University of Arkansas at Little Rock Law Review

Volume 40 | Issue 3 Article 6

2018

Property Law and Civil Procedure--Establishing Precedent for AFHA Enforcement and Revising Arkansas's Law on Punitive Damages. Watkins v. Turner, 2016 Ark. App. 158, 2016 WL 903765

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PROPERTY LAW AND CIVIL PROCEDURE—ESTABLISHING PRECEDENT FOR AFHA ENFORCEMENT AND REVISING ARKANSAS'S LAW ON PUNITIVE DAMAGES. *WATKINS V. TURNER,* 2016 ARK. APP. 158, 2016 WL 903765.

I. INTRODUCTION

"This is your eviction notice," your landlord says as he points a pistol at your one-year-old daughter and her mother, six-months pregnant and noticeably with child.[1] The owner of your home boasts of his experience in "coon hunting"[2] and laughs at his own wit.[3] You, an African-American man living in the state that arguably has the worst tenant laws in the country, freeze under a tangible threat clearly accompanied by racially-motivated aggression.[4] Humiliated, frightened, offended, and emasculated, you stand by unable to protect your family.[5]

Eventually, the police arrive and end the assault but you are too terrified to remain in your home or to take the time to collect your belongings, and the experience was so traumatic that you cannot put it completely behind you.[6] Now you would likely be asking, "What will my legal system do for me?"

These astonishing events prompted the decision in *Watkins v. Turner*.[7] Fortunately, the real-life tenants described above achieved a notable victory when the Arkansas Court of Appeals affirmed a trial court's enforcement of the Arkansas Fair Housing Act ("AFHA")[8] and upheld an order requiring the defendant to pay compensatory and punitive damages for his conduct.[9] The decision is significant both because it is Arkansas's only precedent of AFHA enforcement, and because the court upheld an award of punitive damages even though the case reached its disposition through a default judgment that was awarded as a discovery sanction.[10]

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1. Watkins v. Turner, 2016 Ark. App. 158, at 2, 2016 WL 903765, at *1; Abstract, Addendum & Brief for Appellant Ruben Watkins at AB. 7, AB. 13, AB. 23, *Watkins*, 2016 Ark. App. 158, 2016 WL 903765 (No. CV-15-845), 2015 WL 10433756, at *7, *13, *24.
2. *Watkins,* 2016 Ark. App. 158, at 2, 2016 WL 903765, at *1.
3. Brief for Appellant at AB 13, *Watkins*, 2016 Ark. App. 158, 2016 WL 903765 (No. CV-15-845), 2015 WL 104337, at *13.
4. Brief for Appellant, *supra* note 3, at *13.
5. *Id.* at *13–14, *16.
6. *Id.* at *15.
7. *Watkins*, 2016 Ark. App. 158, at 2, 2016 WL 903765, at *1.
8. ARK. CODE ANN. § 16-123-201 (Repl. 2016).
9. *Watkins*, 2016 Ark. App. 158, at 7, 9, 2016 WL 903765, at *4–5.
10. *Id.* at 8–9, 2016 WL 903765, at *4–5.

Prior to this decision, it was unclear whether an award of punitive damages under those specific circumstances was proper in Arkansas due to the holding in *Tricou v. ACI Management, Inc*.[11] *In Watkins*, the Arkansas Court of Appeals limited the *Tricou* holding and set its first precedent for enforcing the AFHA.[12] This note argues that *Watkins* is an indispensable decision because its contributions to both landlord-tenant law *and* civil procedure are necessary to effectively carry out justice within the state of Arkansas.

Part II of this note explores the AFHA,[13] the general law of punitive damages,[14] and the backgrounds of *Tricou*[15] and *Watkins*.[16] Part III argues that *Watkins* is a critical addition to Arkansas's appellate case law because judicial enforcement of the AFHA will increase the act's power to protect victims of housing discrimination.[17] Next, Part IV argues that the Arkansas Court of Appeals correctly decided to permit punitive damages to be imposed in cases that result from a default judgment entered as a discovery sanction because it established case law that is consistent with public policy and the purpose of punitive damages.[18] Finally, Part V concludes the note.[19]

II. BACKGROUND

A. The Arkansas Fair Housing Act and Arkansas Fair Housing Commission Are Intended to Prevent and Remedy Housing Discrimination Within the State

1. Purpose and Basic Provisions

The Arkansas General Assembly intended the Arkansas Fair Housing Act (AFHA) to be "substantially equivalent" to its federal counterpart.[20] The AFHA subchapter consists of ten sections that list and define the conduct that the law prohibits, which includes prohibiting landlords from discriminating against tenants in the terms, conditions, or privileges of a real estate transaction and from threatening, intimidating, or interfering with tenants in their enjoyment of the dwelling on the basis of race, color,

11. Tricou v. ACI Mgmt., Inc., 37 Ark. App. 51, 823 S.W.2d 924 (1992); HOWARD W. BRILL & CHRISTIAN H. BRILL, ARKANSAS LAW OF DAMAGES § 9:4 (Nov. 2017 Update).
12. *Watkins*, 2016 Ark. App. 158, at 8, 2016 WL 903765 at *4.
13. *See infra* Part II.A.
14. *See infra* Part II.B.
15. *See infra* Part II.C.1.
16. *See infra* Part II.C.2.
17. *See infra* Part III.
18. *See infra* Part IV.
19. *See infra* Part V.
20. ARK. CODE ANN. § 16-123-203(b) (Repl. 2016).

disability, national origin, sex, or familial status.[21] It authorizes victims of a violation to seek recourse through a civil action,[22] but the subsequent subchapter offers an alternative to the judicial system by creating an agency, the Arkansas Fair Housing Commission ("Commission"), for the specific purpose of enforcing the AFHA.[23]

In addition to creating the Commission, the subchapter that follows the AFHA also defines the composition of the Commission, sets out its duties, outlines the procedures it must follow in evaluating a complaint, more thoroughly describes discriminatory conduct, and delineates the options and remedies available to victims of housing discrimination.[24] The Commission exists to "ensure every Arkansan's access to fair and equitable housing," and it is "dedicated to eradicating housing discrimination in Arkansas."[25] In its pursuit of those goals the Commission is responsible for educating the public about its right to fair housing; investigating claims of alleged violations; and pursuing claims when there is reasonable cause to believe that a violation has occurred.[26]

2. Pursuing a Complaint Through the Commission

The Commission subchapter gives tenants who believe that they are victims of discrimination the option to file a complaint with the Commission[27] or initiate a civil action against the alleged violator.[28] If the tenant chooses to file a complaint with the Commission, the Commission must investigate the facts surrounding the allegations, issue an investigative report, and determine if there is a reasonable cause to believe that the allegations are true.[29] From the moment the complaint is filed until the case is dismissed or a charge is filed, the statute requires the Commission to engage in conciliation efforts to reach an agreement between the parties.[30]

Each case follows one of four possible courses of actions after the complaint is filed: (1) the parties enter into a binding conciliation agreement that can be enforced through a civil action;[31] (2) the Commission finds that

21. *Id*. §§ 16-123-204, -206 (Repl. 2016).
22. *Id*. § 16-123-210 (Repl. 2016).
23. *Id*. §§ 16-123-203(b), -303 (Repl. 2016).
24. *Id*. §§ 16-123-301 to -348 (Repl. 2016 & Supp. 2017).
25. Carol Johnson, *About Us,* STATE OF ARK. FAIR HOUSING COMMISSION, https://fairhousing.arkansas.gov/about-us (last visited July 31, 2018).
26. ARK. CODE ANN. §§ 16-123-319, -324, -346.
27. *Id.* § 16-123-317.
28. *Id*. § 16-123-336.
29. *Id*. §§ 16-123-323, -324.
30. *Id.* § 16-123-321 (Supp. 2017).
31. *Id*.

there is no reasonable cause and the case will immediately be dismissed;[32] (3) the Commission finds that there is reasonable cause and it shall issue a charge;[33] or (4) the aggrieved party chooses to terminate the administrative proceedings and file a civil action.[34] Once the Commission files a charge, the Attorney General, the aggrieved party, or the respondent may elect to institute a civil action; otherwise, an administrative hearing will be held.[35] Finally, if the Commission determines at the administrative hearing that a violation has occurred, it may issue appropriate relief of actual damages, a civil penalty, and/or mandatory education for the violator.[36]

An administrative hearing cannot be held if a civil action has begun,[37] and a civil action cannot begin if an administrative hearing has commenced,[38] so the aggrieved party must necessarily decide whether she wishes to pursue her claim in the administrative setting or the judicial system.

3. Pursuing a Complaint in the Judicial System

If a person chooses to pursue her complaint of an AFHA violation through the judicial system, she may do so by filing a civil action in a court with competent jurisdiction within two years after the alleged violation.[39] The aggrieved party may file the action after a complaint has been filed with the Commission, but she may not file if she has entered into a conciliation agreement or the Commission has commenced an administrative hearing.[40] If the fact-finder finds that a violation has occurred, it may award compensatory and punitive damages, reasonable attorney's fees, court costs, and if reasonable, a temporary or permanent injunction.[41]

B. Purpose, Standard, and Application of Punitive Damages

Substantive property law implications aside, *Watkins* is a vital decision for procedural law. The court's holding with respect to punitive damages clarifies an obscure area of Arkansas's civil procedure and is consistent with the purpose of punitive damages. A general understanding of the purposes,

32. ARK. CODE ANN. § 16-123-327 (Repl. 2016).
33. *Id*. § 16-123-325 (Repl. 2016).
34. *Id*. § 16-123-328 (Repl. 2016).
35. *Id.* §§ 16-123-329, -331 (Repl. 2016).
36. *Id*. § 16-123-332 (Repl. 2016).
37. *Id*. § 16-123-328 (Repl. 2016).
38. ARK. CODE ANN. § 16-123-336 (Repl. 2016).
39. *Id*.
40. *Id.*
41. *Id*. § 16-123-338 (Repl. 2016).

standards, and application of punitive damages is necessary to grasp the importance of the court's clarification.

1. Purpose of Punitive Damages

Punitive damages exist for two purposes, the first of which is to punish the wrongdoer.[42] Unlike compensatory damages, the fact-finder does not award punitive damages to compensate the aggrieved party but rather to inflict a penalty for undesirable behavior; thus punitive damages serve a retributive function.[43] Even though the core purpose of punitive damages is punishment, they also serve the secondary purpose of deterring the wrongdoer, and other potential wrongdoers, from engaging in the undesirable conduct in the future.[44] Essentially, punitive damages fulfill this deterrent function by placing a heavy financial burden on the wrongdoer, in addition to the obligations that the law places on the wrongdoer, to provide a more substantial disincentive.[45]

2. Standard for Assessing Punitive Damages

Punitive damages are proper when the plaintiff proves by clear and convincing evidence[46] that the defendant is liable for compensatory damages, knew that his or her conduct would naturally and probably result in injury or damage, and that he or she continued the conduct with malice.[47] It is counterintuitive for the statute to require an award of compensatory damages before punitive damages may be awarded when punitive damages are designed to punish the wrongdoer rather than to compensate the injured party; however, the requirement ensures that the plaintiff has actually suffered an injury for which the wrongdoer should be punished.[48]

Though the plaintiff must prove each element listed above, the key to getting an award of punitive damages is to provide evidence of malicious conduct.[49] Malice is typically defined as ill-will, but the Arkansas Judiciary defines it more specifically as situations in which the defendant "intentionally pursued a course of conduct for the purpose of causing injury

42. Jim Ray, Inc. v. Williams, 99 Ark. App. 315, 321, 260 S.W.3d 307, 310 (2007).

43. James R. McKown, *Punitive Damages: State Trends and Developments,* 14 REV. LITIG. 419, 422 (1995) (discussing the role of punitive damages in the "gray area" between the compensatory nature of civil law and the retributive/deterrent nature of criminal law).

44. BRILL & BRILL, *supra* note 11, § 9:1.

45. *Id.*

46. ARK. CODE ANN. § 16-55-207 (Repl. 2016).

47. *Id*. § 16-55-206 (Repl. 2016).

48. BRILL & BRILL, *supra* note 11, § 9:5.

49. *Id.*

or damage."[50] The Arkansas Court of Appeals does not require that a defendant acted with malice in order to affirm a finding of malice; it will also affirm when the defendant acted wantonly or "with such a conscious indifference to the consequences that malice can be inferred."[51] As long as there is substantial evidence to support a claim for punitive damages, the issue is a question for the jury.[52]

3. Procedural Safeguards

Once a jury or judge awards punitive damages, there are various ways for a defendant to challenge the award. First, as long as the defendant raised an objection at trial, he or she may file an appeal arguing that there was insufficient evidence for an award of punitive damages.[53] When a court is reviewing a jury award, it will reverse the award if there was insufficient evidence to warrant the award,[54] but if a judge served as the trier of fact, the award may only be reversed if it is clearly erroneous.[55]

An unhappy defendant is also entitled to challenge an award of punitive damages for being excessive.[56] In Arkansas, an award for damages will only be adjusted or overturned if it "shocks the conscience of the court" or shows that the trier of fact was prejudiced.[57] Furthermore, a defendant can request a new trial if his or her rights have been substantially affected by excessive damages or there was an error in the assessment of the amount of recovery,[58] seek relief from a judgment if he or she was not personally served with process,[59] or move to set aside a default judgment if the statutory requirements for such a motion are met.[60] All of these remedies protect defendants from an unjust ruling.

C. Case Histories

1. Tricou v. ACI Management, Inc.

In *Tricou,* a case where default judgment was entered as a discovery sanction, the Arkansas Court of Appeals reversed the trial court's award of

50. ARK. CODE ANN. § 16-55-206(2).
51. D'Arbonne Const. Co. v. Foster, 354 Ark. 304, 308, 123 S.W.3d 894, 898 (2003).
52. *In re* Prempro Prod. Liab. Litig., 586 F.3d 547, 571 (8th Cir. 2009).
53. Advocat, Inc. v. Sauer, 353 Ark. 29, 49, 111 S.W.3d 346, 357 (2003).
54. McCoy v. Montgomery, 370 Ark. 333, 341, 259 S.W.3d 430, 436 (2007).
55. Entertainer, Inc. v. Duffy, 2012 Ark. 202, at 11, 407 S.W.3d 514, 521.
56. *Advocat*, 353 Ark. at 49, 111 S.W.3d at 357.
57. *Id.* at 43, 111 S.W.3d at 353.
58. ARK. R. CIV. P. 59(a) (2016).
59. ARK. R. CIV. P. 60(k) (2016).
60. ARK. R. CIV. P. 55(c) (2016).

punitive damages.[61] The award amounted to double punishment for the discovery violations given the facts in the record.[62] *Watkins* clarified the court's holding and limited it to the circumstances present in *Tricou*.[63]

a. The facts and procedural history

The original dispute in *Tricou* involved allegations of fraudulent misrepresentation, but the conflict between the parties escalated when the defendants refused to comply with discovery requests for "certain" information.[64] Even after the plaintiff filed a motion to compel and the trial court granted the motion, the defendants ignored the plaintiff's numerous requests for the information.[65] Eventually, the plaintiff requested that the trial court sanction the defendants for their noncompliance in the form of summary judgment.[66]

Immediately after the plaintiff filed the motion for summary judgment the defendants delivered the requested information; however, the trial court had issued the order to compel seven months earlier, so the court entered default judgment as a sanction for the discovery violations.[67] The trial court awarded compensatory damages and $95,000 in punitive damages, but it did not report any finding of conduct that warranted such a severe punishment.[68]

b. Appellate review

When the defendants appealed, the Arkansas Court of Appeals held that the award of punitive damages was improper due to that lack of finding.[69] On the one hand, punitive damages were improper if they were awarded for the defendants' conduct prior to the lawsuit because the evidence did not support such an award.[70] Specifically, the requisite malicious conduct—express or implied—was not apparent in the facts in the record.[71] On the other hand, if the trial court awarded punitive damages in addition to default judgment as a response to the failure to comply with the

61. Tricou v. ACI Mgmt., Inc., 37 Ark. App. 51, at 59, 823 S.W.2d 924, 929.
62. *Id.* at 59, 823 S.W.2d at 929.
63. Watkins v. Turner, 2016 Ark. App. 158, at 8, 2016 WL 903765, at *4.
64. *Tricou*, 37 Ark. App. at 53, 823 S.W.2d at 925.
65. *Id.*, 823 S.W.2d at 925.
66. *Id.*, 823 S.W.2d at 925.
67. *Id.* at 54, 823 S.W.2d at 926.
68. *Id.*, 823 S.W.2d at 926.
69. *Id.* at 60, 823 S.W.2d at 929.
70. *Tricou*, 37 Ark. App. at 60, 823 S.W.2d at 929.
71. *Id.* at 59, 823 S.W.2d at 929.

discovery order, the award amounted to double punishment.[72] The appellate court held that the award was not justified under either theory.[73]

The plaintiff in *Tricou* did not present evidence to the circuit court that the defendants acted willfully and maliciously, and the failure to do so was the focus of the appellate court's decision.[74] Even though the court emphasized that the crucial factor was that lack of evidence, at least one commentator interpreted the holding to mean that the court banned punitive damages in all cases where a default judgment was granted as a discovery sanction.[75]

For years there was uncertainty regarding that issue and it was not addressed again until the Arkansas Court of Appeals revisited it in *Watkins v. Turner,* a case featuring a defendant who exhibited obviously malicious conduct, and the court clarified that its previous holding was not a blanket ban.[76]

2. Watkins v. Turner

Because *Watkins* is the subject of this note and the nature of its facts contribute to its significance, a thorough discussion of the facts is necessary. Not only did the facts of the case lead to a different result than the one in *Tricou,*[77] they also prompted the landmark appellate decision to enforce the AFHA.[78]

a. The facts

The landlord in *Watkins*, who would later be the defendant, became frustrated when the tenants continuously made late rental payments, so he decided to evict them.[79] The situation became hostile when the tenants requested the eviction notice that they were entitled to by law and rather than take advantage of Arkansas's landlord-friendly laws and evict them properly, the landlord held the couple and their young child at gunpoint, informed them that the gun was their eviction notice, and made several racist comments.[80]

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72. *Id.*, 823 S.W.2d at 929.
73. *Id.,* 823 S.W.2d at 929.
74. *Id.,* 823 S.W.2d at 929.
75. BRILL & BRILL, *supra* note 11, § 9:4.
76. Watkins v. Turner, 2016 Ark. App. 158, at 8, 2016 WL 903765, at *4.
77. *Id.* at 7, 2016 WL 903765, at *4.
78. *Id.* at 6–9, 2016 WL 903765, at *4.
79. *Id.* at 1–2, 2016 WL 903765, at *1.
80. *Id.* at 2, 2016 WL 903765, at *1.

The couple was terrified for their lives and for their child's life and quickly called the police.[81] While waiting for the police to arrive, the landlord continued to make veiled threats and suggested that the police force would not take any action against him if he chose to make good on those threats.[82] Once officers removed the landlord from the scene, the tenants left the premises immediately and were afraid to return for their belongings for a few days following the confrontation.[83] When the tenants returned to the residence to collect their things, they were dismayed to learn that all of their belongings were either outside and ruined, or locked inside the house and inaccessible.[84]

Eventually, the tenants filed a complaint against the landlord for violating the Arkansas and federal Fair Housing Acts, among other claims, and sought compensatory and punitive damages.[85] Despite the severity of the claims against him, the defendant did not file a timely answer.[86]

b. Procedural history

After he was granted leave to file an untimely answer because of poor health, the defendant repeatedly refused to comply with discovery requests which prompted the plaintiffs to file a motion for default judgment.[87] When the defendant ignored the motion and numerous notices of the hearing for it, the trial court granted the motion, finding that the defendant had "willfully failed and refused to comply with the rules regarding discovery" and that "[h]e should not be allowed to proceed further by way of defense of this matter."[88] At the damages hearing, the trial court did not consider any evidence by the defendant on the issue of liability; rather, it accepted the facts as alleged by the plaintiffs as true.[89] However, the court specifically told the defendant that he was entitled to offer evidence on the issue of damages.[90] He did not, so the court entered a judgment requiring the defendant to compensate the plaintiffs for their lost property and for the fright and horror that his actions caused them.[91] In addition, it awarded each plaintiff $10,000 in punitive damages, stating that the facts were particularly

81. *Id.*, 2016 WL 903765, at *1.
82. *Watkins,* 2016 Ark. App. 158, at 5, 2016 WL 903765, at *3.
83. *Id.* at 2, 2016 WL 903765, at *1.
84. *Id.* at 5, 2016 WL 903765, at *3.
85. *Id.* at 1, 2016 WL 903765, at *1.
86. *Id.* at 2, 2016 WL 903765, at *1.
87. *Id.* at 3–4, 2016 WL 903765, at *2.
88. *Watkins,* 2016 Ark. App. 158, at 5, 2016 WL 903765, at *2.
89. *Id.* at 6, 2016 WL 903765, at *3.
90. *Id.* at 5–6, 2016 WL 903765, at *3.
91. *Id.* at 6–7, 2016 WL 903765, at *4.

appalling and that it would not tolerate racial prejudice under Arkansas law or in its courtroom.[92]

c. Appellate review

On appeal, the defendant relied heavily on *Tricou* and argued that the award of compensatory and punitive damages from the default judgment awarded as a discovery sanction amounted to double punishment.[93] The defendant did not argue the point at trial and thus failed to preserve his arguments for appeal so the court did not decide the issue on its merits; however, it went on to say that it would have affirmed the trial court on the merits because the trial court had specifically noted that the defendant engaged in willful and malicious conduct that warranted the imposition of punitive damages.[94]

It also emphasized that in this case the award of punitive damages was not double-punishment for the failure to comply with discovery; rather it was imposed because of the separate and distinct fact that the defendant's conduct was so deplorable.[95] *Watkins* was unlike *Tricou* because the trial court made a finding of the defendant's willful, malicious conduct that warranted punitive damages while the court in *Tricou* did not give any reason at all for imposing punitive damages.[96]

d. Distinguished from *Tricou*

Thus, it was the trial court's specific finding of malicious conduct in *Watkins* that distinguished it from *Tricou* and made the award of punitive damages proper despite the default judgment for failure to comply with discovery.[97] *Watkins* clarified the result in *Tricou* and limited its restriction on punitive damages in a "default judgment as a discovery sanction" case to those in which there is no evidence of malicious conduct.[98]

III. *WATKINS* IS A VALUABLE ADDITION TO ARKANSAS'S LANDLORD-TENANT LAW

Watkins is a relatively short, simple decision and even with its outlandish facts it could easily be overlooked; however, when the Arkansas

92. *Id.* at 6, 2016 WL 903765, at *3.
93. *Id.* at 7, 2016 WL 903765, at *4.
94. *Watkins*, 2016 Ark. App. 158, at 8, 2016 WL 903765, at *4.
95. *Id.*, 2016 WL 903765, at *4.
96. *Id.*, 2016 WL 903765, at *4.
97. *Id.*, 2016 WL 903765, at *4.
98. *Id.*, 2016 WL 903765, at *4.

Court of Appeals set its first precedent for enforcing the AFHA, it provided much needed support to victims of housing discrimination. Watkins is monumental for Arkansas because housing discrimination inconspicuously occurs in the state every day,[99] the administrative system is not always able to provide the protection that tenants need, and victims of housing discrimination tend to be more successful in the federal court system.

For those reasons, it is imperative that Arkansas not only have laws that prohibit discrimination, but that it also actively enforces those laws to give them teeth.[100] *Watkins* is the first step toward creating a robust body of case law for combating housing discrimination in Arkansas, which will inevitably facilitate the administration of justice within Arkansas state courts, so this deceptively simple case is truly a landmark decision.

A. Housing Discrimination in Arkansas Occurs Too Frequently Without Repercussions

Despite the Legislature and Commission's goal to eradicate discriminatory housing practices, the multiple impediments to fair housing in Arkansas[101] and continued discrimination[102] across the state indicate that too many Arkansans are still becoming victims. The Arkansas Judiciary has a duty to enforce anti-discrimination laws to protect its citizens, especially when the administrative system is burdened with obstacles.[103] Studies suggest that housing discrimination is rampant in Arkansas, further proving that *Watkins* was critical and overdue.[104]

The National Fair Housing Alliance ("NFHA"), a private organization that fights housing discrimination nationwide, tested for housing discrimination in Little Rock, Arkansas in 2013, and the results were disappointing.[105] The experiment included a series of investigations where numerous testers called and/or visited apartment complexes to request rental information.[106] Discrimination was quickly evident as white testers

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99. David Koon, *Fair Housing Group Testing Rental Bias in Little Rock: "Discrimination with a Smile,"* ARK. TIMES (June 12, 2014), http://www.arktimes.com/arkansas/fair-housing-group-testing-rental-bias-in-little-rock/Content?oid=3334900.

100. *See* Jason Bailey, *The Fight for Fair Housing in Arkansas,* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW (Apr. 15, 2016), https://lawyerscommittee.org/2016/04/fight-fair-housing-arkansas/.

101. J-QUAD PLANNING GRP., LLC, STATE OF ARKANSAS ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE, at ii (2014).

102. Koon, *supra* note 99.

103. *See infra* Part III.B.

104. *See infra* Part III.B.

105. Koon, *supra* note 99.

106. *Id.*

immediately received applications while minorities repeatedly did not receive applications or received them after a twelve-day delay.[107] The NFHA filed complaints against two apartment complexes, but it also collected evidence of numerous other rental properties across the city engaging in discriminatory practices.[108]

In the 2014 "State of Arkansas Analysis of Impediments to Fair Housing Choice" ("Analysis"), J-Quad Planning Group ("J-Quad") cited discrimination against large families, minorities, those in low socioeconomic positions, and the elderly as its biggest concerns.[109] J-Quad conducted an analysis of the current state of fair housing choice in Arkansas and recommended remedial actions to improve it.[110] It hosted focus groups across the state in order to obtain data straight from communities within Arkansas,[111] and participants in the focus groups confirmed that various forms of housing discrimination are present throughout the state.[112] The focus groups expressed concern over the amount of discrimination that occurs and suggested that mitigation of discriminatory practices needs to be increased.[113]

Both J-Quad and NFHA's investigations indicate that an unacceptable level of discriminatory housing practices exists in Arkansas. One explanation is that many tenants are unaware of their rights.[114] People cannot bring forth claims unless they know that they are entitled to fair housing opportunities or that their experience constitutes a violation of the AFHA,[115] so education is a critical component in the fight against housing discrimination. Perhaps a growing body of case law of AFHA enforcement, stemming from *Watkins*, will spread awareness of fair housing rights and opportunities.

B. Claimants Face Numerous Obstacles When Pursuing a Complaint Through the Administrative System

Unfortunately, even if a victim is well aware of his or her rights, the pursuit of a claim against the wrongdoer is not without additional obstacles.

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107. Jacob Kauffman, *Little Rock Apartment Complex Found to Discriminate Against Latinos*, PUB. RADIO FROM UA LITTLE ROCK (Aug. 25, 2014), http://ualrpublicradio.org/post/little-rock-apartment-complex-found-discriminate-against-latinos#stream/0.

108. Koon, *supra* note 99.

109. J-QUAD PLANNING GRP., LLC, *supra* note 101, at 109–35.

110. *See generally id.*

111. *Id.* at 60.

112. *See id.* at 66.

113. *Id.*

114. *See* Koon, s*upra* note 99 (explaining the need for private fair housing organizations).

115. J-QUAD PLANNING GRP., LLC, *supra* note 101, at 55.

Various issues often impede the pursuit and resolution of individual cases[116] and the Commission often faces challenges to the administrative system as a whole.[117] The potential for the Commission to be abolished increases *Watkins'* significance to landlord-tenant law. Without an agency dedicated to eradicating housing discrimination in Arkansas, the judiciary will have an even greater obligation to provide victims with an alternative to the administrative system, and there is no doubt that challenges to the Commission will continue to be brought in the future.

1. Valid Claims Are Often Unresolved Due to Various Impediments

When the NFHA's investigations led them to file complaints in the administrative system, it became apparent that justice is not easily obtained. One of the complaints was against Waterford Apartments, a complex that was unsuccessfully sued for discriminatory practices in 1998.[118]

When the Commission investigated the NFHA's complaint in 2014 it found reasonable cause to believe that Waterford Apartments engaged in discriminatory practices, and it referred the case to the Arkansas Attorney General.[119]

A spokesperson for the Arkansas Attorney General confirmed that the complaint was received and said the office would be visiting with clients to discuss the next step.[120] To date, no case has been filed and this researcher was unable to locate any additional statements regarding the complaint.

The most recent data released by the Commission shows that reasonable cause is found in a low percentage of claims, in large part because it is difficult to find concrete evidence of discrimination.[121] Typically, discrimination is performed so subtly that even the tenant is unaware that it is occurring and it can be impossible to prove.[122] In 2012, the Commission investigated 291 cases with allegations of fair housing violations.[123] Of those 291, the Commission found reasonable cause to

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116. *See* Koon, *supra* note 99.

117. Telephone Interview with Carol Johnson, Dir., Arkansas Fair Hous. Comm'n (Mar. 16, 2017) [hereinafter Johnson Interview].

118. Ark. Acorn Fair Hous., Inc. v. Bailey Corp., 163 F.3d 601 (8th Cir. 1998).

119. Kauffman, *supra* note 107.

120. Jacob Kauffman, *Arkansas Attorney General Looking at Next Steps in Latino Housing Discrimination Case*, PUB. RADIO FROM UA LITTLE ROCK (Aug. 27, 2014), http://ualrpublicradio.org/post/attorney-general-looking-next-steps-latino-housing-discrimination-case.

121. CAROL JOHNSON, ARK. FAIR HOUS. COMM'N, 2012 ANNUAL REPORT TO THE ARKANSAS LEGISLATURE 17 (2012).

122. Koon, *supra* note 99.

123. JOHNSON, *supra* note 121.

conclude that violations may have occurred in 18 of them.[124] Hearings for cause found were conducted in zero cases, while many cases were resolved with a conciliation agreement.[125]

The Commission strives to place "Arkansas on the map for its enforcement of this very basic civil right."[126] Even so, its best efforts may be hindered by insufficient evidence to justify a judgment against the wrongdoer. Though all of the issues described above impede the Commission's ability to do its job, the largest obstacle that it faces is a consistent stream of challenges to the AFHA itself.[127]

2. The Commission Must Constantly Fight for the AFHA

According to the Director of the Commission, she is often faced with challenges to the AFHA and she spends a large portion of her time trying to convince others that the AFHA is necessary.[128] From the individual who believes that discrimination no longer exists making anti-discrimination laws unnecessary to the individual who feels that property owners are entitled to do as they see fit with their own property, there are a variety of opinions as to why the AFHA should not be in force.[129] Even these everyday, unofficial challenges force the Commission to fight for the AFHA's very existence, burdening the Commission and hindering it from effectively performing its duties.[130]

Matters were further complicated during the 91st General Assembly when the House received a bill that proposed to abolish the Commission and transfer its functions to the Arkansas Development Finance Authority (ADFA).[131]

On March 13, 2017, the House passed the bill and it was referred to the Senate Committee on Insurance and Commerce,[132] but the bill died in a Senate Committee in May.[133] Fortunately, the bill was unsuccessful; such a drastic change would be an additional impediment to combatting housing discrimination in Arkansas. By transferring the functions of the Commission to the ADFA, the General Assembly may have preserved an administrative

124. *Id.*
125. *Id.*
126. *Id.* at 29–30.
127. Johnson Interview, *supra* note 117.
128. *Id.*
129. *Id.*
130. *Id.*
131. H.R. 2053, 91st Gen. Assemb., Reg. Sess. (Ark. 2017).
132. *Bill Status History,* ARK. STATE LEG., http://www.arkleg.state.ar.us/assembly/2017/2017R/Pages/BillInformation.aspx?measureno=hb2053 (last visited Apr. 9, 2018).
133. *Id.*

system,[134] but it would have likely been ineffective. The Commission is dedicated solely to fighting housing discrimination, and it faces obstacles to its mission daily.[135] If the Commission's job is transferred to an agency that has additional responsibilities, the number of obstacles would multiply. This change would have been nothing more than an impediment to the General Assembly's ultimate goal for the AFHA.

The proposed bill of 2017 is not an isolated event. In October 2018, Arkansas Governor Asa Hutchinson proposed a state government reorganization plan that seeks to consolidate many of the state's agencies.[136] Under this proposal, the Commission would be joined with the Office of Medicaid.[137] If Hutchinson is reelected this fall, he plans to present the proposal to the legislature during its regular session beginning January 2019.[138] Though the proposal may never go into effect, it demonstrates that the Commission will continue to face challenges in the future. Consolidating the Commission with an agency that has an incongruent purpose will further hinder the Commission's ability to its job, and make the administrative route a less viable option for victims of housing discrimination.

C. *Watkins* Set Vital Precedent for Judicial Enforcement of the AFHA

Many more cases are filed under the federal Fair Housing Act than the AFHA; which is curious given that the AFHA is modeled after the federal Fair Housing Act.[139] Perhaps the reason is rooted in a greater likelihood of success in federal court. During 2017, the Department of Justice settled 43 cases resulting in over $80 million in relief.[140] Those cases were processed through the federal administrative system then referred to the Department of Justice, so the relief estimate does not include the undoubtedly larger number of cases that were independently litigated. An $80 million recovery for the year is impressive, particularly when considering that Arkansas has just seen its first instance of appellate enforcement of the AFHA.[141]

Watkins was the first Arkansas appellate decision that contained allegations of an AFHA violation.[142] The lack of claims filed in the State's judicial system may also be attributable to the facts that many victims of

134. H.R. 2053, 91st Gen. Assemb., Reg. Sess. (Ark. 2017).

135. *See infra* Part III.B.1.

136. Michael R. Wickline, *Arkansas Governor Proposes 42 State Agencies Pare to 15,* ARK. DEMOCRAT GAZETTE (Oct. 4, 2018), https://www.arkansasonline.com/news/2018/oct/04/hutchinson-proposes-42-agencies-pare-to/.

137. *Id.*

138. *Id.*

139. ARK. CODE ANN. § 16-123-203(b) (Repl. 2016).

140. NATIONAL FAIR HOUSING ALLIANCE, 2018 FAIR HOUSING TRENDS REPORT (2018).

141. *See* Watkins v. Turner, 2016 Ark. App. 158, 2016 WL 903765.

142. *See id.*, 2016 WL 903765.

housing discrimination are members of a low socioeconomic class without access to legal representation and that many tenants are unaware of their legal rights.[143] Whatever the reason is for the lack of case law in this area, precedent is critical to advancing individual rights, stabilizing this area of law, and making anti-discrimination law more predictable.[144]

For that reason, *Watkins* was necessary and remarkable. When the Arkansas Court of Appeals affirmed the trial court's finding of discriminatory practices, it proved that Arkansas's judicial system is available to protect Arkansans when the administrative process cannot. If more cases are filed in state court, more favorable precedent can be set and a predictable body of case law will develop that stringently enforces the AFHA and helps to eradicate housing discrimination within the state.

IV. *WATKINS'* HOLDING SAFEGUARDS THE PURPOSE OF PUNITIVE DAMAGES

A. Punitive Damages Should Be Available in "Default Judgment Awarded as a Discovery Sanction" Cases

In addition to the ramifications that *Watkins* has for landlord-tenant law,[145] the decision also contributes to Arkansas Civil Procedure. By limiting its *Tricou* holding to prohibit punitive damages in cases where default judgment was entered as a discovery sanction only where there is no finding of conduct warranting punitive damages, the court preserved the function and purpose of punitive damages.

1. Policy Arguments Weigh in Favor of Allowing Punitive Damages in Cases that Reach Disposition Through a Default Judgment Awarded as a Discovery Sanction

Though strong arguments weigh both in favor of and against a blanket ban on punitive damages in cases where default judgment is awarded as a discovery sanction, the public policies of punishing wrongdoers and deterring malicious conduct indicate that such a ban would ultimately have a negative effect on society.

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143. *See* Koon, *supra* note 99.

144. *See generally* NAT'L CRIME VICTIM LAW INST., DEVELOPING VICTIMS' RIGHTS LAW: A STUDY OF PRECEDENT AND DICTA (2005), https://law.lclark.edu/live/files/21765-developing-victims-rights-lawa-study-of-precedent (analyzing landmark cases in the area of victim's rights law, and advocating for a slow, careful approach).

145. *See supra* Part III.

a. A blanket ban on punitive damages in these cases would undermine the purpose of punitive damages

The primary argument against a blanket ban on punitive damages in cases where the disposition was reached through a default judgment entered as a discovery sanction is that it would thwart the purpose of punitive damages. If the aforementioned ban were instituted the judiciary would essentially create the opportunity for any defendant to circumvent the imposition of punitive damages by simply ignoring discovery requests then failing to comply with the resulting discovery orders.[146] That unmistakable opportunity would be contrary to the purpose of punitive damages[147] and the public policy of holding bad actors accountable for their actions.

As discussed, punitive damages are designed to punish particularly bad actors.[148] If a defendant could so easily escape punishment for his or her horrendous conduct on a technicality, that purpose would be negated completely. The once unassuming technicality would lead to the loss of both the retributive function and the cautionary function, and potentially lead to an increase in undesirable conduct.

It is intuitive that a truly guilty defendant, facing a high likelihood of losing his or her case in court, would ignore discovery requests and orders so that he or she could escape a more excessive punishment than mere liability. Because punitive damages are specifically calculated to punish wrongdoers to such a degree that they will refrain from repeating the malicious conduct, whatever compensatory liability might be imposed on the defendant would inevitably be significantly less burdensome than a massive monetary award of punitive damages.[149] Not only would those defendants escape the punishment their actions merit, they would also cease to serve as an effective example to others.[150]

Conversely, a defendant that knows that he or she is innocent and has a strong case would have less of an incentive to abuse the loophole because it would be preferable for him or her to avoid liability altogether. If the defendant respects the system, cooperates in discovery, and prevails at the conclusion of the case, he or she will be burdened with neither compensatory nor punitive damages; the probability of no liability at all is more alluring than the certainty of defeat and liability for a wrong that you

146. Brief for Appellees Michael Turner and Megan Ramirez at Arg. 7, *Watkins*, 2016 Ark. App. 158 (No. CV-15-845), 2015 WL 10433757, at *7.

147. BRILL & BRILL, s*upra* note 11, § 9.4.

148. *See infra* Part II.B.1.

149. *See* BRILL & BRILL, *supra* note 11, § 9.4.

150. *See* Christopher J. Robinette, *A Public Purpose for Punitive Damages?*, 2 CHARLESTON L. REV. 327, 338 (2008) (discussing punitive damages' theoretical effect on negative behavior).

did not commit. Thus, if the described ban does not work to protect the innocent defendant, it follows that those it would protect would be the very ones that it should not. The logical inference is that preventing an award of punitive damages in cases with default judgments frustrates the purpose of punitive damages and undermines the credibility of the judicial system. However, it is possible that a blanket ban on punitive damages in such cases would provide an extra layer of protection for innocent defendants.

b. Alternatively, a blanket ban on punitive damages in these cases could reduce the likelihood that an innocent, uninformed defendant receives unwarranted punishment

Once a default judgment has been entered, liability is established and the defendant is not allowed to dispute the facts as presented by the plaintiff.[151] This poses a concern that punitive damages will be imposed on innocent parties who are not permitted to adequately defend themselves, a possibility that public policy cannot permit.

Ironically, such a significant burden on an innocent party would also run contrary to the purpose of punitive damages.[152] Punitive damages are strongly disfavored by the law and are intentionally limited in order to prevent courts from excessively burdening those under their authority.[153] So, in addition to the humanitarian concerns that the potential for such an injustice presents, it must be noted that purpose of punitive damages could be threatened if the previously discussed ban is not instituted.

There are situations in which innocent parties may not personally receive notice of discovery requests and are unaware that discovery sanctions—including default judgment—are looming. It may be unfair for such parties to be held liable, but it would be completely unconscionable for them to pay punitive damages if their lack of participation in the litigation was through no fault of their own.

c. The procedural safeguards within the law of damages adequately protect innocent parties

Even though public policy concerns over innocent parties receiving undeserved harsh punishments may indicate that a ban on punitive damages in cases where default judgment is entered as a discovery sanction is a desirable law to establish, the structure of our judicial system and the rules

151. B & F Engineering, Inc. v. Cotroneo, 309 Ark. 175, 181, 830 S.W.2d 835, 838 (1992).

152. BRILL & BRILL, *supra* note 11.

153. *Cotroneo*, 309 Ark. at 178–79, 830 S.W.2d at 837–38.

of civil procedure counteract those concerns. All defendants have ample opportunity to respond to discovery requests and comply with discovery orders so that they will not be sanctioned with a default judgment, and in the event that a default judgment is awarded, there are procedures for setting aside the judgment when it would be equitable to do so.[154]

Furthermore, at some point the judiciary has to make a choice. It can preserve the retributive and cautionary functions that punitive damages are intended to serve or worry about the highly unlikely event in which an innocent person is sanctioned with a default judgment, for failure to comply with discovery, *and* with punitive damages. Not only would that rare individual have the opportunity to appeal and turn to our judicial system's resources for getting out of the undeserved punishment, but society also retains the benefit of punishing the truly evil and malicious.

For example, in *Watkins,* the court ordered the defendant to comply with discovery requests multiple times, yet he refused to respond.[155] After multiple notices and numerous opportunities to prevent default judgment from being entered, the defendant elected to ignore the lawsuit and thereby forfeited his chance to participate in the dispute.[156]

If defendants, such as the defendant in *Watkins,* refuse to comply with discovery by ignoring the threat of a default judgment, then concerns surrounding their inability to dispute the facts as presented by the plaintiff carry a lot less weight. Perhaps a refusal to cooperate in the lawsuit justifies whatever misfortune falls on the problematic party; however, the procedural safeguards discussed above will provide individuals with relief from unfair punishments that result from no wrongdoing on their part.

Punitive damages are not awarded unless malicious conduct is present which requires more than a showing of mere improper conduct; such a significant requirement reduces the chances of an innocent party being unjustifiably harmed.[157] The facts of a given case have to provide substantial evidence of malice, express or implied, on which a judge or jury can base an award of punitive damages before the award will be affirmed on appeal.[158] It seems unlikely that such a finding could be made on anything less than a sturdy foundation, such as reliable evidence that an unprovoked landlord threatened his tenants at gunpoint, which ensures that the procedures of our laws provide significant protection from the possibility of these concerns becoming a reality.

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154. ARK. R. CIV. P. 55 (2016).
155. Watkins v. Turner, 2016 Ark. App. 158, at 3–4, 2016 WL 903765, at *2.
156. *Id.*, 2016 WL 903765, at *2.
157. Stein v. Lukas, 308 Ark. 74, 78–79, 823 S.W.2d 832, 834–35 (1992).
158. *Id.*, 823 S.W.2d at 834–35.

The Arkansas Court of Appeals correctly aligned Arkansas law with public policy when it affirmed the award of punitive damages in *Watkins*. Even if a case in an Arkansas state court ends with a default judgment granted as a discovery sanction, punitive damages will be available to serve the retributive and deterrent functions and to benefit society as a whole.[159]

V. CONCLUSION

It is distressing that the plaintiffs in *Watkins v. Turner* suffered from discriminatory practices so egregious that punitive damages were necessary to adequately punish the defendant. However, their experience presented the Arkansas Court of Appeals with an opportunity to stringently enforce the AFHA and set precedent in an unchartered area of Arkansas appellate law.[160] Through their tragedy, they initiated a change in Arkansas's approach to housing discrimination cases.

The court also took the opportunity to clarify its prior holding in *Tricou*[161] that has been interpreted as placing a blanket ban on punitive damages in all cases that reached disposition through a default judgment entered for discovery violations.[162] Worthy arguments can be identified in support of a blanket ban on damages in that specific scenario, but the holding of *Watkins* ensures that Arkansas's case law is consistent with the purpose that punitive damages are designed to fulfill.[163] At a minimum, aggrieved Arkansans and their attorneys can find relief in this decision, for they can rest assured that the most malicious actors will continue to be punished to the fullest extent allowed under our law without the ability to circumvent the system through a mere technicality. *Watkins* makes crucial contributions to both Arkansas Civil Procedure and landlord-tenant law, and it is an invaluable piece of Arkansas precedent.

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159. *See* Robinette, *supra* note 150.
160. *Watkins,* 2016 Ark. App. 158, at 8, 2016 WL 903765, at *4.
161. Tricou v. ACI Mgmt., Inc., 37 Ark. App. 51, 823 S.W.2d 924 (1992).
162. BRILL & BRILL, *supra* note 11, at § 9:4.
163. *Id.* at § 9:1.

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