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SENATE JOINT RESOLUTION

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AMENDING THE ARKANSAS CONSTITUTION CONCERNING THE

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PROCEDURES FOR CIVIL CLAIMS; PROVIDING FOR THE AWARD

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OF COSTS AND FEES WHEN A CLAIM IS DISMISSED FOR

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FAILURE TO STATE FACTS UPON WHICH RELIEF CAN BE

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GRANTED AND THE CLAIM IS FRIVOLOUS AND STATING

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CERTAIN EXCEPTIONS TO THIS RULE; ESTABLISHING THE

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BURDEN OF PROOF IN ACTIONS FOR MEDICAL INJURY WHEN

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THE ASSERTED NEGLIGENCE DOES NOT LIE WITHIN THE

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JURY'S COMPREHENSION AS A MATTER OF COMMON KNOWLEDGE;

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PROVIDING FOR THE FILING OF A CERTIFICATE OF GOOD

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FAITH IN CONJUNCTION WITH AN ACTION FOR MEDICAL

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INJURY IN WHICH EXPERT TESTIMONY IS REQUIRED UNDER

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ARKANSAS LAW; AND REQUIRING WRITTEN NOTICE OF A CLAIM

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FOR MEDICAL INJURY TO PERSONS ALLEGEDLY LIABLE BEFORE

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THE COMMENCEMENT OF A LEGAL CLAIM.

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Subtitle

29

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.

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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.

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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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16 */s/J. Hutchinson*
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