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**Tort Law—Tort Immunity for Non-Profits—Is the Charitable Immunity Defense Becoming an Offense for Arkansas Hospitals? George v. Jefferson Hospital Ass'n, 337 Ark. 206, 987 S.W.2d 710 (1999).**

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TORT LAW—TORT IMMUNITY FOR NON-PROFITS—IS THE CHARITABLE IMMUNITY DEFENSE BECOMING AN OFFENSE FOR ARKANSAS HOSPITALS?  
*George v. Jefferson Hospital Ass'n*, 337 Ark. 206, 987 S.W.2d 710 (1999).

I. INTRODUCTION

*Charity is No Substitute for Justice Withheld.*<sup>1</sup>

In *George v. Jefferson Hospital Ass'n*,<sup>2</sup> the Arkansas Supreme Court examined the controversial doctrine of charitable immunity. The case focused on the applicability of the charitable immunity defense to Jefferson Regional Memorial Hospital in a medical malpractice action.<sup>3</sup> The court, for the first time, applied the recently adopted test for the charitable immunity defense to a hospital.<sup>4</sup>

On appeal, the court examined two separate issues: first, whether the trial court erred by issuing summary judgment on the issue of charitable immunity in favor of Jefferson Regional Medical Center, and second, whether the trial court erred in denying plaintiff's relation back claim on the statute of limitations against the insurance carrier.<sup>5</sup> The court affirmed both decisions, allowing the summary judgment to stand on both issues.<sup>6</sup>

This note first discusses facts that led to the decision in *George*. Next, it traces the background of the charitable immunity doctrine in majority jurisdictions and in Arkansas, a minority-view state. Part III also reviews the test adopted in *Masterson v. Stambuck*<sup>7</sup> for the charitable immunity defense and its application to this case. Part IV then examines in detail the reasoning behind the court's decision. Finally, this note discusses the impact of broadly applying the *Masterson* test, and the resulting extension of the charitable immunity defense through this application.

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1. See St. Augustine, *quoted in* BARNES & NOBLE BOOK OF QUOTATIONS 196 (Robert I. Fitzgerald ed., 1986).

2. 337 Ark. 206, 987 S.W.2d 710 (1999).

3. See *George*, 337 Ark. at 209, 987 S.W.2d at 711.

4. See *id.* at 214, 987 S.W.2d at 714. For a discussion of the new test for the charitable immunity defense, see *infra* Part III, B.

5. See *George*, 337 Ark. at 209, 987 S.W.2d at 713.

6. See *id.*, 987 S.W.2d at 713.

7. 321 Ark. 391, 902 S.W.2d 803 (1995).

## II. FACTS

On August 31, 1994, Gina George was admitted to Jefferson Regional Medical Center<sup>8</sup> to give birth to her child.<sup>9</sup> The following day, Dr. Reid G. Pierce performed a Cesarean section on Ms. George in the hospital.<sup>10</sup> Ms. George then sought medication to suppress her breast milk production for which Dr. Pierce prescribed Parlodel.<sup>11</sup> Ms. George continued taking Parlodel after her discharge and was subsequently rushed to the emergency room for treatment of severe "seizure-like symptoms" on September 5, 1994.<sup>12</sup>

Parlodel's use by post-birth mothers has a turbulent history. The Food and Drug Administration (FDA) asked manufacturers to cease labeling Parlodel and other Bromocriptines for use as a milk suppressant in 1989 following the FDA Fertility Advisory Committee findings which determined that the drugs were unsafe for such use.<sup>13</sup> In 1994, the manufacturers agreed with the FDA to cease marketing Bromocriptines entirely for use in milk suppression after receiving numerous reports of strokes, seizures, and myocardial infarctions that had occurred in post-birth women using the drug.<sup>14</sup>

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8. See *George*, 337 Ark. at 209, 987 S.W.2d at 711. The hospital, Jefferson Regional Medical Center, will herein be referred to as JRMC.

9. See Brief for Appellant at 2, *George v. Jefferson Hosp. Ass'n*, 337 Ark. 206, 987 S.W.2d 710 (1999) (No. 98-1134). JRMC is located in Pine Bluff, Arkansas, a town of approximately 55,000 residents. See Pine Bluff, Arkansas, 22 *ENCYCLOPEDIA AMERICANA* 113 (Int'l ed. 1995). The corporation, Jefferson Hospital Association, Inc., does business as Jefferson Regional Medical Center. See *George*, 337 Ark. at 209, 987 S.W.2d at 711.

10. See Brief for Appellant at 2, *George* (No. 98-1134). Dr. Pierce performed a lower transverse Cesarean section on Appellant which proceeded normally. See *id.*

11. See *id.* Parlodel is the brand name for the generic drug Bromocriptine. See *Bromocriptine Systematic*, I DRUG INFORMATION FOR THE HEALTH CARE PROFESSIONAL 599 (18th ed. 1998). Bromocriptines inhibit the production of prolactin, a hormone which stimulates milk production, helps regulate fertility, and stimulates the production of the neurotransmitter dopamine, reducing the sluggish movements and rigidity of Parkinson's disease. See *id.* at 599-600. Parlodel was initially manufactured by Sandoz Pharmaceuticals which later merged with the Novartis Corporation. See *Novartis - Who We Are* (visited October 7, 1999) <[http://www.novartis.com/textsite/weare/t\\_corpomerger.html](http://www.novartis.com/textsite/weare/t_corpomerger.html)>.

12. Brief of Appellant at 2, *George* (No. 98-1134).

13. See *FDA Seeks Withdrawal of Indication for Suppressing Breast Milk*, FDA NEWS UPDATE (FDA Fertility and Maternal Health Drugs Advisory Committee Report), Sept. 27, 1989.

14. See Donald McLearn, *FDA Moves to End Use of Bromocriptine for Postpartum Breast Engorgement*, FDA NEWS UPDATE (FDA Fertility and Maternal Health Drugs Advisory Committee Report), Aug. 17, 1994. According to the FDA 31 women suffered strokes, 63 women reported seizures, and 7 women reported heart attacks, including at least 10 fatalities related to the use of Bromocriptines for milk suppression. See *Parlodel No Longer to Be Sold for Lactation Suppression*, FDA CONSUMER, Nov. 1994, at 2-3. For the current status of Parlodel and other Bromocriptines, see *Estrogen for Postpartum Breast Engorgement; Withdrawal of Approval of the Labeled Indication for Postpartum Breast Engorgement in Estrogen-Containing Drug Products*, 63 *FED. REG.* 69,631 (1998).

On August 29, 1996, Ms. George filed a complaint against JRMC and Dr. Pierce alleging medical malpractice for prescribing Parlodel<sup>15</sup> and strict liability in tort against Sandoz Pharmaceuticals.<sup>16</sup> Ms. George failed, however, to file suit against JRMC's insurance carrier, St. Paul Fire & Marine Insurance Co., until she amended her complaint in January 1998.<sup>17</sup> Ms. George argued that Jefferson Hospital Association was maintained as a for-profit corporation and did not qualify for the charitable immunity defense.<sup>18</sup> The trial court granted summary judgment for St. Paul Fire & Marine Insurance Company and JRMC, ruling that the hospital qualified for the charitable immunity defense and was thus immune from tort liability, and that the amended complaint did not "relate back" to include the insurance carrier, St. Paul.<sup>19</sup> After the trial court granted summary judgment for JRMC, Ms. George non-suited her claims against Sandoz Pharmaceuticals and Dr. Pierce and pursued an appeal.<sup>20</sup> The Arkansas Supreme Court affirmed, agreeing that the amended complaint failed to meet the Rule 15(c)'s requirements to relate-back,<sup>21</sup> and that fair-minded persons could not disagree that JRMC met the requirements for the defense of charitable immunity.<sup>22</sup>

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15. See *George*, 337 Ark. at 209, 987 S.W.2d at 711.

16. See *id.*, 987 S.W.2d at 711. "Apparently, the medication had been withdrawn from the market in mid-August 1994, but notice of the recall had not been given by the manufacturer, Sandoz . . . to doctors and hospitals, including the Defendants in this action, prior to its prescription by Dr. Pierce to appellant." *Id.*, 987 S.W.2d at 711.

17. See *id.* at 210, 987 S.W.2d at 712. The original complaint in this case was filed just prior to the two year statute of limitations for medical malpractice. See *id.*, 987 S.W.2d at 712. "Except as otherwise provided in this section, all actions for medical injury shall be commenced within two years after the cause of action accrues . . . [t]he date of the accrual of the cause of action shall be the date of the wrongful act complained of and no other time . . ." ARK. CODE ANN. § 16-114-203(a), (b) (Michie 1997). The 1998 amendment to the complaint did not fall within the statute of limitations unless the amendment "related back" to the original pleading under Arkansas Rules of Civil Procedure Rule 15(c). See *George*, 337 Ark. at 215, 987 S.W.2d at 715.

18. See Brief of the Appellee at vi, *George v. Jefferson Hosp. Ass'n*, 337 Ark. 206, 987 S.W.2d 710 (1999) (No. 98-1134).

19. See *George*, 337 Ark. at 215, 987 S.W.2d at 714. Arkansas Rules of Civil Procedure Rule 15(c)'s relation back provisions required four things: (1) the claim must have arisen out of conduct set forth in the original pleading; (2) St. Paul must have received notice of the institution of the action that it would not be prejudiced in maintaining defense on the merits; (3) St. Paul must have known, or should have known, that but for mistake concerning identity of the proper party, the action would have been brought against it; and (4) the second and third requirements must have been filled within 120 days from the date of the original complaint. See ARK. R. CIV. P. 15(c). See also *George*, 337 Ark. at 215, 987 S.W.2d at 715.

20. See Brief for Appellant at vii, *George* (No. 98-1134).

21. See *George*, 337 Ark. at 216, 987 S.W.2d at 715. See also ARK. R. CIV. P. 15(c).

22. See *George*, 337 Ark. at 214, 987 S.W.2d at 713. The plaintiff in this case could have sued the insurance carrier, St. Paul Fire & Marine Co., directly in the original complaint. See ARK. CODE ANN. § 23-79-210 (Michie 1997).

### III. BACKGROUND

The *George* decision represents a distinct minority view of full charitable immunity that can provide charities a complete immunity defense from tort liability. Accordingly, the following section traces the development of the doctrine of charitable immunity in both majority-view jurisdictions and in Arkansas. First, this section discusses the development of the defense generally, as well as its fall into disfavor in the majority of jurisdictions. Second, it reviews the development of charitable immunity in Arkansas, and the court's commitment to retaining the defense to protect Arkansas' charities.

#### A. Evolution of Charitable Immunity

##### 1. *Where It Began*

Charitable immunity is viewed as an exception to the principle of respondeat superior which states that corporations retain liability for harms inflicted by their agents when the agents act within the scope of their duties.<sup>23</sup> The exception creates immunity for charities by refusing to hold them liable in tort. The concept of immunity originated in England in case law that gave favorable tort treatment to charitable organizations.<sup>24</sup> The early doctrine simply stated that trustees were not liable for the negligent acts of their employees because it defeated the purpose of a trust to use these monies for tort judgments.<sup>25</sup>

Although England soon abandoned the doctrine, the states began to use the charitable immunity defense to protect charities. A seminal step in the states adopting charitable immunity occurred when the Massachusetts

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23. See *President of Georgetown College v. Hughes*, 130 F.2d 810, 818 (D.C. Cir. 1942).

24. See *Developments in the Law - Nonprofit Corporations, Special Treatment and Tort Law*, 105 HARV. L. REV. 1677, 1692, n.18 (1993) (discussing the inception of charitable immunity in England in the case of *Feoffees of Heriot's Hosp. v. Ross*, 8 Eng. Rep. 1508, 1510 (1846)). See also *Fordyce & McKee v. Woman's Christian Nat'l Library Ass'n*, 79 Ark. 550, 563, 96 S.W. 155, 160 (1906) (quoting *Feoffees of Heriot's Hosp. v. Ross*, 8 Eng. Rep. 1508, 1509 (1846)). The *Ross* court explained its policy rationale as follows:

[It] is obvious that it would be a direct violation, in all cases, of the purpose of a trust if this could be done, for there is not any person who ever created a trust that provided for payment out of it for damages to be recovered from those who had the management of the fund. . . . To give damages out of a trust fund would not be to apply it to those objects which the author of the fund had in view, but would be to divert it to a completely different purpose.

*Id.*, 96 S.W. at 160.

25. See *Holliday v. Parish of St. Leonard*, 142 Eng. Rep. 769, 774 (1861).

Supreme Court decided *McDonald v. Massachusetts General Hospital*.<sup>26</sup> This decision reiterated that hospitals rely upon charitable donations from the public trust, and that those funds should not be diverted from that purpose to pay judgments.<sup>27</sup> This policy rationale was easily embraced by other jurisdictions seeking to protect hospitals whose sole purpose in the early days consisted of treating poor patients, not paying patients.<sup>28</sup> States adopting the doctrine justified immunity for a variety of reasons, including that the use of charitable funds was contrary to the charitable donor's intent,<sup>29</sup> that a patient in the care of a charity assumed the risk,<sup>30</sup> or that because hospitals received no profits from their employees' work, respondeat superior did not apply.<sup>31</sup> Of course, many courts also feared the bankruptcy of charitable groups from tort judgments.<sup>32</sup> The charitable immunity doctrine continued to expand to other jurisdictions in the United States, and by the early 1940s, over forty states accepted full charitable immunity as the prevailing view.<sup>33</sup>

## 2. *A Short Stay at Grandma's House for the Immunity Defense*

With drastic changes to hospitals' primary purposes and organization, many of the jurisdictions that earlier embraced the doctrine of charitable immunity began to chip away at it.<sup>34</sup> Considered the first major blow, in 1942, the District of Columbia Court of Appeals rejected charitable immunity because of the availability of insurance to compensate plaintiffs.<sup>35</sup> The

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26. 120 Mass. 432 (1876), *overruled in part by* Colby v. Carney Hosp., 254 N.E.2d 407 (Mass. 1969). Interestingly, the English cases that created the doctrine were overruled before the United States even began adopting charitable immunity. See *Mersey Docks & Harbour Bd. of Trustees v. Gibbs*, 11 Eng. Rep. 1500 (1866).

27. See *McDonald*, 120 Mass. at 436.

28. See Mark J. Garwin, *Immunity in the Absence of Charity: EMTALA and the Eleventh Amendment*, 23 S. ILL. U. L.J. 1 (1998). The hospitals were generally funded by religious organizations while the wealthy were treated at home by traveling physicians. See *id.* at 1.

29. See *Jensen v. Maine Eye & Ear Infirmary*, 78 A. 898, 899 (Me. 1910). For the law of vicarious liability see RESTATEMENT (SECOND) OF AGENCY § 219 (Supp. 1999).

30. See *Powers v. Massachusetts Homoeopathic Hosp.*, 109 F. 294, 303 (1st Cir. 1901).

31. See, e.g., *Hearn v. Waterbury Hosp.*, 33 A. 595, 604 (Conn. 1895).

32. See, e.g., *Vermillion v. Woman's College of Due West*, 88 S.E. 649 (S.C. 1916).

33. See Bradley C. Canon & Dean Jaros, *The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity*, 13 L. & SOC'Y REV. 969, 971 (1979).

34. See Garwin, *supra* note 28, at 2.

35. See *President of Georgetown College v. Hughes*, 130 F.2d 810, 827-28 (D.C. Cir. 1942). Minnesota and New York repudiated the doctrine prior to the *Georgetown* decision. See Note, *The Quality of Mercy: 'Charitable Torts' and Their Continuing Immunity*, 100 HARV. L. REV. 1382, 1398 n.31 (1987) (citing *Mulliner v. Evangelischer Diakonniessenverein*, 175 N.W. 699 (Minn. 1920); *Sheehan v. North Country Community Hosp.*, 7 N.E.2d 28 (N.Y. 1937)).

insurance exception<sup>36</sup> to charitable immunity became the first of many exceptions to full immunity, including an exception for negligently screening servants<sup>37</sup> and the exclusion of commercial funds from immunity.<sup>38</sup> For example, Georgia allowed recovery when a patient paid for services subject to availability of non-charitable funds from the hospital.<sup>39</sup> Some states even enacted statutes entirely eliminating the common-law doctrine.<sup>40</sup> Overall, the charitable immunity defense became fragmented, varying widely state to state, with each jurisdiction creating various exceptions and levels of abandonment.<sup>41</sup> Adding to the feverish abrogation in the majority of jurisdictions, in 1977, the Restatement (Second) of Torts formally opposed charitable immunity stating that a benevolent enterprise does not enjoy immunity because of its charitable purpose.<sup>42</sup>

### 3. *State of Disarray and New Concerns of Tort Liability*

The numerous states that eliminated or restricted charitable immunity began to deal with an increasing number of tort actions, particularly in the area of health service organizations.<sup>43</sup> Adding to the dilemma, the 1980s produced a dramatic rise in insurance premiums that encouraged some states to provide protection for charities.<sup>44</sup> A number of states reacted by placing

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36. See *Georgetown*, 130 F.2d at 827-28.

37. See, e.g., *Old Folks' & Orphan Children's Home of Church v. Roberts*, 171 N.E. 10, 12 (Ind. App. 1930) (allowing liability when a charity negligently screened servants).

38. See *Lincoln Mem'l Univ. v. Sutton*, 43 S.W.2d 195, 196 (Tenn. 1931) (distinguishing for-profit moneys from charitable funds). See also *Morton v. Savannah Hosp.*, 96 S.E. 887, 888 (Ga. 1918) (allowing recovery from funds received from paying patients).

39. See *Morton*, 96 S.E. at 888.

40. See, e.g., CONN. GEN. STAT. ANN. § 52-557(d) (West 1991); N.C. GEN. STAT. § 1-539.9 (1983); R.I. GEN. LAWS § 9-1-26 (1956).

41. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 996 (4th ed. 1971) (proclaiming charitable immunity in a state of full retreat and predicting the doctrine's eradication in American law within twenty years). Six jurisdictions including Maryland, Nebraska, New Jersey, Ohio, South Carolina, and Wyoming eliminated immunity for charitable hospitals but allowed it to remain for other charities. See *RESTATEMENT (SECOND) OF TORTS* § 895E reporter's note (1977).

42. See *RESTATEMENT (SECOND) OF TORTS* § 895E (1977). "One engaged in a charitable, educational, religious or benevolent enterprise or activity is not for that reason immune from tort liability." *Id.*

43. See *Canon & Jaros*, *supra* note 33, at 976. "Suits against hospitals did, in fact, increase dramatically following abrogation . . . . For example, there were five awards of over \$150,000 in Illinois shortly after abrogation." *Canon & Jaros*, *supra* note 33, at 976 (internal citation omitted).

44. See Michael Pierce Singsen, *Charity Is No Defense: The Impact of the Insurance Crises on Nonprofit Organizations and an Examination of Alternative Insurance Mechanisms*, 22 U.S.F. L. REV. 599, 601-09 (1988) (discussing the impact of 1980's insurance crisis on charities' ability to obtain insurance). See also Kenneth Reich, *Youth Agencies Hit Hard by*

damage caps on awards against charities<sup>45</sup> or limiting recovery to the amount of insurance coverage.<sup>46</sup> Other states, applying a novel approach, increased charities' protection by requiring insurance companies to give long-term notice of policy cancellations and prohibiting interim cancellations entirely when insuring non-profit organizations.<sup>47</sup>

Another thorny issue arose when juries began awarding punitive damages against charities, placing them in grave danger of financial ruin.<sup>48</sup> For example, in Texas, Goodwill Industries paid almost five million dollars to the parents of a teenage daughter who was murdered by a parolee employed by the company.<sup>49</sup> Another scare occurred when the YMCA settled a suit for over \$831,000, plus lifetime monthly payments, when a young girl almost drowned in its pool.<sup>50</sup> Occasionally, a state has upheld punitive damages against charities, but this remains a generally disfavored result for obvious reasons.<sup>51</sup>

In recent years, most states have retained or reinitiated some type of limited charitable immunity to protect charities. This preservation has occurred in the form of protection statutes, damages caps, or other initiatives,

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*Soaring Insurance Costs*, L.A. TIMES, July 19, 1986, Part II, at 1; *Insurance Increases Forces YMCA to Drop Youth Minibike Program*, CHRISTIAN SCIENCE MONITOR, Aug. 14, 1986, at 5.

45. See MASS. GEN. LAWS ANN. ch. 231, § 85k (West Supp. 1999) (placing a limit at \$20,000 per occurrence); N.H. REV. STAT. ANN. § 508:17 (Lexis Supp. 1998) (limiting recovery absent willful or wanton negligence); S.C. CODE ANN. § 33-55-210 (Law Co-op. 1990) (setting damage cap of \$200,000); TEX. CIV. PRAC. & REM. CODE ANN. § 84.007(g) (West Supp. 1999) (placing damage cap at \$500,000 per person, \$1,000,000 each incident of death or bodily injury, and \$100,000 each incident of damage to property). In jurisdictions allowing recovery, critics began voicing concern over the state of affairs, particularly in regard to hospital liability. See Claire Grandpré Combs, Comment, *Hospital Vicarious Liability for the Negligence of Independent Contractors and Staff Physicians: Criticisms of Ostensible Agency Doctrine in Ohio*, 56 U. CIN. L. REV. 711 (1987). However, one critic chastised the damages cap in Massachusetts as a remnant of the immunity doctrine that should have remained dead and buried. See Paul T. O'Neill, *Charitable Immunity: The Time to End Laissez-Faire Health Care in Massachusetts Has Come*, 82 MASS. L. REV. 223, 235 (1997).

46. See ME. REV. STAT. ANN. tit. 14, § 158 (West 1980) (setting the amount of recovery at the limit of a charity's insurance coverage).

47. See *The Quality of Mercy*, supra note 35, at 1397.

48. See Daniel A. Barfield, Note, *Better to Give Than to Receive: Should Nonprofit Corporations and Charities Pay Punitive Damages?*, 29 VAL. U. L. REV. 1193 (1995).

49. See Gary Taylor, *Goodwill Must Pay \$5M in Murder by Parolee-Employee*, NAT'L L.J., June 8, 1987, at 22.

50. See David Rohn, *YMCA, Pool Victim Settle; Girl Who Nearly Drowned to Get \$4,000 a Month*, WASH. POST, May 17, 1978, at A4. For other examples of high-profile cases involving non-profits, see Lisa Green Markoff, *A Volunteer's Thankless Task*, NAT'L L.J., Sept. 19, 1988, at 1.

51. See *Mrozka v. Archdiocese of St. Paul & Minneapolis*, 482 N.W.2d 806, 809-10 (Minn. 1992) (allowing punitive damages against a church where a priest had molested a parishioner); *Christofferson v. Church of Scientology of Portland*, 644 P.2d 577, 607-08 (Or. 1982) (allowing punitive damages to be assessed against a religious organization when it defrauded a parishioner's assets).



leaving the doctrine in flux in the majority of jurisdictions today.<sup>52</sup> Mr. Prosser's prediction that charitable immunity would soon meet an untimely end failed to materialize in any practical sense.<sup>53</sup>

## B. History of Charitable Immunity in Arkansas

### 1. *The Early Cases*

The doctrine of charitable immunity enjoys almost a hundred-year history in Arkansas.<sup>54</sup> Unlike its turbulent history found elsewhere, the doctrine in Arkansas has remained steadfast.<sup>55</sup> The Arkansas Supreme Court first recognized the doctrine in *Grissom v. Hill*,<sup>56</sup> a property suit involving a conveyance of land to trustees for the sole benefit of a church.<sup>57</sup> The trustees initially allowed the church to be used as a school with later financial problems resulting in a mechanics lien encumbering the property.<sup>58</sup> The land was then sold by execution with the new purchaser disallowing any religious activities in violation of the donor's conditions.<sup>59</sup> The court ordered the return of the property to the donor because the trust was created for a charitable purpose, and allowing the sale of the property and its non-religious use defeated the donor's charitable intent.<sup>60</sup>

Soon after, the Arkansas Supreme Court examined a judgment rendered to a workman injured by a blast while constructing a public library facility.<sup>61</sup>

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52. See *The Quality of Mercy*, *supra* note 35, at 1382, 1387; Barfield, *supra* note 48, at 1196-97.

53. See PROSSER, *supra* note 41. For a look at some particular state approaches in the area of non-profit protection, see Brenda Kimery, *Tort Liability of Nonprofit Corporations and Their Volunteers, Directors, and Officers: Focus on Oklahoma*, 33 TULSA L.J. 683 (1997); Martin C. McWilliams, Jr., *Charitable Immunity: Statutory Remnants in South Carolina*, 8 S.C. LAW. 28 (Oct. 1996); Peter J. Whitmore, *Immunities from Liability for Colorado Nonprofit Organizations*, 25 COLO. LAW. 37 (May 1996).

54. See *George*, 337 Ark. at 211, 987 S.W.2d at 712.

55. But see generally Canon & Jaros, *supra* note 33 (tracking the demise of charitable immunity in other jurisdictions).

56. 17 Ark. 483 (1856).

57. See *Grissom*, 17 Ark. at 483.

58. See *id.* at 484.

59. See *id.* at 485.

60. See *id.* at 491. The court explained that allowing the trustees to involve the property in debt and be sold defeated the purpose of the trust because under the deed's provisions, the property could not be sold for non-religious purposes. See *id.* at 488. This, in essence, allowed the trustees to escape personal liability for misusing the land by returning the land to the donors and not allowing execution on charitable property. See *id.*

61. See *Woman's Christian Nat'l Library Ass'n v. Fordyce*, 73 Ark. 625, 626, 86 S.W. 417, 418 (1904).

In *Woman's Christian National Library Ass'n v. Fordyce*,<sup>62</sup> the library association relied solely on trustees' donations to build the library which provided free books and instructional periodicals to the community.<sup>63</sup> However, the property was sold to satisfy the tort judgment, and was—ironically—purchased by the injured workman. The Arkansas Supreme Court, building on *Grissom*, held that trustees may not defeat the intent of a trust by default through the use of funds for other purposes, particularly to pay judgments.<sup>64</sup> The court therefore refused to enforce the execution and sale, leaving title with the original trustees.<sup>65</sup>

## 2. *The Early Policy Rationale Behind Immunity*

The Arkansas Supreme Court further solidified the doctrine on a subsequent appeal in *Fordyce & McKee v. Woman's Christian National Library Ass'n*<sup>66</sup> when it declared the property of a charity immune from sale under execution based on the impropriety of its agents or trustees.<sup>67</sup> Charitable immunity was justified by examining the history of charitable immunity in England and in other jurisdictions as well as reiterating the general policy rationale of preserving the public good.<sup>68</sup> The court specifically affirmed the propriety of *Grissom* and refused to reverse its prior holding proclaiming charitable immunity a valid rule of property.<sup>69</sup>

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62. 73 Ark. 625, 86 S.W. 417 (1904).

63. *See id.*, 86 S.W. at 418.

64. *See id.*, 86 S.W. at 419.

65. *See id.*, 86 S.W. at 419. The court did not review the judgment of liability because that issue was not appealed. *See id.*, 86 S.W. at 419 (Hill, J., opinion on rehearing).

66. 79 Ark. 550, 96 S.W. 155 (1906).

67. *See Fordyce & McKee v. Woman's Christian Nat'l Library Ass'n*, 79 Ark. 550, 559, 96 S.W. 155, 159 (1906).

68. *See Fordyce*, 79 Ark. at 568-70, 96 S.W. at 162-63.

69. *See id.* at 570, 96 S.W. at 163. The court explained that the policy change should be made by the legislature, if at all. *See id.*, 96 S.W. at 163. Observing the latest trends, the court noted the legislature had expanded its protection of charities by giving them tax-exempt status. *See id.*, 96 S.W. at 163. The court soon after declared the building and property of the hospital Sisters of Mercy of Female Academy exempt from taxes under the Constitution. *See Hot Springs Sch. Dist. v. Sisters of Mercy*, 84 Ark. 497, 106 S.W. 954 (1907). For later treatments of tax exemptions for charitable organizations, see *Burgess v. Four States Mem'l Hosp.*, 250 Ark. 485, 465 S.W.2d 693 (1971); *Sebastian County Equalization Bd. v. Western Ark. Counseling & Guidance Ctr.*, 296 Ark. 207, 752 S.W.2d 755 (1988); *Crittenden Hosp. Ass'n v. Bd. of Equalization*, 330 Ark. 767, 958 S.W.2d 512 (1997).

### 3. *Charitable Immunity: The Tort Doctrine and Attempted Changes*

In 1953, the court first applied the doctrine of charitable immunity as it related to the tort of a hospital employee in *Crossett Health Center v. Crossett*.<sup>70</sup> The plaintiff sued the hospital for medical negligence when a doctor inadvertently left an object inside her abdomen during an operation.<sup>71</sup> The hospital argued on appeal that it was a charitable association, and was therefore not liable for the acts of its agents.<sup>72</sup> After affirming its commitment to charitable immunity, the Arkansas Supreme Court found that the hospital failed to meet the standard of a charity.<sup>73</sup> First, the court rejected the contention that charitable articles of incorporation alone establish immunity.<sup>74</sup> Applying the defense narrowly, the court also distinguished the hospital from the library association in the *Fordyce* cases, citing the commercial uses of the hospital's money as non-charitable activity that placed it outside the purview of immunity.<sup>75</sup>

The Arkansas Supreme Court again declined to overrule the doctrine of charitable immunity in *Cabbiness v. North Little Rock*,<sup>76</sup> when a boy sustained serious injury after diving in a city swimming pool.<sup>77</sup> The court refused to hold the Boys' Club liable with little discussion, noting that the legislature must effectuate any change in the long-established immunity rule in Arkansas.<sup>78</sup>

Charitable immunity appeared in its more modern form in the case of *Helton v. Sisters of Mercy*,<sup>79</sup> when the Arkansas Supreme Court inquired into the intent and structure of an entity to determine if it operated as a charity. After being injected with the wrong drug, a child plaintiff sued the hospital for negligence, and later filed a second suit under the same facts for breach of

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70. 221 Ark. 874, 256 S.W.2d 548 (1953).

71. See *Crossett*, 221 Ark. at 875, 256 S.W.2d at 548.

72. See *id.* at 876, 256 S.W.2d at 549.

73. See *id.* at 883, 256 S.W.2d at 552. *Crossett Lumber Company* originally established the hospital, donating land and facilities for the project. See *id.* at 879-80, 256 S.W.2d at 550.

74. See *id.* at 882, 256 S.W.2d at 552. The articles of incorporation in *Crossett* stated charitable purposes yet clearly noted the following:

[a]ny such corporation shall have power to raise money in any manner agreed upon in its constitution or articles of association. Such corporation shall have such powers of suing and being sued, buying, holding and selling property, real and personal and of otherwise carrying out the purposes and objects of their organizations . . . .

*Id.* at 880, 256 S.W.2d at 551.

75. See *id.* at 883, 256 S.W.2d at 552.

76. 228 Ark. 356, 307 S.W.2d 529 (1957).

77. See *Cabbiness*, 228 Ark. at 363, 307 S.W.2d at 533.

78. See *id.*, 307 S.W.2d at 533.

79. 234 Ark. 76, 351 S.W.2d 129 (1961).

contract.<sup>80</sup> The court, discussing the hospital's immune status, noted the purpose of the hospital was indeed charitable because it accepted all patients regardless of their ability to pay and paid no taxes.<sup>81</sup> The court also observed the same hospital was previously declared a charity, citing an earlier case where the hospital was declared tax-exempt.<sup>82</sup> The *Helton* court distinguished *Crossett*, in which evidence existed that the hospital was not truly following its established charitable purpose.<sup>83</sup> The court stated that a public charity is not liable in tort, reiterating that charitable immunity, as a rule of property, should remain unchanged by the courts.<sup>84</sup>

The doctrine of charitable immunity was next brought to the Arkansas Supreme Court by a plaintiff seeking solely to overrule the long-standing precedent.<sup>85</sup> In *Williams v. Jefferson Hospital Ass'n*,<sup>86</sup> the appellants admitted that the hospital was a charity but urged the court to abandon the present state of the law.<sup>87</sup> The appellants argued several convincing points for reversal including the doctrine's harshness on potential plaintiffs, its abandonment by scholars, and a policy argument that charities must not remain out of the reach of the law.<sup>88</sup> After admitting the appellant's arguments were persuasive, the court recited precedent as a major factor implicating the retention of immunity.<sup>89</sup> The court also stated that appellant's arguments appeared less convincing because Arkansas applied the doctrine narrowly.<sup>90</sup> Firm in its

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80. See *Helton*, 234 Ark. at 77, 351 S.W.2d at 129-30. The plaintiffs filed the second suit after the hospital filed a motion to dismiss based on the defense of charitable immunity. See *id.*, 351 S.W.2d at 129-30. The trial court granted the motion to dismiss as to both the tort and contract suits, and they were consolidated on appeal. See *id.* at 78, 351 S.W.2d at 130.

81. See *id.*, 351 S.W.2d at 130. The sisters of the order receive no personal compensation and devote their lives to charity. See *id.*, 351 S.W.2d at 131.

82. See *id.*, 351 S.W.2d at 130-31.

83. See *id.* at 80, 351 S.W.2d at 131.

84. See *id.*, 351 S.W.2d at 131.

85. See *Williams v. Jefferson Hosp. Ass'n*, 246 Ark. 1231, 442 S.W.2d 243 (1969).

86. 246 Ark. 1231, 442 S.W.2d 243.

87. See *Williams*, 246 Ark. at 1233, 442 S.W.2d at 243.

88. See *id.*, 442 S.W.2d at 243-44. Apparently, of concern to the court was its recent judicial abandonment of municipal immunity, promptly met by legislation reinstating the immunity. See *id.* at 1236, 442 S.W.2d at 245. The court case cited by plaintiffs that overturned municipal immunity was *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968). The statute passed by the legislature reinstating immunity to all counties, municipalities, school districts, and other political subdivisions of the state is found at Arkansas Code Annotated section 21-9-301 (Michie 1997).

89. See *Williams*, 246 Ark. at 1235, 442 S.W.2d at 244. In support of the narrow construction rationale, the court cited *Crossett*, in which the court denied immunity to a hospital because its purpose was not purely charitable. See *id.*, 442 S.W.2d at 244. The court questioned how many hospitals in Arkansas would meet the charitable immunity criteria discussed in *Helton v. Sisters of Mercy*, 234 Ark. 76, 351 S.W.2d 129 (1961). See *Williams*, 246 Ark. at 1235, 442 S.W.2d at 245.

90. See *Williams*, 246 Ark. at 1234, 442 S.W.2d at 244.

stance, one year later, the court refused to even discuss the revocation of the immunity doctrine in Arkansas, explaining that *Williams* was dispositive on the issue.<sup>91</sup>

The *Williams* omen refusing to overturn total immunity for charitable organizations from torts did not deter future plaintiffs from challenging its use as a defense. For example, the Arkansas Court of Appeals conducted a thorough inquiry of the validity of the defense in *J.W. Resort v. First American National Bank*<sup>92</sup> before deciding to deny the non-profit corporation immunity.<sup>93</sup> Reminiscent of the early cases, the issue in *J.W. Resort* examined whether the corporation's property, which initially provided housing for the elderly and veterans, was exempt from sale under execution of a judgment.<sup>94</sup> The Arkansas Court of Appeals upheld a judgment against the resort for the unlawful cutting and removal of timber from a neighbor's property.<sup>95</sup> The resort's articles of incorporation described it as a charity, and the resort received charitable donations; however, currently the resort only rented land for farming.<sup>96</sup> The court of appeals also pointed out that the resort provided children with transportation to a nearby grocery store on occasion, but performed no other charitable acts as its purpose indicated.<sup>97</sup> The court denied the defendant immunity because the corporation was not maintained exclusively as a charity and had not supplied any charitable services in over five years.<sup>98</sup>

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91. See *LeMay v. Trinity Lutheran Church*, 248 Ark. 119, 120-21, 450 S.W.2d 297, 297 (1970). The *LeMay* case involved an appeal from a judgment in favor of Trinity Lutheran Church when a tree from the church's property fell on a neighbor's house. See *id.*, 450 S.W.2d at 297.

92. 3 Ark. App. 290, 291, 625 S.W.2d 557, 557 (1981).

93. See *id.*, 625 S.W.2d at 557.

94. See *id.* at 290-91, 625 S.W.2d at 557.

95. See *id.* at 291, 625 S.W.2d at 557.

96. See *id.*, 625 S.W.2d at 557.

97. See *id.*, 625 S.W.2d at 557.

98. See *J.W. Resort*, 3 Ark. App. at 292-93, 625 S.W.2d at 558. The court cited *Crossett Health Center* for the proposition that an entity must be maintained for a purely charitable purpose to qualify for immunity. See *id.* at 292, 625 S.W.2d at 558. Charities in Arkansas receive other benefits as well. For example, in an intriguing twist on charitable immunity, the Arkansas Court of Appeals, four years after *J.W. Resort*, held that a charitable hospital is immune from liability for worker's compensation benefits, citing language similar to that used to exempt a charity from tort liability. See *Marion Hosp. Ass'n v. Lanphier*, 15 Ark. App. 14, 15-16, 688 S.W.2d 322, 323 (1985). The appeals court also held an ambulance service immune from workman's compensation liability in *Sloan v. Volunteer Ambulance Serv.*, 37 Ark. App. 138, 826 S.W.2d 296 (1992).

#### 4. *A Test Emerges—Masterson v. Stambuck and Its Progeny*

The Arkansas Supreme Court recognized that no guidance existed for determining charitable status, and in *Masterson v. Stambuck*,<sup>99</sup> adopted an eight-part test to decide the issue.<sup>100</sup> The *Masterson* test incorporated earlier considerations such as the charter's indication of a charitable purpose and whether the entity offered free services to those unable to pay, as well as new factors regarding the financial organization of the entity.<sup>101</sup> The court never denoted that the adoption of these factors changed the law regarding charitable immunity.<sup>102</sup> These new factors, discussed in depth in part IV of this note, examine several issues including the following: the organization's charter purpose, whether it is non-profit, whether it realistically earned a profit, how that profit or surplus is used, whether the entity depends on donations, whether it charges those who can not pay, and if its officers receive compensation.<sup>103</sup>

The *Masterson* case involved a garbage truck driver killed in an auto accident when he struck an electric utility pole operated by Conway Corporation.<sup>104</sup> The utility franchise claimed immunity based on its charitable status.<sup>105</sup> The court, applying the new test, concluded charitable immunity did

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99. 321 Ark. 391, 902 S.W.2d 803 (1995).

100. See *Masterson*, 321 Ark. at 401, 902 S.W.2d at 809.

101. See *id.*, 902 S.W.2d at 809. These factors were originally set forth in a Virginia district court case, *Davidson v. Colonial Williamsburg Foundation*, 817 F. Supp. 611, 614 (E.D. Va. 1993). See *Masterson*, 321 Ark. at 401, 902 S.W.2d at 809.

102. See *Masterson*, 321 Ark. at 401, 902 S.W.2d at 810.

103. See *id.*, 902 S.W.2d at 809. The Arkansas Court of Appeals in *Marion Hospital Ass'n v. Lamphier* used an analogous test for hospitals that examined the following: (1) do the articles of incorporation provide the hospital is charitable in nature; (2) is the corporation maintained for private gain or profit; (3) does the hospital have capital stock or does it have provisions for distributing dividends or using profits; (4) does the hospital derive funds from public and private charity as well as those able to pay; (5) do all "profits" go toward maintaining the hospital and extending the charity; (6) is the hospital open to those unable to pay; (7) are patients unable to pay received without charge and absent discrimination; and (8) is the hospital exempt from federal and state taxes. See *Marion*, 15 Ark. App. at 14, 688 S.W.2d at 322 (1985). The *Masterson* court cited this test for charitable hospitals in a footnote but did not explain why it adopted a different test. See *Masterson*, 321 Ark. at 401, 902 S.W.2d at 809 n.2. This apparently caused some confusion as to whether hospitals were judged by the court of appeals test instead of *Masterson*, causing the Eighth Circuit to remand a malpractice action using the court of appeals factors instead of the *Masterson* test since it involved a hospital. See *Roberts v. Francis*, 128 F.3d 647, 651-52 (8th Cir. 1997).

104. See *Masterson*, 321 Ark. at 393-94, 902 S.W.2d at 805.

105. See *id.* at 400, 902 S.W.2d at 809. Conway Corporation also argued governmental immunity based on its agency as an arm of the city of Conway. See *id.* at 395, 902 S.W.2d at 806. The court reversed, denying municipal immunity and explaining Conway Corporation's agency relationship with the city fell outside the language of Arkansas Code Annotated section 21-9-301. See *id.* at 398, 902 S.W.2d at 808.

not apply and upheld summary judgment for the plaintiffs.<sup>106</sup> Specifically, the court found that Conway Corporation failed to meet charitable status under three factors: (1) its articles of incorporation did not limit it to non-profit uses, (2) it made a substantial profit, (3) and it refused to supply utilities to those unable to pay.<sup>107</sup>

Soon thereafter, the court denied immunity status to a juvenile rehabilitation camp based on the *Masterson* test in *Ouchita Wilderness Institute v. Mergen*.<sup>108</sup> The court reasoned that because the charter did not limit the corporation to charitable purposes and because the camp was state-funded, immunity was inapplicable.<sup>109</sup> The court also noted that the camp's profit goals seemed indefinite because it returned any surplus to the state and received no contributions otherwise.<sup>110</sup> The court next applied the *Masterson* factors in *George v. Jefferson Hospital Ass'n* where the plaintiff launched a vigorous challenge to the charitable immunity defense of JRMC.<sup>111</sup>

#### IV. REASONING OF THE COURT

In *George v. Jefferson Hospital Ass'n*,<sup>112</sup> the Arkansas Supreme Court reviewed the trial court's issuance of summary judgment for Jefferson Hospital Association and St. Paul Insurance Company against the plaintiff, Ms. George.<sup>113</sup> The court first examined if summary judgment was

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106. See *id.* at 403, 902 S.W.2d at 811.

107. See *id.* at 402-03, 902 S.W.2d at 810. Justice Brown, also the dissenter in *George* wrote a dissent in *Masterson* disagreeing with the denial of municipal immunity to Conway Corporation and criticizing the majority for applying statutory immunity too narrowly. See *id.*, 902 S.W.2d at 811 (Brown, J., dissenting). But see *George v. Jefferson Hosp. Ass'n*, 337 Ark. at 217, 987 S.W.2d at 716 (Brown, J., dissenting) (writing a dissenting opinion because the majority applied charitable immunity too broadly denying the plaintiff relief).

108. 329 Ark. 405, 418, 947 S.W.2d 780, 787 (1997).

109. See *Mergen*, 329 Ark. at 418, 947 S.W.2d at 787.

110. See *id.*, 947 S.W.2d at 787. Arkansas also places another barrier to tort recovery from hospitals due to the negligence of their physicians based on agency. See, e.g., *Kenning v. St. Paul Fire & Marine Ins. Co.*, 990 F. Supp. 1104 (W.D. Ark. 1997). Although the case law remains somewhat murky, apparently a doctor may not be an agent or employee of a charitable corporation. See *Kenning*, 990 F. Supp. at 1113. But see *Medi-Stat Inc. v. Kusturin*, 303 Ark. 45, 792 S.W.2d 869 (1990) (holding a for-profit corporation may be held liable for the negligence of its physician employees). The court specifically declined to extend the *Medi-Stat* principle to non-profit corporations in *Thomas v. Sessions*, 307 Ark. 203, 211, 818 S.W.2d 940, 944 (1991). For an excellent background on agency principles and physician employees in Arkansas, see H. Ward Classen, *Hospital Liability for Independent Contractors: Where Do We Go From Here?*, 40 ARK. L. REV. 469 (1987).

111. See generally *George v. Jefferson Hosp. Ass'n*, 337 Ark. 206, 987 S.W.2d 710 (1999).

112. 337 Ark. 206, 987 S.W.2d 710 (1999). The majority decision was authored by Justice Lavenski R. Smith. See *id.*, 987 S.W.2d at 710.

113. See *id.* at 210, 987 S.W.2d at 712.

appropriate for deciding the status of JRMC as a tort-immune charity under Arkansas law.<sup>114</sup> Next, it discussed if the trial court erred by issuing a second summary judgment in response to the defendant's relation-back claim on the statute of limitations.<sup>115</sup> This second summary judgment decision disallowed plaintiff's amended suit against St. Paul, JRMC's malpractice insurance carrier.<sup>116</sup>

#### A. Doctrine of Charitable Immunity

The Arkansas Supreme Court began its substantive discussion by stating that the doctrine of charitable immunity has enjoyed an almost hundred year history in Arkansas.<sup>117</sup> The policy rationale behind the defense of charitable immunity, according to the court, is to protect charities from financial disaster by disallowing the execution of judgments against them due to the negligent acts of their agents.<sup>118</sup> The court observed that the doctrine obviously favors charities and limits their liability to those whom they serve.<sup>119</sup> To reduce this pro-defendant bias, the court stated that it construes charitable immunity very narrowly.<sup>120</sup> The court then cautioned that a narrow construction would not preclude the use of charitable immunity as a defense when it is clearly applicable.<sup>121</sup>

The court then enumerated the eight-factor test from *Masterson v. Stambuck*<sup>122</sup> which determines if charitable immunity is applicable to a particular organization.<sup>123</sup> The court, reviewing its recent treatment of the *Masterson* test, noted the eight factors are illustrative and are not an exclusive

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114. See *id.*, 987 S.W.2d at 712. Arkansas is one of the few remaining states which retains the defense of full charitable immunity for non-profit entities. See *id.* at 217, 987 S.W.2d at 716 (Brown, J., dissenting).

115. See *id.* at 216, 987 S.W.2d at 714.

116. See *id.*, 987 S.W.2d at 714. The appellant amended its complaint by adding St. Paul as a party in January 1998. See *id.* at 215, 987 S.W.2d at 714. St. Paul Fire & Marine Insurance Co. is the medical malpractice carrier for JRMC. See *id.*, 987 S.W.2d at 714.

117. See *id.* at 211, 987 S.W.2d at 712. The earliest case cited by the court in favor of charitable immunity was *Grissom v. Hill*, 17 Ark. 483 (1856).

118. See *George*, 337 Ark. at 211, 987 S.W.2d at 712.

119. See *id.*, 987 S.W.2d at 712.

120. See *id.*, 987 S.W.2d at 712. See also *Williams v. Jefferson Hosp. Ass'n*, 246 Ark. 1231, 442 S.W.2d 243 (1969). Interestingly, the court noted in *Williams* that the finding of charitable immunity for JRMC was binding only for that particular case. See *Williams*, 246 Ark. at 1237, 442 S.W.2d at 245 n.1.

121. See *George*, 337 Ark. at 211, 987 S.W.2d at 713.

122. 321 Ark. 391, 401, 902 S.W.2d 803, 809 (1995).

123. See *George*, 337 Ark. at 212, 987 S.W.2d at 713. See also *supra* text accompanying note 101 (origin of the *Masterson* eight-part test).



or final determination of charitable status.<sup>124</sup> The court then proceeded to recite the eight factors as including the following: (1) whether the organization's charter purpose confines it to charitable purposes; (2) whether the organization's charter contains any not-for-profit language; (3) whether the organization's goal is profit-making; (4) whether the organization actually earned a profit; (5) how any profit or surplus is used; (6) whether the organization depends on contributions for its financing; (7) whether the organization provides service for those unable to pay; and (8) whether the officers receive compensation or are volunteers.<sup>125</sup>

In reviewing the lower court's application of these factors, the Arkansas Supreme Court noted that the first three factors were clearly demonstrated based upon the evidence in the record.<sup>126</sup> The court quickly disposed of the first two factors, indicating the organization's charter clearly contained both charitable and not-for-profit language.<sup>127</sup> Also, the court concluded the evidence showed JRMC treated patients free of charge who were unable to pay.<sup>128</sup>

Before examining the remaining factors, the court dismissed Ms. George's argument that these were questions of fact for a trial by stating these were only differing legal constructions of undisputed facts.<sup>129</sup> The court explained that in such a case, an appellate court should affirm summary judgment where reasonable persons could not draw varying conclusions based upon those undisputed facts.<sup>130</sup>

The court analyzed the factors involving the profit-making status of JRMC.<sup>131</sup> It concluded that although JRMC seeks a yearly surplus, this fact alone is not incompatible with its claim for charitable status.<sup>132</sup> Comparing JRMC with for-profit hospitals, the court noted that JRMC's annual profit of

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124. See *George*, 337 Ark. at 212, 987 S.W.2d at 713. See also *Ouchita Wilderness Inst. v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997).

125. See *George*, 337 Ark. at 212, 987 S.W.2d at 713.

126. See *id.*, 987 S.W.2d at 713.

127. See *id.*, 987 S.W.2d at 713.

128. See *id.*, 987 S.W.2d at 713. The court accepted the defendant's evidence that JRMC treated those unable to pay, and discounted Ms. George's argument that the poverty write-off program did not exist prior to its recent formalization in 1996. See *id.*, 987 S.W.2d at 713. According to plaintiffs, in 1994, at the time of the action, JRMC "did not have an objective criteria in place to determine which patients would [qualify] as charitable . . . but it was a [subjective] . . . determination of the business manager of the collection agency after payment collection efforts were attempted and failed." Brief of Appellant at 98, *George* (No. 98-1134).

129. See *George*, 337 Ark. at 211, 987 S.W.2d at 712.

130. See *id.*, 987 S.W.2d at 712.

131. See *id.* at 212, 987 S.W.2d at 713.

132. See *id.*, 987 S.W.2d at 713. The court noted that "trying to break even is only one factor and certainly is not a dispositive one when applied to a hospital" because of the complex and expensive nature of the entity. *Id.*, 987 S.W.2d at 713.

5% fell clearly below the margin of for-profit hospitals that maintain profit margins of 15% to 20%.<sup>133</sup>

After comparing JRMC's annual profit with for-profit hospitals, the court investigated how any surplus or profit was used.<sup>134</sup> The court held that based on the record, JRMC used its surplus to further its charitable purposes by reinfusing surplus funds into the hospital.<sup>135</sup> The court briefly discussed JRMC's ownership of several for-profit entities whose dividends fund the hospital.<sup>136</sup> These profits, according to the court, were also used in furthering JRMC's charitable purpose of providing quality health care and did not destroy its charitable status.<sup>137</sup>

The court then discussed JRMC's dependency on donations for its livelihood.<sup>138</sup> The court stated that although JRMC only receives 6% of its budget from donations, a large hospital could rarely survive from donations alone.<sup>139</sup> In summary, the court commented that the overall structure of JRMC's finances and organization did not dilute its overall purpose as a charity.<sup>140</sup>

Finally, the court discussed the compensation of the directors and officers of JRMC.<sup>141</sup> The court noted that the Chief Executive Officer of JRMC received \$225,000 per year, plus bonuses depending upon surplus, with similar compensation given to the Chief Financial Officer and others.<sup>142</sup>

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133. See *id.*, 987 S.W.2d at 713. The court also cited a 1961 case, *Helton v. Sisters of Mercy of St. Joseph's Hospital*, 234 Ark. 76, 351 S.W.2d 129 (1961), in which a hospital made an annual profit of \$600,000 and was still deemed to be a charity. See *George*, 337 Ark. at 212, 987 S.W.2d at 714. JRMC, incidentally, retained a five-year surplus of over 5 million dollars. See *id.* at 217, 987 S.W.2d at 715 (Brown, J., dissenting).

134. See *George*, 337 Ark. at 213, 987 S.W.2d at 714.

135. See *id.*, 987 S.W.2d at 714.

136. See *id.*, 987 S.W.2d at 714.

137. See *id.* at 213, 987 S.W.2d at 714. JRMC has ownership interests in several companies including Davis Life Care, a long-term care facility, Jefferson Management Services, a collection agency and physician management company, Jefferson Regional Medical Center Development, a manager of office lease space, and Jefferson Health Affiliates, a diagnostic imaging service. See *id.*, 987 S.W.2d at 714. JRMC is the sole-stockholder in all of the corporations except the Arkansas Preferred Provider Organization, in which it owns 50%. See Brief for Appellee at 12, *George* (No. 98-1134). The other 50% is owned by physicians in the area and benefits the doctors to help bring in patients who may be admitted to JRMC. See *id.* JRMC is also a member of Premiere, Inc., a group purchasing alliance, which buys supplies for the hospital. See Brief for the Appellant at 38, *George*, (No. 98-1134). According to the CEO of the Jefferson Hospital Association, Robert Atkinson, Jefferson invested \$31,900 in Premier Inc., which was exchanged for SunHealth stock. See *id.*

138. See *George*, 337 Ark. at 214, 987 S.W.2d at 714.

139. See *id.*, 987 S.W.2d at 714.

140. See *id.*, 987 S.W.2d at 714.

141. See *id.*, 987 S.W.2d at 714.

142. See *id.*, 987 S.W.2d at 714. The Chief Financial Officer's reported salary is \$170,000 per year plus bonus, depending on surplus. See *id.*, 987 S.W.2d at 714.

However, it found that minimal bonus compensation did not push JRMC into the status of for-profit.<sup>143</sup> The court reasoned that a sizable hospital must pay a competitive rate for essential personnel, and, accordingly, it is unnecessary for a charity to maintain exclusively volunteer personnel.<sup>144</sup>

In summary, the court concluded upon a review of all the facts that JRMC qualified as a charity under Arkansas law and could assert the defense of charitable immunity.<sup>145</sup> The court, admitting that such a result could be harsh, instructed injured parties to sue the insurance carrier directly as allowed under Arkansas Code Annotated section 23-79-210.<sup>146</sup>

The dissenting opinion also examined the application of the *Masterson* test to the facts.<sup>147</sup> Justice Brown's dissent criticized the majority's failure to discuss how any of the facts affected JRMC's status.<sup>148</sup> In particular, the dissenting opinion pointed out how the ownership of several for-profit entities and the lack of charitable guidelines seriously undermined JRMC's status as a charity.<sup>149</sup> Another problem, according to Justice Brown, was the amount of charitable care offered at the hospital, which only comprised approximately 10% of its total clientele.<sup>150</sup> Justice Brown also questioned the amount of profit made by JRMC as being in accord with its claim of charitable status.<sup>151</sup> Additionally, Justice Brown raised questions regarding whether JRMC provided write-offs for the differential between Medicaid benefits and actual

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143. See *id.*, 987 S.W.2d at 714. The court offered no real explanation for why this system was considered "minimal" bonus compensation or what amount might sway the factor in favor of negating immunity. *Id.*, 987 S.W.2d at 714.

144. See *George*, 337 Ark. at 214, 987 S.W.2d at 714.

145. See *id.*, 987 S.W.2d at 714. The court also stated "fair-minded persons presented with the same facts would reach the same conclusion." *Id.*, 987 S.W.2d at 714.

146. See *id.*, 987 S.W.2d at 714. The statute states:

[W]hen liability insurance is carried by any cooperative nonprofit corporation . . . not subject to suit for tort, and if any person . . . suffers injury or damage to person or property on account of negligence . . . of the organization, . . . its servants, [or] agents . . . then the person so injured or damaged shall have a direct cause of action against the insured to the extent of the amounts provided for in the insurance policy . . . .

ARK. CODE ANN. § 23-79-210(a)(1) (Michie 1997). It is important to note that the statute limits recovery to the amount "ordinarily [to] be paid under the terms of the policy." *Id.*

147. See *George*, 337 Ark. at 217, 987 S.W.2d at 715 (Brown, J., dissenting).

148. See *id.*, 987 S.W.2d at 715 (Brown, J., dissenting).

149. See *id.*, 987 S.W.2d at 715 (Brown, J., dissenting).

150. See *id.*, 987 S.W.2d at 715. See also Brief for Appellant at 43, *George* (No. 98-1134).

151. See *George*, 337 Ark. at 217, 987 S.W.2d at 715. For support, Justice Brown quoted the language from another hospital charity case, *Crossett Health Center v. Croswell*, which states "[b]ut in the case at bar there are factors sufficient for the jury to find that the medical center was not a trust involving dedication of its property to the public." *Crossett Health Ctr. v. Croswell*, 221 Ark. 874, 883, 256 S.W.2d 548, 552 (1953).

cost of care and if the write-offs qualified as bad debts or were included in charity totals.<sup>152</sup>

Justice Brown stressed that several fact questions existed that affected the hospital's qualification as a charity.<sup>153</sup> He strongly criticized the majority's focus on the fact that JRMC paid no dividends and was not a stockholder corporation.<sup>154</sup> Additionally, he noted that the majority's approach abandoned the *Williams* mandate of narrow construction for the defense of charitable immunity and therefore broadened the defense by refusing to narrowly apply the *Masterson* factors.<sup>155</sup> The dissent, citing the myriad of factual issues in the case, concluded that summary judgment was inappropriate and that the majority should have remanded the case for trial.<sup>156</sup>

## B. Relation-Back and the Statute of Limitations

The Arkansas Supreme Court also reviewed the circuit court's holding that the claim against St. Paul did not relate-back to the original complaint under Arkansas Rule of Civil Procedure 15(c) and accordingly was barred by the statute of limitations.<sup>157</sup> The court found that the district court correctly decided the issue and affirmed the grant of summary judgment in favor of St. Paul Fire & Marine Insurance Company.<sup>158</sup>

The court stated that four components are required to use Rule 15(c)'s relation-back provision: (1) the claim must arise out of conduct set forth in the original pleading; (2) St. Paul must have notice of the action so as not to be prejudiced in its defense; (3) St. Paul must or should have known but for a mistake concerning the identity of the party, it would have been a defendant; and (4) both requirements for subsections two and three must be met within 120 days from the date of the original complaint.<sup>159</sup> The court conceded that Ms. George readily proved the first and second requirements under the Rule.<sup>160</sup> The court then stated that Ms. George had failed to establish that St. Paul knew that her failure to include it as a party was a mistake of identity.<sup>161</sup>

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152. See *George*, 337 Ark. at 218, 987 S.W.2d at 716 (Brown, J., dissenting).

153. See *id.*, 987 S.W.2d at 716 (Brown, J., dissenting).

154. See *id.*, 987 S.W.2d at 716 (Brown, J., dissenting). Justice Brown indicated the majority only paid lip service to the *Masterson* factors and broadened the doctrine of charitable immunity by concluding no factual questions existed in a case "fraught" with fact questions. See *id.*, 987 S.W.2d at 716 (Brown, J., dissenting).

155. See *id.* at 218, 987 S.W.2d at 716 (Brown, J., dissenting).

156. See *id.*, 987 S.W.2d at 716 (Brown, J., dissenting).

157. See *id.*, 987 S.W.2d at 716.

158. See *George*, 337 Ark. at 215, 987 S.W.2d at 715.

159. See *id.*, 987 S.W.2d at 715.

160. See *id.*, 987 S.W.2d at 715.

161. See *id.*, 987 S.W.2d at 715.

Ms. George argued that she believed suing St. Paul prior to a decision regarding charitable status of the hospital might have resulted in both parties being dismissed.<sup>162</sup> The court quickly disposed of this argument and concluded that no mistake of identity was made but that plaintiff made a purposeful calculation as to choice of parties.<sup>163</sup> Accordingly, the court upheld the trial court's decision and affirmed the summary judgment dismissing St. Paul from the case.<sup>164</sup>

## V. SIGNIFICANCE

The most significant aspect of the *George* opinion is the application of the *Masterson* charitable immunity factors for the first time to a hospital. This decision should continue to guide future malpractice suits in Arkansas when the defense of charitable immunity is raised.

First, the court clearly adheres to the distinct minority position of full charitable immunity for hospitals and their staffs.<sup>165</sup> As mentioned, most scholars and jurisdictions have long since placed the doctrine in retreat.<sup>166</sup> This is largely based on the notion that the rationale for immunity no longer exists, and full immunity for hospitals is an ineffective allocation of tort risk.<sup>167</sup>

Second, *George* clearly indicates the new *Masterson* eight-part test for the immunity defense is applicable to hospitals and may be decided on summary judgment.<sup>168</sup> At first glance, the application greatly clarifies the defense. *George* specifically indicates what factors the court will consider in the charitable immunity inquiry, and that these factors are applicable to all types of charitable organizations asserting the defense.<sup>169</sup> Importantly, *George* illustrates what individual weaknesses a plaintiff may argue to defeat the immunity defense.

Third, *George* instructs future plaintiffs to pursue a direct remedy against the insurance carrier under Arkansas Code Annotated section 23-79-210.<sup>170</sup>

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162. See *id.* at 216, 987 S.W.2d at 715. The court dismissed her argument as "meritless" because she could have sued both defendants and with alternative pleading experienced no danger of a double dismissal. *Id.*, 987 S.W.2d at 715.

163. See *id.*, 987 S.W.2d at 715.

164. See *George*, 337 Ark. at 215, 987 S.W.2d at 715.

165. See *id.* at 217, 987 S.W.2d at 716 (Brown, J., dissenting).

166. See RESTATEMENT (SECOND) OF TORTS § 895E reporter's note (1977).

167. See *The Quality of Mercy*, *supra* note 35, at 1389-90.

168. See *George*, 337 Ark. at 210, 987 S.W.2d at 712.

169. See *id.* at 212, 987 S.W.2d at 713.

170. See ARK. CODE ANN. § 23-79-210(a)(1) (Michie 1997). For the full text of the statute see *supra* text accompanying note 146. The statute also does not require a hospital or other charitable entity to carry liability insurance. See ARK. CODE ANN. § 23-79-210(c)(1) (Michie

Significantly, recovery under the statute is limited to the amount of the insurance policy.<sup>171</sup> Also, charitable hospitals are not required by law to carry liability insurance, which may leave some plaintiffs entirely without a remedy.<sup>172</sup> Without an adequate source of compensation available to them and their attorneys, who generally work on a contingency basis, plaintiffs' decisions to sue may be negatively affected. Such factors may also fail to provide a real remedy to a plaintiff whose injuries exceed insurance policy limits.

The *Masterson* clarification of the defense leaves the inquiry with several problems. The court seems to have carved out a hybrid application for hospitals. The same eight factors are used, however their application serves as a justification for immunity rather than an application at all. The earlier more narrow application of the *Masterson* test is somehow absent in *George*.<sup>173</sup> The two previous cases decided under the *Masterson* factors, which incidentally, did not involve hospitals, disallowed the defense of charitable immunity based on two or three of the factors that indicated some non-charitable activities.<sup>174</sup> In both of these instances, the court applied the factors narrowly, and denied the defense to otherwise non-profit entities.

The *George* court, however, examined all the factors as they apply to JRMC with an overriding concern for effective hospital operation.<sup>175</sup> The court seemed to indicate that no one should expect a hospital to operate in the same humble manner as other non-profits because of the complex nature of the industry.<sup>176</sup> Following *George*, it remains difficult to reconcile how a juvenile rehabilitation camp does not qualify for charitable immunity but a profitable hospital system that owns several for-profit corporations does qualify.<sup>177</sup> The court seemed unconcerned with whether JRMC's profitable activities defeated the overall charitable objectives of the hospital.<sup>178</sup> It seemed so unconcerned

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1997).

171. See ARK. CODE ANN. § 23-79-210(a)(2) (Michie 1997).

172. See ARK. CODE ANN. § 23-79-210(c)(1) (Michie 1997).

173. See *George*, 337 Ark. at 218, 987 S.W.2d at 716 (Brown, J., dissenting).

174. See *Masterson*, 321 Ark. at 402-03, 902 S.W.2d at 810; *Mergen*, 329 Ark. at 418, 947 S.W.2d at 787.

175. See *George*, 337 Ark. at 213, 987 S.W.2d at 713. "Modern hospitals are complex and expensive, technological, economic, and medical enterprises that can ill afford to come short of even in their financial integrity." *Id.*, 987 S.W.2d at 713. "Yet, it is not necessary for charitable organizations to have entirely volunteer staff and management. JRMC's size and complexity make knowledgeable, well-qualified personnel essential." *Id.* at 214, 987 S.W.2d at 714. "[A] modern hospital, with rare exception, would find it extremely difficult to operate wholly or predominately on charitable organizations." *Id.*, 987 S.W.2d at 714.

176. See *id.*, 987 S.W.2d at 714.

177. Compare *Ouchita Wilderness Inst. v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997), with *George v. Jefferson Hosp. Ass'n*, 337 Ark. 206, 987 S.W.2d 710 (1999).

178. See *George*, 337 Ark. at 214, 987 S.W.2d at 714.

in fact, that it allowed the lower court's decision to stand on summary judgment without a thorough inquiry into the nature of the hospital system.<sup>179</sup> Previously, the *Williams* court had indicated that few hospitals would qualify for immunity with the narrow application given by the court.<sup>180</sup> However, with a broader version of charitable immunity, a substantial number of hospitals may operate within these quasi-immunity parameters.

Other practical concerns were also left unanswered. The court never indicated how many of the eight factors a plaintiff must disprove before the defense failed.<sup>181</sup> This is particularly problematic because the court upheld *George*, a complex, fact intensive case, on summary judgment after discussing the eight factors only briefly.<sup>182</sup> In earlier immunity cases, any organization that acted outside of its stated purpose was denied the charitable immunity defense.<sup>183</sup> Now, two or three factors that go against a defendant may not preclude the defense that it operates as a charity. Moreover, similar to *George*, the defendant hospital may never have to prove the immunity defense to a jury.

The exact effect of *George* on the charitable immunity defense for future plaintiffs is unclear. The court may continue to apply the *Masterson* test broadly to hospitals, giving them deference because of the importance of their mission and the complexity of their operations. This may open the door for many hospitals, formerly not charitable, to assert the defense in litigation. A number of Arkansas hospitals operate similarly to JRMC, treating patients who cannot pay. Also, charitable hospitals may take a cue that making a profit and diversifying with other for-profit enterprises will not preclude them from asserting the defense of charitable immunity in tort. As the non-profit industry continues to grow, so will the need for a clear application of Arkansas's full charitable immunity doctrine and a solution for the lack of accountability it provides.<sup>184</sup>

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179. See *id.*, 987 S.W.2d at 714.

180. See *Williams*, 246 Ark. at 1235, 442 S.W.2d at 245.

181. See *George*, 337 Ark. at 213, 987 S.W.2d at 714.

182. See *supra* text accompanying note 137 (discussing the various entities owned and operated by the Jefferson Hospital Association and their profit-making status).

183. See *Crossett*, 221 Ark. at 880, 256 S.W.2d at 552.

184. See *Quality of Mercy*, *supra* note 35, at 1391. "[T]he victim of a tort should not be made to bear the whole social cost of this good." *Id.* at 1390.

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