

**Stricken language would be deleted from and underlined language would be added to the Arkansas Constitution.**

1 State of Arkansas  
2 89th General Assembly  
3 Regular Session, 2013

SJR 2

4  
5 By: Senators J. Hutchinson, Files, J. Hendren, Holland, J. Woods, J. Dismang, Hester, G. Stubblefield, S.  
6 Flowers, R. Thompson, D. Johnson, B. Pierce, D. Wyatt, Burnett, E. Cheatham, U. Lindsey, Elliott  
7 By: Representatives Wright, Hammer, D. Altes, J. Burris, Neal, Kizzia, Leding, Vines, Davis, Steel,  
8 Sabin, McLean, Ballinger

**SENATE JOINT RESOLUTION**

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11 AMENDING THE ARKANSAS CONSTITUTION CONCERNING THE  
12 PROCEDURES FOR CIVIL CLAIMS; PROVIDING FOR THE AWARD  
13 OF COSTS AND FEES WHEN A CLAIM IS DISMISSED FOR  
14 FAILURE TO STATE FACTS UPON WHICH RELIEF CAN BE  
15 GRANTED AND THE CLAIM IS FRIVOLOUS AND STATING  
16 CERTAIN EXCEPTIONS TO THIS RULE; ESTABLISHING THE  
17 BURDEN OF PROOF IN ACTIONS FOR MEDICAL INJURY WHEN  
18 THE ASSERTED NEGLIGENCE DOES NOT LIE WITHIN THE  
19 JURY'S COMPREHENSION AS A MATTER OF COMMON KNOWLEDGE;  
20 PROVIDING FOR THE FILING OF A CERTIFICATE OF GOOD  
21 FAITH IN CONJUNCTION WITH AN ACTION FOR MEDICAL  
22 INJURY IN WHICH EXPERT TESTIMONY IS REQUIRED UNDER  
23 ARKANSAS LAW; AND REQUIRING WRITTEN NOTICE OF A CLAIM  
24 FOR MEDICAL INJURY TO PERSONS ALLEGEDLY LIABLE BEFORE  
25 THE COMMENCEMENT OF A LEGAL CLAIM.

**Subtitle**

THE TORT REFORM AMENDMENT OF 2013.

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32 BE IT RESOLVED BY THE SENATE OF THE EIGHTY-NINTH GENERAL ASSEMBLY OF THE  
33 STATE OF ARKANSAS AND BY THE HOUSE OF REPRESENTATIVES, A MAJORITY OF ALL  
34 MEMBERS ELECTED TO EACH HOUSE AGREEING THERETO:



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2 SECTION 1. This amendment shall be known and may be cited as the "Tort  
3 Reform Amendment of 2013".

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5 SECTION 2. Article 7 of the Arkansas Constitution is amended to add  
6 additional sections to read as follows:

7 § 53. Motions to dismiss.

8 (a) As used in this section, "frivolous" means a claim that is:

9 (1) Not well grounded in fact;

10 (2) Not warranted by existing law or a good faith argument for  
11 the extension, modification, or reversal of existing law; or

12 (3) Interposed for an improper purpose, including without  
13 limitation to harass or to cause unnecessary delay or needless increase in  
14 the cost of litigation.

15 (b)(1)(A) When a court grants a motion to dismiss for failure to state  
16 facts upon which relief can be granted and makes a finding that the claim is  
17 frivolous, the court shall award the party or parties against whom the  
18 dismissed claims were pending at the time the successful motion to dismiss  
19 was granted the costs and reasonable and necessary attorney's fees incurred  
20 in the proceedings.

21 (B) The awarded costs and fees shall be paid by the party  
22 or parties whose claim or claims were dismissed as a result of the granted  
23 motion to dismiss.

24 (2) Costs awarded shall include all reasonable and necessary  
25 litigation costs actually incurred due to the proceedings that resulted from  
26 the filing of the dismissed claims, including without limitation:

27 (A) Court costs;

28 (B) Attorney's fees;

29 (C) Court reporter fees;

30 (D) Interpreter fees; and

31 (E) Guardian ad litem fees.

32 (c)(1) An award of costs under this section shall be made only:

33 (A) After all appeals of the issue of the granting of the  
34 motion to dismiss have been exhausted; and

35 (B) If the final outcome is the granting of the motion to  
36 dismiss.

1           (2) The award of costs and attorney's fees under this section  
2 shall be stayed until a final decision that is not subject to appeal is  
3 rendered.

4           (d)(1) Notwithstanding any other provision of this section, the court  
5 shall not require a party to pay costs under this section in excess of a  
6 combined total of ten thousand dollars (\$10,000) in any single lawsuit.

7           (2) When multiple parties are entitled to recover their costs  
8 from a single party under this section and those parties' combined actual  
9 costs under this section exceed ten thousand dollars (\$10,000), then the  
10 court shall apportion the awarded costs to the moving parties in proportion  
11 to the amount of each moving party's incurred costs unless agreed otherwise  
12 by the moving parties.

13           (3) This section does not limit the award of costs as otherwise  
14 provided under Arkansas law, court rules, or at common law.

15           (e) This section does not apply to:

16           (1) Actions by or against the state, other governmental  
17 entities, or public officials acting in their official capacity or under  
18 color of law;

19           (2) Any claim that is dismissed by the granting of a motion to  
20 dismiss that was filed more than sixty (60) days after the moving party  
21 received service of the latest complaint, counter-complaint, or cross-  
22 complaint in which that dismissed claim was made;

23           (3)(A) Any claim that the party against whom the motion to  
24 dismiss was filed:

25                   (i) Withdrew; or

26                   (ii) In good faith amended to state a claim upon  
27 which relief may be granted.

28           (4)(A) Except as provided in subdivision (e)(4)(B) of this  
29 section, actions by pro se litigants.

30           (B) Subdivision (e)(4)(A) of this section does not apply  
31 if the court also finds that the pro se litigant acted unreasonably in  
32 bringing or refusing to voluntarily withdraw the dismissed claim;

33           (5)(A) Except as provided in subdivision (e)(5)(B) of this  
34 section, any claim that is a good faith, nonfrivolous claim filed for the  
35 express purpose of:

36                   (i) Extending, modifying, or reversing existing

1 precedent, law, rule, or regulation; or

2 (ii) Establishing the meaning, lawfulness, or  
3 constitutionality of a law, rule, regulation, or United States or Arkansas  
4 constitutional right if the meaning, lawfulness, or constitutionality is a  
5 matter of first impression that has not been established by precedent in a  
6 published opinion by the Supreme Court, Court of Appeals, a United States  
7 district court in Arkansas, or the United States Supreme Court.

8 (B) Subdivision (e)(5)(A) of this section does not apply  
9 unless at the time the successful motion to dismiss was filed, the party that  
10 made the dismissed claim had:

11 (i) Specially pleaded in its latest complaint,  
12 counter-complaint, or cross-complaint that the dismissed claim was made for  
13 one (1) of the express purposes under subdivision (e)(5)(A) of this section;  
14 and

15 (ii) Cited the contrary precedent or interpretation  
16 the party seeks to distinguish or overcome or stated that the issue to be  
17 decided is a matter of first impression as described in subdivision (e)(5) of  
18 this section; or

19 (6) Any claim for which relief could be granted under a law, a  
20 court precedent published by a court described in subdivision (e)(5) of this  
21 section, a rule, or a regulation that was in effect and applicable to the  
22 claim at the time the motion to dismiss was filed when the:

23 (A) Law, precedent, rule, or regulation was cited in the  
24 pleading in which the dismissed claim was made or in the response to the  
25 motion to dismiss; and

26 (B) Motion to dismiss the claim was granted due to the  
27 subsequent repeal, amendment, overruling, or distinguishing of that law,  
28 rule, regulation, or published court precedent.

29 (f) This section does not limit the ability of a court to dismiss a  
30 claim or assess costs against a party whose claim has been dismissed when  
31 permitted or required by other law, court rule, or at common law.

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33 § 54. Burden of proof.

34 (a)(1)(A) As used in this section, "same specialty as the defendant"  
35 means a medical care provider who practices the treatment or procedure at  
36 issue in the action for medical injury.

1                   (B) "Same specialty as the defendant" does not mean a  
2 medical care provider with the same specific credentials of the defendant  
3 physician.

4                   (2) A physician who by education, training, and experience is  
5 familiar with the treatment or procedure at issue in an action for medical  
6 injury shall be deemed to practice in the same specialty at issue.

7                   (b) In an action for medical injury, when the asserted negligence does  
8 not lie within the jury's comprehension as a matter of common knowledge, the  
9 plaintiff shall have the burden of proving:

10                   (1) By means of expert testimony provided only by a medical care  
11 provider of the same specialty as the defendant, the degree of skill and  
12 learning ordinarily possessed and used by members of the profession of the  
13 medical care provider in good standing, engaged in the same type of practice  
14 or specialty in the locality in which he or she practices or in a similar  
15 locality;

16                   (2) By means of expert testimony provided only by a medical care  
17 provider of the same specialty as the defendant that the medical care  
18 provider failed to act in accordance with that standard; and

19                   (3) By means of expert testimony provided only by a qualified  
20 medical expert that as a proximate result thereof the injured person suffered  
21 injuries that would not otherwise have occurred.

22                   (c)(1) Without limiting the applicability of subsection (b) of this  
23 section, when the plaintiff claims that a medical care provider failed to  
24 supply adequate information to obtain the informed consent of the injured  
25 person, the plaintiff shall have the burden of proving that the:

26                   (A) Treatment, procedure, or surgery was performed in  
27 other than an emergency situation; and

28                   (B) Medical care provider did not supply that type of  
29 information regarding the treatment, procedure, or surgery as would  
30 customarily have been given to a patient in the position of the injured  
31 person or other persons authorized to give consent for such a patient by  
32 other medical care providers with similar training and experience at the time  
33 of the treatment, procedure, or surgery in the locality in which the medical  
34 care provider practices or in a similar locality.

35                   (2) In determining whether the plaintiff has satisfied the  
36 requirements of subdivision (c)(1) of this section, the following matters

1 shall be considered as material issues:

2 (A) Whether a person of ordinary intelligence and  
3 awareness in a position similar to that of the injured person or persons  
4 giving consent on his or her behalf could reasonably be expected to know of  
5 the risks or hazards inherent in such treatment, procedure, or surgery;

6 (B) Whether the injured party or the person giving consent  
7 on his or her behalf knew of the risks or hazards inherent in such treatment,  
8 procedure, or surgery;

9 (C) Whether the injured party would have undergone the  
10 treatment, procedure, or surgery regardless of the risk involved or whether  
11 he or she did not wish to be informed thereof; and

12 (D) Whether it was reasonable for the medical care  
13 provider to limit disclosure of information because such disclosure could be  
14 expected to adversely and substantially affect the injured person's  
15 condition.

16  
17 § 55. Certificate of good faith.

18 (a)(1) In an action for medical injury in which expert testimony is  
19 required under Arkansas law, the plaintiff or plaintiff's counsel shall file  
20 a certificate of good faith with the complaint.

21 (2) If the certificate is not filed with the complaint, the  
22 complaint shall be dismissed as provided in subsection (d) of this section  
23 absent a showing that the failure to file a certificate of good faith was due  
24 to:

25 (A) The failure of the provider to timely provide copies  
26 of the claimant's records requested under Arkansas law; or

27 (B) Demonstrated extraordinary cause.

28 (b) The certificate of good faith shall state that:

29 (1) The plaintiff or plaintiff's counsel has consulted with one  
30 (1) or more experts who have provided a signed written statement confirming  
31 that upon information and belief they:

32 (A) Are competent under Arkansas law to express an opinion  
33 or opinions in the case; and

34 (B) Believe, based on the information available from the  
35 medical records concerning the care and treatment of the plaintiff for the  
36 incident or incidents at issue, that there is a good-faith basis to maintain

1 the action consistent with the requirements of Arkansas law; or

2 (2) The plaintiff or plaintiff's counsel has consulted with one  
 3 (1) or more experts who have provided a signed written statement confirming  
 4 that upon information and belief they:

5 (A) Are competent under Arkansas law to express an opinion  
 6 or opinions in the case; and

7 (B)(i) Believe, based on the information available from  
 8 the medical records reviewed concerning the care and treatment of the  
 9 plaintiff for the incident or incidents at issue and, as appropriate,  
 10 information from the plaintiff or others with knowledge of the incident or  
 11 incidents at issue, that there are facts material to the resolution of the  
 12 case that cannot be reasonably ascertained from the medical records or  
 13 information reasonably available to the plaintiff or plaintiff's counsel and  
 14 that, despite the absence of this information, there is a good-faith basis  
 15 for maintaining the action as to each defendant consistent with the  
 16 requirements of Arkansas law.

17 (ii) Refusal of the defendant to release the medical  
 18 records in a timely fashion or when it is impossible for the plaintiff to  
 19 obtain the medical records shall waive the requirement that the expert review  
 20 the medical record prior to expert certification.

21 (c) Within thirty (30) days after a defendant has alleged in an answer  
 22 or amended answer that a nonparty is at fault for the injuries or death of  
 23 the plaintiff and expert testimony is required to prove fault as required by  
 24 Arkansas law, each defendant or defendant's counsel shall file a certificate  
 25 of good faith stating that:

26 (1) The defendant or defendant's counsel has consulted with one  
 27 (1) or more experts, which may include the defendant's filing the certificate  
 28 of good faith, who have provided a signed written statement confirming that  
 29 upon information and belief they:

30 (A) Are competent under Arkansas law to express an opinion  
 31 or opinions in the case; and

32 (B) Believe, based on the information reviewed concerning  
 33 the care and treatment of the plaintiff for the incident or incidents at  
 34 issue, that there is a good-faith basis to allege such a fault against  
 35 another consistent with the requirements of Arkansas law; or

36 (2) The defendant or defendant's counsel has consulted with one

1 (1) or more medical experts, which may include the defendant's filing the  
2 certificate of good faith, who have provided a signed written statement  
3 confirming that upon information and belief they:

4 (A) Are competent under Arkansas law to express an opinions  
5 or opinions in the case; and

6 (B) Believe, based on the information reviewed concerning  
7 the care and treatment of the plaintiff for the incident or incidents at  
8 issue, that:

9 (i) There are facts material to the resolution of  
10 the case that cannot be reasonably ascertained from the information  
11 reasonably available to the defendant or defendant's counsel; and

12 (ii) Despite the absence of the material facts under  
13 subdivision (c)(2)(B)(i) of this section, there is a good-faith basis for  
14 alleging such a fault against another, whether already a party to the action  
15 or not, consistent with the requirements of Arkansas law.

16 (d)(1) The failure of a plaintiff to file a certificate of good faith  
17 in compliance with this section shall, upon motion, make the action subject  
18 to dismissal with prejudice.

19 (2) The failure of a defendant to file a certificate of good  
20 faith in compliance with this section alleging the fault of a nonparty shall,  
21 upon motion, make such allegations subject to being stricken with prejudice  
22 unless the plaintiff consents to waive compliance with this section.

23 (3) If the allegations are stricken, a defendant, except for a  
24 defendant who complied with this section, cannot assert, and neither shall  
25 the judge nor jury consider, the fault, if any, of those identified by the  
26 allegations.

27 (4) The court may, upon motion, grant an extension within which  
28 to file a certificate of good faith if the court determines that a health  
29 care provider who has medical records relevant to the issues in the case has  
30 failed to timely produce medical records upon timely request, or for other  
31 good cause shown.

32  
33 § 56. Notice of claim for medical injury.

34 (a) An action for medical injury shall not be commenced until at least  
35 sixty (60) days after service of a written notice of the alleged claim for  
36 medical injury upon the person or persons alleged to be liable, by certified



1 or registered mail, to the last known address of the person or persons  
2 allegedly liable.

3 (b) If the written notice under subsection (a) of this section is  
4 served within sixty (60) days of the expiration of the period for bringing  
5 suit, the time for commencement of the action shall be extended one hundred  
6 and eighty (180) days from the service of the notice.

7 (c)(1) Except as provided in subdivision (c)(2) of this section,  
8 during the one-hundred-eighty-day extension of the statute of limitations  
9 under subsection (b) of this section a potential party to the alleged claim  
10 or an attorney for a potential party to the alleged claim shall not have ex  
11 parte communication with the claimant's treating medical care providers.

12 (2) A potential party to the alleged claim or an attorney for a  
13 potential party to the alleged claim may request medical records from the  
14 claimant's treating medical care providers upon proper authorization.

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