

Tort Reform Cases in the Arkansas Supreme Court

By Jess Askew III

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Although the adoption of tort reform legislation in Act 649 of 2003 created a storm of passionate and far-reaching arguments among lawyers and legal commentators,¹ the subsequent course of litigation in the Arkansas Supreme Court has been marked by restraint and careful selection of cases and issues. Several Act 649 cases have reached the Court, but only one, *Summerville v. Thrower*,² has been decided on the merits of an Act 649 issue. This article will report on the cases that have reached the Supreme Court because this is where the law of Arkansas will be made; federal courts have ruled on Act 649 issues and will continue to do so,³ but those decisions will only be educated predictions about what the Arkansas Supreme Court may ultimately decide on those questions.⁴

The Supreme Court's Selectivity in Tort Reform Cases

A week before handing down its opinion in *Summerville v. Thrower*, the Supreme Court dismissed an appeal in *McKinney v. Bishop*,⁵ a case that attempted to raise the same issue presented in *Summerville* as well as seeking a declaratory judgment that additional sections of Act 649 were “unconstitutional or otherwise invalid.” The plaintiff had named ten “John Doe” defendants and had failed to obtain a final order on the claims against those anonymous defendants. Even though no party raised this issue, the Supreme Court addressed the lack of a final judgment as a barrier to its own jurisdiction, and it

dismissed the appeal without prejudice. At that time, *Summerville v. Thrower* had already been argued and was under submission.

Similarly, in *Shipp v. Franklin*,⁶ the Court dismissed the plaintiff's challenges to Act 649 as moot. This ruling required careful analysis of the posture and history of the case. The plaintiff had sued two alleged joint tortfeasors, Franklin and Sanders, and argued that the limitations on joint and several liability in ARK. CODE ANN. §16-55-201 were unconstitutional. The plaintiff also argued that her medical bills were \$44,497.19, but that ARK. CODE ANN. § 16-55-212(b) limited her evidence of medical bills to \$16,478.64 as the amount paid by her or on her behalf, or which were unpaid and remained the liability of the plaintiff or a third party. Before trial, the plaintiff had settled with Sanders, and Franklin retained third-party claims against Sanders. At trial, the jury found Sanders to be 100% at fault.

The Court decided that reviewing the constitutional questions would have no practical effect on the case. Sanders was the only party at fault, and the modification of joint and several liability in § 16-55-201 did not matter because two or more people must be liable in tort for the plaintiff's injuries for the change to come into play. On the issue of proof of medical bills, the plaintiff's settlement with Sanders and the jury's exoneration of Franklin ended any chance of a retrial where the question could come up.

These decisions reflect that the Court is exercising great care and



deliberation in reviewing issues under Act 649.⁷ In view of the constitutional tensions between the Supreme Court and the General Assembly that surfaced in *Summerville*, this is a wise course.

Substance v. Procedure in *Summerville*

Summerville raised a question concerning the constitutionality of the reasonable-cause affidavit requirement of ARK. CODE ANN. § 16-55-209(b)(3). Section 209 in general is concerned with establishing reasonable cause in any action for medical injury. If expert testimony is required in the case, then § 209(b)(1) states that reasonable cause may be established only by an affidavit of an expert in the same type of medical care as the defendant, and § 209(b)(2) requires

the affidavit to state with particularity the expert's qualifications and familiarity with the applicable standard of care, how the standard of care has been breached, and how the breach resulted in injury or death.

Section 209(b)(3), the provision at issue in *Summerville*, requires that the affidavit establishing reasonable cause be filed within 30 days after the complaint is filed. Failure to file the affidavit within 30 days after the complaint is filed subjects the party or lawyer who signs the complaint to sanctions under § 209(a) and requires dismissal of the complaint under § 209(b)(3)(B).

Tomosa Summerville's complaint alleged claims for medical injury against an obstetrician and a licensed nurse practitioner. She failed to file a reasonable-cause affidavit within 30 days after her complaint was filed. In response to a motion to dismiss, her lawyer submitted an affidavit asserting that the lawyer had researched the medical issues and was convinced that the plaintiff had a valid cause of action. Her lawyer also stated that the plaintiff's obstetrical expert witness had agreed to testify but had been too busy to prepare a reasonable-cause affidavit. The trial court upheld the 30-day filing requirement of §209(b)(3)(A) and dismissed the action under § 209(b)(3)(B).

Arkansas lawyers will recognize in the dismissal requirement an echo of a rule from the Medical Malpractice Act that the Supreme

Court struck down in *Weidrick v. Arnold*.⁸ *Weidrick* addressed the statutory requirement that a plaintiff provide 60 days' advance notice to a medical malpractice defendant before filing suit. The Court rejected this statutory requirement as in direct conflict with Rule 3 of the Rules of Civil Procedure, which governs the commencement of a civil action. Tomosa Summerville argued that *Weidrick* required the same result in her case.

The Supreme Court made short work of the 30-day filing requirement, rejecting it as a violation of the separation of powers doctrine of the Arkansas Constitution. All seven justices found the filing requirement unconstitutional. Justice Brown, joined by Chief Justice Hannah and Justices Corbin, Gunter and Danielson, held the 30-day filing requirement unconstitutional for conflicting with Rule 3 on the commencement of a civil action, applying the reasoning used in *Weidrick*. Just as *Weidrick* rejected the 60-day-advance-notice requirement as "an added encumbrance for filing a complaint," these five justices concluded that the 30-day post-commencement filing requirement was a "legislative encumbrance to commencing a cause of action that is not found in Rule 3."¹⁰

Justice Imber, joined by Justice Glaze, concurred in the result because they found the requirement of mandatory dismissal inconsistent with the provisions of Rule 11. They reasoned that the reasonable-cause affidavit of § 209 in general mirrors the reasonable-inquiry requirements of Rule 11 without conflicting with it, but that the mandatory dismissal required by § 209(b)(3)(B) is a particular sanction that conflicts with the discretionary range of sanctions available to a trial court under Rule 11, and that the statute provides no opportunity to withdraw or cure the pleading defect, in conflict with the cure opportunity provided by Rule 11.

Both opinions start from the same premise. If a procedural matter is governed by one of the Rules of Civil Procedure, then the General Assembly has no power to pass a statute that conflicts with the Rule. From a constitutional standpoint, this reasoning is unassailable in light of the adoption of Amendment 80. Section 3 of Amendment 80 gives the Supreme Court exclusive power to establish rules of pleading, practice and procedure in the state courts.¹¹ The exclusive power of the Supreme Court in this area is more firmly established under Amendment 80 than it was when *Weidrick* was decided in 1992.

The difficulty is not in stating this principle of the separation of powers, but in applying it. Justice Imber's concurrence neatly found two direct conflicts between the statutory filing requirement and Rule 11 of the Rules of Civil Procedure. The conflicts are stark: the statute compels a specific sanction of dismissal



Jess Askew III is a member of Williams & Anderson PLC where he specializes in business litigation, employment law and media law.



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inconsistency between the statutory requirement and the judicial rule of procedure, so that it is necessary to determine which of the two inconsistent rules is supreme. Justice Brown’s notion of “conflict” seems to turn on whether the General Assembly is legislating in an area that is reserved to the Court under Amendment 80. Whether an unconstitutional conflict requires actual inconsistency or a simple legislative trespass may be an issue of constitutional doctrine that the Court will develop in future cases.

Lessons?

It is too soon to try to draw lessons from the Court’s treatment of Act 649. Certainly the Supreme Court has been careful in examining the cases that attempt to raise questions about Act 649, and it is appropriate for the Court to review its jurisdiction closely before it accepts an issue where a party wants it to annul an Act of the General Assembly, especially when the challenge involves the rule-making power of the Supreme Court itself. The Court should be cautious when it has an interest as both rule-maker and ultimate arbiter of a dispute involving one of its rules.

The constitutional doctrine involving Amendment 80 bears more development. Is legislation unconstitutional simply because it trespasses on territory reserved exclusively to the Supreme Court for rule-making, or will the Court look for actual inconsistency between the legislative and the judicial rules, so that it is necessary to determine which is supreme?

Finally, the narrow decision in *Summerville* sheds no light on the numerous other constitutional challenges being made on the provisions of Act 649 in the trial courts by its opponents. Even on the isolated question of whether a provision of Act 649 conflicts with the Amendment 80 power of the Supreme Court to regulate state-court practice and procedure, *Summerville* leaves many questions unanswered. For example, the much-maligned punitive-damages bifurcation requirement of ARK. CODE ANN. § 16-55-211 is often assumed to be unconstitutional as in conflict with ARK. R. CIV. P. 42(b), which provides discretion to order separate trials. But Rule 42(b) deals with separate trials, while § 211 addresses the order in which the finder of fact shall determine issues concerning punitive damages. These are different matters. Even if they were the same matter, it is likely that many trial courts will exercise discretion to order a separate trial on punitive damages under Rule 42(b) in order to minimize the prejudice of punitive-damage evidence. Justice Glaze has suggested such a bifurcation may be mandatory, not just discretionary: “Upon remand, should the court conclude that the prior convictions are admissible pursuant to ARK. R. EVID. 403, it would be *necessary* to bifurcate the punitive-damages phase of the trial pursuant to ARK. R. CIV. P. 42(b).”¹⁵

If Rule 42(b) requires bifurcation of punitive damages in a case, then there could be no conflict with the statutory bifurcation provision. It is for reasons like these that it is not possible to read the tea leaves from *Summerville*.

Endnotes

1. A brief bibliography of the articles is included here for the

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where the Rule provides broad discretion to the trial court, and the statute provides no opportunity to cure where the Rule does. Because of these direct conflicts, the supremacy principle embedded in Amendment 80 favors Rule 11 and overrides the statute.

The conflict with Rule 3 is not so direct. The statute does not establish any additional condition to the commencement of a lawsuit under Rule 3; Ms. Summerville was able to and did file (and therefore commence) her lawsuit under Rule 3 without a reasonable-cause affidavit. The statute did not add a filing requirement that was inconsistent with the rules for commencing a lawsuit under Rule 3, and the defendants in *Summerville* argued this as a reason to distinguish *Weidrick* and uphold the post-commencement affidavit requirement. The issue under the statute arose 30 days *after* the action was commenced.

Justice Brown’s opinion addressed this argument forthrightly: “There is little, if any, practical difference in this court’s mind between a mandatory legislative requirement before commencing a cause of action like we had in *Weidrick* and a mandatory requirement within thirty days immediately after filing a complaint such as we have here. Both procedures add a legislative encumbrance to commencing a cause of action that is not found in Rule 3 of our civil rules.”¹² The Court made clear that its concern was with the “gotcha” effect of the statute; a properly commenced lawsuit would have to be dismissed if the reasonable-cause affidavit were not filed within 30 days. “The constitutional infirmity in § 16-114-209(b) is the provision for dismissal if the affidavit does not accompany a complaint within thirty days.”¹³

Is the post-commencement filing requirement of the statute really in conflict with the commencement requirements of Rule 3? Not for the first 30 days after commencement, but on the 31st day the statutory requirement functions like a condition subsequent, or a poison pill, that requires dismissal and therefore defeats the proper commencement of the action. The majority concluded that the statutory requirement must fall to Rule 3 because the statute adds an “encumbrance” to filing a lawsuit that “is not found in Rule 3.”¹⁴

This notion of conflict is slightly different from the one inherent in Justice Imber’s opinion. A statute can add to the requirements of court rules without contradicting them, as Justice Imber observed in her concurrence with respect to those portions of § 209 that are consistent with Rule 11. But Justice Brown’s opinion rejected the statutory requirement as an encumbrance that is not found in Rule 3. Justice Imber’s notion of “conflict” seems to involve actual

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reader's convenient reference, and some observations are included to demonstrate the passion that the debate has engendered. Note, *Arkansas's Civil Justice Reform Act of 2003: Who's Cheating Who?* 57 ARK. L. REV. 651 (2004) (generally predicting doom for tort reform, and arguing that "Act 649 is certain to touch every civil lawsuit in Arkansas in some way," *id.* at 695, which is a vast overstatement); Robert B. Leflar, *How the Civil Justice Reform Act Changes Arkansas Tort Law*, 38 ARK. LAW 26 (2003) (concluding that Act 649's provisions create "significant changes but not a revolution in Arkansas tort law." *Id.* at 28); Janet A. Flaccus, *Joint and Several Liability and Partnership Law*, 2003 ARK. L. NOTES 79; Recent Developments, *Civil Justice Reform Act of 2003*, 56 ARK. L. REV. 703 (2003); Note, *To Truly Reform We Must Be Informed: Davis v. Parham, the Separation of Powers Doctrine, and the Constitutionality of Tort Reform In Arkansas*, 59 ARK. L. REV. 781 (2006) (attempting to predict how the Court will approach Act 649 issues based on its decision in *Davis v. Parham*, 362 Ark. 352 (2005)); Robert B. Leflar, *The Civil Justice Reform Act and the Empty Chair*, 2003 ARK. L. NOTES 67; *Survey of Legislation*, 26 U. ARK. LITTLE ROCK L. J. 441 (2004); Joseph A. Falasco,

Sizing Up a Multi-Party Tortfeasor Suit in Arkansas: A Tale of Two Laws – How Fault Is, and Should Be, Distributed, 26 U. ARK. LITTLE ROCK L. J. 251 (2004) (an excellent review and analysis of the history and doctrine of liability in multi-party cases in Arkansas); *see also* Ark. Op. Atty. Gen. No. 2005-014 (April 21, 2005) (answering the questions presented, which dealt with the limitations on joint and several liability, and then speculating on how "equitable considerations might conceivably bear on the determination of liability" in a footnote).

2. *Summerville v. Thrower*, ___ Ark ___, No. 06-501 (Ark. S. Ct. March 15, 2007).
3. Through August 1, 2007, the reported federal cases are: *Dabrymple v. The Harris Waste Management Group, Inc.*, 2005 WL 2456239 (E.D. Ark., Oct. 4, 2005) (case accrued before effective date of Act 649; held that "the legislature left no doubt that the statute does not apply retroactively"); *Perry v. Ethicon*, 2006 WL 3445250 (E.D. Ark., Nov. 28, 2006) (refusing to consider constitutional challenges because Arkansas Attorney General did not receive sufficient notice); *Moss v. American Alternative Ins. Corp.*, 2006 WL 3147438 (E.D. Ark., Nov. 1, 2006) (applying Act 649's standard for award of punitive damages without discussion); *Wheeler v. Carlton*, 2007

WL 30261 (E.D. Ark., Jan. 4, 2007) (same).

4. *See, e.g., Salve Regina College v. Russell*, 499 U.S. 225 (1991), discussing the business of federal-court decisions on issues of state law under the *Erie* Doctrine.
5. *McKinney v. Bishop*, 2007 WL 700956 (Ark. March 8, 2007).
6. *Shipp v. Franklin*, 2007 WL 1713271 (Ark. June 14, 2007).
7. In one other case, *Yeakley v. Doss*, 2007 WL 1560550 (Ark. May 31, 2007), the Supreme Court cited and applied Act 649's definition of the standard required for an award of punitive damages in deciding an issue on the admission of evidence.
8. 310 Ark. 138, 835 S.W.2d 843 (1992).
9. *Summerville*, slip op. at 8.
10. *Id.* at 10-11.
11. ARK. CONST. amend. 80, § 3 provides that the "Supreme Court shall prescribe the rules of pleading, practice and procedure for all courts; provided these rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as declared in this Constitution."
12. *Summerville*, slip op. at 10-11.
13. *Summerville*, slip op. at 11.
14. *Summerville*, slip op. at 11.
15. *Yeakley v. Doss*, *supra* n. 7, slip op. at 10 (Glaze, J., concurring) (emphasis added). ■