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**\*251 SIZING UP A MULTI-PARTY TORTFEASOR SUIT IN ARKANSAS: A TALE OF TWO LAWS--HOW FAULT IS, AND SHOULD BE, DISTRIBUTED**

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I. Introduction

In an era where lawyers, courts, and politicians have attempted to steer tort liability damage allocation in a more predictable direction, both the Arkansas Supreme Court and the General Assembly have recently turned multi-party tort law into a morass. The supreme court's precedent drastically changed Arkansas's traditional approach to contribution among tortfeasors, and the General Assembly's reaction through the Civil Justice Reform Act equally nullified prior law. [FN1] For claims accruing prior to March 25, 2003, a settlement and release by plaintiffs can cost more than the traditional pro-rata share of the joint tortfeasor's responsibility; a settlement can completely absolve other possible defendants of liability. [FN2] For claims accruing after March 24, 2003, a plaintiff's ability to recover through trial has been severely tempered. The Arkansas Supreme Court has veered from its traditional approach of fault attribution in joint tortfeasor suits. The court erred in its interpretation of the law, and a more appropriate reading will be introduced along with an analysis of how attorneys can approach the multi-party tortfeasor suits in Arkansas for acts accruing prior to March 25, 2003. Moreover, the General Assembly created a unique framework for multi-party tortfeasor suits, and an analysis of the new law will follow.

This article will focus on the historical development of the comparative fault doctrine in Arkansas and the purposes associated with comparative fault and settlements. Next, this article will introduce the pertinent line of cases developing comparative fault and multi-party tortfeasors in Arkansas. It will then discuss the multiple approaches taken by the Arkansas Supreme Court and litigants in interpreting seemingly semantic changes in the 1975 language of the Arkansas Comparative Fault Statute. Additionally, this article\*252 proposes a more complete analysis to interpreting the statute. Next, this article will explore that new law of comparative fault. Through that examination, this article will explain how strategies and tactics have changed conceptually for suits involving joint tortfeasors and will offer

two tools one can use when dealing with multi-party tort suits in Arkansas. Lastly, this article will attempt to dissect and explain the General Assembly's new approach for multi-party tortfeasor suits in Arkansas.

The tools will give the reader both a practical and theoretical means to use when approaching a multi-party tort suit involving acts accruing prior to March 25, 2003. The practical tool will show that while the law has appeared to change, practitioners can still achieve substantially similar results with some planning. The theoretical legal instrument helps a practitioner develop a strategy and a deep understanding of the problem at hand. In addition, by dissecting the pertinent sections of the Civil Justice Reform Act, practitioners will be apprised of the procedural pitfalls that will accompany multi-party tort suits accruing after March 24, 2003.

This article will suggest that the General Assembly overreacted and there is a preferable direction for the law of comparative fault in Arkansas; that is, Arkansas law should return to its established law of fault attribution in multi-party tortfeasor suits. It will conclude with a discussion of how the desirable law can be instituted and recommend a return to the Arkansas Uniform Contribution Among Tortfeasors Act with amendment.

## II. Historical Development of the Comparative Fault Doctrine

### A. Contributory Negligence: A Germinal Seed and Important Tort Doctrine

Contributory negligence served as one of the first stepping-stones on the doctrinal road that led to what we now call comparative fault. The first major development was determining that a plaintiff had blameworthy conduct. [FN3] Then, in 1809, *Butterfield v. Forrester* [FN4] laid the foundation of contributory negligence. [FN5] In *Butterfield*, the plaintiff, while riding a horse on a public road, was injured by a pole that the defendant laid across the road. The court directed the jury that if it found the plaintiff was not riding with ordinary care and that the plaintiff would not have hit the pole had he been riding with ordinary care, then the jury should find for the defendant. [FN6]

\*253 The American courts, in *Smith v. Smith*, [FN7] adopted the rule of contributory negligence in a similar case where a horse was injured by a woodpile placed on the road by the defendant. The plaintiff was charged with the burden of proving an absolute absence of negligence on his part. [FN8] The courts reasoned it would not aid a person's conduct that did not conform with generally approved legal standards. [FN9] Stated more artfully, "(r)elief is denied to anyone who comes into court under a taint." [FN10] Arkansas defined contributory negligence when the supreme court upheld a jury instruction that stated, "if the plaintiffs, or either of them, contributed to the negligence, the defendant was not bound." [FN11] While the theory of contributory negligence was expanding, there was a growing effort to limit this absolute defense, and a number of exceptions arose in the states. [FN12] Professor Leflar [FN13] defined several limitations to the defense of contributory negligence including death act cases, attractive nuisance cases, imputed negligence cases, and the last clear chance cases. [FN14]

### B. Comparative Fault: The Tree from an Old Doctrine

In a reaction to the harsh holdings of contributory negligence, the United States Congress adopted a system of pure comparative negligence in 1908 to cases covering injuries to railroad employees. [FN15] Under a pure comparative fault theory, a plaintiff's damages are reduced in proportion to her own fault.

[FN16] Mississippi was the first state to adopt pure comparative negligence \*254 for personal injuries in 1910. [FN17] Pure comparative negligence was later proffered by Dean Prosser in a bill approved by the California State Bar Association that stated "(i)n all actions hereafter accruing for negligence resulting in personal injury . . . the damages awarded shall be diminished in proportion to the amount of negligence attributable to the injured person . . . ." [FN18]

Georgia courts pioneered modified comparative negligence through statutory interpretation of two statutes, including an 1860 statute. [FN19] Under a modified comparative fault system, the plaintiff's damages are reduced by his fault; however, he is barred from recovery if his fault is greater than the defendant's. [FN20] Some states adopt a modified comparative fault approach where the plaintiff is barred from recovery if his fault is greater than or equal to the defendant's. [FN21] Wisconsin embodied modified comparative negligence in a statute it enacted in 1931 that required the plaintiff to show his negligence was "not as great" as the defendant's in order to recover. [FN22] Later, New Hampshire tailored the modified approach so the plaintiff could still recover if his fault was determined to be equal to, or less than, the defendant's. [FN23] Arkansas was the fourth state to follow suit, and it statutorily adopted a form of comparative negligence. [FN24] It started with the "pure form" [FN25] following Dean Prosser's recommendation, and later converted to a modified plan in 1957. [FN26] In 1975, Arkansas slightly changed the language of the comparative fault statute to read as it did just prior to the enactment of the Civil Justice Reform Act. [FN27] The metamorphosis was complete when the General Assembly passed the Civil Justice Reform Act in 2003.

\*255 Comparative fault is an affirmative defense. [FN28] The burden is on the defendant to establish the plaintiff's fault. [FN29] When comparing fault with multiple tortfeasors, a court can either apply a pro-rata approach or an apportionment-by-relative-degree approach. [FN30] The pro-rata approach simply divides the apportionment of fault equally among the parties. [FN31] For example, if there were two parties responsible, they would each be fifty percent liable, and if there were three parties, they would each be thirty three and a third percent liable. The apportionment-by-relative-degree, or equitable distribution approach, apportions a party's fault ("fault-share") [FN32] relative to his degree of responsibility. [FN33] For example, if there are two parties--Party 1 and Party 2--and Party 1 is ninety percent at fault and Party 2 is ten percent at fault, then Party 1 would be responsible for ninety percent of the damages and Party 2 would be responsible for ten percent. Traditionally, Arkansas allowed a plaintiff to compare his fault-share to the aggregate fault-share of all parties responsible. [FN34] Now it appears, however, that for acts accruing before March 25, 2003, a plaintiff can only compare his fault-share to the fault-share of actual named defendants. [FN35] To the contrary, for claims accruing after March 24, 2003, a plaintiff can compare his fault-share to the aggregate fault-share of all tortfeasors. [FN36]

### C. Purposes of the Comparative Fault Doctrine and Its Fruit

As comparative fault statutes gained increasing popularity in the states, certain policies and purposes grew out of the courts to support the movement. First, comparative fault supports justice and fairness by allowing damage allocation and recovery to be distributed to those who were at \*256 fault. [FN37] Additionally, comparative fault supports risk spreading where the damages are distributed among those who caused them. [FN38] Thus, by applying comparative fault instead of contributory negligence, the resultant awards seem to be more fairly distributed, as each party is responsible for his respective portion of the damages. Moreover, where a plaintiff is only partly negligent, he is not forced to absorb

the entirety of damages caused by the defendant. [FN39] The cost of damages therefore is spread across multiple parties, which concomitantly reduces the burden any one party must bear.

## 1. The Fruit of Settlements

Settlements are an important weapon in the litigator's arsenal. They provide numerous benefits for the client and the lawyer. Perhaps the most dominant theme in settlement proceedings is money. [FN40] Additionally, courts look favorably upon settlements, as "(i)t is the policy of the law to encourage compromise. . . ." [FN41] "Settlements help relieve the strain" caused by an increasingly litigious society. [FN42] It is important to note that while courts are aware of the importance of a settlement, they are "intolerant of unreasonable settlement postures." [FN43]

Settlements "bring ()finality." [FN44] Additionally, they can ameliorate harsh attitudes between plaintiffs and defendants. [FN45] Settlements also offset the jury factor. A jury, while constrained by a judge, [FN46] could return an unpredictable, grossly large, or minuscule verdict. In fact the Illinois Institute for Continuing Legal Education lists the status of parties as an important pre-trial evaluation. [FN47]

**\*257** For example, when the defendant is a large, corporate shopping mall with a hole in its sidewalk, a jury might strictly construe the defendant's duty to exercise reasonable care to protect its invitees from falling because of the hole. On the other hand, a similar jury might hold a defendant homeowner with a hole in his sidewalk to a less stringent duty of care. [FN48] Thus, because of the jury factor, a large corporation may be more likely to settle than a homeowner under the same factual scenario.

Because costs of litigation, including fees for attorneys, court reporters, subpoenas, experts, exhibits, and documents, can accumulate to an enormous amount in a trial, they must be considered. [FN49] There are also future litigation costs such as appeals to consider. [FN50] Additionally, plaintiff's counsel must consider liens and the likelihood of recovery from a defendant if a judgment is entered. [FN51] Moreover, attorneys in settlement procedures should consider the time value of money. In states where pre-judgment interest is accruing, a defendant should be more apt to settle, and if the state does not allow for pre-judgment interest, then plaintiffs should look more to settlement. [FN52] Simply stated, "(l)itigation is complicated, costly, and (time consuming as it) can go on for years." [FN53] Lastly, attorneys working on a contingent fee basis view settlements as economically beneficial even if the total collected is less than that of going to trial because there is generally less time and workload involved with procuring a settlement as opposed to going to trial. [FN54]

In multi-party suits, settlements can be used to fund the expensive action against a deeper pocket. This tactic is especially effective when a defendant appears to be judgment proof but is willing to make an out-of-court settlement. [FN55]

## **\*258** 2. The Fruit of Joint and Several Liability and the Effects of Multi-party Settlements in Arkansas

Traditionally all defendant tortfeasors were jointly and severally liable for tort in multi-party injury suits. [FN56] With the passage of Act 649, however, joint and several liability has been altered. [FN57] Regardless, Arkansas gives a right of contribution among joint tortfeasors. [FN58] That right of contribution is limited, however, by restricting a party's right of contribution from the joint tortfeasor

until he has paid more than his pro-rata share. [FN59]

If a release settlement is entered into, all parties are not automatically indemnified. Rather, in accordance with the Arkansas Uniform Contribution Among Tortfeasors Act, the agreement releases the settling party of liability "but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid." [FN60] For example, if Plaintiff settles with Defendant A for \$20,000 and then a judgment for \$100,000 is rendered against Defendant B, Defendant B's maximum liability will be \$80,000 (\$100,000 - \$20,000). If, however, the agreement provides for a release of forty percent of the liability then Defendant B will only be liable for \$60,000 (\$100,000 - \$40,000 (forty percent of \$100,000)). Moreover, if the settlement agreement provides for a release of the settling defendant's "pro rata" share, then Defendant B will only be liable for \$50,000 (\$100,000 - (100,000 / 2)). [FN61]

Additionally, the settling party does not maintain a right of contribution against any other tortfeasor whose liability is not extinguished by the settlement. [FN62] For example, if Defendant A settles for \$20,000, and at trial the jury determines Defendant A's fault-share is ten percent and Defendant B's fault share is ninety percent and that the total damages are \$100,000, Defendant A does not have a right of contribution for \$10,000 (\$20,000 - \*259 \$10,000 (ten percent of \$100,000)) against Defendant B even though Defendant A paid more than his equitable share.

In order to protect himself from the right of contribution from a non-settling party, however, the settling party will state that the reduction, if greater than the settlement, will be equal to his pro rata share in the damages recoverable by the plaintiff; otherwise the settling party risks being subject to the non-settling party's right of contribution. [FN63] For example, assume first that the settlement only provides for a release of the consideration paid, \$20,000 in our example. If a judgment for \$100,000 is rendered against Defendant B and the jury finds that Defendant A's fault-share was ninety percent, then Defendant B will have a right of contribution against Defendant A for \$70,000. To get to this number you first find that Defendant B is only personally liable for ten percent of the judgment (\$10,000) and that because of the settlement, his joint and several liability is only \$80,000 (\$100,000 - \$20,000 (settlement money)). Next you find the difference in Defendant B's joint and several liability and his personal liability (\$80,000 - \$10,000) which equals \$70,000.

The pro rata share does not take into account the fault-share of the tortfeasor. [FN64] However, Arkansas allows for equitable distribution of fault to substitute for the pro rata share in determining the rights of contribution "when there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution . . . ." [FN65]

### III. A Metamorphosis: Substantive Facts of the Pertinent Case Law

#### A. Substantive Facts of *Walton v. Tull* (1962)

*Walton v. Tull*, [FN66] an opinion penned by the late Justice George Rose Smith, is the seminal case interpreting the Arkansas Comparative Fault statute. In *Walton*, plaintiff Tull, a passenger in a car, brought suit against his driver, Walton, and the driver of an oncoming automobile, Brigham. [FN67] The two cars collided after Walton tried to pass Brigham while Brigham was trying to make a left hand turn. [FN68] After the collision, while Tull was exiting the car, a third vehicle driven by a drunk Glenn struck

Tull's door and injured Tull.

**\*260** The jury found that Walton was sixty-six percent at fault and that Brigham was thirty-four percent at fault for the first collision. [\[FN69\]](#) Additionally, with respect to the second collision, the jury assigned sixty percent of the negligence to Glenn, twenty percent to Walton, ten percent to Brigham, and ten percent to Tull. [\[FN70\]](#) Although Glenn settled with Tull, he was still pecuniarily interested as he had liability to Walton for contribution. [\[FN71\]](#)

The Arkansas Supreme Court held that the purpose of the Arkansas Comparative Fault statute was to distribute the total damages among all those who caused them and that a plaintiff whose own negligence is less than fifty percent can recover against any defendant at fault. [\[FN72\]](#)

#### B. Substantive Facts of Riddell v. Little (1972)

In Riddell v. Little, [\[FN73\]](#) Little, a crop dusting flagman, was killed when he was struck by a crop dusting plane piloted by defendant Riddell. [\[FN74\]](#) The estate of Little alleged that Riddell was flying "at too low an altitude under the circumstances" and "failed to keep a proper lookout for . . . Little." [\[FN75\]](#) Little's estate also alleged that Riddell's employer, McGraw, knew or should have known of Riddell's incompetence to be a crop duster and, thus, was liable for the negligent employment of Riddell. [\[FN76\]](#)

After trial, the jury concluded that pilot Riddell was seventy percent at fault, the flagman, Little, was twenty percent at fault, and the former employer, McGraw, was ten percent at fault. The trial judge rendered a \$72,000 judgment against Riddell and McGraw jointly and severally. [\[FN77\]](#) In affirming the lower court, the Arkansas Supreme Court held that the purpose of the comparative fault statute was "to distribute the total damages among those who cause them . . .," and that "if plaintiff's negligence is less than fifty percent, (then plaintiff) is entitled to recover from each or all of them as joint tortfeasors even though the plaintiff's (own) negligence (may) equal . . . or exceed . . . that of a particular co-defendant." [\[FN78\]](#)

#### **\*261** C. Substantive Facts of NationsBank, N.A. v. Murray Guard, Inc. [\[fn79\]](#)

On January 24, 1994, a fire was started by a space heater that ignited papers on the fourteenth floor of the Worthen National Bank of Arkansas building. The fire caused severe damage to NationsBank, KPMG Peat Marwick ("KPMG"), and the law firm of Wright, Lindsey & Jennings. [\[FN80\]](#) The fourteenth floor was leased to KPMG. [\[FN81\]](#) It was determined that the space heater that caused the fire was left on either by a KPMG employee or accidentally turned on by a janitor employed by Laidlaw, Inc., who was cleaning the office. [\[FN82\]](#)

Prior to the suit, the parties stipulated that NationsBank's damages totaled \$1,635,000, and KPMG's damages totaled \$888,600. [\[FN83\]](#) After stipulation, the only complaints left to be resolved were those of plaintiffs NationsBank and KPMG against defendant Murray Guard. Pursuant to a jury verdict by interrogatory, the Murray Guard was determined to be thirty two percent at fault, KPMG twenty one percent at fault, and NationsBank forty seven percent at fault. [\[FN84\]](#)

According to the jury's findings, the Circuit Court of Pulaski County awarded compensatory damages

to KPMG in the amount of \$284,352, which equaled thirty-two percent of the stipulated damages. [FN85] After the jury verdict, Murray Guard argued that pursuant to Arkansas Code section 16-64-122 and the jury instructions given, NationsBank could not recover because it was at greater fault and only sought damages against Murray Guard. [FN86] The court dismissed the complaint of NationsBank with prejudice, \*262 stating that it was inconsistent to argue model instruction 2110 [FN87] to the jury and then allow NationsBank to recover. The court further reasoned that because KPMG was not a defendant, Arkansas Code section 16-64-122 would not allow KMPG's fault to be combined with that of Murray Guard. [FN88]

NationsBank appealed to the Arkansas Supreme Court on the grounds that the trial court erred in entering judgment in favor of Murray Guard based on the jury's apportionment of fault. [FN89] In a four-three decision, [FN90] with Justices Imber and Glaze not sitting, the Arkansas Supreme Court affirmed the trial court's ruling stating that "in light of the plain language of the statute and the events at trial, we cannot say that the trial court erred in refusing to combine the fault of Murray Guard (with) KPMG." [FN91] The court held that section 16-64-122 "in its current form no longer provid(ed) for a comparison of fault among all those responsible . . . ." [FN92] Rather, a plaintiff can only compare fault to those parties from whom he sought to recover damages, and a party with which a plaintiff settled is not a party from which the plaintiff sought damages. [FN93]

After the decision in Nations Bank, the Arkansas General Assembly redrafted the comparative fault statute. However, instead of merely altering the language relied on by the supreme court in that case, [FN94] the General Assembly created an entirely new version of comparative fault. [FN95]

#### \*263 IV. The Old Law: Reviewing the Statutory Language Changes and the Arkansas Supreme Court's Construction Culminating in NationsBank

##### A. The Language

The comparative fault statute of 1975 substantially changed the language of the original Arkansas comparative fault statute. The pertinent section of the original Act is reproduced below:

##### Arkansas Act 296 of 1957 Extraordinary Session

SECTION 1. Contributory negligence shall not bar recovery of damages for any injury, property damage or death where the negligence of the person injured or killed is of less degree than the negligence of any person, firm, or corporation causing such damage.

SECTION 2. In all actions hereafter accruing for negligence resulting in personal injuries or wrongful death or injury to property, the contributory negligence shall not prevent a recovery where any negligence of the person so injured, damaged, or killed is of less degree than any negligence of the person, firm, or corporation causing such damage; provided that where such contributory negligence is shown on the part of the person injured, damaged or killed, the amount of the recovery shall be diminished in proportion to such contributory negligence. [FN96]

The 1957 Act was changed slightly in 1973 and the pertinent sections are reproduced below:

##### Arkansas Act 303 of 1973

SECTION 1. The word "fault" as used in this Act includes negligence, wilful (sic) and wanton conduct, supplying of a defective product in an unreasonably dangerous condition, or any other act or

omission or conduct actionable in tort.

SECTION 2. Fault chargeable to a party claiming damages shall not bar recovery of damages for any injury, property damage or death where the fault of the person injured or killed is of less degree than the fault of any person, firm, or corporation causing such damages.

SECTION 3. In all actions for damages for personal injuries or wrongful death or injury to property, fault chargeable to a claiming party shall not \*264 prevent a recovery where any fault chargeable to the person so injured, damaged, or killed is of less degree than any fault of the person, firm, or corporation causing such damage; provided, that where such fault is chargeable to the person injured, damaged, or killed, the amount of the recovery shall be diminished in proportion to such fault. [FN97]

The 1975 statute, codified at Arkansas Code Annotated section 16-64-122, reads as follows:

Arkansas Code Annotated section 16-64-122

(a) In all actions for damages for personal injuries or wrongful death or injury to property in which recovery is predicated upon fault, liability shall be determined by comparing the fault chargeable to a claiming party with the fault chargeable to the party or parties from whom the claiming party seeks to recover damages.

(b)(1) If the fault chargeable to a party claiming damages is of a lesser degree than the fault chargeable to the party or parties from whom the claiming party seeks to recover damages, then the claiming party is entitled to recover the amount of his damages after they have been diminished in proportion to the degree of his own fault.

(2) If the fault chargeable to a party claiming damages is equal to or greater in degree than any fault chargeable to the party or parties from whom the claiming party seeks to recover damages, then the claiming party is not entitled to recover such damages. [FN98]

## B. Substantive Changes

### 1. Substantive Changes from 1957 to 1973

First, the 1973 Act added a "Section 1" to define the word fault. [FN99] The definition of fault simply accommodated the idea of strict liability. Section 2 of the 1973 act is almost the same as Section 1 of the 1957 Act. The only difference is that the first part of the 1973 Act was reworded to incorporate the word "fault" instead of "negligence" by replacing each "negligence" with "fault." [FN100] The first part changed from "(c)ontributory negligence" to "(f)ault chargeable to a party claiming damages . . . ." [FN101] This change is consistent \*265 with the addition of Section 1 in the 1973 statute that defines negligence as part of fault. [FN102] Section 3 of the 1973 Act mirrors Section 2 of the 1957 Act. [FN103] The only difference between these two sections of the Acts is that the grammatical structure of the 1973 Act changed where it was necessary to replace "contributory negligence" with "fault." [FN104] Thus, the only real substantive change between these Acts actually broadened the scope of the statute from "contributory negligence" to "fault," which "includes negligence, willful and wanton conduct, supplying of a defective product in an unreasonably dangerous condition, and any other act or omission or conduct actionable in tort." [FN105]

### 2. Substantive Changes from 1973 to 1975

The 1975 Act and the 1973 Act do not mirror each other like that of the 1973 Act and 1957 Act. The



1973 Act first describes fault, second defines when recovery is barred, and third, defines when recovery is diminished. [FN106] The 1975 Act (1) provides for a determination of liability allocation, (2) defines when courts will diminish recovery, and (3) defines when courts will bar recovery. [FN107] The first difference between the two structures is that the 1973 Act does not explicitly provide a means of liability allocation. [FN108]

The 1973 Act simply refers to "fault chargeable to a party" whereas the 1975 Act states that "liability shall be determined by comparing the fault chargeable to a claiming party with the fault chargeable to the party or parties from whom the claiming party seeks to recover damages." [FN109] There is no substantive difference in this language; rather, the 1975 Act just states how liability will be determined whereas the 1973 Act states when there is liability.

Another language change with no legal repercussions is the language used to determine when court will bar recovery. In Section 2, the 1973 Act uses the words "of less degree" to determine when recovery is barred, and in Section 3 of the 1975 Act, recovery is barred if "the fault chargeable to a party claiming damages is equal to or greater in degree . . . ." [FN110] There is no \*266 substantive difference in this language; in either case, if a party is anywhere from fifty percent to one hundred percent at fault, he cannot recover.

The most significant difference, and the language the NationsBank court relied on, is the language used to define from whom a party can compare his fault-share to. [FN111] In the 1973 Act, a party compares his fault-share to the fault-share of any "person, firm, or corporation causing such damage," and in the 1975 Act a party compares his fault share to "the party or parties from whom (he) seeks to recover damages . . . ."

The dilemma spawned by the language metamorphosis from the 1957 Act to the 1975 Act is in determining with whom the plaintiffs can compare their fault-share. In the 1957 Act, the plaintiff's fault is compared to the person, firm, or corporation causing the damage. The Arkansas Supreme Court, in Walton, construed the 1957 Act to mean that a plaintiff could recover from any defendant regardless of their fault-share if the plaintiff's total fault-share was less than fifty percent. [FN112] Then in 1962, relying on Walton, the Arkansas Supreme Court in Riddell determined that this language allows for the fault to be compared to and aggregated with all parties at fault. [FN113] In NationsBank, however, the Supreme Court changed its view under the 1975 Act, where it held the plaintiff may only compare and aggregate his fault against a party or parties from whom she seeks to recover damages. [FN114]

The 1975 Act was derived from, and repealed, Arkansas Act 303 of 1973. [FN115] According to the General Assembly, the purpose of the 1973 Act was to replace "contributory negligence" in the statute with "fault." [FN116] Still, the 1973 language [FN117] was consistent with the 1957 Act where it states that a plaintiff's recovery shall not be barred if it is less than that of the parties causing such damage. [FN118] In 1975, however, the structural language of the statute changed. [FN119] Thus, the change from "damaging party" to "party from whom damages are sought" from 1973 to 1975 essentially changed the operative focus of the comparative fault statute in Arkansas. [FN120]

\*267 Once all this was done, the Arkansas Bar was presented with many unanswered questions. Was this language change an accident, an oversight, or a fluke? Did the General Assembly really think they were changing the way contributory negligence operated in Arkansas? The Arkansas Supreme Court

tried to answer these questions in NationsBank.

### C. Analyzing the Language Change of section 16-64-122

#### 1. The First Approach: The Majority Opinion of NationsBank

The majority court initially looked to Riddell, [FN121] a case with similar procedural alignment. In Riddell the plaintiff sued two defendants. [FN122] The jury determined the plaintiff was twenty percent at fault, one defendant ten percent at fault, and the second defendant seventy percent at fault. [FN123] The court held that if the plaintiff's negligence is less than fifty percent of the aggregated codefendant's negligence, then he can recover even if her negligence equals or exceeds that of any single defendant. [FN124]

The court in NationsBank held that Riddell and its progeny [FN125] are inapplicable because the Arkansas General Assembly changed the language of the comparative fault statute. [FN126] The court reasoned that the general assembly changed the operative language from "any person, firm, or corporation causing such damages" to "party or parties from whom the claiming party seeks to recover damages," and thus the statute no longer allowed comparison of fault among all responsible parties. [FN127] Rather, a jury could only compare the fault-share of the plaintiff to the fault-share of defendants named by the plaintiff in the complaint; not third-party defendants in the case. [FN128] Under the old law, a plaintiff could compare his fault to all parties with a pecuniary interest. [FN129]

Relying on some general rules of statutory construction, the court reasoned that it was giving effect to the "intent of the General Assembly." [FN130] \*268 The court found that the language of the statute was clear and unambiguous with a clear and definite meaning and therefore need not be interpreted. [FN131] Additionally, the court found that the settlement between NationsBank and KPMG did not bring KPMG within the definition of a "party . . . from whom (NationsBank sought) to recover damages" where the settlement was the "result of each party being exposed to possible contribution claims" from Murray Guard. [FN132] Thus, the court held that because NationsBank did not seek to recover damages from KPMG, in accordance with the plain language of the statute and in consideration of the events at trial, KPMG's fault-share could not be added to that of Murray Guard's. [FN133] Moreover, because the fault of KPMG and Murray Guard could not be combined, NationsBank's fault-share was greater than Murray Guard's, and, thus, NationsBank could not recover. [FN134]

#### 2. The Second Approach: The Dissent's and Appellants' Analysis in NationsBank

The dissent, penned by Justice Thornton, first looked to the traditional approach to fault comparison in Arkansas over the last thirty years. [FN135] Then the dissent looked to the historical development of comparative fault in Arkansas starting with the "Prosser Act" and culminating in Riddell. [FN136] The dissent concluded that the legislature never "meant to go any farther than to deny a recovery to a plaintiff whose negligence was at least fifty percent of the cause of damage." [FN137] Additionally, the dissent argued that intent of the doctrine is to distribute the total liability so that each party bears her fair share, taking injuries and fault into consideration. [FN138] The dissenting opinion \*269 finalized its policy argument by citing to Justice George Rose Smith [FN139] in Walton, stating, to go further "would 'be almost a return to the common law doctrine of contributory negligence.'" [FN140] In Walton, Justice George Rose Smith gave the following hypothetical in support of his statement:

Suppose that a plaintiff fails to stop his car at a through street and is hit by a drunken driver traveling at an excessive speed. If the jury attributes thirty-three and one third per cent of the negligence to the plaintiff for having run the stop sign and sixty-six and two thirds per cent to the defendant the plaintiff recovers the greater part of his damages. This is fair.

But now suppose that upon the same facts it develops that a third person had been negligent in lending his car to the drunken driver. The owner of the car becomes a joint tortfeasor. The plaintiff may still be found guilty of thirty-three and one third per cent of the total negligence, for his conduct has not been changed. But no matter how the jury apportions the other sixty-six and two thirds per cent the plaintiff's recovery, under Brigham's theory, is reduced. In fact, if the jury should divide the remaining negligence equally between the owner of the car and the drunken driver the plaintiff could recover nothing at all! We should be hard put to explain to a layman why it is that a person hit by a drunken driver can recover if the wrongdoer was driving his own car but cannot recover if some third person had also been at fault in lending the car. The plaintiff's conduct is so plainly identical in both instances that it is only common sense for it to have the same effect upon his recovery. [\[FN141\]](#)

Second, Justice Thornton looked to the plain language of the statute. Focusing on the language change from "the negligence of any person, firm, or corporation causing the damage" to "the fault chargeable to the party or parties from whom the claiming party seeks to recover damages" the dissent finds that the legislature could not have intended to overturn the principles of comparative fault. [\[FN142\]](#)

Lastly, the dissent interprets the operative language of the statute and concludes that KPMG was a party from whom NationsBank sought damages. \*270 [\[FN143\]](#) The dissent finds that not only had NationsBank sought damages from KPMG, it had been paid damages, and, thus, the majority's requirement of comparing fault to "party or parties from whom damages are sought" was clearly met. [\[FN144\]](#)

Counsel for NationsBank relied on *Riddell v. Little*, [\[FN145\]](#) concluding that the fault of all those responsible for damages should have been combined and compared to plaintiff's fault share. In *Riddell*, the court reasoned that the legislature only meant to deny recovery to a plaintiff when his negligence was at least fifty percent of the cause. [\[FN146\]](#) Thus, because NationsBank's fault-share was determined to be only forty seven percent, under *Riddell*, NationsBank should be entitled to recovery.

Alternatively, and in recognition of the statutory language, NationsBank argued that the settlement between it and KPMG brought KPMG within the meaning of "parties from whom the claiming party seeks to recover damages . . . ." [\[FN147\]](#) In essence NationsBank argued that the timing of when damages are sought should not to be considered; instead, the dispositive question is whether or not damages have been, or are currently being sought.

### 3. The Third Approach: The Appellee's Analysis in NationsBank

The appellee relied on the Eighth Circuit case, *Hiatt v. Mazda Motor Corp.*, [\[FN148\]](#) to conclude that NationsBank could not aggregate the fault-share of KPMG and Murray Guard. [\[FN149\]](#) *Hiatt* was a products liability action brought against a vehicle manufacturer and distributor. [\[FN150\]](#) The manufacturer impleaded a third party defendant, Wadlow, and the plaintiff did not amend his complaint

to seek damages against the third party defendant. [FN151] The plaintiff did not amend his complaint because, if he had, diversity jurisdiction would have been destroyed and the case dismissed for lack of jurisdiction. [FN152] The Eighth Circuit held that because Hiatt, for his own strategic reasons, withheld his claim against Wadlow, he did not seek to recover damages against him, and thus the fault-share of Mazda Motor Corporation \*271 and Wadlow could not be combined under the Arkansas comparative fault statute. [FN153] Thus, the appellee reasoned that because Hiatt could not compare fault to Wadlow where he did not affirmatively assert an action against Wadlow, [FN154] NationsBank could not compare fault to KPMG where he was not a named defendant.

#### 4. A More Complete Analysis

The Arkansas Supreme Court completely changed the way comparative fault operates in Arkansas. The court based this operative change on a negligible amendment in statutory language. [FN155] Almost forty years of precedent and substantive understanding have been overruled. [FN156] The change in statutory language appears to limit recovery based on a comparison between plaintiffs' and defendants' fault-share. [FN157] However, the precise language of the statute is "seeks to recover damages," and this language does not limit the plaintiff to only comparing his fault share to named defendants. [FN158] If the Arkansas General Assembly had intended to limit comparison to solely a plaintiff and named defendants, then it could have drafted that statute using "plaintiff(s)" and "defendant(s)." [FN159]

The process of construing a statute requires consideration of more than one rule of interpretation. The object in construing a statute "is to seek out and enforce" the intention of the General Assembly. [FN160] There is little to no legislative history available to help illuminate the Legislature's intent in enacting Arkansas statutes. One can hope that a particular hearing was taped, [FN161] or look in the Arkansas Legislative Digest for clues. Thus, it is \*272 near impossible to get a sense of Arkansas legislative intent by looking through historical documents.

The context of an obscure law is a necessary factor to consider when interpreting a statute. [FN162] Every statute has a literal meaning that incorporates the commonly accepted connotation of the words. [FN163] The Arkansas Comparative Fault statute does not appear to be obscure on its face, however, there have been at least three different views of how the statute should be applied, and, thus, it is ambiguous at best. [FN164] The literal meaning of the words "seeks to recover damages" means that a party must be currently seeking damages. Nevertheless, section (a) of the code, where the words first appear, is a clause used to simply establish liability. [FN165] Liability can only be established if a party is in the suit, and thus, the literal meaning of the words "seeks to recover damages" which modifies the phrase "liability shall determined by" can be read consistent with Walton to mean that seeking damages is equivalent to a party with a pecuniary interest. [FN166] Moreover, in order to give full effect to the language of the statute, one must compare the fault of the plaintiff party claiming damages to all those from whom he seeks to recover damages. When parties settle, they are making allowances for damages that would be determined in a court of law. Clearly then, one party is still seeking to recover damages through settlement. Stated more simply, a settlement is still based on a party seeking and recovering damages. A party is only maintained as a named defendant when he cannot come to a settlement of damages consistent with the plaintiff's views.

Moreover, courts presume that the legislature did not intend an unjust result from a statute. [FN167] The Arkansas Supreme Court and federal courts interpreting Arkansas law have consistently determined

that the purpose of the comparative fault statute is to allocate responsibility to all parties at fault. [FN168] It is well settled that the purpose of comparative fault was to alleviate the harsh results of contributory negligence that barred a plaintiff from recovery when he was minimally at fault, and replace it with a more just law. [FN169] Thus, it is unjust for a party to be barred from recovery simply because he settles with a tortfeasor or does not name the tortfeasor as a party \*273 defendant. Such an analysis is akin to the doctrine of contributory negligence.

In searching for the meaning of a statute, one may look to the history of the Act. [FN170] Once the highest court has construed a statute, such construction is as much part of the statute as the original itself. [FN171] There is a presumption that the General Assembly enacts statutes in "accord with settled principles of public policy." [FN172] The Arkansas Supreme Court has historically held that the Arkansas Comparative Fault statute was designed to allow recovery for plaintiffs who were not over fifty percent negligent; that application comports with sound public policy. [FN173]

While it is a general rule of statutory construction that language change in a statute suggests an intent to change the substantive law, in cases where there is a mere change in phraseology, a law should not be deemed to change unless there was an evident intention to do so. [FN174] The change from the 1973 Comparative Fault Act to the 1975 Comparative Fault statute was merely a change in phraseology. The General Assembly did not only change the wording of how to determine liability, it also changed the wording of when courts bar recovery. [FN175] Additionally, the General Assembly did not articulate a clear intent to change the substantive law of comparative fault in the 1975 statute. It follows that the wording change for determining liability was merely a change in phraseology and not a change in the substantive law.

In interpreting statutory language, a court need not only look to the intent of the general assembly and construe the language as it reads--maybe this just purports to effectuate the meaning of the statute by giving effect to the plain meaning of the statutory text--it should also avoid an application of the language that yields absurd results. [FN176] Under the comparative fault policies defined by the Arkansas Supreme Court, interpreting the statute to bar recovery when a plaintiff is less than fifty percent at fault is absurd. [FN177] This absurdity is captured by Justice Thornton stating that to go further than to deny recovery to a plaintiff who is less than fifty percent at fault "would almost be a return to the common law doctrine of contributory negligence." [FN178] While this statement may be an exaggeration, Justice George \*274 Rose Smith illustrated the application of such a statement and, the point he makes is clear: the General Assembly never intended for a party who was less than fifty percent at fault to be denied recovery. [FN179] Another absurdity resulting from the NationsBank ruling is that a tortfeasor can be maintained in the suit to determine fault-share by suing him for one dollar. [FN180]

Additional support for allowing the plaintiff to use the fault-share of all tortfeasors can be found in the Restatement Third of Torts on Apportionment section 16. [FN181] Section 16 suggests the same law Arkansas had prior to NationsBank, allowing recovery from the non-settling party diminished by the fault-share of the settling tortfeasor. [FN182]

#### V. The New Law of Comparative Fault in Arkansas for Acts Accruing Before March 25, 2003

In order to efficiently and effectively represent clients, plaintiffs' bar and defendants' bar will need to change their tactics in suits involving joint tortfeasors under the NationsBank ruling for acts accruing

prior to March 25, 2003. [FN183] Plaintiffs should be cautious of entering into a settlement with a joint tortfeasor. If they do enter into a settlement, they should maintain a right of nominal damages against the joint tortfeasor. By maintaining a right of nominal damages, the plaintiff can name the settling joint tortfeasor as a defendant and thus combine the settling joint tortfeasor's fault-share with the fault-share of the "true" defendant. The plaintiff would have a "primary defendant,"--the tortfeasor from which the plaintiff expects to recover damages--and a "fault defendant"--the tortfeasor whose fault will be used to aggregate and allow for recovery. Some agreements like this, however, have been classified as "Mary Carter" agreements and Arkansas attorneys need to understand the ramifications of this label. [FN184]

The basis of a "Mary Carter" agreement is an agreement made between a plaintiff and one or more, but not all, defendants in a multi-party lawsuit. \*275 [FN185] The term "Mary Carter" has its genesis in Florida where the agreements seem to be quite popular. [FN186] The original characteristics of a "Mary Carter" were: (1) secrecy; (2) the agreeing defendants are maintained as parties; (3) "the agreeing defendants' liability is decreased in direct proportion to the non-agreeing defendants' increase in liability"; and (4) the agreeing defendant guarantees the plaintiff a specified amount of money if a judgment less than a specified sum is rendered against the non-agreeing defendant. [FN187] As "Mary Carter" agreements grew in popularity, however, the secrecy element dropped out in many jurisdictions where the plaintiff was forced to reveal the agreement to the jury in order for it to be enforceable. [FN188]

Arkansas first dealt with the "Mary Carter" agreement in *Firestone v. Little*, [FN189] in which the supreme court held that the plaintiff was required to reveal the details of the agreement to the jury. On remand, the trial court gave effect to the "Mary Carter" agreement. That ruling was again appealed to the Arkansas Supreme Court. [FN190] In its final adjudication of the issue, the supreme court held that "Mary Carter" agreements would not be given effect in Arkansas when they affect the joint and several liability of all the defendants. [FN191]

## \*276 VI. Practicing Under the NationsBank Ruling: Tools of the Trade

### A. The First Tool: Transforming a "Mary Carter"

After NationsBank, a plaintiff may want to consider using a "Mary Carter" type of agreement. The agreement should initially be a settlement as would usually be entered into by the parties. [FN192] In addition, the agreement should allow the plaintiff to maintain a right of nominal damages against the settling party as a named defendant in the case. A "right of nominal damages" simply means that the plaintiff can name the settling party as a defendant in the case; however, the plaintiff can only recover one dollar from the settling party regardless of jury award.

This agreement, although not a "Mary Carter" agreement on its face, has a similar effect. The settling defendant is maintained in the suit; however, his liability is not contingent upon the non-settling defendant's liability. Additionally, while the settling defendant guarantees the plaintiff a sum of money as specified in the settlement, that number cannot be changed after a verdict is entered. Thus, this agreement is lacking essential elements of a "Mary Carter" agreement and would be more appropriately titled a "Party Maintenance" agreement.

In drafting a "Party Maintenance" agreement, [FN193] a plaintiff should consider how Arkansas courts will view the contract. The courts may determine that this agreement is a "Mary Carter" agreement and

thus invalid as to the effect it has on the non-settling party. [FN194] The supreme court held in Shelton that the agreement was invalid because it would effectively alter the joint and several liabilities of the defendants. [FN195] The retention of a party with right of nominal damages, however, does not alter the joint and several liabilities of the defendants. If the settling defendant did not follow the Arkansas Uniform Contribution Among Tortfeasors Act in the settlement, then he may be exposed to the right of contribution from the non-settling defendant. However, if done properly, the Arkansas Uniform Contribution Among Tortfeasors Act legally alters the joint and several liability. [FN196] Thus the Shelton rule should not apply, and the "Party Maintenance" agreement should be effective.

\*277 Additionally, it is not likely that Arkansas courts will deem a "Party Maintenance" agreement to be an ineffectual "Mary Carter" agreement. While the Arkansas courts have not addressed the validity of a "Mary Carter" agreement as a whole, [FN197] the policy considerations developed in invalidating the agreement are nugatory in this context. First, the Shelton principle does not apply where the "Mary Carter" type provisions of the agreement do not affect the joint and several liabilities of the defendants. [FN198]

Next, a "Mary Carter" agreement gives the settling defendant a financial interest in the outcome of the case and can effectually disrupt the fair administration of justice. [FN199] In addition, some courts have found that these agreements are void as violative of sound public policy where they can "skew the trial process, mislead the jury, (and) promote unethical collusion . . . ." [FN200] A "Party Maintenance" agreement does not carry these attributes as the Arkansas comparative fault statute allows for a reduction in damages or right of contribution against the settling party, and the settling defendant is only in the case to determine the fault-share of respective parties. Furthermore, the existence of a "Party Maintenance" agreement is discoverable and admissible into evidence, and, thus, is not likely to mislead a jury. [FN201] Supporting this rationale, the Restatement (Third) of Torts adds that these settlements can have a legitimate purpose and the unfair aspects can be controlled. [FN202]

Admittedly, the "Party Maintenance" agreement brings a host of other problems. Because the settling defendants have no real interest in the case they will have no incentive to put on a good faith defense. This can be resolved in two ways. First, the plaintiff can require that the settling defendant make a good faith defense in the settlement agreement. Or second, a Restatement approach, because the non-settling defendant has an interest in showing that the settling defendant was liable, and the Plaintiff has the incentive of showing that the non-settling party was most liable, the court can allow both parties to introduce evidence of the settling defendants' negligence and inform the jury of the settlement and ramifications it has on the \*278 verdict. [FN203] Still, the fact finder is required to determine the liability of a defendant that will not be subject to a monetary judgment. This will result in administrative costs and may confuse the fact-finding process. Additionally, litigation based on a dispute as to whether a settling defendant made a "good faith" defense is inevitable. [FN204] Moreover, if a requirement of a good faith defense is provided for in the settlement, a defendant is less likely to enter into a settlement. [FN205]

It is likely that the Arkansas courts will find that while a "Party Maintenance" agreement has traits similar to a "Mary Carter" agreement, the genuine purpose of the "Party Maintenance" agreement overrides the invalidity considerations attributable to the distinguishable "Mary Carter" agreement. [FN206] The intent of the Arkansas General Assembly has always been to allow the burden of compensation from a tort action to be spread across all parties who were at fault. [FN207] While the

language of the Arkansas comparative fault statute may have changed, the risk spreading policy remains. [FN208] Additionally, the "Party Maintenance" agreement allows the jury to consider all liable parties and attribute such fault accordingly. Moreover, the retention of a right to nominal damages against the settling defendant allows the plaintiff to aggregate the fault-share of all other parties by meeting the plain words of the statutory language; this absurd semantic exercise is necessary only because of the NationsBank rule.

Additionally, in arguing to a jury on interrogatories, plaintiffs' attorneys should be careful not to limit their remedies by telling the jury the plaintiff can only recover if their fault is less than any of the defendants. [FN209] \*279 It appears the court gave great weight to what counsel argued to the jury in NationsBank. [FN210]

As counsel for a potential defendant in cases involving joint tortfeasors, attorneys will have to consider the effects of the settlement. [FN211] If a potential defendant settles, it may still be required to join in the suit, and, thus, incur costs of litigation. [FN212] However a settlement may still prove beneficial to the defendant in cases where liability could be enormous. Because the settling party may still be a defendant, in coming to a settlement, the costs of making a good faith defense must be considered. These costs, however, should be fairly ascertainable and the settlement will still essentially cap the settling party's liability.

If a joint tortfeasor is named as a defendant, defense counsel should always seek to bring the other joint tortfeasors into the suit. Even if the other joint tortfeasors are judgment proof, the jury could feasibly draw some of the fault-share from the defendant and assign it to another joint tortfeasor. Therefore, there is a greater chance that the defendant will be found to be less negligent than the plaintiff and thus be absolved of damages under the NationsBank interpretation of section 16-64-122 of the Arkansas Code.

Consider the following illustrative hypothetical tort involving three joint tortfeasors A, B, and C, where A is the only party seeking damages. If a suit only involves A versus B, the jury may look specifically at A's fault and determine it to be forty percent. B, of course, would be sixty percent at fault. C is not in the suit and the jury would not have the pertinent information or ability to allocate C a percentage of fault. If C, however, was named and could be allocated fault, the jury may still find the plaintiff to be forty percent at fault and then split the remaining sixty percent so that B is less than forty percent at fault, effectively barring the plaintiff from recovery.

Under the old comparative fault law, plaintiffs would recover in the above hypothetical. There would be no reason for the defendant to bring in the additional joint tortfeasor C. If C were judgment proof, B would still be jointly and severally liable. [FN213] If A had entered into a settlement with C, \*280 then A would still recover, although his recovery would be diminished by his pro rata share if the settlement tracked the Arkansas Uniform Contribution Among Tortfeasors Act. [FN214] Under the NationsBank ruling, because A was not seeking to recover from C (due to negotiations, etc.), B's fault and C's fault could not be aggregated. Thus, A would be barred from recovery as his fault-share would be greater than B's.

A defendant can accomplish the reallocation of fault in three ways: (1) by bringing in the joint tortfeasors under a theory of contribution; (2) by bringing a direct claim; or (3) by joining a joint tortfeasor as a necessary party. [FN215]



## B. The Second Tool: Game Theory and Multi-Tortfeasor Transactions

Game theory is a way for an attorney to get a good understanding of a case by mapping out the possible scenarios that may play out. It requires an attorney to quantify unknown probabilities and apply them to the facts of the case. Lawyers do this intuitively. For example, when deciding whether or not to take a tort case on a contingency basis, a lawyer will weigh the probability of settling the case, getting the case to a jury, winning the case, and ultimately the possible amount of recovery. In making these considerations, a lawyer is really engaging in Game Theory thinking. The following explanation sets out the basics of technical Game Theory thinking and how it can apply to multi-party tortfeasor suits in Arkansas.

### 1. Terms Defined

**Actions:** The associated movement of making a choice.

**Decision Point:** A point in the game when a player is confronted with more than one choice.

**Payoff:** What the player stands to gain or lose from the choices made in a game.

**Rational Choice:** The choice that inherently brings the best payoff.

**Risk Consideration:** Unknown variables in the game that can affect a payoff.

**\*281 Rules:** Defines who is playing, what choices are available to the players, the order of play, and what the associated payoffs are. [\[FN216\]](#)

**Strategy:** A strategy is a plan that tells the player what to do at each decision point requiring the player to make a choice. [\[FN217\]](#)

### 2. Game Theory

Game theory is the study of strategic interactions among actors who are self-interested and acting in a rational way. [\[FN218\]](#) The origins of game theory come from Von Neumann and Morgenstern's *The Theory of Games and Economic Behaviour*. [\[FN219\]](#) More precisely stated, game theory is the formal study of conduct by two or more players that must make choices at decision points that have a limited number of actions spawning from them. [\[FN220\]](#)

In any given "game," game theory assumes that all the players know all the rules and all actions that can be taken at any given decision point. [\[FN221\]](#) Additionally, the players know the payoffs that are associated with each game end, and the path of choices leading through each decision point that develops the necessary strategy to reach a desired payoff. [\[FN222\]](#) Thus players must develop a strategy that will lead them to their desired payoff. [\[FN223\]](#) The only uncertainty is that a player cannot predict what choice another opponent will make.

Let us consider this hypothetical and the following "rules" to the game: (1) Tort occurs in Arkansas and is governed by Arkansas law; (2) Plaintiff sues defendants A and B; (3) The suit is worth \$100,000: the amount of damages plaintiff sustained; (4) Plaintiff's fault-share is forty percent; and (5) A and B's respective fault-shares are thirty percent.

#### a. Plaintiffs' strategy

The plaintiff has the first move in the game and immediately confronts a decision point. Plaintiff can

either sue or accept the tort. If she sues, she will move to her next decision point, however if she accepts the tort, then \*282 the game is over and the payoff is the resultant damage sustained by the plaintiff. Next assume that plaintiff chooses to sue A and B. At this point, it becomes A's and B's turn to make a move as they are at their first decision point. [FN224] There are essentially four choice sets that Plaintiff may confront based on the decisions made by A and B: (1) both can choose to settle--(S, S); (2) or (3) one can choose to settle and one can choose to go to court--(C, S) or (S, C) [FN225]; or (4) both can choose to go to court--(C, C).

Now plaintiff may be at her second decision point. If she is confronted by option four, the game is over for our purposes and she enters into the new game--that of trial--where her payoff will be the jury verdict of \$60,000. [FN226] If she is confronted by option one, the game is, again, over for our purposes, and she will enter into a new game--that of settlement--and her payoff will be the negotiated settlement price. However, if plaintiff is confronted with choice 2 or 3, she will need to take into consideration the rules under Arkansas law with respect to the application of NationsBank. [FN227]

Prior to NationsBank, plaintiff could assume that she would recover the settlement from one party and \$30,000 from the non-settling party. [FN228] After NationsBank, however, the plaintiff would only recover the settlement. Because he cannot aggregate the two defendants' fault-shares, the plaintiff's own fault-share (forty percent) is greater than that of the remaining defendant's (thirty percent) and thus he can not recover. Therefore it would be irrational for plaintiff to accept just one settlement; unless both defendants were amenable and came to a settlement agreement, this case would go to trial against both A and B.

We can, however, throw an additional wrinkle into this elementary hypothetical game. If the plaintiff can maintain a right for damages, albeit nominal, against the settling defendant, then she may make a rational choice to accept a single settlement. [FN229] In this situation the plaintiff would have the same payoff as she did under the prior law of the settlement plus \$30,000 from trial.

In deciding whether or not to accept a settlement, it is reasonable to assume that both plaintiff and defendant will accord some amount to the trial \*283 and the time value of money to come up with a rational decision that works out in the end to be approximately equivalent to giving the plaintiff \$60,000. In our example, a comparable amount may be \$15,000 per defendant. However, this game used rules that will not be known to plaintiffs and defendants. For example, it is difficult to estimate what fault-share a jury will attribute to each party. Thus, when playing this game outside of this model, plaintiffs must take a risk consideration into the fault-share allocation process, as it can completely change the payoff of the game. [FN230]

Risk considerations are any set of variables that can potentially change the payoff, or probabilities in any given game. [FN231] For example, in our simple hypothetical, all the rules would present a risk consideration. First, while there is a good chance that because the tort occurred in Arkansas, Arkansas law will apply, that may not be the case. [FN232] There may be a chance that Arkansas law will not apply and an attorney will need to take this risk into consideration when playing the game. Second, the suit's economic worth can never be precisely determined in advance. Thus, the attorney will have risk associated with determining the potential recovery. Third, no lawyer can determine the fault-share of each party. That is a question for the jury and while a lawyer can estimate these numbers, estimation may be more of an art than a science, and the risk of estimating wrong will need to be taken into

consideration.

b. Defendants' strategy

The defendants will only be forced to enter the game if the plaintiff decides to bring a cause of action against them. Once this decision is made, and if the plaintiff is amenable to settlement, the defendants will need to decide if they will settle. Additionally, if they do settle, what amounts will they settle for, and what clauses will need to be in the settlement?

First, if either defendant goes forward with a settlement, he will want to include a reduction in the amount of the damages awarded to the plaintiff to meet the standards set forth in the Arkansas Uniform Contribution Among Tortfeasors Act. [FN233] Once a defendant has settled, his game is over as long as he has immunized himself against a right of contribution. He can do \*284 this by getting the plaintiff to agree to a pro-rata reduction of damages awarded against the non-settling defendant. [FN234]

In deciding whether or not to settle, however, the defendant may inadvertently enter into a special game theory situation termed the "prisoner's dilemma." [FN235] In the "prisoner's dilemma," each player's payoff is dependent upon the other player's choice. Generally, in the case of the prisoner's dilemma, each player can either cooperate or defect. [FN236] Assume, as stated above, that a reasonable settlement with each defendant would be \$15,000. To cooperate in our hypothetical would be to settle, and to defect would be to go to court. It has been established that the joint optimum strategy is for both parties to cooperate (S,S), however defecting is the individually dominant strategy (S,C) or (C,S). [FN237] Additionally the joint worst strategy is for both parties to defect (C,C). See Figure 1 below for a graphic representation of the choice model confronting both defendants.

Defendant A, Defendant B	Settle(S)	#Go to Court (C)
Settle (S)	15K, 15K	15K, 0K
Go to Court (C)	0K, 15K	30K, 30K

Figure 1

The model in figure one can be described as follows. The (S,S) set yields a total payoff to the plaintiff of \$30,000--\$15,000 from each settling defendant. The (S,C) or (C,S) sets will only yield \$15,000; nothing will be collected from the defendant going to court and \$15,000 will have been paid by the settling defendant. The (C,C) set will yield \$60,000 for the plaintiff because each defendant will be liable for \$30,000 by going to court.

\*285 In application, if both defendants were to settle, each would be liable for \$15,000, and they would effectively minimize the attorney's fees and other costs. Under the NationsBank rule, however, the party who holds out on settlement can effectively go to trial and be released of all liability. [FN238] Thus, they must make a choice--settle and accept liability--or hope the other side settles and thus be released of liability. It would, therefore, be in the defendant's individual best interest to defect and hope the other party settles. However, in the likely case where both parties defect, the case will go to trial, and both tortfeasors will be assessed full liability and associated attorney's fees.

It is also important to note that if a "Party Maintenance" agreement is struck between the plaintiff and the settling defendant, the settlement should take the proceedings out of the NationsBank scenario; no prisoner's dilemma would then arise. If a potential settlement cannot extinguish a non-settling party's liability, then the non-settling party's liability is not dependent, and thus no prisoner's dilemma can exist.

### 3. Risk Calculations in Game Theory

It should be clear in the reader's mind that the previous example was based on full knowledge of the outcome of the game. Let us now consider how to calculate risk and gains. In our first example, we will assume that as one gets richer the utility of each dollar decreases. [FN239] We thus have a concave utility function, [FN240] that is, an additional \$15,000 is worth less to the defendant who already has \$15,000 compared to the worth of \$15,000 to a defendant who owes \$30,000.

Let us now consider the two choices Defendant A has: (1) Settle, or (2) Not Settle. In both cases, the defendant can "win" or "lose." [FN241] If Defendant A chooses to settle, a loss would occur when Defendant B settles and we can characterize this as a \$15,000 loss. [FN242] Defendant A, however, wins when Defendant B does not settle and this is a \$15,000 gain. [FN243] Consider now the \*286 win-lose scenario for not settling. Defendant A loses when Defendant B additionally does not settle and is characterized by a \$30,000 loss. [FN244] Conversely, Defendant A wins when Defendant B settles and this is characterized by a \$30,000 win. [FN245]

Now further assume that we can assign a probability of occurrence and that in any given scenario we have a fifty percent chance of winning (like a coin toss). [FN246] Under the above example, settling puts \$15,000 at risk and not settling puts \$30,000 at risk. Thus we can say that settling is "less risky" than not-settling. If we take into consideration our utility function, we see that settling will be preferred to not settling. The inequality can be described as follows where U is utility:  $U(\$30,000) - U(\$15,000) < U(<\$15,000>) - U(<\$30,000>)$ . This is further graphically described as Figure 2.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Figure 2

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

\*287 Figure 2 shows that the average expected utility (D) is greater in the settlement as opposed to the average expected utility (D') in the non-settlement choice.

Thus the gamble of settling is "preferred," that is, the utility loss of A to A' is less than the utility gain of C to C'. Moreover, the average utility yielded by settling is greater than the average utility of not settling. Additionally, we can say that Defendant A is averse to risk because, in the long run, the defendant will lose more by taking the larger risk. [FN247]

If, however, we do not assume that the utility of the dollar lessens as one's wealth increases, rather, utility increases as wealth increases, we get a convex utility function. [FN248] The inequality can be described as follows where U is utility:  $U(\$30,000) - U(\$15,000) > U(<\$15,000>) - U(<\$30,000>)$ . \*288 This scenario is graphically described in Figure 3 which demonstrates that the average utility of not settling is greater than that of settling. Additionally, we note that not settling is "preferred" where the utility loss of A to A' is greater than the utility gain of C to C'.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Figure 3

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

In the previous two examples, the average expected utility was derived from our assumption that the gamble was fifty percent. Look again at Figure 2 and note that as the probability of winning increases, the average expected utility is increased. Moreover one can see that at some point the average utility of the greater risk (not-settling, E') will be equal to or greater than that of the less risky choice (settling, E), which is the key to assigning a risk and probability. Thus, a party is more likely to take the greater risk choice where the average payoff is equal to or greater than the lesser risk choice. Moreover, the larger the difference between average payoff of the greater risk choice and the average payoff of the lesser risk choice gets, the more likely a party will take the greater risk choice. For example, if a party can decide that his probability to win is one hundred percent then he will always choose the greater risk choice.

**\*289 VII. The New Comparative Fault Law in Arkansas: Analysis of Act 649 of 2003**

In 2003 the Arkansas General Assembly passed an act entitled "The Civil Justice Reform Act of 2003." [FN249] Among other things, that Act completely reformed how multi-party-tortfeasor suits in Arkansas will operate. In general, the Act modified joint and several liability and changed the method for assessing fault-share for cases arising out of multi-party torts. The Arkansas act is unique, and, thus, there is no case law interpreting its application. As such, it is prudent to examine the language of the Act and determine how it affects multi-party-tortfeasor suits for all actions accruing after March 24, 2003. [FN250]

**A. Section 1: Several Liability and Calculation of Judgment**

Under Act 649 each tortfeasor's liability is several. [FN251] Moreover, the several liability is determined by each tortfeasor's own fault-share, and a separate judgment is rendered against each defendant. [FN252] To determine the amount of judgment against each defendant, the court multiplies each defendant's fault-share by the "damages recoverable by the plaintiff." [FN253]

At this point, it is unclear what constitutes "damages recoverable by the plaintiff" as the legislature did not define that phrase in the Act. The definition of that phrase can drastically change the amount of judgment rendered against each defendant. For example, assume that a jury determines the plaintiff suffered \$100,000 damages, but, that plaintiff's fault-share was 20%, Defendant A's fault-share was 30%, and Defendant B's fault-share was 50%. If "damages recoverable by the plaintiff" is defined broadly as the amount of damage suffered by the plaintiff, then the judgment against Defendant A would be for \$30,000 (\$100,000 X 30%), and the judgment against Defendant B would be for \$50,000 (\$100,000 X 50%). However, if "damages recoverable by the plaintiff" is strictly defined as the aggregate damages attributed to the defendants, here \$80,000 (\$100,000 x (30% + \*290 50%)), the judgments against the defendants will be different. Under that strict construction of "damages recoverable by the plaintiff" the judgment against Defendant A would be for \$24,000 (\$80,000 x 30%), and the judgment against Defendant B would be for \$40,000 (\$80,000 x 50%).

Thus, under a broad construction, each party is liable for its own contribution to the harm. However, under a strict construction of the term "damages recoverable by the plaintiff," the plaintiff's fault-share is effectively increased. In our hypothetical, the plaintiff's fault-share is increased by 16%. Furthermore,

under a strict construction of the statute, as plaintiff's own fault-share increases, the plaintiff's obligation to absorb the fault-share of other parties also increases. [FN254]

## 1. Strict Construction

The Arkansas Supreme Court has thoroughly expressed its views on statutory construction. "The cardinal rule of statutory construction is to effectuate the legislative will." [FN255] When the language of a statute is plain and unambiguous, the legislative intent is derived from the ordinary meaning of the language used. [FN256] Words of the statute will be construed using their ordinary and usually accepted meaning in common language. [FN257] Moreover the court strives to give meaning and effect to each word in the statute without rendering any word "void, superfluous, or insignificant." [FN258] The act is read as a whole with the purpose of reconciling provisions to make them consistent, harmonious, and sensible. [FN259]

The pertinent sections of Act 649 read as follows:

(b) Each defendant shall be liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate several judgment shall be rendered against that defendant for that amount.

**\*291** (c) To determine the amount of judgment to be entered against each defendant, the court, with regard to each defendant, shall multiply the total amount of damages recoverable by the plaintiff by the percentage of each defendant's fault, and that amount shall be the maximum recoverable against the defendant. [FN260]

Accordingly, section (b) details that a defendant is only liable for his own fault-share, and then mandates that any judgment be entered against each defendant severally. Section (c) then explains how to calculate the amount of that judgment. Read separately, section (b) defines the amount of judgment different from section (c). In section (b), the amount of judgment is equal to the damages in proportion to the defendant's fault-share. In section (c), however, the amount of judgment is proportionate to the damages recoverable by the plaintiff. [FN261]

It follows that in order to give meaning to each word of the statute, a strict construction of the phrase "damages recoverable by the plaintiff" is necessary. The shifting of monetary burden established by this rule can be rationalized by looking to the root of modified comparative fault. Recall that when a plaintiff contributes to the negligence in any degree, the doctrine of contributory negligence is an absolute bar to recovery. [FN262] On the other hand, pure comparative fault allows a plaintiff to recover, diminished by his own fault-share, regardless of his contribution to the fault. [FN263] Modified comparative fault merged the two doctrines; in that, like pure comparative fault, a plaintiff can recover if he contributes to the negligence. Like the doctrine of contributory negligence, however, a plaintiff is completely barred from recovery when his fault-share reaches a certain amount. [FN264] Accordingly, modified comparative fault draws a bright line as to when a plaintiff must absorb more damages than that for which he was responsible. Under Arkansas's model of modified comparative fault, a plaintiff must absorb all the damages when his fault-share is fifty percent. [FN265]

**\*292** Similarly, section 1(c) of Act 649 forces a plaintiff to absorb more damages than that for which he was responsible. While Arkansas retains a fifty percent bright line bar, section 1(c) employs a progressive allocation of damages to plaintiffs whose fault-share is between 0% and 50%. [FN266]

Stated more poignantly, a plaintiff who contributes to the negligent act will be responsible for the damages he causes plus some portion of the damages caused by other tortfeasors, and when the plaintiff's fault share reaches 50%, he will be responsible for the damages caused by all tortfeasors.

## 2. Non-parties and Immune Parties

In construing the Act strictly, the court will also be called on to interpret whether the fault-share attributable to a non-party, or an immune party, is considered "damages recoverable by the plaintiff." [FN267] In NationsBank the court made an incredibly strained reading of the phrase "party or parties from whom the claiming party seeks to recover damages," and held that plaintiff did not seek to recover damages from a settling defendant. [FN268] Accordingly, it is prudent to examine how a corollary strict reading of Act 649 will affect suits with non-party tortfeasors or immune tortfeasors.

### a. Non-settling non-parties

Black's Law Dictionary defines "recoverable" as "(c)apable of being recovered, esp. as a matter of law." [FN269] Damages caused by a non-party are capable of being recovered assuming a plaintiff could file suit against a non-party. [FN270] However, both liability and the amount of those damages is indeterminate as the Act states, "(w)here fault is assessed against nonparties, findings of fault shall not subject any nonparty to liability in any action, or be introduced as evidence of liability." [FN271] Accordingly, while fault-assessed against a non-party is capable of being recovered, it is not recoverable as a matter of law. Thus, it is unclear whether the liability assessed to a non-party will be used to calculate the amount of judgment to be entered against a defendant under Section 1(c).

### \*293 b. Settling non-parties

In some multi-party-tortfeasor cases, it is not uncommon for one or more tortfeasor to settle out of the suit. Based upon the strict construction of Act 649, this scenario again requires critical analysis to determine the amount of damages recoverable by the plaintiff. There are three situations for parties to consider: (1) the good-settling tortfeasor; (2) the even-settling tortfeasor; and (3) the bad-settling tortfeasor.

A good-settling tortfeasor is a tortfeasor who settles for an amount less than that which was assessed by the jury in the plaintiff's case. For example, a tortfeasor who settles for \$10,000 (\$20,000) in a case where the jury would have found the tortfeasor liable for 20% of \$100,000 in damages is a good-settling tortfeasor. The even-settling tortfeasor is one who settles for the same amount that would have been assessed by the jury. Lastly, a torfeasor who settles for \$30,000 in a case where the jury would have found the tortfeasor liable for 20% of \$100,000 (\$20,000) in damages is a bad-settling tortfeasor. Assuming that a court will use damages caused by a settling-tortfeasor in its calculation of judgment under Section 1(c), based on these three situations, the analysis turns to an inquiry of which amount constitutes the "damages recoverable by the plaintiff."

In the case of a good-settling tortfeasor, the court will be required to determine whether to calculate judgment based upon the settlement amount or liability as assessed by the jury. A plaintiff will likely argue that the judgment should be calculated based upon the liability assessed by the jury in order to increase the judgment against a defendant. On the other hand, a defendant will likely argue that liability

should be based upon the settlement amount in order to decrease the judgment.

Under the plain language of Section 1(c), only damages recoverable by the plaintiff are to be considered in calculating the amount of judgment. When a tortfeasor settles with a plaintiff, that tortfeasor's liability to the plaintiff is released. [FN272] Thus, the difference between the jury assessment and the settlement amount are "damages lost" and not recoverable. [FN273] Accordingly, \*294 it appears that only the settlement amount would be considered in the judgment. [FN274]

In the case of an even-settling tortfeasor, the amount of recoverable damages is the same regardless of the calculation method. That is, the jury assesses damages to the settling-tortfeasor in an amount equal to that of the settlement. In this case, it does not matter which amount the court uses to calculate judgment. [FN275]

The bad-settling tortfeasor is the mirror-image to the case of a good-settling tortfeasor. The same analysis will apply and the court will likely use the settlement amount to calculate the damages recoverable. Although the case of the good-settling tortfeasor resulted in "damages lost" and not recoverable to the plaintiff, this situation does not result in any "damages gained." Accordingly, the "damages recoverable by the plaintiff" will be the same regardless of whether the court uses the amount based upon the jury determination or the amount based upon the settlement. Recall that under the Arkansas Uniform Contribution Among Tortfeasors Act a defendant is credited with the settlement amount. Accordingly, when a settling-tortfeasor makes a bad settlement, the defendant-tortfeasor, not the plaintiff, is given the benefit. [FN276]

#### \*295 c. Effect of settling tortfeasors

Construing Act 649 strictly will inevitably chill the procurement of settlements in Arkansas multi-party tortfeasor suits. There is very little benefit for a plaintiff to settle. As in all settlements, the plaintiff will receive immediate gratification; however, by settling, the plaintiff risks a decrease in the judgment against a non-settling tortfeasor. In addition, similar to the case of the prisoners dilemma, [FN277] tortfeasors have some incentive to wait for a joint-tortfeasor to settle and then go to trial. By going to trial after a joint-tortfeasor settles, the non-settling tortfeasor can effectually reduce any judgment rendered.

#### d. Immune tortfeasors

In addition to settling defendants, some tortfeasors are immune from tort liability. [FN278] In cases of immunity, the courts will again be called on to interpret the phrase "damages recoverable by the plaintiff." If a defendant is immune from suit, then, as a matter of law, the plaintiff cannot recover damages from him. Accordingly, "damages recoverable by the plaintiff" will be limited to the damages assessed to non-immune parties.

This situation can lead to patently unfair results as it allows a non-immune defendant tortfeasor to ride the coattails of an immune tortfeasor. The following example illustrates the result:

\*296 Fault-share of non-immune tortfeasor - 50%.

Fault-share of immune tortfeasor - 50%

Damages - \$100,000



Damages Recoverable by the Plaintiff - \$50,000 (50% x \$100,000)  
Judgment against non-immune tortfeasor - \$25,000 (50% x \$50,000)  
Pour-over immunity - 25%

Under these facts, we see the patently unfair results arising out of strict construction of Act 649. First, the non-immune tortfeasor is afforded the benefit of some of the immune-tortfeasor's immunity. In addition, we see that under these facts a completely faultless plaintiff is forced to absorb seventy-five percent of the damages.

The law prior to the enactment of Act 649 reaches a better result. [\[FN279\]](#) Prior to Act 649, the non-immune tortfeasor would be jointly and severally liable for all the damages. It follows that the plaintiff would be entitled to collect all the damages from a party responsible for injury--the non-immune tortfeasor.

### 3. Broad Construction

While the judiciary can rationally support a strict construction of Section 1(c), the Arkansas Supreme Court may indeed find a rational basis to broadly construe the language of section 1(c) of Act 649. The court may construe the phrase "damages recoverable by the plaintiff" to simply mean damages suffered.

Courts will construe words of the statute using "their ordinary and usually accepted meaning in common language. . . ." [\[FN280\]](#) The supreme court has held that for a breach of contract, those damages that would place the injured party in the same position as if the contract had not been breached are "damages recoverable." [\[FN281\]](#) Likewise, the court may consider the total damages \*297 suffered by the plaintiff to be the "damages recoverable" under Section 1(c).

Under this interpretation, application of Section 1(c) is straightforward. A court will multiply each defendant's fault-share by the damages assessed by the jury to determine the several judgments entered against each defendant. For example, in a case where plaintiff's fault-share is twenty percent, Defendant A's fault-share is thirty percent, Defendant B's fault-share is fifty percent, and the damages are \$100,000, the court will enter a judgment against Defendant A for \$30,000 (30% x \$100,000) and a judgment against Defendant B for \$50,000 (50% x \$100,000).

### B. Section 2: Assessing Percentages of Fault

Traditionally, a plaintiff was entitled to compare his fault-share with the aggregate fault share of all other tortfeasors. [\[FN282\]](#) In 2001, however, the Arkansas Supreme Court narrowed that rule so that a plaintiff could only compare fault to those parties from whom he sought to recover damages. [\[FN283\]](#) Section 2 of Act 649 has effectively overruled that decision by the supreme court. [\[FN284\]](#)

Under Act 649, the "fact finder shall consider the fault of all persons or entities who contributed to the alleged injury . . . regardless of whether the person or entity was, or could have been, named as a party to the suit." [\[FN285\]](#) Accordingly, after a settlement, the plaintiff is still entitled to aggregate the fault-share of all parties responsible for the injury. [\[FN286\]](#)

### C. Sections 3 and 5: Joint Liability

While Act 649 has provided for several judgments against each tortfeasor, it has made some exceptions. First, in cases where one tortfeasor is essentially judgment proof, Act 649 allows the court to jointly increase the fault-share, and hence the judgment against, a solvent tortfeasor. [\[FN287\]](#) Second, there is complete joint and several liability for cases where an agent or servant relationship exists. [\[FN288\]](#) Last, tortfeasors who consciously agree to and commit an intentional tort are liable jointly and severally. [\[FN289\]](#)

### **\*298** 1. Partial Joint and Several Liability - Section 3

In section 3 of Act 649 a several defendant can be held accountable for some of the fault-share attributable to a joint-tortfeasor. [\[FN290\]](#) The joint liability, however, is limited and subject to procedural hurdles. [\[FN291\]](#) Moreover, because the partial-joint liability affects the fault-share of a tortfeasor, it indirectly affects the judgment rendered. [\[FN292\]](#)

In order to hold a solvent tortfeasor liable for the damages caused by a joint-tortfeasor, within ten days of entry of judgment, the plaintiff must first "move the court to determine whether all or part of the amount of the several share for which a defendant is liable for will not be reasonably collectible." [\[FN293\]](#)

After motion by the plaintiff, the court determines whether any defendant's several share will not be reasonably collectible. [\[FN294\]](#) The Act then mandates that the court make its decision based upon the preponderance of the evidence. [\[FN295\]](#) Generally, it is the moving party's burden to bring forth a preponderance of the evidence. Accordingly, in order to get a partial-joint and several judgment against a defendant-tortfeasor, a plaintiff must be prepared to prove by a preponderance of the evidence that the damages caused by a tortfeasor are not reasonably collectible.

The term "reasonably collectible" is not defined in the Act. However, because it must be proven by a preponderance of the evidence, the qualification is a question of fact. Thus, the trial court will likely have great discretion in determining if a judgment is "reasonably collectible." [\[FN296\]](#) While it can reasonably be presumed that a judgment against an insolvent defendant is not "reasonably collectible," other factors will need to be considered for cases involving a solvent tortfeasor. [\[FN297\]](#)

**\*299** Once a court determines that a judgment against a tortfeasor is not reasonably collectible, it must increase the fault-share of each remaining defendant. The amount of increase in fault-share appears to be discretionary, however, and is limited based upon the fault-share attributable to the tortfeasor. The court shall not increase the fault-share of a tortfeasor determined to be ten percent or less at fault. [\[FN298\]](#) The court shall increase the fault-share of a tortfeasor who is greater than ten percent at fault but less than fifty percent at fault by no more than ten percent. [\[FN299\]](#) If a tortfeasor is fifty percent at fault or greater, the court shall increase that tortfeasor's fault share no more than twenty percent. [\[FN300\]](#) A tortfeasor is jointly and severally liable to the plaintiff for any increased fault-share. Accordingly, when fault-share is increased pursuant to this section, a tortfeasor maintains a right of contribution against that tortfeasor from whom the court determined was not reasonably collectible. [\[FN301\]](#)

Several Liability (SL)    Joint and Several Liability (JSL)

SL < = 10 %	JSL = 0%
10% < SL < 50%	JSL < = 10%
SL > = 50%	JSL < = 20%

A tortfeasor whose fault-share increases is not without remedy; Section 3(e) of Act 649 grants a tortfeasor whose several share has been increased a right of contribution from the tortfeasor whose several share is determined to be not reasonably collectible. The right of contribution, however, is subject to the tortfeasor first discharging his obligation to pay the increased share. [FN302]

## 2. Joint and Several Liability - Section 5

In addition to the partial joint and several liability provided for in section 3, section 5 of Act 649 provides for complete joint and several liability \*300 in two situations. First, if a tortfeasor is acting as an agent or servant to a party, both the tortfeasor and the party will be held jointly and severally liable for any damages. [FN303]

Second, Act 649 provides for joint and several liability for parties who act in concert. [FN304] The Act further defines what constitutes "acting in concert." In order to "act in concert," a party must enter "into a conscious agreement to pursue a common plan or design to commit an intentional tort and actively (take) part in (the) intentional tort." [FN305] The Act reiterates that joint and several liability based upon actions done in concert only apply to intentional conduct. [FN306] Moreover, that Act reiterates that a person or entity must consciously agree with another to commit an intentional tort in order to act in concert; providing substantial assistance without conscious agreement is not sufficient. [FN307]

## VIII. Proposal

Comparative fault in Arkansas is now a bifurcated law--one law governs acts accruing prior to March 25, 2003, and the other law governs acts accruing after March 24, 2003. Neither law appropriately considers the rights of all the parties involved. The law prior to NationsBank worked aptly for over forty years. Throughout that time, the Arkansas courts aptly applied the doctrine of comparative fault taking into consideration the appropriate policies and purposes. [FN308] The policy and purpose of the doctrine in Arkansas is to allow the damages of a tort to be attributed to all the parties' relative degree of responsibility, and not to deny recovery unless the plaintiff's relative fault is equal to or greater than fifty percent. [FN309] Lawmakers developed the comparative fault doctrine to allow fault recovery to be fairly distributed. [FN310] NationsBank avoided applying the established policies and purposes to the facts at bar. Fault should be allocable to settling parties as well as non-settling parties as long as the pertinent information is in front of the court and jury. [FN311] Moreover, a plaintiff should be able to aggregate the fault-\*301 share of all parties whose information is before the court, including those with whom they have settled with, but excluding those from whom the plaintiff specifically does not claim damages from for strategic reasons. [FN312] To hold otherwise is fundamentally unfair and completely inconsistent with the rationale of comparative fault.

The new law, Act 649 of 2003, returns Arkansas to the prior law of aggregation voided by NationsBank. However, while the Act gives in one hand, it takes from the other. To alleviate the harsh ruling of NationsBank the General Assembly could have simply amended Arkansas Code section 16-64-122. [FN313] Instead, the General Assembly rewrote the law of comparative fault from a blank slate. In

doing so, the Arkansas General Assembly ignored the years of precedent from commentators and other states, and created a new doctrine with undefined language.

With the enactment of Act 649, it is unlikely that the Arkansas Supreme Court will reexamine the language of Arkansas Code section 16-64-122 to take a second look at the legislative intent and overrule NationsBank. Nonetheless, the Arkansas Supreme Court may limit the NationsBank holding to the specific facts where the court found that the attorney for NationsBank argued that NationsBank could not recover if the jury found that NationsBank fault-share was greater than Murray Guards' fault-share. [FN314]

It is also possible under the old law to meet in the middle--a compromise giving effect to the language enunciated by the courts in NationsBank and the policy considerations set forth in Riddell and its progeny can be reached. The court should respect future "Party Maintenance" agreements such as the following:

Assume Johnson is a Plaintiff and Adams is a settling defendant:

1) Pursuant to Arkansas Code section 16-61-205, Johnson agrees that any judgment entered for Johnson against another party, proceeding under the facts and circumstances related to this settlement, will be reduced by the \*302 consideration here paid (\$XXX,XXX), or Adams' pro rata share of liability, whichever is greater.

2) If Johnson should pursue an action against another tortfeasor relating to the facts and circumstances of this settlement, Johnson may maintain a right of nominal damages against Adams limited to one dollar (\$1.00) (and if named as a defendant in the action, Adams shall make a good faith defense).

3) Johnson and Adams agree that if an action should arise against another tortfeasor under the facts and circumstances relating to this settlement, the terms of this settlement are discoverable and can be presented to a jury.

This simple solution allows plaintiffs to seek damages against all parties in a suit for acts accruing prior to March 25, 2003. Additionally, it allows for the total fault to be appropriately apportioned. Admittedly, as a result of the compromise, settlements in Arkansas involving multiple tortfeasors will likely be "chilled;" [FN315] however, a little chilling is better than a fundamentally unfair and inequitable rule of law that conflicts with public policy.

## IX. Conclusion

As it stands, Act 649 is complicated and untenable. While the Act allows traditional aggregation, it still chills settlements. By removing joint and several liability in general, completely innocent plaintiffs are left without a remedy and forced to absorb damages. The Act's allowance for partial joint and several liability is a feeble compromise. While it allows an innocent plaintiff to increase her recovery against a solvent defendant, the procedural hurdles set up temper the effect. [FN316] In addition, the Act's haphazard language used to determine how fault-share and judgments are calculated requires interpretation. [FN317] Accordingly, practitioners have been left with little guidance on how to advise their clients and appropriately navigate through a complicated legal problem.

The status of comparative fault in Arkansas is irresolute. Nonetheless, one thing is clear, for acts accruing prior to March 25, 2003 one law applies, and for acts accruing after March 24, 2003 a completely different law applies. Neither law, however, appropriately weighs the interests of plaintiffs and tortfeasors. The best course of action is to return to the tried and true doctrine as set out in the 1975 statute codified at Arkansas Code section 16-64-122.

[FNa1]. J.D., magna cum laude, University of Arkansas School of Law - Fayetteville, 2002; B.S. with honors, Aeronautical Technology, Arizona State University, 1998. During the 2002-2003 term, Mr. Falasco served as law clerk to the Honorable Annabelle Clinton Imber, Associate Justice, Arkansas Supreme Court. A great deal of thanks to Robert B Leflar for his guidance through the early drafts of this article. Recognition also to the staff of the UALR Law Review for their editorial comments and suggestions.

[FN1]. See infra notes 90-93 and accompanying text.

[FN2]. Traditionally a settlement and release would lower a plaintiff's recovery by a pro-rata share. Ark. Code Ann. § 16-61-204 (Michie 1987). Under the new reading of the Arkansas Comparative Fault Statute, the release lowers the percentage of fault a plaintiff can have and still recover. See infra notes 92-93 and accompanying text.

[FN3]. Henry Woods & Beth Deere, Comparative Fault § 1:2 (3rd ed. 1996).

[FN4]. 11 East 60, 103 Eng. Rep. 926 (1809).

[FN5]. Woods & Deere, supra note 3, at § 1:3.

[FN6]. Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926, 927 (1809).

[FN7]. 19 Mass. 621 (1824).

[FN8]. See Leon Green, Illinois Negligence Law, 39 U. Ill. L. Rev. 36, 125 (1944).

[FN9]. See Robert A. Leflar, Contribution and Indemnity Between Tortfeasors, 81 U. Pa. L. Rev. 130, 131 (1932).

[FN10]. Robert A. Leflar, The Declining Defense of Contributory Negligence, 1 Ark. L. Rev. 1, 3 (Winter 1946-47).

[FN11]. Halibut v. Forrest City, 34 Ark. 246, 256 (1879).

[FN12]. In a life saving emergency situation, contributory negligence is inapplicable. Brock v. Peabody Coop. Equity Exch., 352 P.2d 37, 40 (Kan. 1960). It is not applicable when one is saving valuable property. Liming v. Ill. Cent. R. Co., 47 N.W. 66, 68 (Iowa 1890). It does not apply to intentional torts. Woods & Deere, supra note 3 at § 1:6. Additionally, it did not apply under the last clear chance doctrine. Woods & Deere, supra note 3, at § 1:7.

[FN13]. Professor Robert A. Leflar was a true legal scholar and educator. He taught for nearly seventy years with a good portion of that at the University of Arkansas School of Law. Leflar published on many subjects including contributory negligence and was at the forefront of the conflicts revolution developing the Leflar Choice Influencing Considerations. For a series of tributes to Professor Robert A. Leflar see generally, 50 Ark. L. Rev 407-48.

[FN14]. Leflar, supra note 10, at 5-16.

[FN15]. 45 USCS § § 51-60 (West 2002); See Woods & Deere, supra note 3, at § 1:11.

[FN16]. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 67, at 472 (5th ed. 1984).

[FN17]. See Miss. Code Ann. § 11-7-15 (1972); see also Woods & Deere, supra note 3, at § 1:11.

[FN18]. William L. Prosser, Comparative Negligence, 41 Cal. L. Rev. 1, 37 (1953).

[FN19]. See Ga. Code Ann. § § 46-8-291 (1992), 51-11-7 (2000); Christian v. Macon Ry. & Light Co., 47 S.E. 923, 924 (Ga. 1904) ; See also Woods & Deere, supra note 3, at § 1:11.

[FN20]. Keeton, supra note 16, at 473.

[FN21]. Id.

[FN22]. Wis. Stat. Ann. § 895.045 (West 1997); see Woods & Deere, supra note 3 at § 4:3.

[FN23]. See Woods & Deere, supra note 3, at § 4:4.

[FN24]. See id. § 1:11.

[FN25]. 1955 Ark. Acts 191. This act was also known as the "Prosser Act" because Dean Prosser drafted the model act and urged the Arkansas Bar Association to adopt it. See Woods & Deere, supra note 3, § 1:11; see generally Address of Dean Prosser to the Arkansas Bar Association, 9 Ark. L. Rev. 81.

[FN26]. 1957 Ark. Acts 296; see Woods & Deere, supra note 3, at § 1:11.

[FN27]. Ark. Code Ann. § 16-64-122. (LEXIS Supp. 2003). See infra Part IV for a discussion on the language change.

[FN28]. See Rogers v. CWR Constr., Inc., 343 Ark. 126, 131, 33 S.W.3d 506, 509 (2000). See also David W. Robertson, Ruminations on Comparative Fault, Duty-Risk Analysis, Affirmative Defenses, and Defensive Doctrines in Negligence and Strict Liability Litigation in Louisiana, 44 La. L. Rev. 1341, 1344 (1984).

[FN29]. See Robertson, supra note 28.

[FN30]. David W. Robertson, Eschewing Ersatz Percentages: A Simplified Vocabulary of Comparative

Fault, 45 St. Louis. U. L.J. 831, 831 n.3 (2001).

[FN31]. See Keeton, *supra* note 16, § 67 at 476 (labeling the pro-rata method as the equality rule).

[FN32]. The author has adopted the phrase "fault-share" to mean the fault attributable to a party.

[FN33]. See Keeton, *supra* note 16, § 67 at 476 (labeling the equitable division method as the comparative contribution).

[FN34]. See Riddell v. Little, 253 Ark. 686, 689, 488 S.W.2d 34, 36 (1972).

[FN35]. See NationsBank, N.A. v. Murray Guard, Inc., 343 Ark. 437, 443, 36 S.W.3d 291, 295 (2001); see also *infra* notes 121-134 and accompanying text.

[FN36]. The Civil Justice Reform Act of 2003, No. 649, 2003 Ark. Acts 649, sec. 2 (codified at Ark. Code Ann. § § 16-55-201 to-220, 16-114- 206 to-212 (LEXIS Supp. 2003).)

[FN37]. See Stull v. Ragsdale, 273 Ark. 277, 281, 620 S.W.2d 264, 267 (1981).

[FN38]. See *id.* (post 1975 language change) (citing Walton v. Tull, 234 Ark. 882, 891, 356 S.W.2d 20, 26 (1962) (pre 1975 language change)); see also FDIC v. Deloitte & Touche, 834 F. Supp. 1129, 1144 (E.D. Ark. 1992) (finding that the purpose of the comparative negligence statute is to distribute the total damages among those who caused them).

[FN39]. Notably, under modified comparative fault, when a plaintiff's fault share is greater than fifty percent, he is forced to absorb the entirety of damages. See *supra* note 20 and accompanying text.

[FN40]. Herbert M. Kritzer, *Let's Make A Deal: Understanding the Negotiation Process in Ordinary Litigation* 57 (1991). For a great discussion of economic realities in settling see *id.* at 58-66.

[FN41]. St. Paul Fire & Marine Ins. Co. v. Wood, 242 Ark. 879, 888, 416 S.W.2d 322, 328 (1967).

[FN42]. Hon. Eugene F. Lynch et al., *Negotiation and Settlement* § 2:2 (1992).

[FN43]. *Id.*

[FN44]. Henry G. Miller, *Art of Advocacy-Settlement* § 1.01 (1992)

[FN45]. See *id.* § 1.03.

[FN46]. See Ark. R. Civ. P. 50(b) (Judgment Notwithstanding the Verdict); see also Ark. R. Civ. P. 59 (Motion For New Trial).

[FN47]. Illinois Institute for Continuing Legal Education, *Evaluation of a Premises Liability Case for Purposes of Settlement or Trial*, Kevin J Conway, James T Newman, Michael Mulvihill, Cooney and Cooney Chicago, § V. A. (10.7).

[FN48]. Id.

[FN49]. See Miller, supra note 44, at § 1.03.

[FN50]. Id.

[FN51]. The Civil Justice Reform Act of 2003, No. 649, 2003 Ark. Acts 649, sec. 3 (codified at Ark. Code Ann. § § 16-55-201 to-220, 16-114- 206 to-212 (LEXIS Supp. 2003)) (regulating the extent of joint and several liability based on judgments that are not reasonably collectible); see also Lynch, supra note 42, at § 3:33.

[FN52]. Miller, supra note 44, at § 1.03. A successful plaintiff in a contract or tort lawsuit is entitled to the award of pre-judgment interest only if the amount of damages awarded was definitely ascertainable by mathematical computation at the time the plaintiff suffered the injury for which he was subsequently awarded damages. Woodline Motor Freight Inc. v. Troutman Oil Co., 327 Ark. 448, 451-53, 938 S.W.2d 565, 567-68 (1997).

[FN53]. Margaret C. Jasper, *The Law of Alternative Dispute Resolution 1* (2d ed. 2000).

[FN54]. See Kritzer, supra note 40, at 99-100.

[FN55]. This idea has been weakened by 2003 Ark. Acts 649. See infra note 249 and accompanying text.

[FN56]. See Ark. Code Ann. § 16-61-201 (Michie 1987). Each tortfeasor contributed to the proximate cause of the damages. See A.M.I. Civil 4th 2110 (West 1999). The joint and several liability is for the total comparative responsibility of the tortfeasors. See Restatement Third of Torts § 15, comment a (2000). Joint and several liability has also been considered to be economically efficient. See Louis A. Kornhauser & Richard L. Revesz, Sharing Damages Among Multiple Tortfeasors, 98 Yale L.J. 831, 851 (1989); William M. Landers & Richard A. Posner, Joint and Multiple Tortfeasors: An Economic Analysis, 9 J. Legal Stud. 517, 549 (1980).

[FN57]. See infra Part VII.

[FN58]. Ark. Code Ann. § 16-61-202(1) (Michie 1987).

[FN59]. Id. § 16-61-202(2).

[FN60]. Id. § 16-61-204 (Michie 1987).

[FN61]. To determine a party's "pro rata" share mathematically, you divide the total damages by the number of tortfeasors (Amount of Damages / Number of Tortfeasors).

[FN62]. See Ark. Code Ann. § 16-61-202(3).



[FN63]. See id. S16-61-205 (Michie 1987).

[FN64]. See supra note 32 and accompanying text.

[FN65]. See Ark. Code Ann. § 16-61-202(4).

[FN66]. 234 Ark. 882, 356 S.W.2d 20 (1962).

[FN67]. Id. at 883-84, 356 S.W.2d at 21.

[FN68]. Id.

[FN69]. Id. at 884, 356 S.W.2d at 21.

[FN70]. Id. at 885, 356 S.W.2d at 21.

[FN71]. Id., 356 S.W.2d at 22.

[FN72]. Walton, 234 Ark. at 893-94, 356 S.W.2d at 26-27.

[FN73]. 253 Ark. 686, 488 S.W.2d 34 (1972).

[FN74]. Id. at 687, 488 S.W.2d at 35.

[FN75]. Id.

[FN76]. Id. at 687-88, 488 S.W.2d at 35.

[FN77]. Id.

[FN78]. Id. at 689, 488 S.W.2d at 36. The court relied on Walton v. Tull, discussed infra at text with notes 66-72, and stated that because the legislature did not amend the Comparative Fault Act after having several opportunities, the court would adhere to the interpretation of the Act from Walton. Id. The Act was subsequently amended in 1973, however, not to change the substantive law, instead, the new Act merely employed a new vernacular. See infra note 116 and accompanying text.

[FN79]. 343 Ark. 437, 36 S.W.3d 291 (2001).

[FN80]. Id. at 440-41, 36 S.W.3d at 293-94.

[FN81]. Id. at 440, 36 S.W.3d at 293.

[FN82]. Id.

[FN83]. Id. at 441-42, 36 S.W.3d at 294.

[FN84]. Id. at 442, 36 S.W. 3d at 294.

[FN85]. NationsBank, 343 Ark. at 442, 36 S.W.3d at 294.

[FN86]. Id. at 442-44, 36 S.W.3d at 294-96. The statute states that a complaining party can only recover against parties from whom relief is sought. See Ark. Code Ann. § 16-64-122 (Michie 1987); see *infra* Part V. NationsBank argued for and Murray Guard opposed Arkansas Model Jury Instruction-Civil 2110 that states:

If you should find that the occurrence was proximately caused by negligence on the part of a party claiming damages and also by negligence on the part of one or more of the parties from whom he seeks to recover, then you must compare the percentage of negligence of these parties.

If the negligence of a party claiming damages was of less degree than the total negligence of all of those parties he is suing whom you find to be chargeable with negligence, then he is entitled to recover from them any damages which you may find he has sustained as a result of the occurrence after you have reduced his damages in proportion to the degree of his own negligence.

On the other hand, if the negligence of a party claiming damages was equal to or greater than the total negligence of all of those parties he is suing whom you find to be chargeable with negligence, then he is not entitled to recover any damages.

A.M.I. Civil 4th 2110 (West 1999).

[FN87]. A.M.I. Civil 4th 2110 (West 1999).

[FN88]. Brief and Abstract at 252-53; Brief at Addendum Final Judgment, 3. See *infra* notes 121-134 for a discussion of how the court came to this conclusion by reliance on a change in statutory language that had gone unnoticed for almost thirty years.

[FN89]. See NationsBank, 343 Ark. at 442, 36 S.W.3d at 294.

[FN90]. Justice Imber and Justice Glaze did not participate in the opinion and were replaced by Special Justice Mazzanti and Special Justice Bailey. Id. at 448, 36 S.W.3d at 298. The two special justices joined in the majority with Justice Brown and opinion author Justice Corbin, while Chief Justice Arnold, Justice Thornton, and Justice Hannah dissented. *Id.*

[FN91]. Id. at 444, 36 S.W.3d at 296. The Arkansas Supreme Court also found that counsel for NationsBank argued to the jury that NationsBank could recover nothing if the jury found their fault was greater than that of Murray Guard's. *Id.* The abstract reveals, however, that counsel was really arguing that if NationsBank's fault was greater than the combined fault of all other parties then it could not recover. Brief and Abstract at 244. Counsel's following statement evinces this: "(If you put a higher percentage on (the jury interrogatory verdict form for NationsBank) than you do against Murray Guard and others, then the bank won't have to pay one thin dime." *Id.* (emphasis added).

[FN92]. NationsBank, 343 Ark. at 443, 36 S.W.3d at 295.

[FN93]. See *id.*

[FN94]. See *infra* Part VIII for a proposed alteration.

[FN95]. See *infra* Part VII. For a comparison of Arkansas's tort reform bill and the reform act proposed by the national conference of commissioners on uniform state laws see Robert B Leflar, *The Civil Justice Reform Act and the Empty Chair*, 2003 Ark. Law Notes 67.

[FN96]. 1957 Ark. Acts 256 (Extraordinary Session) (emphasis added).

[FN97]. 1973 Ark. Acts 303 (emphasis added).

[FN98]. Ark. Code Ann. § 16-62-122 (LEXIS Supp. 2003) (emphasis added).

[FN99]. 1973 Ark. Acts 303.

[FN100]. Compare 1957 Ark. Acts 296 (Extraordinary Session) with 1973 Ark. Acts 303.

[FN101]. Compare 1957 Ark. Act 296 (Extraordinary session) with 1973 Ark. Act 303.

[FN102]. 1973 Ark. Acts 303.

[FN103]. Compare 1957 Ark. Acts 296 (Extraordinary session) with 1973 Ark. Acts 303.

[FN104]. Compare 1957 Ark. Acts 296 (Extraordinary session) with 1973 Ark. Acts 303.

[FN105]. 1973 Ark. Acts 303.

[FN106]. 1973 Ark. Acts 303.

[FN107]. 1975 Ark. Act 367.

[FN108]. Compare 1975 Ark. Acts 367 with 1973 Ark. Acts 303.

[FN109]. Compare 1975 Ark. Acts 367 with 1973 Ark. Acts 303.

[FN110]. Compare 1975 Ark. Acts 367 with 1973 Ark. Acts 303.

[FN111]. See *infra* note 128 and accompanying text.

[FN112]. Walton v. Tull, 234 Ark. 882, 893-94, 356 S.W.2d at 21-22 (1962).

[FN113]. Riddell v. Little, 253 Ark. 686, 689, 488 S.W.2d 34, 36 (1972).

[FN114]. NationsBank, N.A. v. Murray Guard, Inc., 343 Ark. 437, 443-44, 36 S.W.3d 291, 295 (2001).

[FN115]. 1975 Ark. Acts 367 at sec. 4.

[FN116]. See House Bill 55, Arkansas Legislative Digest 1973.

[FN117]. Compare 1957 Ark. Acts 296 (Extraordinary Session) with 1973 Ark. Acts 303.

[FN118]. 1973 Ark. Acts 303 at sec. 2.

[FN119]. See supra notes 107-112 and accompanying text. Senator Gathright described section two as liability being compared to each party and section three as explaining that the plaintiff can only recover if his fault is less than that of the party from whom damages are sought. See Senate Bill 66, Arkansas Legislative Digest 1975.

[FN120]. Compare House Bill 55, Arkansas Legislative Digest 1973 ("damaging party") with Senate Bill 66, Arkansas Legislative Digest 1975 ("party from whom damages are sought").

[FN121]. Riddell v. Little, 253 Ark. 686, 488 S.W.2d 34 (1972).

[FN122]. See generally id. at 687, 488 S.W.2d at 35.

[FN123]. Id. at 688, 488 S.W.2d at 36.

[FN124]. Id. at 689, 488 S.W.2d at 36.

[FN125]. See Parker v. Holder, 315 Ark. 307, 867 S.W.2d 436 (1993); Ray v. Murphy, 284 Ark. 512, 688 S.W.2d 718 (1985).

[FN126]. NationsBank, N.A. v. Murray Guard, Inc., 343 Ark. 437, 443, 36 S.W.3d 291, 295 (2001).

[FN127]. Id.

[FN128]. See generally id. at 437, 36 S.W.3d at 291.

[FN129]. See Walton v. Tull, 234 Ark. 882, 885, 356 S.W.2d 20, 22 (1962).

[FN130]. NationsBank, 343 Ark. at 443, 36 S.W.3d at 295 ("The basic rule of statutory construction is to give effect to the intent of the General Assembly. . . . (T)he first rule is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. The statute must be construed so that no word is left void or superfluous and in such a way that meaning and effect is given to every word therein, if possible.") (citations omitted).

[FN131]. Id.

[FN132]. Id. at 444, 36 S.W.3d at 295.

[FN133]. Id., 36 S.W.3d at 295. The events at trial that the court appears to be alluding to are the fact that NationsBank requested the jury instruction on comparative fault that Murray Guard opposed, which reads: "if the negligence chargeable to a party claiming damages was equal to or greater in degree than the negligence chargeable to a party from whom he seeks to recover . . . then the party claiming damages

is not entitled to recover from that party," and that NationsBank counsel "argued to the jury that they could recover nothing if the jury found their fault to be greater than that of Murray Guard's." Id., 36 S.W.3d at 295-96.

[FN134]. See Ark. Code Ann. § 16-64-122 (b)(2) (LEXIS Supp. 2003).

[FN135]. NationsBank, 343 Ark. at 448, 36 S.W.3d at 298 (Thornton, J., dissenting).

[FN136]. Id. at 449-50, 36 S.W.3d at 298-99 (Thornton, J., dissenting).

[FN137]. Id. at 449, 36 S.W.3d at 299 (citing Justice Smith in Walton v. Tull, 234 Ark. 882, 356 S.W.2d 20 (1962)) (Thornton, J., dissenting).

[FN138]. Id. (citing Walton, 234 Ark. at 843, 356 S.W.2d at 26 (citing Robert A. Leflar, Comparative Negligence: A Survey for Arkansas Lawyers, 10 Ark. L. Rev. 54 (1955))) (Thornton, J., dissenting).

[FN139]. For a great tribute to Justice George Rose Smith see Patrick Emery Longan, Professionalism on the Appellate Bench: The Life and Example of Justice George Rose Smith of the Arkansas Supreme Court, 54 Ark. L. Rev. 523 (2001).

[FN140]. NationsBank, 343 Ark. at 449-50, 36 S.W.3d at 299 (quoting Walton, 234 Ark. at 882, 356 S.W.2d at 20).

[FN141]. Walton, 234 Ark. at 894-95, 356 S.W.2d at 26-27.

[FN142]. NationsBank, 343 Ark. at 451, 36 S.W.3d at 300 (Thornton, J., dissenting). Justice Thornton, confounded by how the principle behind the change in language escaped review for over twenty-five years, found refuge from his "ignorance" in that the policy had eluded everyone else for the same period. Id.

[FN143]. Id. at 451-52, 36 S.W.3d at 300.

[FN144]. Id. at 452, 36 S.W.3d at 300.

[FN145]. See supra notes 73-78 and accompanying text.

[FN146]. Riddell v. Little, 253 Ark. 686, 688-89, 488 S.W.2d 34, 36 (1972).

[FN147]. NationsBank, 343 Ark. at 444, 36 S.W.3d at 295.

[FN148]. 75 F.3d 1252 (8th Cir. 1996).

[FN149]. Appellee's Brief and Abstract at 40, citing Hiatt v. Mazda Motor Corp., 75 F.3d 1252 (8th Cir. 1996).

[FN150]. See generally Hiatt, 75 F.3d at 1252.

[FN151]. Id. at 1254.

[FN152]. Id. at 1257; see also 15 James Wm. Moore, et al., Moore's Federal Practice § 102.20(1) (Matthew Bender 3d ed. 2003).

[FN153]. Hiatt, 75 F.3d at 1260.

[FN154]. The Hiatt court held that Federal Rule of Civil Procedure 14(a) requires the plaintiff to make an affirmative action against a third-party defendant to maintain a claim. Id. at 1259. Thus, because Hiatt did not make an affirmative act, he did not have a claim, and thus could not "seek" damages as the Arkansas comparative fault statute requires. Id. at 1260.

[FN155]. See notes 96-120 and accompanying text to compare the language change.

[FN156]. See Walton v. Tull, 234 Ark. 882, 356 S.W.2d 20 (1962) (operating under the "Prosser Act" of pure comparative fault); see also Riddell v. Little, 253 Ark. 686, 488 S.W.2d 34 (1972) (operating under the modified comparative fault act).

[FN157]. See supra notes 121-134 and accompanying text.

[FN158]. Ark. Code Ann. § 16-64-122 (LEXIS Supp. 2001).

[FN159]. The general assembly could have drafted the statute to read "if the fault chargeable to the plaintiff is equal to or greater in degree than any fault chargeable to any named defendant, then the claiming party is not entitled to recover such damages from that defendant." See infra Part VII for a recommended statutory amendment.

[FN160]. Francis J. McCaffrey, Statutory Construction § 1, at 1 (1953).

[FN161]. Some sessions of the Arkansas General Assembly have been taped and can be found by calling the Office of the Secretary of State. The session, however, in which the Arkansas Comparative Fault Statute was discussed and adopted was not recorded.

[FN162]. McCaffrey, supra note 160, § 2, at 2.

[FN163]. Id. § 3, at 3.

[FN164]. See supra Part IV.B.1-3.

[FN165]. Ark. Code Ann. § 16-64-122(a) (LEXIS Supp. 2003) (beginning with the phrase, "liability shall be determined by").

[FN166]. See id.; see also Walton v. Tull, 234 Ark. 882, 893-94, 356 S.W.2d at 26-27 (1962).

[FN167]. McCaffrey, supra note 160, § 3, at 5.

[FN168]. See supra notes 37-38 and accompanying text.

[FN169]. See supra note 15 and accompanying text.

[FN170]. See McCaffrey, supra note 160, § 37, at 75.

[FN171]. Id. § 42, at 79.

[FN172]. Id. § 34, at 64.

[FN173]. See supra notes 31-88 and accompanying text.

[FN174]. McCaffrey, supra note 160, § 78, at 155-56.

[FN175]. See supra notes 96-120 and accompanying text.

[FN176]. See Ford v. Keith, 338 Ark. 487, 494, 996 S.W.2d 20, 24-25 (1999) (giving effect to the intent of the Arkansas General Assembly and construing it just as it reads); Rineco Chem. Indust., Inc., v. Weiss, 344 Ark. 118, 124, 40 S.W.3d 257, 262 (2001).

[FN177]. See supra Part II.C.

[FN178]. NationsBank, N.A. v. Murray Guard, Inc., 343 Ark. 437, 449-50, 36 S.W.3d 291, 299 (2001) (Thornton, J., dissenting) (citing Walton v. Tull, 234 Ark. 882, 356 S.W.2d 20 (1962)).

[FN179]. See supra note 140 and accompanying text.

[FN180]. See infra Part VI for a discussion on how to sue a settling defendant for nominal damages.

[FN181]. Restatement (Third) of Torts, supra note 56, at § 16 cmt c. (2000) (allowing the fact finder to assign responsibility to the settling party).

[FN182]. See id. § 16.

[FN183]. The General Assembly through the Civil Justice Reform Act has introduced a completely new version of the doctrine of comparative fault. See 2003 Ark. Act 649; see infra Part VII.

[FN184]. For an in depth discussion of "Mary Carter" type agreements, see Restatement (Third) of Torts, supra note 56, at § 24, reporter's notes to cmt i.

[FN185]. Katherine Gay, Note, Mary Carter In Arkansas: Settlements, Secret Agreements, and Some Serious Problems, 36 Ark. L. Rev. 570, 570-71 (1983). This note was published before Shelton v. Firestone Tire & Rubber Co., 281 Ark. 100, 662 S.W.2d 473 (1984), which may have altered the law stated. See infra note 190 and accompanying text.

[FN186]. See Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. Ct. App. 1967); see also Gay, supra note 185, at 574-75, n.24-27.

[FN187]. Frier's, Inc. v. Seaboard Coastline R.R. Co., 355 So. 2d 208, 210 (Fla. Ct. App. 1978). While these four elements are part of a "Mary Carter" agreement, other agreements named loan receipt agreements, sliding scale agreements, guaranty agreements or Gallagher covenants are similar and contain the operative elements of the defendant remaining party to the lawsuit and the settling party's financial liability being dependent upon the recovery against the non-settling defendant. 22 A.L.R. 5th 483, 497-98 (1994).

[FN188]. See Gay, supra note 185, at 576, n.30.

[FN189]. 276 Ark. 511, 639 S.W.2d 726 (1982).

[FN190]. Shelton, 281 Ark. at 102-03, 662 S.W.2d at 474-75.

[FN191]. Id. at 103, 662 S.W.2d at 475 ("In revising the judgment, the trial court, . . . gave application to the 'Mary Carter' agreement . . . to the point that it controlled the joint and several liability of all the defendants. In this respect the trial court erred. The 'Mary Carter' agreement should not have been the basis for relieving Shelton of his share of the liability determined by the jury.").

[FN192]. The parties should follow the settlement format of the Arkansas Uniform Contribution Among Tortfeasors Act. See supra note 60 and accompanying text.

[FN193]. A model "Party Maintenance" agreement is proposed infra Part VII.

[FN194]. Clearly, if the court would not give effect to the "Party Maintenance" agreement, then under the NationsBank rule, a plaintiff would not be able to aggregate the fault of the settling and non-settling defendant.

[FN195]. See supra note 190 and accompanying text.

[FN196]. See supra note 56 and accompanying text.

[FN197]. See Shelton v. Firestone Tire & Rubber Co., 281 Ark. 100, 102, 662 S.W.2d 473, 474 (1984) (denying the effect of "Mary Carter" agreements as they alter the joint and several liability of all defendants).

[FN198]. See supra note 191 and accompanying text. Additionally, the Arkansas Uniform Contribution Among Tortfeasors Act, absent the "Party Maintenance" clause of the settlement agreement, can alter joint and several liability and the right of contribution. See supra notes 60 and accompanying text.

[FN199]. 22 A.L.R 5th 483; see also Restatement (Third) of Torts, supra note 56, at § 24, cmt i.

[FN200]. See Elbaor v. Smith, 845 S.W.2d 240, 250 (Tex. 1992); see also 22 A.L.R. 5th 879.



[FN201]. See Firestone Tire & Rubber Co. v. Little, 276 Ark. 511, 515, 639 S.W.2d 726, 728 (1982).

[FN202]. Restatement (Third) of Torts, *supra* note 56, at § 24, cmt i.

[FN203]. For example, defense counsel may want to tell the jury that the plaintiff has already recovered money from the settling defendant and the only reason he is in the trial is for fault allocation. Plaintiff's counsel may want to tell the jury that they will be apportioning fault to all parties; however, the settling defendant will not be paying for the amount of liability apportioned to him. Rather, plaintiff will only be able to recover from the non-settling party. The Restatement would make this an issue for the jury to consider. *Id.* § A19 (2000). The Restatement's position is that defendant bears the burden of proof for showing there was a settlement and that it was for the legal cause of the injuries sustained by the plaintiff. *Id.* § 16, cmt f.

[FN204]. Part of the problem with "Mary Carter" agreements was that they tended to realign the parties. The settling defendant had a pecuniary interest in having the plaintiff win, thus the trial process was skewed where the settling defendant would not try to defend. See *supra* note 199 and accompanying text.

[FN205]. Settlements will in effect be "chilled" as Justice Thornton warned in his dissent. See NationsBank, N.A. v. Murray Guard, Inc., 343 Ark. 437, 452, 36 S.W.3d 291, 300 (2001) (Thornton, J., dissenting).

[FN206]. See *supra* notes 199-200 and accompanying text (discussing the bad policies a "Mary Carter" carries).

[FN207]. See Walton v. Tull, 234 Ark. 882, 892-94, 356 S.W.2d 20, 25-27 (1962).

[FN208]. See Stull v. Ragsdale 273 Ark. 277, 281, 620 S.W.2d 264, 267 (1981); see also *supra* notes 96-120 and accompanying text.

[FN209]. It appears the court in NationsBank considered the closing arguments to the jury in deciding if NationsBank should be able to recover. In affirming the lower court's judgment, the supreme court stated "(i)n light of the plain language of the statute and the events at trial, we cannot say that the trial court erred in refusing to combine the fault of Murray Guard and KPMG." NationsBank, 343 Ark. at 444, 36 S.W.3d at 296. The court found that NationsBank argued to the jury that they could recover nothing if the jury found their fault to be greater than Murray Guard's. *Id.* The court, however, may have been mistaken as to what counsel was arguing to the jury. See *supra* note 91 and accompanying text.

[FN210]. See *supra* note 200.

[FN211]. See *infra* Part VI.B.

[FN212]. Because the party has settled, the level of representation needed at the trial will be minimal, as they should be essentially indemnified in the settlement.

[FN213]. See Ark. Code Ann. § § 16-61-201 to-203 (Michie 1987); see also Riddell v. Little, 253 Ark.

686, 689, 488 S.W.2d 34, 36 (1972).

[FN214]. See Ark. Code Ann. § 16-61-204 (Michie 1987).

[FN215]. See Ark. R. Civ. P. 19.

[FN216]. Prajit K. Dutta, Strategies and Games: Theory and Practice 17 (1999).

[FN217]. Id.

[FN218]. Stephen W. Salant and Theodore S. Sims, Game Theory and the Law: Ready for Prime Time?, 94 Mich. L. Rev. 1839, 1840 (May 1996).

[FN219]. Salant & Sims, supra note 218, at 1839 (citing Neumans and Morgenstern, The Theory of Game and Economic Behaviour).

[FN220]. Salant & Sims, supra note 218, at 1846.

[FN221]. Id. at 1847.

[FN222]. Id. This set of circumstances defines the game as one of "common knowledge" which is necessary to predict a rational decision process. Id.

[FN223]. Id.

[FN224]. The path that A and B can take will be discussed infra at Part VI.B.ii.

[FN225]. For our purposes, both sets are the same as we have assumed under rule 5 that both defendants are thirty percent at fault.

[FN226]. We are still under the assumption of rule three that states the suit is worth \$100,000 and rule five that A and B are each thirty percent at fault.

[FN227]. See supra notes 35, 92-93, 114, 126 and accompanying text.

[FN228]. Prior to NationsBank, plaintiff would have been able to aggregate the settling and non-settling defendant's fault but only recover for the pro-rata share of the fault thereof. Thus plaintiff would recover the settlement plus \$30,000 which is one half of the damage allocated to all defendants or thirty percent of the total damages caused.

[FN229]. See the discussion of "Mary Carter" agreements supra Part VI.A to see if this is feasible.

[FN230]. For example, if the plaintiff determines he can never be more at fault than either defendant, then he does not need to consider the NationsBank analysis. Alternatively, if the plaintiff determines he may be more at fault than A, but not B, then he would not likely settle with B under NationsBank. The plaintiff might, however, settle with A.

[FN231]. See *infra* Part VI.B.3 for a discussion of risk considerations.

[FN232]. See Wallis v. Mrs. Smith's Pie Co., 261 Ark. 622, 628, 550 S.W.2d 453, 456 (1977) (adopting Dr. Robert A. Leflar's five "choice-influencing considerations").

[FN233]. See *supra* note 63 and accompanying text.

[FN234]. See model agreement *infra* Part VII.

[FN235]. The "Prisoner's Dilemma" stems from the following story. The District Attorney speaks to two prisoners separately and tells them that he has enough evidence to convict them each for conspiracy but it would take some work. So, in order to alleviate some of the work, the District Attorney offers each prisoner the following deal: "Confess to the crime and implicate your co-conspirator and you will go free. However, if your co-conspirator also confesses, you will both do ten years. If you decide not to confess, realize that we will use your co-conspirator's confession against you in which case you will go to jail for twenty years. However if neither of you confess, there is enough evidence already to put you away for five years." As you can see, each prisoner would be best served if he confessed while his co-conspirator did not. However, if one prisoner confesses and so does the co-conspirator, then that prisoner will serve more time than if neither had confessed. However, if he chooses not to confess and his co-conspirator does, he will serve the maximum sentence. Hence the dilemma, does the prisoner confess or not?

[FN236]. Salant, *supra* note 218, at 1862 n.65.

[FN237]. *Id.*

[FN238]. See application through NationsBank *supra* notes 35, 92-93, 114, 126 and accompanying text.

[FN239]. This is a rational view of money. One dollar will serve a person with no money more than it will serve a person with \$1,000,000. That is to say the utility of one dollar is greater for a person who has no money compared to a person who has \$1,000,000.

[FN240]. Von Neuman and Morgenstern developed a utility theory that in effect explains what a player gets from playing the game. Dutta, *supra* note 216, at 7.

[FN241]. "Win" infers that the defendant maximizes his payoff under this choice route.

[FN242]. We are assuming still, that the defendant knows that had Defendant B settled first, he could not be held liable for any damages and thus  $0$  (liability if D2 settled) - \$15,000 (payout) =  $\langle \$15,000 \rangle$  (loss). See rules set out *supra* Part VI.B.2.

[FN243]. Here we assume that Defendant A knows he is liable for \$30,000 and thus we get  $\$30,000$  (liability) - \$15,000 (actual pay out) = \$15,000 (gain).

[FN244]. Following our general assumptions, we see that  $0$  (liability if D2 settled) - \$30,000 (payout) =

<\$30,000> (loss).

[FN245]. Following our general assumptions, we see that \$30,000 (liability) - 0 (payout) = \$30,000 (gain).

[FN246]. While this assumption of fifty percent is not justified in any case, it is possible that where each party knows he is thirty percent at fault, the chance of the other party settling or not settling can be fifty percent.

[FN247]. Dutta, *supra* note 216, at 441.

[FN248]. This irrational view of money can be seen from the following illustration. Assume a person has the ultimate goal of getting \$100. If that individual has \$0, then one dollar would not provide much utility. If, however, that person had \$99, then that same one dollar would provide the most utility.

[FN249]. The Civil Justice Reform Act of 2003, No. 649, 2003 Ark. Acts 649 (codified at Ark. Code Ann. § § 16-55-201 to-220, 16-114-206 to-212 (LEXIS Supp. 2003)).

[FN250]. The General Assembly specifically made the applicability of 2003 Ark. Acts 649 prospective from the Act's effective date. See *Id.* at sec. 25(a), (b). In addition, the Act contains an emergency clause making the date of the Act's approval the effective date. *Id.* at sec. 26. The Act was approved on March 25, 2003.

[FN251]. *Id.* at sec. 1(a). For an analysis of how the Arkansas Civil Justice Reform Act allocates responsibility and compares to the Model Uniform Apportionment of Tort Responsibility Act see Robert B Leflar, *The Civil Justice Reform Act and the Empty Chair*, 2003 Ark. Law Notes 67.

[FN252]. 2003 Ark. Acts 649 at sec. 1(b).

[FN253]. *Id.* at sec. 1(c).

[FN254]. To mathmatically determine the effective increase in Plaintiff's fault-share, simply multiply the plaintiff's percentage fault-share by the defendant's aggregate fault share ( $P\% \times (DA\% + (DB\% + DC\% + \dots))$ ). For example, in the first hypothetical, where plaintiff's fault-share was 20%, Defendant A's fault share was 30%, and Defendant B's fault share was 50%, the plaintiff's fault-share effectively increased 16% ( $20\% \times (30\% + 50\%) = 16\%$ ). With reallocated percentages such that Plaintiff's fault-share is 40%, Defendant A's fault-share is 20%, and Defendant B's fault-share is 40%, plaintiff's fault-share effectively increases 24% ( $40\% \times (40\% + 20\%) = 24\%$ ).

[FN255]. Bank of Eureka Springs v. Evans, 109 S.W.3d 672, 679 (Ark. 2003).

[FN256]. Barclay v. First Paris Holding Co., 344 Ark. 711, 718, 42 S.W.3d 496, 500 (2001).

[FN257]. Id., 42 S.W.3d at 500.

[FN258]. Id., 42 S.W.3d at 500.

[FN259]. Id., 42 S.W.3d at 500.

[FN260]. The Civil Justice Reform Act of 2003, No. 649, 2003 Ark. Acts 649, secs. 1(b)-(c) (codified at Ark. Code Ann. § § 16-55-201 to-220, 16-114-206 to-212 (LEXIS Supp. 2003))

[FN261]. It should be noted that when a plaintiff is not assessed any fault-share, then the amount of judgment from section (b) and section (c) are the same. This observation does not consider the case of a nonparty being assessed fault. See *infra* notes 264-74 and accompanying text.

[FN262]. See *supra* notes 3-14 and accompanying text.

[FN263]. See *supra* notes 16-18 and accompanying text.

[FN264]. See *supra* notes 19-24 and accompanying text.

[FN265]. See Ark. Code Ann. § 16-64-122(b)(1), (2) (LEXIS Supp. 2001); 2003 Ark. Acts 649 at sec. 7. Under Act 649, a plaintiff's fault-share is compared to the aggregate fault share of all other tortfeasors. See 2003 Ark. Acts 649 at sec. 2(a); see also *infra* notes 277-281 and accompanying text.

[FN266]. See *supra* note 254 and accompanying text.

[FN267]. The Act mandates the fact finder to consider the fault of nonparties, however, states that fault assessed against nonparties shall not subject them to liability. See 2003 Ark. Act 649, at secs. 2(a), (c)(3).

[FN268]. See *supra* notes 120-23 and accompanying text.

[FN269]. Black's Law Dictionary 1280 (7th ed. 1999).

[FN270]. A plaintiff may be barred from filing suit against a non-party. For example, a suit would be barred if the statute of limitations on the cause of action had expired. Actions soundings in general negligence have a three-year statute of limitations. See Ark. Code Ann. § 16-56-105 (Michie 1987).

[FN271]. 2003 Ark. Acts 649, at sec. 2(c)(3).

[FN272]. Interestingly, while a tortfeasor's liability to a plaintiff is released after settlement, he may still be liable to a joint-tortfeasor for contribution. See *supra* notes 62-64 and accompanying text. Under 2003 Ark. Act 649, however, the applicability of the Arkansas Uniform Contribution Among Torfeasors Act is tempered. See *infra* notes 296 and accompanying text.

[FN273]. Prior to Act 649, judgments against multi-party tortfeasors were entered jointly and severally. Thus, prior to Act 649, the difference between jury assessment and the settlement amount was only lost when the settlement agreement provided so. See *supra* notes 57-64 and accompanying text. In cases where the settlement agreement failed to provide for a reduction in damages, the settlement amount is credited to the defendant and the defendant then has a right of contribution against the settling party. *Id.*

[FN274]. Illustration:

Defendant-tortfeasor settles for \$10,000 and the jury assesses fault-share to the settling tortfeasor at twenty percent and to the non-settling-tortfeasor at eighty percent ; damages assessed at \$100,000.

Damages Recoverable Based on Jury Assesed Fault-Share - \$100,000 (\$20,000 + \$80,000)

Damages Recoverable Based on Settlement - \$90,000 (\$10,000 + \$80,000)

Damages Lost - \$10,000 (\$100,000 - \$90,000)

In this situation we see that the plaintiff absorbs a \$10,000 loss for the calculation of judgment by settling.

[FN275]. Illustration:

Defendant-tortfeasor settles for \$20,000; jury assesses fault-share to the settling tortfeasor at twenty percent and to the non-settling-tortfeasor at eighty percent; damages assessed at \$100,000.

Damages Recoverable Based on Jury Assessed Fault-Share - \$100,000 (\$20,000 + \$80,000)

Damages Recoverable Based on Settlement - \$100,000 (\$20,000 + \$80,000)

Damages Lost - \$0

Under this factual scenario we see that the plaintiff is not forced to absorb any additional damages based upon a settlement.

[FN276]. This idea is captured by observing that while a defendant is credited with the amount of settlement, a settling-tortfeasor does not maintain a right of contribution against the non-settling-tortfeasor. See supra note 61 and accompanying text.

Illustration:

Hypothesis - Defendant-tortfeasor settles for \$30,000; jury assesses fault-share to the settling tortfeasor at 20% and to the non-settling-tortfeasor at 80%; damages assessed at \$100,000.

Damages Recoverable Based on Jury Assessment - \$100,000 (\$20,000 + \$80,000)

Damages Recoverable Based on Settlement - \$100,000 (\$30,000 + \$70,000)

Damages Lost - \$0

Like the case of the even-settling tortfeasor, when a tortfeasor makes a bad settlement, the plaintiff is not forced to absorb additional damages based upon the settlement. Instead, we see that the non-settling tortfeasor is afforded the benefit of the of the plaintiff's favorable settlement.

[FN277]. See supra note 233 and accompanying text.

[FN278]. The State of Arkansas has sovereign immunity. See Ark. Const. art. 5, § 20 ("The State of Arkansas shall never be made a defendant in any of her courts."); but see University of Ark. for Med. Sci. v. Adams, 117 S.W.3d 588 (Ark. 2003) (explaining that the proper redress against state action is to file a claim with the Arkansas Claims Commission pursuant to Ark. Code Ann. § 19-10-201 et seq. (LEXIS Supp. 2001)).

[FN279]. Note that under the NationsBank decision, other problems relating to recovery can surface with immune parties. For a discussion of immune parties in conjunction with the NationsBank decision, see Crystal Tessaro, NationsBank, N.A. v. Murray Guard, Inc.: Lawyers Can No Longer Bank on Arkansas's Application of Comparative Fault in Multi-Tortfeasor Cases, 55 Ark. L. Rev. 659, 687-90 (2002).

[FN280]. Barclay v. First Paris Holding Co., 344 Ark. 711, 712, 42 S.W.3d 496, 500 (2001).

[FN281]. First United Bank v. Phase II, 347 Ark. 879, 898, 69 S.W.3d 33, 46 (2002).

[FN282]. See Riddell v. Little, 253 Ark. 686, 689, 488 S.W.2d 34, 36 (1972).

[FN283]. See supra notes 120-33 and accompanying text.

[FN284]. The Civil Justice Reform Act of 2003, No. 649, 2003 Ark. Acts 649, secs. 2(a), (b)(1) (codified at Ark. Code Ann. § § 16-55-201 to-220, 16-114-206 to-212 (LEXIS Supp. 2003)).

[FN285]. Id. at sec. 2(a).

[FN286]. Compare 2003 Ark. Act 649, at sec. 2 with NationsBank, supra.

[FN287]. See generally 2003 Ark. Acts 649 at sec. 3.

[FN288]. See id. at sec. 5(a).

[FN289]. See id. at sec. 5(b).

[FN290]. It should be noted that the partial-joint and several liability provided for in section 3 of the Act does not apply to any punitive damages award or judgment. See id. at sec. 3(f).

[FN291]. The plaintiff is only afforded ten days to file a motion for an increase in fault-share, and the plaintiff is required to prove that some damages will not be reasonably collectible. Id. at secs. 3 (a),(b). See supra note 249 and accompanying text.

[FN292]. See supra notes 248-76 or Part VII.A and accompanying text (interpreting the phrase "damages recoverable by the plaintiff" used in calculating the judgment).

[FN293]. 2003 Ark. Acts 649 at sec. 3(a). Entry of judgment occurs when the judgment is filed marked or stamped by the clerk of the court. See, e.g., Judkins v. Hower, 351 Ark. 552, 95 S.W.3d 768 (2003); Admin. Order of the Court 2(b)(2).

[FN294]. 2003 Ark. Acts 649 at sec. 3(b)(1).

[FN295]. Id.

[FN296]. Generally a trial court's ruling on questions of fact are given great deference. See, e.g., Ward v. Williams, 118 S.W.3d 513 (Ark. 2003) (explaining that the appellate courts review a trial court's finding of fact to determine whether they are clearly erroneous).

[FN297]. A list of factors is beyond the scope of this article, however, a plaintiff may start by comparing the amount of the several judgment against the net assets of a tortfeasor.

[FN298]. 2003 Ark. Acts 649 at sec. 3(c)(1).

[FN299]. Id. at sec. 3(c)(2).

[FN300]. Id. at sec. 3(c)(3).

[FN301]. See supra notes 62-64 and accompanying text for a discussion on contribution.

[FN302]. The right of contribution is a remedy in form but likely illusory in substance. Recall that in order for one tortfeasor's fault-share to increase, the damages caused by a joint-tortfeasor must not be reasonably collectible. Accordingly, if the plaintiff proves that the damages are not reasonably collectible, it is unlikely that the damages will be collectible through the right of contribution.

[FN303]. See 2003 Ark. Acts 649 at sec. 5(a).

[FN304]. See id.

[FN305]. See id. at sec. 5(b)(1).

[FN306]. See id. at sec. 5(b)(2).

[FN307]. See id. at sec. 5(b)(3).

[FN308]. See Walton discussed supra notes 66-72 and accompanying text.

[FN309]. See Walton, discussed supra notes 66-72 and accompanying text.

[FN310]. See supra note 37 and accompanying text.

[FN311]. This situation presents a wholly separate issue beyond the scope of this article. The issue is that once a party settles, its actions are generally not in evidence during the suit. Thus, the fact finder does not have the pertinent information needed to allocate fault to all responsible parties and must allocate it solely to the parties appearing before the court. This problem should be solved by the reduction in damages or right to contribution provided by the Arkansas Uniform Contribution Among Tortfeasors Act. See supra note 60- 63 and accompanying text. Admittedly with a Party Maintenance Agreement under the rule in Shelton, a jury would be able to hear the information relating to the settlement and can take that information into consideration when assigning fault-share. See supra note 190 and accompanying text.

[FN312]. See Hiatt v. Mazda Motor Corp., 75 F.3d 1252, 1260 (8th Cir. 1996). See also supra notes 150-154 and accompanying text.

[FN313]. A palpable legislative amendment would have been as follows:

Ark. Code Ann. § 16-64-122 (e)

(e) Unless a claiming party specifically excludes a party in its pleadings, any party with a pecuniary interest in the outcome of a case to which a jury can assign fault in the verdict is a party from whom the



claiming party seeks to recover damages for purposes of this statute.

[FN314]. See supra note 133.

[FN315]. See supra notes 203-205 and accompanying text for chilling factors.

[FN316]. See supra note 291.

[FN317]. See supra Part VII.A.

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