then it violates the separation-of-powers doctrine.” *Id.* at 8, \_\_\_ S.W.3d at \_\_\_\_\_. The court found the provision to be substantive law because it created a special right for military personnel. *Id.* at 8–9, \_\_\_ S.W.3d at \_\_\_\_.

69. 2009 Ark. 241, \_\_\_ S.W.3d \_\_\_\_ (*Johnson II*).

70. *Shipp v. Franklin*, 370 Ark. 262, 267, 258 S.W.3d 744, 748–49 (2007). In *Shipp*, the defendant filed a third-party complaint against Sarah Sanders. *Id.* at 263, 258 S.W.3d at 746. At the conclusion of trial, the jury found Sanders 100 percent responsible. *Id.*, 258 S.W.3d at 748–49. Sanders subsequently settled with *Shipp*. *Id.* at 267, 258 S.W.3d at 749. Accordingly, the court refused to rule on the constitutional challenges to the CJRA as its decision would have no practical effect upon the case. *Id.* at 267, 258 S.W.3d at 748–49.

71. *Johnson II*, 2009 Ark. 241, at 2, \_\_\_ S.W.3d at \_\_\_\_.

was designed, manufactured, and supplied to Eastman by Rockwell Automation, Inc. ("Rockwell").<sup>72</sup> Ordinarily, the starter bucket's safety interlock would prevent the starter bucket from becoming electrically powered.<sup>73</sup> On this instance, however, the safety interlock failed, the starter bucket became electrically powered, and Johnson was injured.<sup>74</sup> Johnson's complaint alleged that the starter bucket's safety interlock was designed, manufactured, and supplied in a defective condition.<sup>75</sup> In its answer, Rockwell claimed that after it had supplied Eastman with the starter bucket, Eastman had modified it without Rockwell's knowledge.<sup>76</sup> Rockwell also reserved all defenses available to it under the CJRA and specifically asserted its rights thereunder to (1) restrict its liability to its percentage share of actual liability and (2) name nonparties at fault.<sup>77</sup> Rockwell later filed a "Notice of Nonparty Fault" in accordance with Arkansas Code section 16-55-202, naming Eastman as a nonparty at fault.<sup>78</sup>

After the accident, Johnson's employee medical plan paid for his medical care and treatment, but the amounts paid by the plan were less than the total balance due for his medical care and treatment.<sup>79</sup> Johnson sought to introduce evidence of the full amount, while Rockwell sought to limit such evidence to those amounts (1) paid by Johnson, (2) paid on behalf of Johnson, (3) which remained unpaid and for which Johnson was responsible, or (4) which remained unpaid and for which another third party was legally responsible pursuant to Arkansas Code section 16-55-212(b).<sup>80</sup> Johnson and Rockwell filed a joint motion for certification of the following questions to the Arkansas Supreme Court:<sup>81</sup>

(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 require a fact finder to consider or access the negligence or fault of nonparties, violates the Arkansas Constitution, when considered along with modifications of "joint and several" liability in the same act, codified at Ark. Code Ann. § 16-55-201.<sup>82</sup>

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72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 3, \_\_\_ S.W.3d at \_\_\_\_.

77. *Johnson II*, 2009 Ark. 241, at 3, \_\_\_ S.W.3d at \_\_\_\_.

78. *Id.*

79. *Id.*

80. *Id.* at 3-4, \_\_\_ S.W.3d at \_\_\_\_.

81. *Id.* at 1, \_\_\_ S.W.3d at \_\_\_\_.

82. *Id.* at 1-2, \_\_\_ S.W.3d at \_\_\_\_; *Johnson v. Rockwell Automation, Inc.*, 374 Ark. 217, 218, 286 S.W.3d 726, 726 (2008) (*Johnson I*).

(2) Under the facts of this case, whether 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.<sup>83</sup>

The district court granted the motion,<sup>84</sup> and the Arkansas Supreme Court accepted certification to address the constitutionality of those provisions of the CJRA.<sup>85</sup>

#### B. The Court's Holdings

The Arkansas Supreme Court determined that both statutes were unconstitutional,<sup>86</sup> and its decision includes a similar analysis for both provisions. The nonparty fault provision at issue provides the following:

(a) In assessing percentages of fault, the fact finder shall consider the fault of all persons or entities who contributed to the alleged injury or death or damage to property, tangible or intangible, regardless of whether the person or entity was or could have been named as a party to the suit.

(b)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if the defending party gives notice that a nonparty was wholly or partially at fault not later than one hundred twenty (120) days prior to the date of trial.

(2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

(c)(1) Except as expressly stated in this section, nothing in this section shall eliminate or diminish any defenses or immunities which currently exist.

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

(3) Where fault is assessed against nonparties, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.<sup>87</sup>

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83. *Johnson II*, 2009 Ark. 241, at 1–2, \_\_\_ S.W.3d \_\_\_; *Johnson I*, 374 Ark. at 218, 286 S.W.3d at 726.

84. *Johnson I*, 374 Ark. at 217, 286 S.W.3d at 726.

85. *Id.* at 219, 286 S.W.3d at 727.

86. *Johnson II*, 2009 Ark. 241, at 8–10, \_\_\_ S.W.3d at \_\_\_.

Johnson argued to the court that the foregoing provision was unconstitutional for a variety of reasons, including that it violated separation of powers.<sup>88</sup> Specifically, Johnson asserted that the statute infringed upon the court's rules of pleading, practice, and procedure because it provided a procedure for assessing nonparty fault.<sup>89</sup> That procedure, Johnson contended, was unconstitutional because it added to or varied from the Arkansas Rules of Civil Procedure.<sup>90</sup>

The court began by noting that its rule-making authority comes from Amendment 80, section 3 of the Arkansas Constitution,<sup>91</sup> which grants it the power to "prescribe the rules of pleading, practice and procedure for all courts."<sup>92</sup> The court then outlined the precedent, *Weidrick* and *Summerville*, for striking down statutes that conflict with the court's rules of pleading, practice, and procedure.<sup>93</sup> The court explained that, even if a provision did not directly conflict with the court's rules, it was unconstitutional: "[W]e take this opportunity to note that so long as a legislative provision dictates procedure, that provision need not directly conflict with our procedural rules to be unconstitutional. This is because rules regarding pleading, practice, and procedure are solely the responsibility of this court."<sup>94</sup>

Finally, the court reiterated the necessity of distinguishing between substantive and procedural law when considering questions of separation of powers because only the latter falls exclusively within the court's province.<sup>95</sup> The court referenced Arkansas Code section 16-55-201, which modified joint and several liability, as an example of substantive law because it defines the right of a party.<sup>96</sup> On the other hand, Arkansas Code section 16-55-202 was a clear example of procedural law, according to the court, because it establishes a procedure for a jury to determine nonparty fault

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87. ARK. CODE ANN. § 16-55-202 (LEXIS Repl. 2005).

88. *Johnson II*, 2009 Ark. 241, at 6, \_\_\_ S.W.3d at \_\_\_.

89. *Id.*

90. *Id.*

91. *Id.*

92. ARK. CONST. amend. 80, § 3. However, legal scholars agree that the court held this power long before the passage of amendment 80. *See supra* notes 15–21 and accompanying text.

93. *Johnson II*, 2009 Ark. 241, at 6–8, \_\_\_ S.W.3d at \_\_\_.

94. *Id.* at 7, \_\_\_ S.W.3d at \_\_\_. On appeal, defendants argued that Arkansas Code section 16-55-202 did not directly conflict with the Arkansas Rules of Civil Procedure. *Id.* The court noted that any conflict with the rules, direct or indirect, was a violation of separation of powers and, therefore, unconstitutional. *Id.* Interestingly, in *Weidrick*, the court held that the General Assembly's "add[ing] an additional step" to a court rule was unconstitutional. *Weidrick*, 310 Ark. at 141–42, 835 S.W.2d at 845. At this point in time, the Arkansas Supreme Court has enunciated a belief that the General Assembly has little or no rule-making authority.

95. *Id.* at 7–8, \_\_\_ S.W.3d at \_\_\_.

96. *Id.* at 8, \_\_\_ S.W.3d at \_\_\_.

through the filing of a pleading.<sup>97</sup> Thus, the court held that it was unconstitutional as violating separation of powers.<sup>98</sup>

Turning to Arkansas Code section 16-55-212(b), the court likewise noted that the provision was procedural in nature.<sup>99</sup> In fact, the statute dictated what type of evidence could be presented for medical damages: “Any *evidence* of damages for the costs of any necessary medical care, treatment, or services received *shall include only* those costs actually paid by or on behalf of the plaintiff or which remain unpaid and for which the plaintiff or any third party shall be legally responsible.”<sup>100</sup> Because a rule of evidence is a procedural rule, the court held Arkansas Code section 16-55-212(b) unconstitutional as violating separation of powers.<sup>101</sup>

#### IV. NEITHER ARKANSAS CODE SECTION 16-55-202 NOR SECTION 16-55-212(B) ARE PURELY PROCEDURAL LAW, AND THE SUBSTANTIVE-PROCEDURAL DISTINCTION IS INSUFFICIENT IN DETERMINING WHETHER A VIOLATION OF SEPARATION OF POWERS EXISTS

Prior to *Weidrick*, *Arnold*, and *Johnson*, the Arkansas Supreme Court had long recognized that both the judiciary and the General Assembly had power to adopt and amend rules of practice and procedure.<sup>102</sup> Even after passage of Amendment 80 to the Arkansas Constitution, the court continued its efforts of cooperation with the General Assembly by following the rules set forth in *Curtis* and its progeny.<sup>103</sup> Under those guidelines, the court has issued nearly three decades’ worth of opinions determining separation of powers questions. Nevertheless, with little or no explanation, the court abandoned that approach and, in its place, adopted a stark *either-or* test.

The difficulty in classifying statutes as *either* substantive *or* procedural law proves the futility of the court’s new test. Many provisions contain *both* substantive and procedural law, yet the Court has nevertheless recognized them as constitutional.<sup>104</sup> Consider the statute at issue in *Curtis*, Arkansas Code section 16-44-203, which allowed videotaping of a young victim’s

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97. *Id.*

98. *Id.* The court did not address any further arguments regarding the constitutionality of ARK. CODE ANN. § 16-55-202. *Id.*

99. *Johnson II*, 2009 Ark. 241, at 9, \_\_\_ S.W.3d at \_\_\_.

100. *Id.* at 9, \_\_\_ S.W.3d at \_\_\_ (quoting ARK. CODE ANN. § 16-55-212(b) (LEXIS Repl. 2005)) (emphasis in original).

101. *Id.* at 10, \_\_\_ S.W.3d at \_\_\_. The court did not address any further arguments regarding the constitutionality of ARK. CODE ANN. § 16-55-212(b). *Id.*

102. *Curtis*, 301 Ark. at 212, 783 S.W.2d at 49.

103. See *supra* notes 35, 37, and 43 and accompanying text. See also *Cato v. Craighead County Cir. Ct.*, 2009 Ark. 334, \_\_\_ S.W.3d at \_\_\_.

104. See *supra* notes 35, 37, and 43 and accompanying text. See also *Cato v. Craighead County Cir. Ct.*, 2009 Ark. 334, \_\_\_ S.W.3d \_\_\_.

testimony outside of the jury's presence to show the videotaped testimony to the jury in lieu of live testimony by the victim.<sup>105</sup> There is no dispute that the provision dictates the admissibility of evidence at trial and is procedural in nature. Conversely, the statute is also substantive because it limits the rights of criminal defendants to confront their accusers at trial.<sup>106</sup> Under the court's new test, Arkansas Code section 16-44-203 is unconstitutional as a violation of separation of powers.

Similarly, the statutes at issue in *Johnson* contain both procedural and substantive law. As previously noted, the statutes were enacted as part of the Civil Justice Reform Act of 2003 (CJRA),<sup>107</sup> which is commonly referred to as "tort reform."<sup>108</sup> The General Assembly noted its intent to revise "the rights, duties, and powers of parties"<sup>109</sup> in tort cases in the Emergency Clause of the CJRA, which provides:

It is found and determined by the General Assembly of the State of Arkansas that in this state, existing conditions, such as the application of joint and several liability regardless of the percentage of fault, are adversely impacting the availability and affordability of medical liability insurance; that those existing conditions recently have caused several medical liability carriers to stop offering coverage in the state and have caused some medical care providers to curtail or end their practices; that the decreasing availability and affordability of medical liability is adversely affecting the accessibility and affordability of medical care and health insurance coverage in this state; that long term care facilities are having great difficulty hiring qualified medical directors because physicians could be held liable for an entire judgment even if they are found to be minimally at fault; and that there is a need to improve access to the courts for deserving claimants; and that this Act is immediately necessary in order to remedy these conditions and improve access to health-care in this state.<sup>110</sup>

Further, one needs only to review Arkansas Code sections 16-55-202 and -212(b) to appreciate that they, in fact, "create[], define[], and regulate[]

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105. *Curtis*, 301 Ark. 208, 783 S.W.2d 47 (1990).

106. U.S. CONST. amend. VI. Arkansas Code section 16-44-203 has previously been challenged on Confrontation Clause grounds and upheld by the Arkansas Supreme Court because defendants are allowed to cross-examine the victim during the videotaped testimony. *McGuire v. State*, 288 Ark. 388, 393, 706 S.W.2d 360, 362 (1986); *Cranford v. State*, 303 Ark. 393, 397, 797 S.W.2d 442, 444-45 (1990).

107. 2003 Ark. Acts 649 (codified as amended in ARK. CODE ANN. §§ 16-55-201 to -220).

108. *Frazier*, *supra* note 1, at 653.

109. *See supra* note 60 and accompanying text.

110. 2003 Ark. Acts 649, § 26.

the rights, duties, and powers of parties.”<sup>111</sup> Specifically, most of Arkansas Code section 16-55-202 relates only to substantive law:

(a) In assessing percentages of fault, the fact finder shall consider the fault of all persons or entities who contributed to the alleged injury or death or damage to property, tangible or intangible, regardless of whether the person or entity was or could have been named as a party to the suit.

(b)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if the defending party gives notice that a nonparty was wholly or partially at fault not later than one hundred twenty (120) days prior to the date of trial.

(2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty’s name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

(c)(1) Except as expressly stated in this section, nothing in this section shall eliminate or diminish any defenses or immunities which currently exist.

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

(3) Where fault is assessed against nonparties, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.<sup>112</sup>

With this provision, the General Assembly modified the rights of plaintiffs related to their potential recovery for tort damages by reducing such recovery for the fault of nonparties. Subsection (a) grants tort defendants the right to have nonparty fault considered when juries determine fault among the named parties.<sup>113</sup> Subsection (c) is also substantive law in that it provides that the right to consideration of nonparty fault (1) does not eliminate any defense or immunity, (2) is for correctly assessing percentages of fault only, and (3) cannot be used outside of the action in which the nonparty was named.<sup>114</sup> Only subsection (b) contains any procedural directives for asserting the right granted in subsection (a).

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111. See *supra* note 60 and accompanying text.

112. ARK. CODE ANN. § 16-55-202 (LEXIS Repl. 2005).

113. *Id.* § 16-55-202(a).

114. *Id.* § 16-55-202(c).



Likewise, Arkansas Code section 16-55-212(b) contains substantive law because it also limits plaintiffs' rights related to their potential recovery for tort damages. In particular, it limits tort plaintiffs from recovering the full amount for medical care or treatment if they or third parties paid a lesser amount.<sup>115</sup> Unquestionably, the provision is couched as an evidentiary rule, but that does not lessen the fact that, through Arkansas Code section 16-55-212(b), the General Assembly modified plaintiffs' rights to receive compensation for medical damages.

Because these provisions are both substantive and procedural law, the substantive-procedural distinction is inadequate for determining whether they violate separation of powers. Instead, the Arkansas Supreme Court should return to the rules set forth in *Curtis* and *Sypult*. Under *Curtis*, Arkansas Code section 16-55-202 would be constitutional because it deals with an area of practice and procedure for which the Arkansas Supreme Court has never adopted a rule—assessing the fault of a nonparty—because the General Assembly created that right with the passage of the CJRA.

Similarly, Arkansas Code section 16-55-212(b) would be constitutional under the *Sypult* rule. The CJRA has "a fixed public policy which has been legislatively or constitutionally adopted" as stated in its Emergency Clause.<sup>116</sup> In addition, Arkansas Code section 16-55-212(b) does not compromise the primary purpose and effectiveness of any court rule. Most opponents of Arkansas Code section 16-55-212(b) suggest that it abrogates the collateral source rule, which "prevents a plaintiff's award from being reduced by monies the plaintiff receives from third parties, such as insurance proceeds."<sup>117</sup> The collateral source rule arose because defendants were arguing that, because a plaintiff had already received \$20,000 from a third party for damages, the \$50,000 in damages plaintiff was claiming from them should be reduced by the \$20,000 plaintiff had already received. Arkansas courts have consistently held that the plaintiff is entitled to the whole \$50,000, even if it means that the plaintiff receives a double recovery.<sup>118</sup> Generally, the third parties in these situations have a subrogation right to the amounts they paid once the plaintiff has obtained a judgment.<sup>119</sup>

However, Arkansas Code section 16-55-212(b) does not seek to reduce a plaintiff's award for money received by the plaintiff from third parties.<sup>120</sup> Instead, it limits the amount a plaintiff can recover to the same amount the

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115. *Id.* § 16-55-212(b).

116. *See supra* note 32 and accompanying text.

117. Nelson, *supra* note 1, at 788 n.48. *See also* Douglas v. Adams Trucking Co., 345 Ark. 203, 212, 46 S.W.3d 512, 517 (2001).

118. Douglas, 345 Ark. at 212, 46 S.W.3d at 517.

119. St. Paul Fire & Marine Ins. Co. v. Murray Guard, Inc., 343 Ark. 351, 355–56, 37 S.W.3d 180, 183 (2001).

120. ARK. CODE ANN. § 16-55-212(b) (LEXIS Repl. 2005).

plaintiff received from third parties, the amount third parties paid on the plaintiff's behalf, or the amount remaining to be paid by the plaintiff or third parties. Within the last twenty years, agreements between insurance companies or the government and medical care providers guarantee that insurance companies and the government obtain medical care and treatment for a reduced rate. Now, many medical care providers will also give a reduced rate to a patient without health insurance. Nevertheless, all medical bills include the original price for the treatment and then the reduced amount that is owed. Arkansas Code section 16-55-212(b) seeks to compensate a plaintiff for only the amount actually paid and not the medical care provider's original price.<sup>121</sup> Accordingly, this provision does not compromise the primary purpose and effectiveness of the collateral source rule and would be held constitutional under *Sypult*.

#### V. PROPOSED REVISIONS TO ARKANSAS CODE SECTIONS 16-55-202 AND 16-55-212(B) TO COMPLY WITH *JOHNSON*'S DIRECTIVES

Before revision can be discussed, it should be noted that, arguably, no revision of Arkansas Code section 16-55-202 is necessary. The CJRA includes a severability clause, which provides:

If any provisions of [the CJRA] or the application of [the CJRA] to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of [the CJRA] which can be given effect without the invalid provision or application, and to this end the provisions of [the CJRA] are declared to be severable.<sup>122</sup>

The *Johnson* court spent little time discussing which parts of Arkansas Code section 16-55-202 were procedural in nature and, therefore, unconstitutional.<sup>123</sup> Further, the *Johnson* court did not address the severability clause or its application to any invalid portion of Arkansas Code section 16-55-202. Because of these oversights and the strong presumption of constitutionality on Arkansas statutes,<sup>124</sup> portions of Arkansas Code section 16-55-202 may still be in effect.

If the substantive law contained in Arkansas Code section 16-55-202 remains in effect, it falls to the Arkansas Supreme Court to enact rules and procedures to effectuate the right contained in the statute.<sup>125</sup> If no such rules

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121. *Id.*

122. *Id.* § 16-55-220(c).

123. *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, at 8, \_\_\_ S.W.3d \_\_\_, \_\_\_ (Johnson II).

124. *Eady v. Lansford*, 351 Ark. 249, 256, 92 S.W.3d 57, 61 (2002) (internal citations omitted).

125. ARK. CONST. amend. 80, § 3.

exist, it falls to trial courts to develop the needed rules and procedures: "*Procedure Not Specifically Prescribed*. When no procedure is specifically prescribed by [the Arkansas Rules of Civil Procedure], the court shall proceed in any lawful manner not inconsistent with the Constitution of this State, [the Arkansas Rules of Civil Procedure] or any applicable statute."<sup>126</sup> Consequently, a strong argument exists that the substantive law set forth in Arkansas Code section 16-55-202 remains intact and that trial courts must implement the same until the Arkansas Supreme Court enacts appropriate rules regarding the provision.

Assuming, however, that all of Arkansas Code section 16-55-202 is unconstitutional, revising the statute to comply with *Johnson* is simple. Only subsection (b) deals with procedure, so it should be left out of the revised provision. A revision of Arkansas Code section 16-55-212(b) is almost as simple:

~~Any evidence of~~ A plaintiff may recover damages for the costs of any necessary medical care, treatment, or services received, which shall include only those costs actually paid by or on behalf of the plaintiff or which remain unpaid and for which the plaintiff or any third party shall be legally responsible.

These revisions, of course, deal only with the separation of powers defects outlined in *Johnson*. Those provisions may still be susceptible to constitutional challenge on other grounds.

## VI. CONCLUSION

A theoretical discussion of separation of powers should always leave matters of practice and procedure to the judiciary. In the real world, however, that line is not easily drawn or followed. In the past, the Arkansas Supreme Court has approached this twilight zone with an attitude of cooperation. Now, the court instead applies the faulty substantive-procedural distinction, a rule based solely on boilerplate definitions contained in Black's Law Dictionary.<sup>127</sup> The court should return to the *Curtis* and *Sypult* rules for a better method of determining whether a General Assembly rule violates separation of powers, while seeking "a healthy and orderly development of procedural reform."<sup>128</sup>

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126. ARK. R. CIV. P. 81(c).

127. See *supra* note 60 and accompanying text.

128. See *supra* note 32 and accompanying text.