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**Health Law—The Arkansas Resident's Rights Statute and Civil Enforcement—Cutting Off Its Nose to Spite Its Face: How the Arkansas Resident's Right Statute Is Defeating Its Purpose of Improving Quality of Care to Nursing Home Residents by Crippling the Nursing Homes Themselves.** Health Facilities Management Corp. v. Hughes, No. 05-90, 2006 Ark. LEXIS 122 (Feb. 9, 2006).

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HEALTH LAW—THE ARKANSAS RESIDENT’S RIGHTS STATUTE AND CIVIL ENFORCEMENT—CUTTING OFF ITS NOSE TO SPITE ITS FACE: HOW THE ARKANSAS RESIDENT’S RIGHTS STATUTE IS DEFEATING ITS PURPOSE OF IMPROVING QUALITY OF CARE TO NURSING HOME RESIDENTS BY CRIPPLING THE NURSING HOMES THEMSELVES. Health Facilities Management Corp. v. Hughes, No. 05-90, 2006 Ark. LEXIS 122 (Feb. 9, 2006).

I. INTRODUCTION

America is facing a crisis in long-term care.1 As the elderly population grows, there is an increasing need for quality nursing-home care.2 Yet reports continue to surface that reveal mismanagement, negligence, and even abuse taking place in nursing homes, outraging the nation.3 A “get tough on the nursing home industry” platform is thus an appealing platform for political hopefuls. In Arkansas, this theme is particularly potent: during the 2006 elections, for example, candidates for governor and attorney general brought nursing-home issues to the forefront of their campaigns and called for increased scrutiny of the industry through increased litigation and legislation, allowing for the use of “granny cams.”4 In the face of rising regulation and litigation, the nursing-home industry is struggling to stay afloat financially, compounding the problems regarding quality of care.5

It is clear that there are major problems in long-term care, but the real question is how to best address these problems.6 Instead of taking a cautious, thoughtful approach to the crisis, it seems that many lawmakers promote any and all legislation aimed at improving the quality of care for nursing-

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6. Brady, supra note 4, at 3.
home residents without regard for the impact such legislation has on the very institutions providing that care. As a result, the combination of heavy regulations and increasingly expensive litigation is overwhelming the nursing-home industry without improving the quality of care. As insurance rates increase due to rising litigation, nursing homes find themselves in a “Catch 22”: they cannot afford to provide the quality of care mandated by regulations, but any breach in care leads to litigation and further financial difficulties. Legislators must find a way to improve the quality of care to residents and to rehabilitate the nursing home industry at the same time. Debilitating nursing homes will not solve the problem.

Arkansas’s current path in nursing-home regulation is leading to the destruction of its nursing-home system. In particular, the Arkansas Resident’s Rights Statute favors plaintiffs and allows for high damage awards. The statute’s civil enforcement provision lacks guidelines for the application of the statute or the award of damages. In February of 2006, the Arkansas Supreme Court decided Health Facilities Management Corp. v. Hughes, a nursing home case concerning the Arkansas Resident’s Rights Statute. The court’s decision on the issue of liability under the statute was well-reasoned and stayed faithful to the goals of the statute, encouraging nursing-home licensees to live up to their responsibilities. However, while the court could have decided the case so as to clarify the statute and give guidance to the parties involved, the court’s decision only contributed to the ambiguity on the issue of damages. In the decision, the court laid out a vague standard for the statute’s application that seems to overlap with traditional negligence law and gives juries exceedingly broad discretion in assessing compensatory damages under the statute.

Arkansas should reform its Resident’s Rights Statute to achieve its goal of improving the quality of life of nursing-home residents while limiting injury to the industry providing the residents with care. The reformed statute should limit large jury awards and establish clear, straightforward, and just standards for the application of the statute and the assessment of damages.

7. Id.
8. Id. at 4. “One must question the wisdom of imposing another layer of regulation on an industry that already is overwhelmed by federal and state mandates.” Id.
9. See id. at 43.
10. Id. at 4.
11. Id.
12. See generally Hughlett, supra note 5.
15. No. 05-90, 2006 Ark. LEXIS 122 (Feb. 9, 2006).
16. See generally id.
This note will begin by looking at the facts of the case at hand, *Health Facilities Management Corp. v. Hughes.* 17 The note will then provide the reader with a background that includes the state of the nursing-home industry, different approaches to problems in long-term care, and the state of Arkansas's laws and litigation regarding nursing homes. 18 Next, the note will look at the Arkansas Supreme Court's reasoning in *Health Facilities Management Corp.* 19 Finally, the note will discuss the significance of that case and will call for a change in Arkansas's approach to nursing home litigation. 20

II. FACTS

Mary Hughes, as executrix of the estate of Mildred Smith ("Estate"), brought a lawsuit against Health Facilities Management Corp., Little Rock Healthcare, Inc., and Little Rock Healthcare and Rehabilitation Center, claiming damages for injuries and death suffered by Ms. Smith from the care and treatment given by Little Rock Healthcare and Rehabilitation Center. 21 Ms. Smith moved to Little Rock Healthcare and Rehabilitation Center ("Nursing Home") in January 1997. 22 During Ms. Smith’s time there, her niece, Ms. Hughes, regularly visited Ms. Smith in order to monitor her condition. 23 Although Ms. Smith needed help with bathing and dressing, she was capable of feeding herself and was able to hold a conversation. 24 There were no reports of problems with Ms. Smith's care at the Nursing Home until an incident on August 3, 1999, after Ms. Smith had been living at the facility for more than two years. 25

On August 3, 1999, the Nursing Home transported Ms. Smith, who was accompanied by Ms. Hughes, in one of the Nursing Home's vans to a dental appointment. 26 During the journey, and in an effort to avoid an accident, the employee driving the van slammed on the brakes. 27 Ms. Smith was not secured in her wheelchair, and the sudden stop threw her from her wheelchair and caused her to hit her head and face on the seat in front of her. 28 The van

17. See infra Part II.
18. See infra Part III.
19. See infra Part IV.
20. See infra Part V.
22. Id. at *1.
23. Id.
24. Id.
27. Id. at *2.
28. Id.
returned to the Nursing Home with Ms. Smith remaining on the van floor. Following this incident, Ms. Smith began to experience medical problems. Three days after the accident, Ms. Smith's physician discovered that Ms. Smith had fractured her tibia during the accident. Additionally, Ms. Smith began to experience emotional trouble. She did not speak as much, and her eating habits changed. In September 1999, the Nursing Home gave Ms. Smith a feeding tube in an effort to counteract her significant weight loss. Furthermore, Ms. Smith was bed-bound and began to develop pressure sores. Former employees of the Nursing Home later testified at trial that they found Ms. Smith in uncomfortable positions, such as lying in her own urine, on several occasions. The Estate's expert witness, a nurse practitioner, testified at trial that Ms. Smith's lower extremities became contracted and that she suffered from dehydration as a result of substandard care on the Nursing Home's part. The expert also believed that Ms. Smith had her first skin breakdown about thirteen days after the van incident and, as a result, became more immobile. The expert further pointed to problems in the Nursing Home's records indicating its failure to take a "proactive approach" to Ms. Smith's decreasing weight and failure to turn her often enough.

On August 23, 1999, doctors diagnosed Ms. Smith with a urinary tract infection, but she did not receive treatment until September 3, 1999. Six months later, on March 21, 2000, the Nursing Home admitted Ms. Smith to St. Vincent's Medical Center ("St. Vincent's") after noticing she had a high fever and was unresponsive. Upon admission, St. Vincent's documented that Ms. Smith suffered from contractures that could have been prevented had Ms. Smith been provided with range-of-motion therapy. On March 26, 2000, Ms. Smith died at St. Vincent's while still undergoing treatment from her admission on March 21, 2000. Both the Estate's expert and St. Vincent's death summary indicated that the cause of death was an infection

29. Id.
31. Id.
33. Id.
34. Brief of Appellant, supra note 25, at Soc 1.
35. Id.
39. Id. at *3.
40. Id.
43. Id.
from sepsis that developed from a bedsore on Ms. Smith's right hip. However, the official death certificate named end-stage coronary artery disease as the cause of death. 

Ms. Hughes, as executrix of Ms. Smith's estate, filed a complaint on February 22, 2002, against Little Rock Healthcare ("Healthcare"), owner of the Nursing Home, and Health Facilities Management Corporation ("Management"), a consulting company contracted to manage the facility. The complaint claimed four causes of action against Healthcare and Management: negligence, medical malpractice, wrongful death, and violations of the Arkansas Resident's Rights Statute. The complaint requested compensatory and punitive damages.

On January 20, 2003, Management filed a motion for summary judgment for the Resident's Rights Statute and medical malpractice claims. Management argued that the trial court should dismiss the Resident's Rights Statute claim as a matter of law because the statute's language created a cause of action only against a "licensee" of a long-term care facility. Specifically, Management argued that because Healthcare, and not Management, held the license for the Nursing Home, the Estate could not sustain such a claim against it. Management further argued that the medical malpractice claim should be dismissed because Management was not a medical provider. The trial court denied summary judgment on both claims. Management moved for a directed verdict on the Estate's Resident's Rights Statute claim, citing the licensure issue, as well as claiming that the Estate had failed to meet its burden of proof. Healthcare also moved for a directed verdict for failure of proof. Both defendants renewed their motions for directed verdict.

After a one-week jury trial in April 2004, the jury returned a verdict in favor of the Estate on the negligence claim against Healthcare and on the Resident's Rights Statute claim against both Healthcare and Management.

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44. Id.
45. Id.
46. Id. at *3–4.
47. Id. at *4.
49. Id.
50. Id.
51. Id.
52. Id.
53. Id. at *4–5. Management and Healthcare were successful on a motion in limine regarding evidence as to the ownership of the companies. Id. at *5.
55. Id.
56. Id. at Soc 3.
However, the jury found in favor of the defendants on the Estate's other causes of action. The jury assessed damages against Healthcare in the amount of $38,000 for negligence and $700,000 for violation of the Resident's Rights Statute. The Estate received a $1.25 million verdict against Management for violations of the Resident's Rights Statute.

Both Healthcare and Management filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial or remittitur, following the jury's verdict. At a hearing on June 25, 2004, the trial court denied those motions. On July 8, 2004, Healthcare and Management filed notices of appeal. Management appealed the judgement on the grounds that it was not a licensee and therefore not a proper defendant for the Resident's Rights Statute claim. Healthcare and Management both appealed the verdicts against them on the Resident's Rights Statute claim on the ground that there was no evidence to support a verdict finding a violation in light of the jury's findings in favor of the defendants on the medical malpractice and wrongful death claims.

III. BACKGROUND

Nursing-home care is a vitally important sector of the healthcare industry. Following World War II, demand for nursing-home care for the elderly and chronically ill increased, and the industry responded. The federal government's enactment of Medicare and Medicaid legislation further bolstered the expanding industry and helped make care more available. As demand and availability grew, nursing homes developed into big business, as subsidiaries of large, for-profit corporate chains replaced traditional mom-and-pop facilities. Unfortunately, nursing-home care was, and is, expensive, demanding on personnel, and highly regulated, thus making it difficult for the nursing-home companies to both make a profit and meet the needs of resi-
The business needs of facilities and the physical and emotional needs of residents often come into conflict, resulting in sub-standard care. As the baby-boom generation grows older and America faces a "profound demographic shift," the need to provide quality care to elderly Americans is now more essential than ever. This section will begin with a look at the state of the nursing-home industry today and the problems it faces. Next, there will be a discussion of the traditional causes of action available to plaintiffs wishing to redress wrongs committed by nursing homes. After exposing the flaws in many of those traditional means, this section will proceed with an examination of legislative reforms to nursing-home regulation and litigation at the federal and state level, with a particular focus on the approach Florida has taken. The section will then focus on Arkansas's nursing home legislation and litigation, including a look at a pivotal nursing-home case decided before the enactment of the Resident's Rights Statute, and will give a brief history of the development of the Resident's Rights Statute and an examination of its provisions. Finally, this section will look at Koch v. Northport Health Services of Arkansas, a Resident's Rights Statute case decided by the Arkansas Supreme Court prior to the case at issue in this note, Health Facilities Management Corp. v. Hughes.

A. The State of the Industry

In the face of rising costs, regulations, and the "dramatic upswing in litigation aimed at the quality of care provided by nursing homes," nursing homes have faced difficulty in consistently providing quality care to the growing population of residents. Operating on limited budgets, facilities are often under-staffed. Moreover, the staff maintained is typically under-
trained, and turnover rates are high. Meanwhile, insurance companies have reacted to increases in nursing-home litigation and rising jury awards by raising insurance rates. Plaintiffs are receiving substandard care on a regular basis, and the nursing homes themselves are constantly under fire from legislation, litigation, and regulation.

B. Traditional Causes of Action Against Nursing Homes

Nursing-home residents have always had standing to sue nursing homes under traditional theories, such as negligence, medical malpractice, and wrongful death. Nursing homes owe a duty of care to their residents, including the duty to conform with federal and state quality standards. However, there are problems unique to nursing-home litigation that make meeting the standard of proof and recovering damages difficult. Typically, residents who are nearing the end of their lives suffer from multiple illnesses and conditions, any one of which may contribute to or cause pain, suffering, and death. And, although a nursing home may breach a duty of care to a resident, a plaintiff may not be able to prove that the nursing home caused any injury.

Furthermore, traditional damages for negligence, medical malpractice, and wrongful death, such as loss of income and loss of life expectancy, do not apply to many nursing home residents. Compensation for pain and suffering is one viable route to damages, but in the case of a deceased resident or one who is already in a great deal of pain, quantifying "pain and suffering" is problematic. Further, although punitive damage awards are growing, they are typically available only when a nursing home's miscon-
duct is "intentional, malicious, recklessly indifferent to patient safety, or at least grossly negligent."\footnote{92}

C. Legislative Reforms

Due to the importance of nursing homes to the healthcare industry and the delicate nature of nursing-home care, the nursing-home industry is highly regulated.\footnote{93} Increasingly, state governments have used litigation reforms as a regulatory tool, to varying degrees.\footnote{94} Some states allow plaintiffs to sue nursing homes directly to seek financial retribution, while others use litigation as a way of policing the nursing home industry without inflicting a great deal of financial harm on the industry.\footnote{95} This subsection will begin with a glance at the federal government’s role in increasing nursing home regulation via litigation.\footnote{96} It will then look at the varied approaches of four states: New York, Wisconsin, Missouri, and Florida, with a particular focus on Florida’s approach.\footnote{97}

1. The Federal Government

The federal government became involved with the nursing home industry in 1965, when Congress set minimum standards for nursing homes wishing to receive Medicare and Medicaid funding.\footnote{98} At the same time, the Senate Select Committee on Aging formed its Subcommittee on Health and Long-Term Care.\footnote{99} However, it was not until two decades later that Congress responded to growing societal concerns about the quality of nursing-home care by enacting the Nursing Home Reform Amendments Act as a part of the Omnibus Budget Reconciliation Act of 1987 (OBRA’87).\footnote{100} OBRA’87 put into federal law the first "Bill of Rights" for nursing-home residents and established minimum "quality of life" standards for all nursing homes receiving Medicare or Medicaid funds.\footnote{101}

Although OBRA’87 did not specifically create a private right of action for nursing-home residents, some courts interpreted the law as implying such a right.\footnote{102} The Supreme Court set up a test for determining whether or

\footnotesize{
\begin{itemize}
  \item \footnote{92}{Id. at 357–58.}
  \item \footnote{93}{Spitzer-Resnick & Krajinovic, supra note 87, at 630–31.}
  \item \footnote{94}{See Phan, supra note 3, at 326.}
  \item \footnote{95}{See infra Part III.C.2.}
  \item \footnote{96}{See infra Part III.C.1.}
  \item \footnote{97}{See infra Part III.C.2.}
  \item \footnote{98}{Hemp, supra note 2, at 203.}
  \item \footnote{99}{Id.}
  \item \footnote{100}{Spitzer-Resnick & Krajinovic, supra note 87, at 632.}
  \item \footnote{101}{42 C.F.R. §§ 483.13, 483.15 (2000).}
  \item \footnote{102}{Spitzer-Resnick & Krajinovic, supra note 87, at 632.}
\end{itemize}
}
not a particular act of legislation carries with it an implied cause of action in the case of *Cort v. Ash.* Applying that test to OBRA'87 allowed courts to find an implied private right of action based on OBRA'87's bill of rights. The need for state courts to use the federal law decreased in importance, however, in light of growing state regulation of nursing homes.

2. Action at the State Level

Taking up where the federal government left off, individual states crafted their own legislation to bolster the rights of nursing-home residents. The goal of state legislation was the same as that of the federal legislation: to improve the quality of care for nursing-home residents while at the same time increasing the accountability of the nursing homes themselves. Yet, individual states took varied approaches to accomplishing this goal. For example, while some states introduced procedural checks to nursing-home abuses, others increased the role of litigation as a tool for nursing-home regulation. New York, Wisconsin, Missouri, and Florida provide representative examples of the latter approach.

a. New York

New York's approach to nursing-home regulation included creating a private right of action for nursing-home residents whose resident's rights had been violated by their nursing homes. The most unique feature of New York's legislation, however, is the fact that it sets a minimum for compensatory damages in such cases. Under the New York law, a prevailing plaintiff is guaranteed to receive at least twenty-five percent of the daily per-patient rate at the facility or the average daily total charges per patient for

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103. 422 U.S. 66 (1975). The Court set forth a four-part test for determining whether legislation implies a right of action: (1) whether the plaintiff is a member of the protected class; (2) whether legislative intent indicates Congress intended to create a private remedy; (3) whether implying such a remedy would be consistent with the law's purpose; and (4) whether the cause of action is "traditionally relegated to state law," suggesting that federal intervention would be inappropriate. *Id.* at 78.
104. *Spitzer-Resnick & Krajcinovic, supra* note 87, at 632.
105. *See id.* at 633–36; *see also infra* Part III.C.2.
106. *See Spitzer-Resnick & Krajcinovic, supra* note 87, at 632–33; *see also infra* Part III.C.2.
107. *See Spitzer-Resnick & Krajcinovic, supra* note 87, at 630; *see also infra* Part III.C.2.
109. *Id.*
110. *Id.*
111. N.Y. PUB. HEALTH LAW § 2801-d(1)–(10) (McKinney 1993).
112. *Id.* § 2801-d(2).
the facility for each day the resident suffered injury.\textsuperscript{113} In addition, a resident may seek punitive damages if the nursing home acted willfully or "in reckless disregard of the lawful rights of the patient."\textsuperscript{114} New York's legislation provides a powerful tool for nursing-home residents, but New York courts have limited this tool by applying the statute and its minimum damages only in cases involving violation of a right or benefit specifically set out within the resident's bill of rights, and not in cases of ordinary negligence.\textsuperscript{115}

b. Wisconsin

Like New York, Wisconsin also created a private right of action for nursing-home residents.\textsuperscript{116} However, Wisconsin's enforcement procedure is less potent and is limited to equitable relief.\textsuperscript{117} Residents whose rights are violated can either seek mandamus against the state regulatory agency to order it to enforce its regulations, or they can seek an injunction against either the nursing home itself or the Department of Health and Social Services.\textsuperscript{118} Therefore, plaintiffs seeking to recover damages from a nursing home in Wisconsin must still use traditional causes of action.\textsuperscript{119} The right to seek mandamus or injunctive relief does, however, provide a method of regulating nursing homes through the judicial system, without subjecting nursing homes to direct, financial penalties for violations of resident's rights.\textsuperscript{120}

c. Missouri

In formulating its resident’s rights legislation, Missouri made a cautious move toward allowing private citizens more involvement in regulating nursing homes.\textsuperscript{121} Missouri’s resident’s rights statute creates a private right of action, but the right does not arise immediately.\textsuperscript{122} First, a plaintiff must seek administrative relief by filing a written complaint with the state attorney general.\textsuperscript{123} Under the statute, the attorney general has sixty days to begin state legal action on the complaint.\textsuperscript{124} In the event that the attorney general takes no action, the plaintiff can then proceed against the nursing home un-
der the statutory cause of action and seek damages.\textsuperscript{125} Unlike Wisconsin, Missouri allows for an award of damages, but punitive damages are limited to the larger of either five times the compensatory damages awarded or five-hundred dollars.\textsuperscript{126}

d. Florida

Florida has the highest elderly population of any state.\textsuperscript{127} Therefore, it has a significant need for quality nursing-home care.\textsuperscript{128} In 1995, Florida enacted a civil enforcement provision for the Residents' Rights Act (RRA) to protect its many elderly citizens living in nursing homes.\textsuperscript{129} This allowance of civil enforcement of a resident's rights led to widespread, expensive nursing-home litigation, ultimately resulting in a rise in liability insurance rates that heavily burdened Florida's nursing-home industry.\textsuperscript{130} In 2001, the Florida legislature amended the RRA in recognition of the impact the law had on Florida's nursing-home system.\textsuperscript{131} Because Arkansas modeled its own Resident's Rights Statute on Florida's original RRA, this section will take an in-depth look at the RRA, the problems it caused, and the 2001 reforms aimed at solving those problems.\textsuperscript{132}

i. Provisions of the RRA

The RRA's civil enforcement provision originally allowed plaintiffs to sue nursing homes for actual and punitive damages resulting from violations of the RRA.\textsuperscript{133} It also provided for the award of attorney's fees to successful plaintiffs, making such litigation more appealing to plaintiffs' attorneys.\textsuperscript{134} The civil enforcement provision also made it easier to win higher damages because a plaintiff could collect on a RRA claim in addition to any other common law claim, such as wrongful death.\textsuperscript{135}

\textsuperscript{125} Id. at ¶ 3.
\textsuperscript{126} Id.
\textsuperscript{127} Williamson, supra note 66, at 430.
\textsuperscript{128} Id.
\textsuperscript{130} Tom J. Manos, Florida's Nursing Home Reform and Its Anticipated Effect on Litigation, 75 FLA. B. J. 18, 18 (2001).
\textsuperscript{131} Id. at 18–20.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
ii. Reform of the RRA

The civil enforcement provision of the RRA "opened the floodgates" of nursing home litigation in Florida.\textsuperscript{136} Nursing home suits grew in number and value, leading insurance companies to withdraw from Florida in the face of rising liability.\textsuperscript{137} Without insurance, Florida's nursing-home industry was in trouble.\textsuperscript{138} As a result, in 2000, Florida's legislature established a task force to look into improving the state of the nursing-home industry.\textsuperscript{139} The task force's report eventually led to the 2001 reforms.\textsuperscript{140} The new act contained several reforms; however, this section will address only some of the reforms dealing with limitations on damages and the establishment of a clear standard of proof.\textsuperscript{141}

To begin with, the reformed act requires that a plaintiff claiming damages under the RRA for a deceased resident must choose to receive either survival damages or wrongful death damages.\textsuperscript{142} This reform limits compensatory damages in cases of death.\textsuperscript{143} The RRA also contains an express provision limiting punitive damages to cases in which the defendant is "personally guilty of intentional misconduct or gross negligence."\textsuperscript{144} If a plaintiff meets that high standard, any punitive damages awarded may not exceed the greater of four times the compensatory damages or four-million dollars.\textsuperscript{145}

Second, the RRA established a clear standard of proof for RRA claims:

The claimant shall have the burden of proving by a preponderance of the evidence, that:

(a) The defendant owed a duty to the resident;
(b) The defendant breached the duty to the resident;
(c) The breach of the duty is a legal cause of loss, injury, death, or damage to the resident; and

\textsuperscript{136} Manos, supra note 130, at 19.
\textsuperscript{137} Id. at 18.
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 20.
\textsuperscript{140} Id.
\textsuperscript{141} Florida also reformed its allowance of attorney's fees. FLA. STAT. § 400.023(1) (2006). Under the new RRA, attorney's fees are recoverable only in circumstances in which the plaintiff seeks injunctive or an administrative remedy. Id.
\textsuperscript{142} Id.
\textsuperscript{143} Manos, supra note 130, at 21.
\textsuperscript{144} FLA. STAT. § 400.023(2) (2006); see also Manos, supra note 130, at 27.
\textsuperscript{145} FLA. STAT. § 400.023(1)(b)1-2 (2006); Manos, supra note 130, at 27.
(d) The resident sustained loss, injury, death, or damage as a result of the breach.\textsuperscript{146}

This reform cleared up confusion in Florida courts about the plaintiff's burden in nursing-home cases involving the RRA.\textsuperscript{147} Under the RRA, a plaintiff must establish each element of negligence; a plaintiff may not simply point to a violation of the RRA and ask for damages, as was the case in some lawsuits before 2001.\textsuperscript{148} There must be actual damages and actual injury caused by the nursing home.\textsuperscript{149}

D. Arkansas's Stance

In 1999, Arkansas adopted its own Resident’s Rights Statute, modeled after Florida’s version.\textsuperscript{150} The Arkansas Resident’s Rights Statute creates a private right of action allowing nursing home plaintiffs to sue nursing homes for damages resulting from violations of the enumerated resident’s rights.\textsuperscript{151} While the enactment of the Resident’s Rights Statute represented a dramatic shift in favor of plaintiffs, it was not a sudden change.\textsuperscript{152} Even before the enactment of that statute, nursing-home litigation in Arkansas had become increasingly expensive, as plaintiffs altered their strategies and juries began sending messages with their verdicts.\textsuperscript{153}

This subsection will begin by discussing the state of nursing-home legislation in Arkansas before the advent of the Resident’s Rights Statute.\textsuperscript{154} Next, the subsection will look at the development of the statute and will examine its provisions, followed by a comparison of Arkansas’s statute with Florida’s resident’s rights statute, both before and after the reforms.\textsuperscript{155} Finally, this subsection will look at the Arkansas Supreme Court’s first application of the Resident’s Rights Statute in \textit{Koch v. Northport Health Services of Arkansas}.\textsuperscript{156}

\begin{itemize}
\item \textsuperscript{146} FLA. STAT. § 400.023(2) (2006).
\item \textsuperscript{147} Manos, \textit{supra} note 130, at 24.
\item \textsuperscript{148} \textit{Id.} at 25.
\item \textsuperscript{149} \textit{Id.}
\item \textsuperscript{150} \textit{See generally} Francis, \textit{supra} note 132.
\item \textsuperscript{151} ARK. CODE ANN. § 20-10-1209 (LEXIS Supp. 2005).
\item \textsuperscript{153} \textit{See generally} \textit{id.}
\item \textsuperscript{154} \textit{See infra} Part III.D.1.
\item \textsuperscript{155} \textit{See infra} Part III.D.2.
\item \textsuperscript{156} 361 Ark. 192, 205 S.W.3d 754 (2005); \textit{see infra} Part III.D.2.e.
\end{itemize}
1. **Nursing Home Litigation Immediately Preceding the Resident’s Rights Statute**

In the years leading up to the Resident’s Rights Statute, nursing-home litigation became increasingly intense, with higher stakes and less certainty.\(^{157}\) Plaintiffs seeking to maximize their damages adjusted their strategy to appeal more to the emotions of jury members, and juries responded by awarding large, message-sending verdicts.\(^ {158}\) This new strategy essentially put the entire nursing-home industry on trial, instead of focusing on the particular wrongs committed by a defendant against a single plaintiff.\(^ {159}\) Plaintiffs began “capitalizing on the trend by asking juries to use individual cases to make monumental decisions that [impacted] entire industries or even [established] de facto public policy.”\(^ {160}\) Although not unique to the nursing-home industry, these message-sending verdicts were a new weapon in the plaintiffs’ arsenals.\(^ {161}\) While the Arkansas Supreme Court kept some of these awards in check through appellate decisions, the overall trend was to break away from traditional damages and to move toward more public-policy based, generalized verdicts.\(^ {162}\) The following case, *Advocat, Inc. v. Sauer*,\(^ {163}\) is one example of this general trend.

The largest jolt to the nursing home industry in Arkansas came on June 29, 2001, when a jury in Mena, Arkansas, awarded seventy-eight million dollars to the family of Greta Sauer in a suit against a local nursing home, Rich Mountain Nursing and Rehabilitation Center, and its related corporations ("Advocat").\(^ {164}\) The verdict included sixty-three million dollars in punitive damages, and the remainder in compensatory damages for medical malpractice and negligence.\(^ {165}\) Although the lawsuit did not involve the Resident’s Rights Statute, its result was in keeping with that statute’s goal of increasing the effectiveness of civil lawsuits against nursing homes.\(^ {166}\)

The law firm Wilkes & McHugh, which had arrived in Arkansas from Florida in 1998 with a reputation for “tough litigation and the ability to

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\(^ {157}\) See generally Bleed, supra note 152.

\(^ {158}\) Id.

\(^ {159}\) Id.

\(^ {160}\) Mark Curriden, *Power of 12: Jurors Increasingly Are Sending Loud Messages of Censure with Megabuck Verdicts. But Critics Charge that a Jury Is the Least Qualified Body to Decide Public Policy*, 87 A.B.A.J. 36, 36 (2001) (describing how juries across the country began sending messages to specific industries, such as the tobacco industry and pharmaceutical companies, with megabuck verdicts).

\(^ {161}\) See id.

\(^ {162}\) See generally Bleed, supra note 152.

\(^ {163}\) 353 Ark. 29, 111 S.W.3d 346 (2003).

\(^ {164}\) Id. at 38, 111 S.W.3d at 350.

\(^ {165}\) Id. at 40, 111 S.W.3d at 351.

\(^ {166}\) See id., 111 S.W.3d at 351.
wring high-dollar verdicts from nursing homes[.]” tried the case for the plaintiff.167 The firm’s approach was to focus not on proving traditional, quantifiable forms of loss, but rather on “the intangible value of a victim’s pain and suffering.”168 Furthermore, the firm litigated their cases by stressing a pattern of negligence by “parent corporations and investor demands,” instead of focusing on the facts of the one particular case at hand and “the plight of a single individual in a single bed.”169 In the case, the plaintiff’s attorney went so far as to openly ask the jury to send a message to the defendants in his closing statement.170 This new approach was aggressive, persuasive, and artful, placing an emphasis on emotion over reason.

In Sauer, the plaintiff, Mrs. Sauer, died at the age of ninety-three after suffering from dehydration, bed sores, malnutrition, and Alzheimer’s disease.171 The jury assigned fault to Advocat for negligence and medical malpractice and awarded compensatory damages in the amount of five million dollars for negligence and ten million dollars for medical malpractice.172 Advocat immediately appealed the jury’s award and argued that, because Mrs. Sauer’s medical bills were only about $7,700, the jury had essentially given her Estate $14,992,291.50 for her pain and suffering.173 However, the Arkansas Supreme Court looked at evidence presented to the jury, including the condition in which employees of the home had found Mrs. Sauer, and determined that there was sufficient evidence to support the award.174 Unfortunately, the court failed to provide a guideline for measuring damages for pain and suffering.175 And while the court concluded that the award was not the result of passion or prejudice, it held that the compensatory damages did shock the conscience of the court and did merit remittitur from fifteen million dollars to five million dollars.176

Advocat’s request for remittitur of the punitive damages award was also successful.177 Advocat argued that the evidence on the record did not merit the award of punitive damages and that the punitive damages were exces-

167. See generally Bleed, supra note 152. Interestingly, the attorneys for the defendants left defense practice soon after the verdict and began doing plaintiffs’ work against nursing homes. Id.
168. Id.
169. Id.
170. Id.
172. Id. at 40, 111 S.W.3d at 351.
173. Id. at 42, 111 S.W.3d at 352.
174. Id. at 44–45, 111 S.W.3d at 354.
175. Id., 111 S.W.3d at 354. “There is no definite and satisfactory rule to measure compensation for pain and suffering.” Id., 111 S.W.3d at 354.
176. Id. at 49, 111 S.W.3d at 357.
177. Advocat, Inc., 353 Ark. at 52, 111 S.W.3d at 359.
sive and violated Advocat’s due process rights. Advocat further contended that under Arkansas law, punitive damages require proof of "conscious or reckless disregard of known or probable consequences from which malice can be inferred." Due to a technicality, the court did not review this insufficiency-of-the-evidence argument. After looking at all of the circumstances and considering the fact that Advocat constituted a "major business enterprise," the court decided that punitive damages were appropriate but that they should be reduced from sixty-three million dollars to twenty-one million dollars.

Although the appeal in Advocat was a victory in many ways for the nursing-home industry because the award was reduced by over fifty million dollars, it was also a defeat because it provided no clear standard for the assessment of damages. With no clear standard for the measurement of damages for pain and suffering, the court left the decision up to a jury’s unlimited discretion. Even with remittitur as large as the one Advocat received in this case, the ultimate award exceeding twenty million dollars sufficed to send a message to the nursing-home industry.

2. The Resident’s Rights Statute

   a. Development

   The Arkansas Resident’s Rights Statute (RRS) developed among many competing interests, which impacted the application and effectiveness of the provisions. The legislature attempted to draft the legislation to improve conditions for nursing-home residents without overly burdening the regulatory system or drastically uprooting the nursing-home industry. A compromise between the industry and resident’s rights advocates was necessary. Thus, while the RRS was able to maintain provisions making it easier for nursing-home residents to sue nursing homes, the bill also restricted

178. Id. at 49, 111 S.W.3d at 357.
179. Id., 111 S.W.3d at 357.
180. Id. at 50, 111 S.W.3d at 357.
181. Id. at 52, 111 S.W.3d at 359.
182. See id. at 23, 111 S.W.3d 346.
183. Advocat, Inc., 353 Ark. at 45, 111 S.W.3d at 354.
184. See id. at 68–69, 111 S.W.3d 369.
186. See, e.g., id. “State senators who amended the measure say the original bill was unacceptable to the industry and likely would have died without the changes.” Id.
187. See id.
residents by removing a proposed provision for the award of attorneys’ fees to plaintiffs.\(^\text{188}\)

After the passage of the RRS, insurance companies began raising rates on long-term liability insurance for Arkansas nursing homes.\(^\text{189}\) These rate hikes prompted the Arkansas Insurance Department to seek tort reform for nursing-home litigation in order to protect the industry from further financial difficulties.\(^\text{190}\) In particular, the proposed reform encouraged the idea of placing a limit on verdicts.\(^\text{191}\) That idea floundered, but in 2003, the nursing-home industry once again sought added protection, this time through lawsuit-limiting amendments to the RRS.\(^\text{192}\) The Arkansas Senate Judiciary Committee considered a bill proposing measures that would limit lawsuits, such as a bar on the admission of documents reporting a nursing home’s violations of the rights of a party other than the plaintiff.\(^\text{193}\) Reacting to an anti-nursing-home outcry, the Committee instead passed a bill allowing such documents to be used in nursing-home litigation.\(^\text{194}\) Additionally, the bill increased the minimum insurance coverage requirements for nursing homes.\(^\text{195}\) The revisions, “proposed to kill the bill and strip the bill,” were not included in the final versions of the bill; however, they revealed a high level of outrage against the nursing-home industry in Arkansas.\(^\text{196}\)

b. Provisions

The RRS consists of nine main sections that are intended “to provide for the development, establishment, and enforcement of basic standards for\(\text{[1]}\) (1) [t]he health, care, and treatment of persons in long-term care facilities; and (2) [t]he construction, maintenance, and operation of these facilities[,] which will ensure safe, adequate, and appropriate care, treatment, and health of persons in the facilities."\(^\text{197}\) The RRS attempts to achieve this goal by laying out twenty-one rights owed by nursing homes to nursing-home residents, which mirror those contained in the federal Resident’s Bill of

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188. Id.
190. Id. (suggesting that recent million-dollar verdicts affected insurance prices).
191. Id.
193. Id.
194. Id.
195. Id.
196. Id.
The final section of the RRS, entitled “Civil enforcement,” provides as follows:

(a)(1) Any resident who is injured by a deprivation or infringement of his or her rights as specified in this subchapter may bring a cause of action against any licensee responsible for the deprivation or infringement.

... 

(4) The resident may seek to recover actual damages when there is a finding that an employee of the long-term care facility failed to do something [that] a reasonably careful person would do or did something [that] a reasonable person would not do under circumstances similar to those shown by the evidence in the case, which caused an injury due to an infringement or a deprivation of the resident’s rights.

Under the RRS, nursing-home residents can therefore sue nursing homes and seek actual damages for a violation of the resident’s rights as set forth in the statute. The legislature did not define the term “actual damages,” but from a plain reading of the statute, it appears that any damages resulting from an injury caused by “an infringement or a deprivation of the resident’s rights” could be recoverable.

c. Application: Koch v. Northport Health Services of Arkansas

The Arkansas Supreme Court first heard cases involving the RRS in 2005, including Koch v. Northport Health Services of Arkansas. In that case, the appellant, Linda Koch, after her mother died, filed a complaint against her deceased mother’s nursing home and its related companies for medical malpractice, negligence, wrongful death, and violations of the RRS. The trial court awarded a verdict for the defense on the medical malpractice, wrongful death, and RRS claims from the jury’s interrogatories. Initially, the judge declared a mistrial on the negligence claim. Eventually, however, the trial judge applied the jury’s answers to interrogatories from the RRS claim to the ordinary negligence claim. Using those answers, the judge found for the defense on that claim as well.
Koch appealed the verdict. 208 One of her points on appeal was that the judge should not have used the jury’s answers to interrogatories on the RRS claim in order to decide the issue of ordinary negligence. 209 Koch contended that the judge should have declared a mistrial on the ordinary negligence claim instead. 210 The Arkansas Supreme Court agreed, holding that the ordinary negligence claim and the RRS claim were two separate claims requiring separate analyses and findings of fact. 211 The trial court could not simply apply the answers to interrogatories on one claim to the other. 212 So long as the facts of the case were in dispute, the jury should have been free to make different conclusions on the facts for the RRS claim and the ordinary negligence claim. 213 Therefore, separate interrogatories were required for the ordinary negligence claim. 214 The Koch court essentially held that negligence with regard to the RRS was different from ordinary negligence, and courts should not restrict themselves to applying the same analysis and findings of fact to the two causes of action. 215

IV. REASONING

The Arkansas Supreme Court decided five main points in Health Facilities Management Corp.; however, for purposes of this note, only three issues will be addressed in detail. 216 First, this section will discuss whether or not Management was a proper defendant in a suit for violation of the Resident’s Rights Statute. 217 Second, this section will look at whether or not the jury’s verdicts in favor of the defendant on the wrongful death and medical malpractice claims effectively exonerated Healthcare from any liability under a theory of violation of the Resident’s Rights Statute. 218 Finally, this section will explore Healthcare’s request for remittitur. 219

208. Koch, 361 Ark. at 196, 205 S.W.3d at 758.
209. Id. at 200, 205 S.W.3d at 761.
210. Id. at 202, 205 S.W.3d at 762.
211. Id. at 200, 205 S.W.3d at 761.
212. See id. at 201, 205 S.W.3d at 762.
213. Id. at 201, 205 S.W.3d at 762.
214. Koch, 361 Ark. at 202, 205 S.W.3d at 762.
215. Id., 205 S.W.3d at 762.
216. Health Facilities Mgmt. Corp. v. Hughes, No. 05-90, 2006 Ark. LEXIS 122, at *7 (Feb. 9, 2006). The other issues involved the violation of a motion in limine, which the court held did not require a mistrial, and the reinstatement of the circuit court’s decision to reduce the post-judgment interest rate to seven percent. Id. at *30, 34.
217. See infra Part IV.A.
218. See infra Part IV.B.
219. See infra Part IV.C.
A. The Licensee Issue

The court first considered whether the Estate could maintain a cause of action against Management for a violation of Ms. Smith's resident's rights under the RRS. The plain language of the Resident's Rights Statute provides that a plaintiff may maintain a cause of action against a licensee of a nursing home for violations of that resident's rights. Management argued that the circuit court lacked the authority to decide that Management was a "de facto" licensee when the statute itself did not create such a category. The Estate countered that the court should construe the term "licensee" to include any group "establishing, conducting, managing, or operating" a nursing-home facility by reading the term in conjunction with other statutory language. For its second point of rebuttal, the Estate urged that the Arkansas General Assembly's intent was to allow residents to maintain actions against such management entities. The Estate's final contention was that the Arkansas Supreme Court should affirm the circuit court's ruling for common sense reasons because Management "was either a licensee in fact, or had committed numerous criminal acts in managing the [nursing home] without a license, and, thus, should be held accountable."

In ruling on this issue, the Arkansas Supreme Court used a de novo standard of review. The court began by looking at the statute and determining that its plain language provided that only a licensee is subject to suit under its provisions. The court then considered another provision of the statute, which provided that "[n]o long-term care facility or related institution shall be established, conducted, or maintained in this state without a license." Looking at the licensure requirements of a long-term care facility contained in Arkansas Code Annotated section 20-10-224 and the definition of "licensee" in Black's Law Dictionary, the court determined that Management was not a licensee under the statute. Furthermore, the court struck down the Estate's legislative intent argument, finding no mention of a "de facto" licensee or other evidence that the General Assembly intended to include entities such as Management. The court then reversed the judg-

223. Id. at *8.
224. Id.
225. Id.
226. Id. at *9.
227. Id. at *10.
230. Id. at *11.
ment against Management with respect to the Resident’s Rights Statute claim.\textsuperscript{231}

B. Application of Koch

The remainder of the appeal addressed only Healthcare.\textsuperscript{232} Healthcare argued that because the jury ruled against the Estate on its claims for medical malpractice and wrongful death, the jury could not have found in favor of the Estate on the Resident’s Rights claim.\textsuperscript{233} This argument hinged on the fact that the Estate presented no evidence supporting a violation of Ms. Smith’s rights apart from the evidence used to support the other causes of action.\textsuperscript{234} At trial, the court instructed the jury that in answering each interrogatory, it should not consider any element of the other interrogatories.\textsuperscript{235} Therefore, Healthcare argued that any damages attributed to a violation of Ms. Smith’s resident’s rights would have to be supported by an element unique to the Resident’s Rights claim.\textsuperscript{236} The only element of the Resident’s Rights claim not encompassed in the other causes of action was “the right to be treated courteously.”\textsuperscript{237} Building on its argument, Healthcare claimed that there was no evidence of any actual damages suffered by Ms. Smith related to discourteous treatment.\textsuperscript{238} Finally, Healthcare argued that the language of the Resident’s Rights Statute did not allow for damages for “mental suffering without a physical injury.”\textsuperscript{239}

The Arkansas Supreme Court began its opinion with regard to this argument by stating the appropriate standard of review for the denial of a motion for directed verdict or a motion for judgment notwithstanding the verdict.\textsuperscript{240} The court then established that Koch v. Northport Health Services of Arkansas\textsuperscript{241} would govern its decision on this point.\textsuperscript{242} The court in Koch held that when there is a claim for ordinary negligence and another claim under a statutory cause of action, and the facts are in dispute, the jury can

\begin{itemize}
  \item \textsuperscript{231} Id. at *12.
  \item \textsuperscript{232} Id.
  \item \textsuperscript{233} Id.
  \item \textsuperscript{234} Id.
  \item \textsuperscript{235} Health Facilities Mgmt. Corp., 2006 Ark. LEXIS 122, at *12–13.
  \item \textsuperscript{236} Id. at *13.
  \item \textsuperscript{237} Id.
  \item \textsuperscript{238} Id.
  \item \textsuperscript{239} Id.
  \item \textsuperscript{240} Id. at *13–14 (quoting Wal-Mart Stores, Inc. v. Tucker, 353 Ark. 730, 739, 120 S.W.3d 61, 66–67 (2003)). On appeal, the court will look at whether or not the trial court’s verdict is supported by substantial evidence. Id. at *14.
  \item \textsuperscript{241} 361 Ark. 192, 205 S.W.3d 754 (2005).
  \item \textsuperscript{242} Health Facilities Mgmt. Corp., 2006 Ark. LEXIS 122, at *14.
\end{itemize}
reach different conclusions on the facts for each claim.\(^{243}\) Therefore, in this case, the jury did not have to reach the same findings of fact on the Resident’s Rights Statute claim as it did on the other claims.\(^{244}\) Thus, even if the Estate did not present evidence of discourteous treatment, the jury was free to find Healthcare liable for violations of the Resident’s Rights Statute.\(^{245}\)

The court also applied \textit{Koch} to the damages phase of the verdict and held that the jury was free to consider elements included in the other causes of action when assessing damages for violations of Ms. Smith’s resident’s rights.\(^{246}\) In this case, for instance, the Estate received a $38,000 verdict against Healthcare for negligence.\(^{247}\) The court held that the same elements used to assess damages on the negligence claim could be used in determining damages for the Resident’s Rights Statute claim.\(^{248}\) Therefore, the jury was able to award damages for “the injuries resulting from the van accident, any weight loss, pressure sores, and contractures, as well as other injuries testified to by the witnesses” under both the negligence claim and the Resident’s Rights Statute claim.\(^{249}\)

C. Remittitur

Healthcare further argued that the jury’s verdict of $700,000 for violations of the Resident’s Rights Statute was excessive and the result of prejudice.\(^{250}\) The court’s standard of review was to review the proof in a light most favorable to the appellee, the Estate.\(^{251}\) The court sought to determine whether the verdict shocked the conscience of the court, whether the jury demonstrated passion or prejudice in reaching its award, and whether the damages were excessive and not sustained by the evidence.\(^{252}\)

The court began its inquiry by stating that there was “ample evidence” of the violation of Ms. Smith’s rights.\(^{253}\) The court then concluded that the jury’s verdict was not the result of passion or prejudice.\(^{254}\) The only question remaining on the issue of remittitur was whether the verdict shocked the conscience of the court.\(^{255}\) In making its determination, the court quoted

\begin{itemize}
  \item \textit{Id.} at *15.
  \item \textit{Id.} at *16.
  \item \textit{Id.} at *17.
  \item \textit{Id.} at *5.
  \item \textit{Id.} at *17.
  \item \textit{Health Facilities Mgmt. Corp.}, 2006 Ark. LEXIS 122, at *17.
  \item \textit{Id.}
  \item \textit{Id.} at *30–31.
  \item \textit{Id.} at *31.
  \item \textit{Id.}
  \item \textit{Id.} at *32.
  \item \textit{Health Facilities Mgmt. Corp.}, 2006 Ark. LEXIS 122, at *32.
  \item \textit{Id.}
language from the Resident’s Rights Statute setting forth the right to health care and other services, as well as the “right to be treated courteously, fairly, and with the fullest measure of dignity.” The court concluded that Ms. Smith had suffered from several lapses of care and that the nursing home treated her without dignity and in violation of the statute; therefore, the Estate was entitled to actual damages. Without going into any standards for quantifying an award for violations of the Resident’s Rights Statute, the court concluded that the jury’s verdict of $700,000 did not require a remittitur.

V. SIGNIFICANCE

The Arkansas Supreme Court’s decision in Health Facilities Management Corp. v. Hughes reveals both strengths and weaknesses in the Resident’s Rights Statute. First of all, the court’s decision on the licensee issue was faithful to the statute’s goal of improving the quality of patient care. However, the vague civil enforcement provision of the statute allowed the court to interpret the statute in such a way that it punishes nursing homes more than it protects residents. The Arkansas legislature and judicial system need to make adjustments in order to strengthen this weakness and make the statute more effective.

A. The Court’s Resolution of the Licensee Issue Maintains the Integrity of the Statute

Placing liability for lapses in care on the licensee of a long-term care facility best serves the purpose of the Resident’s Rights Statute—to improve the quality of care to nursing home residents. The court’s reasoning focused on the generalized definition of “licensee” in Black’s Law Dictionary and the statute’s plain language. The requirements and materials for licensure of long-term care facilities in Arkansas bolster the court’s decision even more, making clear why it was appropriate for the legislature to limit liability to licensees. The Office of Long Term Care, in its materials detailing the process for licensure of long-term care facilities, defines “licensee” as

256. Id. at *33 (quoting Ark. Code Ann. § 20-10-1204(a)(21) (Repl. 2000)).
257. Id. at *33–34.
258. Id. at *34.
259. See id. at *12.
261. See supra Part IV.A.
"any state, municipality, political subdivision, institution, public, or private corporation, association, individual, partnership, or any other entity to whom a license is issued for the purpose of operating the nursing home, who shall assume primary responsibility for complying with approved standards for the institution."

The Office of Long Term Care’s definition of “licensee,” read in conjunction with the civil enforcement provision, fulfills the purposes of the Resident’s Rights Statute. It is logical that the party assuming “primary responsibility for complying with approved standards” should be the party responsible for damages for lapses in a resident’s care or rights. While the Estate attempted to argue for a reading of the statute that would include “de facto” licensees, it had no basis for the argument. Had the court recognized “de facto” licensees, the integrity of the Resident's Rights Statute may have been undermined. If the purpose is to improve quality of care to nursing home residents, any liability for a lapse in care should fall on the party who has assumed responsibility for complying with approved standards. Furthermore, although the Estate tried to argue that if Management was operating the Nursing Home without its own license it was breaking the law, there is no requirement under Arkansas’s licensure procedure for every entity involved with a nursing home to obtain a license; in fact, because the definition of “licensee” references “primary responsibility,” the obvious conclusion is that only one entity may be a licensee.

The court’s reading of the Resident’s Rights Statute on the licensee issue was correct, because a long-term care facility license in Arkansas conveys to the licensee primary responsibility. Only one party may bear primary responsibility, and therefore there can be no “de facto” licensee. Moreover, it achieves the purposes of the Resident’s Rights Statute by encouraging the licensees, who have assumed responsibility, to carry out their responsibility and improve patient care.

B. The Double Recovery Allowed Following the Hughes Decision Unjustly Punishes Nursing Home Defendants

While the court reached the right conclusion on the licensure issue, its opinion on the issue of recovery is troubling. The purpose of compensatory damages is to compensate the plaintiff for actual injuries or damages suf-
ferred as the result of the defendant’s conduct. Compensatory damages are not meant to punish a defendant or unjustly enrich a plaintiff. The Arkansas Supreme Court’s holding, which applies its decision in Koch, essentially amounts to the allowance of double recovery. A jury following instructions based on the Hughes decision could basically consider damages included in assessing damages for other causes of action when assessing damages under a Resident’s Rights Statute claim. Therefore a plaintiff could recover damages from a fall twice—once under a negligence theory and again on a Resident’s Rights claim. Such double recovery is punitive, going beyond compensating the plaintiff to actually punishing the defendant. The plaintiff should not be able to recover damages for the same injury twice. Damages recovered for a Resident’s Rights claim should therefore be limited to damages not recovered on any other theory.

Arkansas should reform its Resident’s Rights Statute to limit jury awards, or in the alternative, the Arkansas Supreme Court should establish a clear, straightforward, and just standard for applying the statute and assessing damages. It is time for the state to take a rational, reasoned approach to the nursing-home crisis that will improve the quality of life of residents while also bolstering the industry’s ability to sustain itself. Arkansas cannot rely on litigation to solve the problems of the nursing home industry. As it stands now, the RRS in combination with the Arkansas Supreme Court’s decision allows juries to punish nursing homes with compensatory damages—an idea antithetical to the foundations of the justice system.

One option would be for Arkansas to adopt reforms similar to those adopted by the Florida legislature in order to decrease the dangerously punitive nature of the current civil enforcement provision of the RRS. Otherwise Arkansas runs the risk of going the way of Florida and running insurance companies out of the state, making providing nursing home care even more difficult than it currently is. Alternatively, the Arkansas Supreme Court should establish a clear and just standard for applying the statute and assessing damages. Limiting damages to those not recovered under any other theory would prevent double recovery and avoid the problem of punishing defendants under the veil of compensatory damages. If the legislature or the court steps in to make these changes, the Arkansas Resident’s Rights

269. See Manhattan Credit Co., Inc. v. Skirvin, 228 Ark. 913, 915–17, 311 S.W.2d 168, 170 (1958).
270. See id. at 917, 311 S.W.2d 168. The court distinguished compensatory damages from damages used to punish a defendant. Id.
272. See Brady, supra note 4.
273. See id.
275. See supra Part III.C.2.d.
Statute would be aimed at meeting its goals in a more effective way while not unnecessarily crippling the industry supplying care to nursing home residents.

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