STATE OF ARKANSAS COMPENDIUM OF LAW

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PRE-SUIT AND INITIAL CONSIDERATIONS

Pre-Suit Notice Requirements/Prerequisites to Suit

Generally, Arkansas does not have pre-suit notice requirements; however, a contractor may not obtain a materialmen's lien unless the contractor gives the notice specified in ARK. CODE ANN. § 18-44-115(c) to the owner of the property before supplying any materials for fixtures. ARK. CODE ANN. § 18-44-115.

Relationship to the Federal Rules of Civil Procedure

Arkansas has its own Rules of Civil Procedure. ARK. R. CIV. P. 1-86. The Arkansas Rules of Civil Procedure generally track the organizational structure of the Federal Rules and have adopted many portions of the Federal Rules. Civil procedure in Arkansas Federal District Courts is governed not only by the Federal Rules of Civil Procedure but also by the Local Rules of the United States District Court for the Eastern and Western Districts of Arkansas.

Organization of the State Court System

A) Arkansas state court judges are elected by voters in nonpartisan elections. Judges must receive over fifty percent of the vote to obtain office.

B) The Arkansas court system consists of four (4) courts: the Supreme Court, the Court of Appeals, the Circuit Court, and the District Court. The Court of Appeals is divided into seven (7) judicial districts and four (4) divisions. There is a Circuit Court in each of Arkansas's seventy five (75) counties. There are one (1) or more District Courts in each county in Arkansas. District Court cases are typically reserved for law damages, pro-se and non personal injury matters.

C) Each circuit or appellate court in Arkansas has the authority to order any civil, juvenile, probate, or domestic relations case or controversy to mediation. ARK. CODE ANN. § 16-7-202.

Service of Summons

A) A person may be served by personal service, by leaving a copy of the summons and complaint at the person's dwelling place or usual place of abode with a person residing therein who is at least fourteen (14) years of age, or delivering a copy of the summons and complaint to an agent authorized by appointment or law to receive service of summons. A person may also be served by mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee. ARK. R. Civ. P. 4(d).

B) A domestic or foreign corporation, partnership, limited liability corporation, or any unincorporated association subject to suit may be served by delivering a copy of the summons and complaint to an officer, partner other than a limited partner, managing or

general agent, or any agent authorized by appointment or by law to receive service of summons. A domestic or foreign corporation, partnership, limited liability corporation, or any unincorporated association subject to suit may also be served by mail addressed to one of the individuals identified above to be served with a return receipt requested and delivery restricted to the addressee. Service on the registered agent of a corporation or other organization may be made by certified mail with a return receipt requested. ARK. R. CIV. P. 4(d).

C) Service may also be made by mailing a copy of the summons and the complaint by first-class mail, postage prepaid, to the person to be served, together with two copies of a notice and acknowledgement conforming substantially to a form adopted by the Supreme Court and a return envelope, postage prepaid, addressed to the sender. The court shall order the payment of the costs of personal service by the person served if such person does not complete and return the notice and acknowledgement of receipt of summons within twenty days after mailing. ARK. R. CIV. P. 4(d)(8)(B).

D) Service may be made on a defendant whose whereabouts are unknown by publication of a warning order. ARK. R. CIV. P. 4(f).

Statutes of Limitations

A) **Construction.**

1) Action in Contract. No action in contract, whether oral or written, to recover damages caused by any deficiency in the design, planning, supervision, or observation of construction or the construction or repair of any improvement to real property or for injury to real or personal property caused by such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, or observation of construction or the construction or repair of the improvement more than five (5) years after substantial completion of the improvement. ARK. CODE ANN. § 16-56-112(a).

2) Action in Tort, Personal Injury. No action in tort or contract, whether oral or written, sealed or unsealed, to recover damages for personal injury or wrongful death caused by any deficiency in the design, planning, supervision, or observation of construction or the construction and repairing of any improvement to real property shall be brought against any person performing or furnishing the design, planning, supervision, or observation of construction or the construction and repair of the improvement more than four (4) years after substantial completion of the improvement. ARK. CODE ANN. § 16-56-112(b)(1)).

3) Action in Tort, Wrongful Death. In the case of personal injury or an injury causing wrongful death, which injury occurred during the third (3rd) year after the substantial completion, an action in tort or contract to recover damages for the injury or wrongful death may be brought within one (1) year after the date on which injury occurred, irrespective of the date of death, but in no event shall such an action

be brought more than five (5) years after the substantial completion of construction of such improvement. ARK. CODE ANN. § 16-56-112(b)(2).

B) Actions to enforce a written contract, obligation, duty, or right, except those to which ARK. CODE ANN. § 4-4-111 is applicable, must be commenced within five (5) years after the cause of action accrues. However, partial payment or written acknowledgement of default shall toll this statute of limitations. ARK. CODE ANN. § 16-56-111.

C) Actions founded upon any contract, obligation, or liability not in writing must be commenced within three (3) years after the cause of action accrues. ARK. CODE ANN. § 16-56-105.

D) The Uniform Contribution Among Joint Tortfeasors Act gives a defendant sued by an injured party the right to seek contribution from a third party that is or may be liable to the defendant, thereby holding each tortfeasor liable for his own share. *See* ARK. CODE ANN. § 16-61-201 *et seq*. A claim for contribution accrues and the statute of limitations begins to run when a party pays more than its share of a common liability. *Heinemann v. Hallum*, 365 Ark. 600, 606, 232 S.W.3d 420, 423 (2006). The party is not, however, "required to wait until he has paid the judgment to implead in the primary action other persons who are or may be jointly liable for the tort." *Martin Farm Enters., Inc. v. Hayes*, 320 Ark. 205, 208, 895 S.W.2d 535, 537 (1995).

E) Any action to recover wages and liquidated damages based on an employer's discrimination in the payment of wages between the sexes must be commenced within two (2) years of the accrual thereof and not afterwards. ARK. CODE ANN. § 11-4-611(c) .

F) Any action based on employment discrimination in violation of the Arkansas Civil Rights Act shall be brought within one (1) year after the alleged employment discrimination occurred or within ninety (90) days of receipt of a "Right to Sue" letter or a notice of "Determination" from the United States Equal Employment Opportunity commission concerning the alleged unlawful employment practice, whichever is later. ARK. CODE ANN. § 16-123-107(c)(3).

G) A worker's compensation claim for compensation on account of death shall be barred unless filed with the Arkansas Worker's Compensation Commission within two (2) years of the date of such death. ARK. CODE ANN. § 11-9-702(A)(3).

H) A worker's compensation claim for compensation for disability on account of an injury other than an occupational disease and occupational infection shall be barred unless filed with the Arkansas Worker's Compensation Commission with two (2) weeks from the date of the compensable injury. ARK. CODE ANN. § 11-9-702(a)(1).

I) The statute of limitations on actions for fraud is three (3) years. *See* ARK. CODE ANN. § 16-56-105.

J) All actions against sheriffs and coroners upon any liability incurred by them by doing any act in their official capacity or by the omission of any official duty, except for escapes, shall be brought within two (2) years after the cause of action has accrued and not thereafter. All actions against sheriffs or other officers for the escape of any person imprisoned on civil process shall be commenced within one (1) year from the time of escape, and not thereafter. ARK. CODE ANN. § 16-56-109.

K) Actions on the official bonds of sheriffs and coroners shall be commenced within four (4) years after the cause of action shall accrue, and not afterward. A certified copy of the bond shall be evidence in all suits brought on the bond. No suit shall be brought on any bond of a constable after the expiration of four (4) years from its date. ARK. CODE ANN. § 16-56-110.

L) No claim may be considered and allowed by the Arkansas State Claims Commission unless it has been filed with the director of the commission as provided by this subchapter within the period allowed by law for the commencement of an action for the enforcement of the same type of claim against a private person. ARK. CODE ANN. § 19-10-209.

M) An action for indemnity arising from an agreement is governed by the same statute of limitations as any other action on a written contract: five (5) years. *Ray & Sons Masonry Contractors, Inc. v. U.S. Fid. & Guar. Co.*, 353 Ark. 201, 216, 114 S.W.3d 189, 198 (2003). However, if a potential claim for indemnity is based on an unwritten contract, equitable indemnity, or a right incidental to the written contract, a three (3)-year statute of limitation applies. *See* ARK. CODE ANN. § 16-56-105(1) & (3) (stating unwritten or implied contracts and actions "founded on any contract or liability, express or implied" are govern by three-year statute of limitations); *Larson Mach., Inc. v. Wallace*, 268 Ark. 192, 213, 600 S.W.2d 1, 12 (1980) ("The basis for the right to indemnity in a case where there is no express contract therefore is liability upon an implied contract or quasi-contract.").

N) All actions founded on any obligation or liability not in writing, expressed or implied, shall be commenced within three (3) years after the cause of action accrues. ARK. CODE ANN. § 16-56-105. This statute has been interpreted to include actions based on torts, including negligence, that are not otherwise covered by a specific statute of limitations. *Shelter Ins. Co. v. Arnold*, 57 Ark. App. 8, 12-13, 940 S.W.2d 505, 506-07 (1997).

O) All product liability actions shall be commenced within three (3) years after the date on which the death, injury, or damage complained of occurs. ARK. CODE ANN. § 16-116-103.

P) All actions for legal malpractice shall be commenced within three (3) years after the cause of action accrues. ARK. CODE ANN. § 16-57-105.

Q) All actions for taking or injuring goods or chattels shall be commenced within three (3) years after the cause of action accrues. ARK. CODE ANN. § 16-56-105(6**)**.

R) All actions for trespass on land shall be commenced within three (3) years after the cause of action accrues. ARK. CODE ANN. § 16-56-105(4).

S) For wrongs done to the person or property of another, an action may be maintained against a wrongdoer, and the action may be brought by the person injured or, after his or her death, by his or her executor or administrator against the wrongdoer or, after the death of the wrongdoer, against the executor or administrator of the wrongdoer, in the same manner and with like effect in all respects as actions founded on contracts. ARK. CODE ANN. § 16-62-101(a)(1).

T) If any person, by leaving the county, absconding, or concealing himself, or by any other improper act of his own, prevents the commencement of any action specified in this act, the action may be commenced within the times respectively limited after the commencement of the action shall have ceased to be so prevented. ARK. CODE ANN. § 16-56-120.

U) All actions for medical injury, including wrongful death, shall be commenced within two (2) years after the cause of action accrues. ARK. CODE ANN. § 16-114-203(a). If a plaintiff serves written notice of intention to file an action for medical injury within thirty (30) days prior to the expiration of the applicable statute of limitations, the statute of limitations shall be tolled for ninety (90) days only if the following conditions are met: (1) the written notice shall be served by certified mail, return receipt requested, upon the medical care provider alleged to have caused the medical injury; (2) the written notice shall include the following: (a) the plaintiff's full name, date of birth, present address, address at the time of treatment at issue, and social security number; (b) the date or dates of the treatment in question and a summary of the alleged wrongful conduct; and (c) the names and addresses of the known medical care providers relating to the alleged injury; and (3) an authorization to release medical records signed by the plaintiff, which shall authorize the medical care provider alleged to be liable to obtain pertinent medical records, shall be attached to the notice. ARK. CODE ANN. § 16-114-212(a).

V) All actions for wrongful death, except for those caused by medical negligence, shall be commenced within three (3) years after the death of the person alleged to have been wrongfully killed. If a nonsuit is suffered, the action shall be brought within one (1) year from the date of the nonsuit without regard to the date of the death of the person alleged to have been wrongfully killed. ARK. CODE ANN. § 16-62-102(c).

W) All actions not included in Arkansas Code Annotated §§ 16-56-104, -105, -108, and -109 shall be commenced within five (5) years after the cause of action has accrued. ARK. CODE ANN. § 16-56-115.

Statutes of Repose

The statute of repose applicable to construction actions is governed by ARK. CODE ANN. § 16-56-112. No action in contract to recover damages caused by any deficiency in the design, planning, supervision, or observation of construction or the construction and repair of any improvement to real property or for injury to real or personal property caused by such deficiency, shall be brought more than five (5) years after substantial completion of the improvement. No action in tort or

contract to recover damages for personal injury or wrongful death caused by any deficiency in the design, planning, supervision, or observation of construction or the construction and repairing of any improvement to real property more than four (4) years after substantial completion of the improvement. In the case of personal injury or wrongful death occurring during the third (3rd) year after the substantial completion, an action in tort or contract to recover damages for the injury or wrongful death may be brought within one (1) year after the date on which injury occurred, but in no event shall such an action be brought more than five (5) years after the substantial completion of construction of such improvement. The foregoing limitations shall also apply to any action for damages caused by any deficiency in surveying, establishing, or making the boundaries of real property, the preparation of maps, or the performance of any other engineering or architectural work upon real property or improvements to real property. ARK. CODE ANN. § 16-56-112.

Venue Rules

A) Actions for the recovery of real property, the partition of real property, the sale of real property under a mortgage, lien, or other encumbrance or charge, and an injury to real property must be brought in the county in which the subject of the action, or some part thereof, is situated. ARK. CODE ANN. § 16-60-101.

B) Actions for the following causes must be brought in the county where the cause, or some part thereof, arose:

1) An action for the recovery of a fine, penalty, or forfeiture imposed by a statute, except that where the offense for which the claim is made was committed on a watercourse or road which is the boundary of two (2) counties, the action may be brought in either of them;

2) An action against a public officer for an act done by him or her in virtue or under color of his or her office, or for a neglect of official duty; and

3) An action upon the official bond of a public officer, except as provided in §§ 16-106-101 and 16-106-104.

ARK. CODE ANN. § 16-60-102.

C) The following actions must be brought in the county in which the seat of government is situated:

1) All civil actions on behalf of the state, or which may be brought in the name of the state, or in which the state has or claims an interest, except as provided in § 16-106-101;

2) All actions brought by state boards, state commissioners, or state officers in their official capacity, or on behalf of the state, except as provided in § 16-106-101;

3) All actions against the state and all actions against state boards, state commissioners, or state officers on account of their official acts, except that if an action could otherwise be brought in another county or counties under the venue laws of this state, as provided in § 16-60-101 *et seq.*, then the action may be brought either in Pulaski County or the other county or counties; and

4) All other actions required by law to be brought in Pulaski County.

ARK. CODE ANN. § 16-60-103.

D) An action against a turnpike road company may be brought in any county in which any part of the road of the defendant lies. ARK. CODE ANN. § 16-60-107.

E) Contract actions by a resident subcontractor, supplier, or materialman against a prime contractor or subcontractor who is a nonresident of this state or who is a foreign corporation may be brought in the county in which the plaintiff resided at the time the cause of action arose. ARK. CODE ANN. § 16-60-114.

F) An action brought in this state by or in behalf of an insured or beneficiary against a domestic or foreign surety on a contractor's payment or performance bond may be brought in the county in which the loss occurred, of the insured's residence at the time of loss, or of the beneficiary's residence at the time of loss. ARK. CODE ANN. § 16-60-115.

G) Any action for medical injury brought under ARK. CODE ANN. § 16-114-201, *et seq.*, against a medical care provider shall be filed in the county in which the alleged act or omission occurred. ARK. CODE ANN. § 16-55-213(e).

All remaining civil actions must be brought in the county in which a substantial part of the events or omissions giving rise to the claim occurred, the county in which an individual defendant resided, or the county in which the plaintiff resided. If the plaintiff or defendant is an entity other than an individual, then the action may be brought in the county where the entity had its principal office in this state at the time of the accrual of the cause of action. ARK. CODE ANN. § 16-55-213(a).

DISCOVERY

Electronic Discovery Rules

Electronic discovery relates to the discovery of electronically stored information. In October 2009, the Arkansas Supreme Court adopted Rule 26.1 of the Arkansas Rules of Civil Procedure to address electronic discovery issues. Rule 26.1 is meant to supplement the Arkansas Rules of Civil Procedure and will not govern if a conflict between it and other rules emerge. ARK. R. CIV. P. 26.1(b).

Pursuant to Rule 26.1, "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities, "and "electronically stored information" means information that is stored in an electronic medium and is retrievable in

perceivable form. A "person" under the rule means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity. ARK. R. CIV. P. 26.1(a).

Rule 26.1 is an optional discovery rule because either (1) both parties must agree to follow the rule or (2) the circuit court must enter an order that it will apply upon a motion for good cause. Any such agreement or motion shall be made within 120 days after the date that the complaint was filed. The court, however, may extend or reopen this period for good cause. ARK. R. CIV. P. 26.1(c) (201).

Rule 26.1(c) also governs the time periods in which the parties shall confer and discuss their electronic discovery plan. Within 30 days of an agreement or order to proceed under Rule 26.1, the parties shall confer, and, at this conference, the parties shall discuss the following issues:

(A) any issues relating to preservation of discoverable information;

(B) the form in which each type of the information will be produced;

(C) the period within which the information will be produced;

(D) the method for asserting or preserving claims of privilege or of protection of the information such as trial-preparation materials, including the manner in which such claims may be asserted after production;

(E) the method for asserting or preserving confidentiality and proprietary status of information relating to a party or a person not a party to the proceeding;

(F) whether allocation among the parties of the expense of production is appropriate; and

(G) any other issue relating to the discovery of electronically stored information.

Following the conference pursuant to 26.1(c), the parties shall develop a proposed plan relating to discovery of the information, and, not later than 14 days after the conference, the parties shall submit to the court a written report that summarizes the plan and states the position of each party as to any issue about which they are unable to agree.

According to Rule 26.1(d), the court may issue an order governing the discovery of electronically stored information pursuant to:

(A) a motion by a party seeking discovery of the information or by a party or person from which discovery of the information is sought;

(B) a stipulation of the parties and of any person not a party from which discovery of the information is sought; or

(C) the court's own motion, after reasonable notice to, and an opportunity to be heard from, the parties and any person not a party from which discovery of the information is sought.

If the Court issues an order governing discovery of electronically stored information, the order may address:

(A) whether discovery of information is reasonably likely to be sought in the proceedings;

(B) preservation of the information;

(C) the form in which each type of the information is to be produced;

(D) the time within which the information is to be produced;

(E) the permissible scope of discovery of the information;

(F) the method for asserting or preserving claims of privilege or of protection of the information as trial-preparation material after production;

(G) the method for asserting or preserving confidentiality and the proprietary status of information relating to a party or a person not a party to the proceeding;

(H) allocation of the expense of production; and

(I) any other issue relating to the discovery of the information.

ARK. R. CIV. P. 26.1(d).

Absent exceptional circumstances, the court may not impose sanctions on a party under these rules for failure to provide electronically stored information lost as the result of the routine, good-faith operation of an electronic information system. ARK. R. CIV. P. 26.1(e).

In conjunction with Arkansas Rule of Civil Procedure 34, Rule 26.1(f) allows a party to serve on any other party a request for production of electronically stored information and for permission to inspect, copy, test or sample the information. A party on which a request to produce electronically stored information has been served shall, in a timely manner, serve a response on the requesting party. The response must state, with respect to each item or category in the request that inspection, copying, testing, or sampling of the information will be permitted as requested or any objection to the request and the reasons for the objection.

Pursuant to Rule 26.1(g), unless the parties otherwise agree or the court otherwise orders, (1) the responding party shall produce the information in a form in which it is ordinarily maintained or in a form that is reasonably useful; (2) if necessary, the responding party shall also produce any specialized software, material, or information not ordinarily available so that the requesting party

can access and use the information in its ordinarily maintained form; and (3) a party need not produce the same electronically stored information in more than one form.

Rule 26.1(h) governs the limitations on electronic discovery. A party may object to discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or expense. In its objection the party shall identify the reason for such undue burden or expense. On motion to compel discovery or for a protective order relating to the discovery of electronically stored information, a party objecting bears the burden of showing that the information is from a source that is not reasonably accessible because of undue burden or expense. The court may order discovery of electronically stored information that is from a source that is not reasonably accessible because of undue burden or expense if the party requesting discovery shows that the likely benefit of the proposed discovery outweighs the likely burden or expense, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues. If the court orders discovery of electronically stored information, it may set conditions for discovery of the information, including allocation of the expense of discovery. The court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that:

(A) it is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive;

(B) the discovery sought is unreasonably cumulative or duplicative;

(C) the party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or

(D) the likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

A claim of privilege or protection after production of electronic data is governed by Rule of Civil Procedure (26)(b)(5) unless the application of that rule is modified by agreement of the parties or by order of the court. ARK. R. CIV. P. 26.1(i).

Rule 26.1(j) governs the use of a subpoena to gather electronic discovery. A subpoena in a civil proceeding may require that electronically stored information be produced and that the party serving the subpoena or person acting on the party's request be permitted to inspect, copy, test, or sample the information. ARK. R. CIV. P. 26.1(j)(1). A party serving a subpoena requiring production of electronically stored information shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. ARK. R. CIV. P. 26.1(j)(3). An order of the court requiring compliance with a subpoena issued under this rule must provide protection to a person that is neither a party nor a party's officer from undue burden or expense resulting from compliance. ARK. R. CIV. P. 26.1(j)(4) (201). Subject to subsections 26.1(j)(3) and 26.1(j)(4), 26.1(g), (h), and (i) apply to a person responding to a subpoena under subsection 26.1(j)(1) as if that person were a party. ARK. R. CIV. P. 26.1(j)(2).

Inadvertent Disclosures

Arkansas Rule of Civil Procedure 26(b)(5) protects parties who inadvertently disclose material protected by any evidentiary privilege or doctrine of protection, such as the attorney-work-product doctrine. The Court recognized that, although attorneys do their best to avoid mistakes, they sometimes happen. Discovery has always posed the risk of the inadvertent production of privileged or protected material. The advent of electronic discovery has only increased the risk of inadvertent disclosures. Rule 26(b)(5) addresses this risk by creating a procedure to evaluate and address inadvertent disclosures, including disputed ones.

The new provision creates a presumption against waiver if the disclosing party acts promptly after discovering the inadvertent disclosure. Notice by the disclosing party must be specific about both the material inadvertently disclosed and the privilege or doctrine protecting it. After receiving this kind of notice, a party may neither use nor disclose the specified material. Instead, the receiving party must either return, sequester, or destroy the material (including all copies). A party's failure to fulfill these obligations will expose that party to sanctions under Rule 37. The new provision also creates a procedure for the receiving party to challenge a notice of inadvertent disclosure and a procedure for the circuit court to resolve the dispute. This procedure, which requires the court to consider all the material circumstances, "strikes the appropriate balance" and is "best suited to achieving a fair result." *See Gray v. Bicknell*, 86 F.3d 1472, 1483-84 (8th Cir. 1996).

Specifically, a party who discloses or produces material or information without intending to waive a claim of privilege or attorney work product shall be presumed not to have waived under these rules and the Arkansas Rules of Evidence if the party takes the following steps: (i) within fourteen calendar days of discovering the inadvertent disclosure, the producing party notifies the receiving party by specifically identifying the material or information and asserting the privilege or doctrine protecting it; and (ii) if responses to written discovery are involved, then the producing party amends them as part of this notice. ARK. R. CIV. P. 26(b)(5)(A).

Within fourteen calendar days of receiving notice of an inadvertent disclosure, a receiving party must return, sequester, or destroy the specified materials and all copies. After receiving this notice, the receiving party may not use or disclose the materials in any way. ARK. R. CIV. P. 26(b)(5)(B).

A receiving party may challenge a disclosing party's claim of privilege or protection and inadvertent disclosure. The reason for such a challenge may include, but is not limited to, the timeliness of the notice of inadvertent disclosure or whether all the surrounding circumstances show waiver. ARK. R. CIV. P. 26(b)(5)(C).

In deciding whether the privilege or protection has been waived, the circuit court shall consider all the material circumstances, including: (i) the reasonableness of the precautions taken to prevent inadvertent disclosure; (ii) the scope of the discovery; (iii) the extent of disclosure; and (iv) the interests of justice. Notwithstanding Model Rule of Professional Conduct 3.7, and without having to terminate representation in the matter, an attorney for the disclosing party may testify about the circumstances of disclosure and the procedures in place to protect against inadvertent disclosure. ARK. R. CIV. P. 26(b)(5)(D).

Expert Witnesses

Discovery of facts known and opinions held by expert witnesses is governed by Arkansas Rules of Civil Procedure 26(b)(4) and 35(b). Rule 26(b)(4) distinguishes between two types of experts: Testifying Experts and Non-Testifying Experts.

A) Rule 26(b)(4)(A) limits the manner in which a party seeking discovery may obtain information from experts expected to testify at trial to two ways: Interrogatories and Depositions.

1) The party seeking discovery may through interrogatories require the opposing party to:
   (a) Identify each expert the party intends to call as a witness at trial;
   (b) State the subject matter on which the expert is expected to testify; and
   (c) State the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

2) The party seeking discovery may depose any person identified as an expert expected to testify at trial. Rule 26(b)(4)(C)(i) requires that, unless manifest injustice would result, the party seeking to depose a person identified as an expert expected to testify at trial shall pay the expert a reasonable fee for time spent in responding to the discovery.

B) Rule 26(b)(4)(B) and 35(b) governs discovery of facts known and opinions held by experts that are retained or specially employed by another party in anticipation of litigation or preparation of trial but who are not expected to be called as a witness at trial.

1) The facts known and opinions held by these experts may not be discovered unless:
   (a) Under Rule 26(b)(4)(B), there are exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by another means; or
   (b) Under Rule 35(b), the facts known and opinions held by such experts deal with a physical or psychological examination of a party who's physical or mental condition is in controversy.

2) Rule 26(b)(4)(C)(ii) requires that, unless manifest injustice would result, the party seeking discovery from a non-testifying expert shall pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party obtaining facts and opinions from the expert.

C) Rebuttal Witnesses. Although Rule 26(b)(4) applies to discovery of facts known and opinions held by rebuttal expert witnesses, rebuttal expert witnesses do not always have to be disclosed. When rebuttal expert witnesses are not disclosed, it is within the discretion of the trial court to allow rebuttal expert witnesses to testify because

Arkansas Rule of Civil Procedure 26(e) governs a party's duty to supplement previously answered discovery requests.

A party is under a duty to seasonably amend prior responses to discovery, including the subject matter and substance of any expert witness's testimony, when he knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment. *Phillips v. McAuley*, 297 Ark. 563, 564-66, 764 S.W.2d 424, 424-26 (1989).

D) Unlike the Federal Rules, the Arkansas Rules of Civil Procedure do not explicitly protect from disclosure draft reports and communications between a party's attorney and testifying expert. *See* Fed. R. Civ. P. 26(b)(4).

Non-Party Discovery

A) Subpoenas are governed by Arkansas Rule of Civil Procedure 45. Subpoenas may be issued by the clerk of the court or an attorney of record who is admitted to practice in Arkansas. The issuance of a subpoena commands the non-party to appear and, if ordered, to produce documents or other tangible items within the scope of the matter at a specified time and place. When a subpoena is issued, notice must be sent to all parties to the action. A subpoena is not required for parties to an action but may be desired because of the contempt sanction for noncompliance.

B) Pursuant to Rule 45(e), a non-party witness may not be required to attend a deposition that is more than one hundred miles away from where he or she resides, is employed, or transacts business in person, unless the court otherwise orders another convenient place.

C) Service of subpoenas is governed by Rule 45(c) and may be accomplished in two fashions. First, the subpoena may be served personally on the non-party witness by the sheriff of the county where service is made, the sheriff's deputy, or any person not a party and at least eighteen years of age. Second, the attorney of record may serve the subpoena on the non-party witness by mail if a return receipt is requested and delivery is restricted to the addressee or agent of the addressee.

D) Subpoenas must be served at least five business days prior to the date of deposition and must be accompanied by the tender of a witness fee to the non-party witness. Rule 45(c) provides that the witness fee is to be calculated at the rate of thirty dollars per day for attendance and twenty-five cents per mile for travel from the non-party witness's residence to the place where the deposition is to be taken. No witness fee is necessary for a party served with a subpoena.

E) The Arkansas Supreme Court has issued an official subpoena form for civil actions, including probate and juvenile matters. Although the official subpoena form is not mandatory, the subpoena must contain all the information called for by the form. *In re Arkansas Rules of Civil Procedure*, 340 Ark. Appx. 731, 733 (2000).

F) The Arkansas Supreme Court has revised Rule 45(b), governing subpoenas to produce documents or other tangible items, which are commonly called subpoena duces tecum. Unlike the prior rule, these subpoenas need not be issued in connection with a deposition. Unlike other subpoenas, however, such a subpoena must be served to all other parties at least three business days before the subpoena is served to the party at whom it is directed. A court "upon motion made promptly" may quash or modify the subpoena or condition compliance upon the payment of costs by the requesting party. The party issuing the subpoena must provide a copy to all other parties of all material produced in response to the subpoena.

G) Rule 45(g) provides that, when a party or non-party witness fails to attend or produce documents in obedience to any subpoena or intentionally evades the service of a subpoena by concealment or otherwise, the court may issue a warrant for arresting and bringing the witness before the court to give testimony and answer for the contempt.

Privileges

As Arkansas Rule of Civil Procedure 26 provides, privileged matters are not discoverable and are not subject to disclosure. An attorney's duty to protect client communications and information can be found in three bodies of law: the attorney-client privilege, the attorney work-product doctrine, and the Arkansas Rules of Professional Conduct.

A) **Attorney-Client Privilege**. The attorney-client privilege is governed by Arkansas Rule of Evidence 502. The attorney-client privilege is an evidentiary privilege that provides protection to communications between a client and his or her attorney. The client is the one who is given the privilege of refusing to disclose confidential communications, and while the attorney may claim the privilege, he can only do so on behalf of the client. *Sikes v. Seger*, 266 Ark. 654, 665, 587 S.W.2d 554, 559 (1979). The purpose of the attorney-client privilege is to promote full and frank communication between attorneys and clients, and that, in turn, promotes the observance of law and administration of justice. *Holt v. McCastlain*, 357 Ark. 455, 465-66, 182 S.W.3d 112, 119 (2004).

1) Rule 502 provides that a communication is confidential and privileged if the communication is (1) made by the client or client's representative to the client's attorney or attorney's representative, (2) made by the attorney or the attorney's representative to the client or the client's representative, (3) not intended to be disclosed to third parties other than the client, attorney, or either's representative, and (4) made in furtherance of the rendition of professional legal services to the client. The attorney-client privilege does not extend to communications between an attorney and third parties in the course of the attorney's representation of his or her client. *Ark. Nat'l Bank v. Cleburne County Bank*, 258 Ark. 329, 331-32, 525 S.W.2d 82, 84-85 (1975). Cases holding certain statements to be protected include: *Courteau v. St. Paul Fire & Marine Ins. Co.*, 307 Ark. 513, 515-18, 821 S.W.2d 45, 46-48 (1991) (hospital

employees and physicians were clients of hospital's insurer's attorney, so that statements made to attorney were covered by attorney-client privilege); *McCrory v. Johnson*, 296 Ark. 231, 246, 755 S.W.2d 566, 572 (1988) (attorney's advice to landlord's agent not to take tenant's property was protected under attorney-client privilege); *Byrd v. State*, 326 Ark. 10, 14-15, 929 S.W.2d 151, 153-54 (1996) (letters and telephone conversation between attorney and attorney's secretary with client were privileged).

B) **Attorney Work Product**. Rule 26(b)(3) of the Arkansas Rules of Civil Procedure governs the attorney work-product doctrine and is a verbatim recount of its Federal counterpart. Although codified in Rule 26(b)(3), the doctrine was first recognized in *Hickman v. Taylor*, 329 U.S. 495 (1947). The doctrine protects two categories of attorney work product when it is prepared with an eye toward litigation. These categories are commonly referred to as "ordinary" work product and "opinion" work product. Ordinary work product consists of photographs, witness statements, and other factual background and is discoverable if the party seeking discovery shows a substantial need for the discovery and an undue hardship in gathering the equivalent information themselves. Opinion work product is not discoverable and consists of an attorney's mental impressions, conclusions, opinions, or legal theories concerning the litigation. *See Parker v. Southern Farm Bureau Cas. Ins. Co.*, 326 Ark. 1073, 1082-83, 935 S.W.2d 556, 560-61 (1996); *Holt v. McCastlain*, 357 Ark. 455, 468, 182 S.W.3d 112, 120-21 (2004). A party may request an interlocutory appeal from an order compelling the disclosure of privileged material; such appeal is discretionary with the Supreme Court.

C) Arkansas Rule of Professional Conduct 1.6. Under Rule 1.6(a), an attorney is barred without informed consent from the client from revealing client confidences, even after the termination of the attorney-client relationship. However, an attorney may break these confidences in certain circumstances governed by Rule 1.6(b). These circumstances include when an attorney reasonably believes revealing client confidences: (1) may prevent the commission of a criminal act, (2) may prevent, mitigate, or rectify the client's commission of fraud that is reasonably certain to result in injury (financial or property) of another and in furtherance of which the client has used or is using the attorney's services, (3) secures legal advice about the attorney's compliance with the Arkansas Rules of Professional Conduct, (4) establishes a claim or defense on behalf of the attorney in a controversy between the attorney and the client or establishes a defense to a criminal charge or civil claim against the attorney based upon conduct in which the client was involved, and (5) complies with other law or a court order.

D) The Arkansas Rules of Evidence, Arkansas Code Annotated § 16-41-101, and other scattered Arkansas code sections and administrator orders govern other forms of privileged communications. The relevant privileges are:

1) Arkansas Rule of Evidence 503 – physician, psychotherapist, chiropractor-patient privilege

2) Arkansas Rule of Evidence 504 – husband-wife privilege
3) Arkansas Rule of Evidence 505 – religious privilege
4) Arkansas Rule of Evidence 506 – political vote privilege
5) Arkansas Rule of Evidence 507 – trade secrets privilege
6) Arkansas Rule of Evidence 508 – governmental privileges
7) Arkansas Rule of Evidence 509 – identity of informer privilege
8) Arkansas Code Annotated § 17-27-311 – counselor-client and therapist-patient privilege
9) Arkansas Supreme Court Admin. Order 11, Canon 5 – Interpreter's duty to keep communications confidential

Requests For Admission

A) Arkansas Rule of Civil Procedure 36 governs requests for admission. The purpose of requests for admissions is to facilitate trial by weeding out facts about which there is no true controversy but which are often difficult or expensive to prove. *In re Dailey*, 30 Ark. App. 8, 10-11, 784 S.W.2d 782, 783 (1989).

1) Requests for admission must be set forth separately their own document and may not be combined with any other material. ARK. R. CIV. P. 36(c).
2) Requests for admissions may not request legal conclusions but a request relating to the application of law to fact or the ultimate issue of the case is permissible.
3) Rule 36(a) provides that requests for admissions may be served on any party with or after service of the complaint. There is no requirement that a party must seek leave of court. A party has thirty days to respond to requests for admissions, unless the party serves the requests for admissions with the complaint, in which case the party has forty-five days.
4) According to Rule 36(a), a party must repeat each request for admission before the response.
5) If responses are not filed within the required time, the matters stated within the requests for admissions will be deemed admitted unless the court allows an admission to be withdrawn or amended. *See* ARK. R. CIV. P. 36(b); *Heritage Ins. Co. v. White County*, 279 Ark. 94, 96, 649 S.W.2d 170, 170-71 (1983).

B) Rule 36(a) sets forth six possible answers to a request for admission:

1) Admit;
2) Deny;
3) Object, stating the reasons for the objection;
4) State reasons why the responding party can neither admit or deny;
5) Admit or deny in part combined with objection or statement of inability to admit or deny as to the remainder; and
6) Admit or deny in whole or in part with qualification.

Important Distinctions From Federal Rules

While the Arkansas discovery rules typically mirror their federal counterparts, there are a few important exceptions not mentioned above:

A) Although the Federal Freedom of Information Act and most state enacted information acts protect attorney-client communications and attorney work product from disclosure when attorneys represent municipalities or other state-funded entities and organizations, the case is not so for attorneys in Arkansas.

In holding that the attorney-client privilege and the attorney work-product doctrine are not exemptions to the Arkansas Freedom of Information Act, the Arkansas Supreme Court has stated that "[t]he FOIA at times provides greater disclosure than do the discovery procedures afforded by the Arkansas Rules of Civil Procedure." *Berry v. Saline Mem'l Hosp.*, 322 Ark. 182, 185, 907 S.W.2d 736, 738 (1995). *See also Scott v. Smith*, 292 Ark. 174, 175-176, 728 S.W.2d 515, 515-516 (1987) (holding that agency's records which were in possession of its deputy general counsel and assistant attorney general were subject to public disclosure and that neither the attorney-client privilege nor the attorney work-product privilege provided an exemption to the Arkansas Freedom of Information Act because neither were specifically mentioned as exemptions in the AFOIA); *Edmark v. City of Fayetteville*, 304 Ark. 179, 185-186, 801 S.W.2d 275, 278 (1990) (holding that legal memos for the city of Fayetteville in the possession of and prepared by outside municipal attorneys in anticipation of litigation were public records and subject to the Arkansas Freedom of Information Act).

B) The Arkansas Rules of Civil Procedure are promulgated from the version of the Federal Rules of Civil Procedure in effect in 1978. Although they have been amended several times since 1978, not all of the amendments have been adopted by the Arkansas Supreme Court. Most notably, the Arkansas Rules fail to mandate disclosure of certain information, require a discovery conference or plan, or place limits on the number of depositions and interrogatories.

NEGLIGENCE

General Common Law Duty

A) Negligence in Arkansas is "a failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them." *Marlar v. Daniel*, 368 Ark. 505, 508, 247 S.W.3d 473, 476 (2007).

B) The question of whether the defendant owed a duty to the plaintiff and what that duty was is always a question of law for the court. *Lawhon Farm Supply Inc. v. Hayes*, 316 Ark. 69, 71, 870 S.W.2d 729, 730 (1994).

C) "To constitute negligence, an act must be one from which a reasonably careful person would foresee such an appreciable risk of harm to others as to cause him not to do the act,

or to do it in a more careful manner." *New Maumelle Harbor v. Rochelle*, 338 Ark. 43, 991 S.W.2d 552 (1999).

D) The defendant does not, however, have to be able to reasonably foresee "the exact or precise harm that occurred, or the specific victim of the harm," but only "reasonably foresee an appreciable risk of harm to others." *Coca-Cola Bottling Co. of Memphis, TN v. Gill*, 352 Ark. 240, 254-55, 100 S.W.3d 715, 724 (2003).

Comparative Fault / Contributory Negligence

A) The Arkansas comparative fault statute, ARK. CODE ANN. § 16-64-122, provides that in all actions for damages for personal injuries, wrongful death, or injury to property in which recovery is predicated upon fault, liability shall be determined by comparing the fault chargeable to the claiming party with the fault chargeable to the party or parties from whom the claiming party seeks to recover damages. "Fault" is defined as "any act, omission, conduct, risk assumed, breach of warranty, or breach of any legal duty which is a proximate cause of any damages sustained by any party." ARK. CODE ANN. § 16-64-122(c).

B) If the fault of the plaintiff is 50% or more, the plaintiff is not entitled to any recovery. ARK. CODE ANN. § 16-64-122(b)(2)**.** If the fault of the plaintiff is less than the aggregate fault of the defending parties, then the plaintiff may recover damages after they have been diminished in proportion to the degree of plaintiff's own fault. ARK. CODE ANN. §16-64-122(b)(1) (2015). The rule has also been read to deny a plaintiff recovery from a defendant who was more at fault than the plaintiff in a multi-plaintiff suit, even when plaintiff's fault was assessed at less than 50%. *See NationsBank, N.A. v. Murray Guard, Inc.*, 343 Ark. 437, 36 S.W.3d 291 (2001) (plaintiff who was 47% at fault could not recover from defendant who was 32% at fault; plaintiff who was 21% at fault could recover from defendant who was 32% at fault).

C) The plaintiff's comparative fault must be pleaded as an affirmative defense (ARK. R. CIV. P. 8(c), and the defendant bears the burden of proving comparative fault. *Rodgers v. CWR Constr., Inc.*, 343 Ark. 126, 131, 33 S.W.3d 506, 509 (2000).

D) To warrant a jury instruction on comparative fault, there must be evidence that the plaintiff's actions were a proximate cause of his or her damages. *Skinner v. R.J. Griffin & Co.*, 313 Ark. 430, 433, 855 S.W.2d 913, 915 (1993). It is within the province of the jury to pass upon the conflicts in, and the weight of, the testimony and evidence. If there is any substantial evidence to support the jury's apportionment of fault, the judgment will be affirmed on appeal. *Ferrell v. Whittington*, 271 Ark. 750, 753, 610 S.W.2d 572, 574 (1981).

E) The fault of the plaintiff is considered in a strict product liability action seeking damages for personal injuries. *Elk Corp. of Ark. v. Jackson*, 291 Ark. 448, 455, 725 S.W.2d 829, 833 (1987). Comparative fault is applicable in professional malpractice actions. *Gartman v. Ford Motor Co.*, 2013 Ark. App. 665, 430 S.W.3d 218. The comparative fault statute is not applicable in a contract action seeking the replacement cost of defective goods and

incidental damages. *Little Rock Elec. Contractors, Inc. v. Okonite Co.*, 294 Ark. 399, 401-02, 744 S.W.2d 381, 382 (1988). Similarly, the doctrine of comparative fault is inapplicable to a claim for damages for economic loss. *E.D. Smith & Sons, Ltd. v. Ark. Glass Container Corp.*, 236 F.3d 920, 921 (8th Cir. 2001). Comparative fault is also not applicable in intentional tort actions. *Kellerman v. Zeno*, 64 Ark. App. 79, 89, 983 S.W.2d 136, 141 (1998).

F) Assumption of risk by the plaintiff is not a complete bar to recovery, but it is an element to be assessed in comparing fault under ARK. CODE ANN. § 16-64-122; *W.M. Bashlin Co. v. Smith*, 277 Ark. 406, 415-16, 643 S.W.2d 526, 530 (1982).

G) If parties are involved in a joint venture or joint enterprise, the fault of one may be imputed to the other for the purpose of comparative fault. *Pittman v. Frazer*, 129 F.3d 983, 986 (8th Cir. 1997). A joint enterprise exists between the driver and passenger of an automobile when each has (1) a community of interest in the object and purpose of an undertaking for which the vehicle is being used and (2) an equal right to share in the control of the vehicle. *Id.* Similarly, the family relationship and the community of interest between spouses in regard to care and supervision of their children imputes the fault of one parent to the other. *See Stull v. Ragsdale*, 273 Ark. 277, 280-81, 620 S.W.3d 264, 267 (1981). The imputation does not apply between divorced parents. *E-Ton Dynamics Indus. Corp. v. Hall*, 83 Ark. App. 35, 41, 115 S.W.3d 816, 820 (2003).

H) A child's negligence is not imputed to his or her parents. Nonetheless, when a parent sues for damages on his own behalf and on behalf of a minor child arising out of the same negligent act, "the child's contributory negligence may be asserted against the parent." *Kirkendoll v. Hogan*, 267 Ark. 1083, 593 S.W.2d 498, 499 (1980).

Non-Party Fault

A) Traditionally, "phantom" parties, such as employers who were not named parties in the lawsuit, were excluded from the comparative fault analysis. *Robertson v. Norton Co.*, 148 F.3d 905, 909 (8th Cir. 1998) (relying upon express language in ARK. CODE ANN. § 16-64-122(a)). With the passage of the Civil Justice Reform Act of 2003, which is codified at ARK. CODE ANN. §§ 16-55-201 *et seq.*, the Arkansas General Assembly attempted to dramatically change the law of comparative fault in Arkansas. The Act's so-called "empty chair provision" provided that, "[i]n assessing percentages of fault, the fact finder shall consider the fault of all persons or entities who contributed to the alleged injury or death or damage to property, tangible or intangible, regardless of whether the person or entity was or could have been named as a party to the suit." ARK. CODE ANN. § 16-55-202(a).

B) The Supreme Court of Arkansas declared the "empty chair" provision unconstitutional in *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135. The appellate court held that ARK. CODE ANN. § 16-55-202(b), which allowed the negligence or fault of a nonparty to be considered by the jury if the defendant filed a "pleading" giving notice of the nonparty allegedly at fault, was "procedural" in nature in violation of the separation of powers doctrine and the powers specifically prescribed to the Supreme Court by

Amendment 80 of the Arkansas Constitution. *Johnson*, 2009 Ark. 241, 308 S.W.3d at 141-42. The Supreme Court explained that, because ARK. CODE ANN. § 16-55-202(b) was unconstitutional, subsection (a), which allowed the jury to consider the fault of nonparties, "falls as well, as it is dependent on (b)." *Id.* Although the Court invalidated the nonparty fault provision as an intrusion of the Court's delegated power, it did not rule on the same type of "empty chair" or "non-party" provision when adopted by court order or other procedural mechanism.

C) Effective January 1, 2015, the Arkansas Rules of Civil Procedure require a defending party who seeks to allocate fault to a non-party to provide notice to the claimant. Ark. R. Civ. P 9(h). The rule does not apply to a party who has entered into a settlement agreement with the plaintiff but does apply to a non-party who is outside the jurisdictional reach of the court. ARK. CODE ANN. § 16-64-204(d). The factfinder must assess the fault of both the parties and the nonparties to the action. Ark. R. Civ. P. 49, 52. *See In re Special Task Force on Practice and Procedure in Civil Cases* – Ark. *R. Civ. P. 9, 49, 52, and Ark. R. App. P. – Civ. 8*, 2014 Ark. 340 (per curiam order adopting new rules). Case law may be necessary to fully clarify the implications of the revised rules in light of *Johnson v. Rockwell* and subsequent decisions, and particular care should be given when assessing this rapidly developing area of law.

Exclusive Remedy – Workers' Compensation Protections

Under the workers' compensation statute, an injured employee is entitled to benefits from the employer regardless of fault. ARK. CODE ANN. § 11-9-101(b). The rights and remedies granted to an employee under the statute are exclusive of all other rights and remedies, and the negligent acts of a co-employee are not imputed to the employer. ARK. CODE ANN. § 11-9-105(a).

A) Arkansas workers' compensation law provides the exclusive remedy for an employee against his or her employer if the injury arises both out of and in the course of employment, absent a showing of actual, specific, and deliberate intent by the employer to injure the employee. If the employee can show actual, specific, and deliberate intent by the employer to injure him, the employment relationship is said to have been severed by the intentional actions of the employer, and the employee may elect to proceed in tort rather than under workers' compensation laws. *See, e.g., King v. Consol. Freightways Corp.*, 763 F. Supp. 1014, 1015-16 (W.D. Ark. 1991). The Arkansas Workers' Compensation Commission has exclusive, original jurisdiction to determine the facts that establish its jurisdiction, "unless the facts are so one-sided that the issue is no longer one of fact but of law, such as an intentional tort." *VanWagoner v. Beverly Enters.*, 334 Ark. 12, 16, 970 S.W.2d 810, 812 (1998).

B) An injured worker may bring a tort action against a third party non-employer who was in part responsible for the injuries, but the employer and the employer's carrier are entitled to notice and an opportunity to join in the action. ARK. CODE ANN. § 11-9-410(a)(1)(A). If either the employer or the carrier join in the action, they are entitled to a first lien upon two-thirds (2/3) of the net proceeds recovered in the action that remain after the payment of the reasonable costs of collection to recover the benefit payments made to the worker.

ARK. CODE ANN. § 11-9-410(a)(1)(B). As discussed above, the Civil Justice Reform Act of 2003 may permit the alleged third party tortfeasor to attribute fault to the negligent employer who is immune from suit in the tort action. *See* ARK. CODE ANN. § 16-55-202(a) (2014) and Ark. R. Civ. P. 9.

C) Even if the worker recovers from the third party tortfeasor, the tortfeasor may not seek contribution against the employer who satisfied the workers' compensation claim. The employer is immune from the claims of third party tortfeasors as a matter of public policy and consistency with the legislative intent to make the Workers' Compensation Act an exclusive remedy. *W. M. Bashlin Co. v. Smith*, 277 Ark. 406, 423, 643 S.W.2d 526, 534 (1982). However, the employer may be liable to the third party tortfeasor under an express indemnity contract or on an implied indemnity theory. *Smith v. Paragould Light & Water Comm'n*, 303 Ark. 109, 114, 793 S.W.2d 341, 343 (1990).

D) The workers' compensation statute expressly permits the employer to file a tort action against a potentially liable third party seeking recovery for the benefit payments made to the worker. The employee is entitled to notice and is permitted, with private counsel, to join the lawsuit and assert a claim against the third party. ARK. CODE ANN. § 11-9-410(b) (2014).

E) The exclusiveness of remedy under workers' compensation law is an affirmative defense that must be pleaded and proved by the defendant employer. ARK. R. CIV. P. 8(c).

F) If an employer does not maintain workers' compensation insurance, an injured employee may elect to either claim compensation as provided under the workers' compensation statute or to sue the employer in tort. ARK. CODE ANN. § 11-9-105(b)(1). To maintain a suit in tort, a plaintiff must prove that he sustained damages, that defendant was negligent, and that the defendant's negligence was a proximate cause of the damages. *Sykes v. Williams*, 373 Ark. 236, 241, 283 S.W.3d 209, 214 (2008). The defendant-employer, in a suit brought under § 11-9-105(b), is precluded by statute from asserting the defenses of fellow-servant negligence, assumption of the risk, and contributory negligence. ARK. CODE ANN. § 11-9-105(b)(2).

Indemnification

A) Indemnity arises by virtue of a contract and holds one liable for the acts or omissions of another over whom he has no control. *East-Harding, Inc. v. Horace A. Piazza & Assocs.*, 80 Ark. App. 143, 148, 91 S.W.3d 547, 550 (2002). The language imposing indemnity and the nature of the losses to be indemnified must be stated in clear, unequivocal, and certain terms. *Capel v. Allstate Ins. Co.*, 78 Ark. App. 27, 38, 77 S.W.3d 533, 540 (2002).

B) A right of contribution exists between joint tortfeasors. Contribution requires that a joint tortfeasor first pay or discharge the common liability or pay more than his or her pro rata share of liability. ARK. CODE ANN. § 16-61-202. In contrast, indemnity shifts the entire loss from one tortfeasor to another party who should instead bear the entire loss. *Mo. Pac. R.R. Co. v. Star City Gravel Co.*, 452 F. Supp. 480, 481-82 (E.D. Ark. 1978).

C) The construction and legal effect of a written contract for indemnity are to be determined by the court as a question of law, except where the meaning of the language depends on disputed extrinsic evidence. *Ark. Rock & Gravel Co. v. Chris-T-Emulsion Co.*, 259 Ark. 807, 809, 536 S.W.2d 724, 726 (1976).

D) Indemnity agreements are construed strictly against the party seeking indemnification, except those between business entities following knowing negotiations. *Chevron U.S.A., Inc. v. Murphy Exploration & Prod. Co.*, 356 Ark. 324, 330, 151 S.W.3d 306, 310 (2004); *Potlatch Corp. v. Mo. Pac. R.R. Co.*, 321 Ark. 314, 321, 902 S.W.2d 217, 222 (1995).

E) If the indemnitor's liability is for "damages" or "losses," the indemnitee cannot recover upon a mere showing that he has incurred liability, but must show that he has suffered actual loss by payment or satisfaction of judgment. *Larson Mach., Inc. v. Wallace*, 268 Ark. 192, 214-15, 600 S.W.2d 1, 13 (1980). Terms such as "liability" or "claim" have different meanings in indemnity law, and the indemnitor's obligation may accrue at other times. *Jones v. Sun Carriers, Inc.*, 856 F.2d 1091, 1094-95 (8th Cir. 1988).

F) The person seeking indemnity may do so in a cross-claim, third party pleading, or an independent, subsequent action. *See Larson Mach., Inc. v. Wallace*, 268 Ark. 192, 214, 600 S.W.2d 1, 14 (1980). Because the mingling of the primary claim and the indemnity claim may create jury confusion, the preferred approach is to try the underlying tort claim first. *See Baldwin Co. v. Ceco Corp.*, 280 Ark. 519, 522, 659 S.W.2d 941, 943 (1983).

G) Attorneys' fees can be recovered in claims for breach of contract, including actions brought upon an indemnity agreement. ARK. CODE ANN. § 16-22-308; *see Stilley v. James*, 347 Ark. 74, 80, 60 S.W.3d 410, 415 (2001).

H) A contract that indemnifies a party against his own negligence is not contrary to the public policy of Arkansas. *Missouri Pac. R.R. Co. v. Winburn Tile Mfg. Co.*, 461 F.2d 984, 987 (8th Cir. 1972). However, a provision that indemnifies a party for its own negligence must be expressed in clear and unequivocal terms and to the extent that no other meaning can be ascribed to the provision. *Chevron U.S.A., Inc. v. Murphy Exploration & Prod. Co.*, 356 Ark. 324, 330, 151 S.W.3d 306, 310 (2004).

I) In the absence of an express contract, the basis for the right to indemnity rests upon a contract implied in law. *See Larson Mach., Inc. v. Wallace*, 268 Ark. 192, 213, 600 S.W.2d 1, 12 (1980). Ultimately, as with other contracts implied in law, it rests upon the basic restitutionary principle of fairness that one who is compelled to pay money that another should have paid is entitled to recover the sums paid. *Martin Farm Enters., Inc. v. Hayes*, 320 Ark. 205, 209, 895 S.W.2d 535, 537 (1995). An indemnitee who relies upon an implied covenant cannot recover by merely showing that he actually incurred liability or suffered loss; it must be further shown that the loss resulted from payment of a judgment or other payment under compulsion. *Carpetland of N. W. Ark., Inc. v. Howard*, 304 Ark. 420, 424, 803 S.W.2d 512, 514 (1991). A party who reaches a voluntary settlement may be entitled to equitable indemnity upon showing: (1) that the settling party faced exposure

to a judgment, (2) the advisability of reaching a settlement, and (3) the reasonableness of the settlement amount. *Id*. at 423, 803 S.W.2d at 514.

J) Under the Arkansas Products Liability Act, a supplier of a product who is liable for a product defect caused by the manufacturer may seek indemnity from the manufacturer. ARK. CODE ANN. § 16-116-107.

Joint and Several Liability

A) Arkansas law regarding joint and several liability has been rapidly evolving since the Civil Justice Reform Act was passed in 2003. Particular care should be given when assessing questions regarding this area of law.

B) At common law, if two individuals commit independent tortious acts causing separate and distinct injuries to an innocent party, the plaintiff must establish the damages due to the wrong of each defendant; the liability of each is several, not joint, and the defendants are separately liable for the damages caused by their separate wrongs. *Troop v. Dew*, 150 Ark. 560, 234 S.W. 992, 994 (1921); *Bill C. Harris Constr. Co. v. Powers*, 262 Ark. 96, 108, 554 S.W.2d 332, 337 (1977).

C) At common law, joint liability among defendants for separate acts of negligence exists in two instances: (1) where there is a common design, purpose, or concert of action in the commission of the separate acts, or (2) when the separate acts of negligence are concurrent in time and place, and unite in setting in operation a single force that produces the injury. *Troop v. Dew*, 150 Ark. 560, 234 S.W. 992, 994 (1921).

D) Separate acts of negligence concurring in time and place to produce a single injury historically supported the joint and several liability of the defendants for all resulting damage. *McGraw v. Weeks*, 326 Ark. 285, 288, 930 S.W.2d 365, 367 (1996). Tortfeasors engaged in a joint enterprise were also jointly and severally liable. A joint enterprise exists when the parties have (1) a community of interest in the object and purpose of an undertaking and (2) a right to direct and control the movements of each other in regard to the common undertaking. *Neal v. J. B. Hunt Transp., Inc.*, 305 Ark. 97, 101, 805 S.W.2d 643, 645 (1991).

E) The Civil Justice Reform Act of 2003 dramatically changed the longstanding law of joint and several liability in Arkansas. Since its passage, in any action for personal injury, medical injury, property damage, or wrongful death, the liability of each defendant for compensatory or punitive damages is several only. ARK. CODE ANN. § 16-55-201(a). Each defendant is liable only for the damages allotted to that defendant based on the defendant's percentage of fault, and a separate judgment is awarded against that defendant for that amount. ARK. CODE ANN. § 16-55-201(b).

F) The Civil Justice Reform Act gives limited authority to the trial court to increase the share against a defendant when the amount of compensatory damages for which a defendant is liable is not reasonably collectable. ARK. CODE ANN. § 16-55-203(a)(1)-(2) & (b). This

provision provides for a partial reallocation of the share that cannot be collected, and it applies only to the fault shares of named defendants. ARK. CODE ANN. § 16-55-203(a)(2)-(3). A defendant whose several share has been increased and who has discharged the obligation to pay the increased several share has a right of contribution from the defendant whose several share was determined by the court to be not reasonably collectible. ARK. CODE ANN. § 16-55-203(a)(5).

G) Under the Civil Justice Reform Act, traditional joint and several liability continues in two situations: (1) when the tortfeasors acted in concert with a conscious agreement to pursue a common plan or design to commit an intentional tort and actively took part in that intentional tort, and (2) if the other person or entity was acting as an agent or servant of the party. ARK. CODE ANN. § 16-55-205(a).

H) Effective January 1, 2015, Rule 49(c) of the Arkansas Rules of Civil Procedure addresses the allocation of fault in actions governed by the Civil Justice Reform Act. Under the revised rule, the jury is to "determine the fault of all persons or entities, including those not made parties, who may have joint liability or several liability for the alleged injury, death, or damage to property." However, the jury is to assess damages to nonparties only if the plaintiff has entered into a settlement agreement with the nonparty or a defending party has complied with the notice requirements outlined in Rule 52 of the Arkansas Rules of Civil Procedure. *See* Non-Party Fault, *supra*.

I) The Arkansas appellate courts have not yet discussed theories developed in other jurisdictions that essentially permit the plaintiff to show his damages and then shift the burden of apportionment to the defendants, such as alternative liability, concert of action, enterprise liability, and market-share liability. The courts that have made note of these theories have found that Arkansas retains the traditional requirement of proximate cause in all tort cases. *See Jackson v. Anchor Packing Co.*, 994 F.2d 1295, 1303 (8th Cir. 1993); *Fields v. Wyeth, Inc.*, 613 F. Supp. 2d 1056, 1060 (W.D. Ark. 2009).

J) When joint and several liability applies, the right of contribution exists among joint tortfeasors pursuant to the Uniform Contribution Among Joint Tortfeasors Act, ARK. CODE ANN. §§ 16-61-201, *et seq.* If a joint tortfeasor has by payment discharged the common liability or has paid more than his pro rata share thereof, he is entitled to a money judgment for contribution. ARK. CODE ANN. § 16-61-202(b).

K) If the fault of the joint tortfeasors is equal, the common liability is distributed equally. However, if an equal distribution of the common liability is inequitable, the relative degrees of fault are evaluated in determining their pro rata shares. ARK. CODE ANN. § 16-61-202(c). Such proration is solely for the purpose of determining their rights of contribution among themselves, each remaining severally liable to the injured person for the whole injury as at common law. ARK. CODE ANN. § 16-61-202**.**

L) Under the Arkansas statute, the issue of contribution may be raised in several ways: (1) by cross-claim against co-defendants; (2) by third party complaint; or (3) by filing a separate action. *See* ARK. CODE ANN. § 16-61-207 (2014). A substantive cause of action for

contribution accrues when one joint tortfeasor pays more than their pro rata share of common liability. *Heinemann v. Hallum*, 365 Ark. 600, 607, 232 S.W.3d 420, 425 (2006)

M) Arkansas permits either the trial judge or the jury to make apportionment. *See Wheeling Pipe Line, Inc. v. Edrington*, 259 Ark. 600, 602, 535 S.W.2d 225, 226 (1976); *Shultz v. Young*, 205 Ark. 533, 169 S.W.2d 648, 651 (1943). If the verdict forms presented to the jury permit it to apportion liability among joint tortfeasors, any error is waived by the lack of objection. *Wheaton Van Lines, Inc. v. Williams*, 240 Ark. 280, 287, 399 S.W.2d 258, 262 (1966).

N) The insolvency, and lack of contribution, from some of the tortfeasors does not limit plaintiff's recovery in any way from solvent tortfeasors. *Shelton v. Firestone Tire & Rubber Co.*, 281 Ark. 100, 103, 662 S.W.2d 473, 475 (1983).

O) A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement. ARK. CODE ANN. § 16-61-202(d).

P) Similarly, a release given by the injured party to one joint tortfeasor does not discharge the other joint tortfeasors unless the release so provides. The limited release has the effect of reducing the plaintiff's claim against the other tortfeasors by the greater of the amount of consideration paid for the release, the pro rata share of the released torfeasor's responsibility, or the amount or proportion by which the release provides that the total clam shall be reduced. ARK. CODE ANN. § 16-61-204(c).

Q) "Mary Carter" agreements are both discoverable and admissible into evidence. *Firestone Tire & Rubber Co. v. Little*, 276 Ark. 511, 514, 639 S.W.2d 726, 728 (1982).

R) A third party tortfeasor may not seek contribution against an employer that satisfied a workers' compensation claim by the plaintiff. *W. M. Bashlin Co. v. Smith*, 277 Ark. 406, 423, 643 S.W.2d 526, 534 (1982). The Uniform Contribution Among Tortfeasors Act is applicable only where there is common liability to an injured person in tort.

Strict Liability

A) In order to state a cause of action under a theory of strict liability, a plaintiff must plead that: (1) the defendant was "engaged in the business of manufacturing, assembling, selling, leasing, or distributing the product;" (2) the "product was supplied by [the defendant] in a defective condition that rendered it unreasonably dangerous;" and (3) the "defective condition was a proximate cause of the harm to a person or to property." ARK. CODE ANN. § 4-86-102(a). Definitions of many of these terms are found in ARK. CODE ANN. § 16-116-102.

B) Arkansas law on the theory of strict liability is patterned after the Restatement (Second) of Torts § 402A, the comments to which define "unreasonably dangerous" as requiring

something "beyond that which would be contemplated" by the "ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Proof that the product was both "defective" and "unreasonably dangerous" is required. *Pilcher v. Suttle Equip. Co.*, 365 Ark. 1, 7, 223 S.W.3d 789, 794 (2006).

C) "In determining the liability of the manufacturer, the state of scientific and technical knowledge available to the manufacturer or supplier at the time the product was placed on the market, rather than at the time of the injury, may be considered as evidence." ARK. CODE ANN. § 16-116-104(a)(1). "Consideration may also be given to the customary designs, methods, standards, and techniques of manufacturing, inspecting, and testing by other manufacturers or sellers of similar products." ARK. CODE ANN. § 16-116-104(a)(2).

D) "If a product is not unreasonably dangerous at the time it leaves the control of the manufacturer or supplier but was made unreasonably dangerous by subsequent unforeseeable alteration, change, improper maintenance, or abnormal use, such conduct may be considered as evidence of fault on the part of the user." ARK. CODE ANN. § 16-116-106.

E) Neither the "mere fact of an accident," nor "the fact that [a product] was found in a defective condition" after an accident, makes out a case that a product was defective. *Williams v. Smart Chevrolet Co.*, 292 Ark. 376, 382, 730 S.W.2d 479, 482 (1987). However, the addition of other facts tending to show that the defect existed before the accident may make out a sufficient case. "In the absence of direct proof of a specific defect, it is sufficient if a plaintiff negates other possible causes of failure of the product not attributable to the defendant." *Id*. (citation omitted).

F) Although proof of a specific defect is normally required, this is not true when "common experience tells us that the accident would not have occurred in the absence of a defect." *Harrell Motors, Inc. v. Flanery*, 272 Ark. 105, 108, 612 S.W.2d 727, 729 (1981).

G) A residence is a "product" to which strict liability applies. *Wingfield v. Page*, 278 Ark. 276, 279, 644 S.W.2d 940, 942 (1983). However, a street in a residential subdivision is a not a "product." *Milam v. Midland Corp.*, 282 Ark. 15, 16-17, 665 S.W.2d 284, 285 (1984), *abrogated on other grounds by Suneson v. Holloway Constr. Co.*, 337 Ark. 571, 99 S.W.2d 79 (1999).

H) A supplier of a defective product has a statutory cause of action for indemnity against the manufacturer. ARK. CODE ANN. § 16-116-107.

I) An affirmative defense to a strict liability claim exists for unavoidably unsafe products. In order for the affirmative defense to apply, the manufacturer must show that the product was properly prepared and accompanied by proper directions and warnings. *West v. Searle & Co.*, 305 Ark. 33, 38-39, 806 S.W.2d 608, 611 (1991) (adopting the "unavoidably unsafe product" defense contained in comment k to § 402A of the Restatement (Second) of Torts). The manufacturer must also prove that there was no feasible alternative design which could

accomplish the product's purpose at lesser risk and that the benefit of the product outweighs the risk. *Id.* at 41, 806 S.W.2d at 612.

J) Arkansas recognizes the learned intermediary doctrine in prescription drug cases. *West*, 305 Ark. at 44, 806 S.W.2d at 614.

Willful and Wanton Conduct

A) Arkansas courts, in applying comparative fault, relate willful and wanton misconduct with a degree of negligence and will not regard such misconduct as something over and beyond or apart from a negligence concept. *Billingsley v. Westrac Co.*, 365 F.2d 619, 623 (8th Cir. 1966).

B) As discussed elsewhere in this section, proof of "willful and wanton" conduct may support the imposition of punitive damages.

EVIDENCE, PROOF & TRIAL ISSUES

Accident Reconstruction

An accident reconstructionist can be used under Arkansas Rule of Evidence 702, if the reconstructionist's specialized knowledge will assist the jury to understand the evidence or determine a fact issue. The admissibility of testimony from an accident reconstructionist is within the trial judge's discretion and will be upheld on appeal absent a "manifest abuse" of that discretion. *S. Farm Bureau Cas. Ins. Co. v. Daggett*, 354 Ark. 112, 123, 118 S.W.3d 525, 532 (2003). An accident reconstructionist's testimony may also be properly admitted when the testimony of other eyewitnesses is "at odds." *Banks v. Jackson*, 312 Ark. 232, 237, 848 S.W.2d 408, 411 (1993).

Appeal

An appeal is a continuation of the legal proceeding following adjudication at the trial level. In civil cases, the scope of appellate court jurisdiction is generally confined to appeals from (a) final orders or judgments of the circuit court and (b) certain interlocutory orders. *See John Cheeseman Trucking, Inc. v. Dougan*, 305 Ark. 49, 51, 805 S.W. 2d 69, 70 (1991) (rejecting appeal of an order because the judgment determining liability but not damages was not an appealable, final judgment); *see also* ARK. R. APP. P. 2(a) (outlining when an appeal may be taken); ARK. R. APP. P. 2(d) (stating all final orders awarding custody are appealable).

A) Generally, final orders of the circuit court are appealable, as a matter of right, to either the Arkansas Supreme Court or Court of Appeals. *Harris Distrib., Inc. v. Marlin*, 220 Ark. 621, 623, 249 S.W.2d 3, 4 (1952). "[F]or an order to be final, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy." *John Cheeseman Trucking, Inc.*, 305 Ark. at 51, 805 S.W.2d at 70.

B) Cases directly appealable to the Arkansas Supreme Court include: (1) all appeals involving the interpretation or construction of the Constitution of Arkansas; (2) petitions for certain relief against state, county, or municipal officials or circuit courts; and (3) second or subsequent appeals following an appeal that has been decided in the Supreme Court. ARK. SUP. CT. R. 1-2. There is no right of appeal from the Arkansas Court of Appeals to the Arkansas Supreme Court; however, opinions decided by the Arkansas Court of Appeals may be reviewed by the Arkansas Supreme Court on application by a party to the appeal, upon certification of the Arkansas Court of Appeals, or if the Arkansas Supreme Court decides the case is one that should have originally been assigned to it. ARK. SUP. CT. R. 1-2(e). The appellate court only has jurisdiction over issues raised in the notice of appeal or those raised by proper amendment to the notice. *See Stuart v. Ark. Well Water Constr. Comm'n*, 343 Ark. 369, 370, 37 S.W.3d 573, 574 (2001) (stating that "[i]n a civil case, the notice of appeal is also essential because it allows the appellate court to determine whether jurisdiction is proper").

C) Certain interlocutory orders may be appealed as a matter of right, including but not limited to orders that (1) grant, continue, modify, refuse, or dissolve an injunction; and (2) deny a motion to dismiss or for summary judgment that is based on sovereign immunity or immunity of a governmental official. ARK. R. APP. P. 2(a). Generally, the appeal should be brought within thirty days of entry of the order. ARK. R. APP. P. 4(a).

D) The notice of appeal must be filed with the clerk of the circuit court within thirty days of the entry of the judgment, decree, or order. ARK. R. APP. P. 4(a). If, however, a motion for judgment notwithstanding the verdict, or any other motion seeking to alter, amend, or vacate the verdict or the court's findings of fact is timely filed, the time for filing is extended until "thirty (30) days from entry of the order disposing of the last motion outstanding." ARK. R. APP. P. 4(b)(1).

Collateral Source Rule

The collateral source rule provides that benefits received by a plaintiff from a source wholly independent of, and collateral to, the defendant do not reduce the damages recoverable from the defendant. For example, a plaintiff's recovery from the tortfeasor is not limited or offset by the amounts or services, if any, the plaintiff receives from his insurance company for property damages or medical bills, from his employer for lost pay, or from his church or neighbors for meals or childcare.

There are, however, at least four instances where evidence of collateral income may be admissible:

1. To discredit the plaintiff's testimony that financial need compelled him to return to work prematurely or to skip required medical care;
2. To impeach his testimony that he paid his own medical bills;
3. To rebut his testimony that he had not worked; and
4. To demonstrate that the plaintiff had attributed his injuries to another cause, such as illness, for which the defendant was not responsible.

Evans v. Wilson, 279 Ark. 224, 650 S.W.2d 569 (1983).

Convictions

Evidence of prior convictions is admissible to impeach the credibility of a witness.

A) Criminal: Evidence of prior convictions punishable by death or more than one-year incarceration and crimes of dishonesty or false statements are admissible, so long as no more than ten years have passed since the date of the conviction or since the witness was released from confinement, whichever is later. ARK. R. EVID. 609(a), (b). When admitting the evidence, the judge follows a balancing test, ensuring that the evidence is not too prejudicial to any person in the case. *See* ARK. R. EVID. 609(a)(1) ("[E]vidence that he has been convicted of a crime shall be admitted only if . . . the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or a witness"). The balancing test will consider several factors including the nature of the prior crime, the witness's criminal history subsequent to the conviction, and the centrality of the credibility issue. *Golston v. State*, 26 Ark. App. 176, 182-83, 762 S.W. 2d 398, 401 (1988). Evidence that a witness was convicted of a crime involving "dishonesty or false statement, regardless of the punishment" is admissible. ARK. R. EVID. 609(a)(2).

B) Traffic: Traffic offenses and non-moving violations are misdemeanor crimes. ARK. CODE ANN. §§ 27-50-302 & 303. Usually, evidence of a prior misdemeanor conviction offered to impeach is inadmissible. *See* ARK. R. EVID. 609(a) (limiting admissibility to crimes that are "punishable by death or imprisonment in excess of one year . . .").

Day in the Life Videos

A "Day in the Life" video is evidence frequently used in personal injury and wrongful death actions to reflect what a day in the life of a particular person is like. The admission and relevancy of such videos is a matter within the discretion of the trial court. A trial court is given broad discretion in determining the admissibility and will not be reversed merely because a videotape is inflammatory and cumulative of other evidence if the videotape's probative value outweighs any prejudice. *Elk Corp. of Ark. v. Jackson*, 291 Ark. 448, 725 S.W.2d 829 (1987).

Dead Man's Statute

The Dead Man's Statute was repealed in Arkansas in 1976 when Arkansas adopted the revised Uniform Rules of Evidence. "Since its repeal, courts determine the admissibility and proof of the deceased's words and dealings on the basis of their relevance and reliability, just as the admissibility of all unprivileged evidence is determined." *Estate of Sabbs v. Cole*, 57 Ark. App. 179, 944 S.W.2d 123 (1997) (citing dissenting opinion).

Medical Bills

A plaintiff is entitled to recover the reasonable expense of any necessary medical care incurred in the past. Arkansas applies the collateral source rule which allows a plaintiff to recover for those

bills paid by insurance. Pursuant to ARK. CODE ANN. § 16-55-212(b), the General Assembly purportedly reversed the collateral source rule; however, this statute has been ruled unconstitutional by the Arkansas Supreme Court. *See Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135. Accordingly, plaintiffs can "blackboard" all medical bills incurred provided they are fair and reasonably related to the injury at issue.

A plaintiff is entitled to recover the reasonable expense of future medical care that is reasonably certain to be required in the future. Recovery of future medical bills will be reduced to present day value.

Offers of Proof

When an attorney's evidence is successfully objected to, the attorney has the chance to explain what the evidence would have shown had it been allowed by the judge. This is called an offer of proof.

A) Offers of proof must be specific and detailed; they usually explain what a witness's response to a question would have been, what the basis was, and what purpose would have served by the evidence. Offers of proof must be made outside the presence of the jury to maintain a lack of bias in the trial procedure.

B) A proper offer of proof preserves the question for review on appeal. Thus, if an appeal is sought at a later time, based on the fact that the proffered evidence was found inadmissible, there will be a record of what it would have proved.

3 Trial Handbook for Arkansas Lawyers § 28:19.

Prior Accident

No specific evidentiary rule addresses the admissibility of prior accidents, but such evidence is admissible under certain circumstances. Evidence of prior accidents may be relevant in a products liability action to demonstrate, among other things, existence of a defect, notice to defendant, or causation, so long as the accidents are sufficiently similar. The admissibility of prior accidents can also be an issue in premises liability cases. For instance, the Arkansas Supreme Court has held that when notice of a danger or defect is an issue, evidence of a prior similar occurrence is admissible, but, only when it is demonstrated that the events arose out of the same or substantially similar circumstances. *Fraser v. Harp's Food Stores, Inc.*, 290 Ark. 186, 718 S.W.2d 92 (1986). The issue of prior accidents has also been applied to railroad crossing cases. *Demaree v. St. Louis S.W. Ry. Co.*, No. 75-349, 1976 W.L. 206. (Ark. June 14, 1976).

Relationship to the Federal Rules of Evidence

Arkansas has its own Rules of Evidence. In some instances the Arkansas Rules of Evidence and the Federal Rules of Evidence are identical, while in others they are significantly different. The Federal Rules of Evidence may be used for guidance in interpreting the Arkansas Rules of Evidence. *See, e.g., Smithey v. State*, 269 Ark. 538, 546, 602 S.W.2d 676, 680 (1980) ("Our

uniform rules are based upon the Federal Rules of Evidence and therefore cases interpreting the federal rules are helpful in the analysis of the Arkansas rules.").

Seat Belt and Helmet Use Admissibility

A plaintiff's failure to wear a properly adjusted and fastened seat belt should not be admissible evidence in a civil action. Evidence of such a failure may be admitted in a civil action as to the causal relationship between non-compliance and the injuries alleged, if the following conditions are satisfied:

1. The plaintiff has filed a products liability claim other than a claim related to an alleged failure of a seat belt;
2. The defendant alleging non-compliance shall raise this defense in its answer; and
3. Each defendant seeking to offer evidence alleging non-compliance has the burden of proving non-compliance, that compliance would have reduced injuries, and the extent of the reduction of such injuries.

ARK. CODE ANN. § 27-37-703.

Arkansas requires that the operator of a motorcycle wear protected headgear unless the person is 21 years old or older. ARK. CODE ANN. § 27-20-104 .

Spoliation

Spoliation has been defined in Arkansas as the intentional destruction of evidence. *Goff v. Harold Ives Trucking Co., Inc.*, 342 Ark. 143, 27 S.W.3d 387 (2000). Arkansas does not recognize an independent tort of spoliation; however, an aggrieved party can request that a jury be instructed to draw a negative inference against the spoliator. Civil Arkansas Model Jury Instruction 106 specifically addresses this issue.

Subsequent Remedial Measures

Evidence of measures taken after an accident occurs that may have prevented the accident if taken beforehand is not admissible to prove negligence or culpable conduct in connection with the accident. *See* ARK. R. EVID. 407. The rule does not require the exclusion of evidence of subsequent measures if offered for another purpose, "such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment." *See id*. When evidence of a subsequent remedial measure is not barred by this rule, its probative value should outweigh any dangers associated with its admission. *See Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 894 S.W.2d 897 (1995).

Use of Photographs

The Arkansas Rules of Evidence require that all photographs, as well as all other writings or recordings, be originals. A duplicate is admissible to the same extent as an original unless:

1. A genuine question is raised as to the authenticity of the continuing effectiveness of the original; or
2. It would be unfair to admit the duplicate in lieu of the original under the circumstances.

The original is not required and other evidence of a photograph is admissible if the original has been lost or destroyed, the original is not obtainable, the original is in possession of the opponent, or the photograph is not closely related to a controlling issue. ARK. R. EVID. 1001-1004.

DAMAGES

Caps on Damages

In 2003, the Arkansas General Assembly enacted The Civil Justice Reform Act ("CJRA"), ARK. CODE ANN. § 16-55-201 *et seq*., which applies to causes of action accruing on or after March 25, 2003. Under the CJRA, there is no cap on compensatory awards. However, the CJRA provides that "[a]ny evidence of damages for the costs of any necessary medical care, treatment, or services received shall include only those costs actually paid by or on behalf of the plaintiff or which remain unpaid and for which the plaintiff or any third party shall be legally responsible." ARK. CODE ANN. § 16-55-212(b). This provision of the CJRA has been attacked as an unconstitutional violation of separation of powers in that it purportedly reversed the collateral source rule. *See, e.g., Burns v. Ford Motor Co.,* 549 F. Supp. 2d 1081 (W.D. Ark. 2008).

The Arkansas Supreme Court in *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135, answered certified questions from the United States District Court for the Eastern District of Arkansas and held that ARK. CODE ANN. § 16-55-202 and ARK. CODE ANN. § 16-55-212(b) were unconstitutional. More specifically, the Court stated that "[b]ecause the nonparty provision is procedural, it offends the principle of separation of powers and the powers specifically prescribed to this court by amendment 80. Accordingly, we hold that ARK. CODE ANN. § 16-55-202 violates separation of powers under article 4, § 2, as well as amendment 80, § 3 of the Arkansas Constitution." *Id.* at 141. As for ARK. CODE ANN. § 16-55-212(b), the Court determined it promulgated a rule of evidence and "[b]ecause rules regarding the admissibility of evidence are within our province, we hold that the medical-costs provision also violates separation of powers under article 4, § 2 and amendment 80, § 3 of the Arkansas Constitution and, therefore, is unconstitutional." *Id.* at 142.

Available Items of Personal Injury Damages

1) **Past medical bills.** A plaintiff is entitled to recover the reasonable expense of any necessary medical care incurred in the past. Arkansas applies the collateral source rule which allows a plaintiff to recover for those bills paid by insurance. Pursuant to ARK. CODE ANN. § 16-55-212(b), the General Assembly purportedly reversed the collateral source rule; however, this statute has been ruled unconstitutional by the Arkansas Supreme Court. *See Johnson v. Rockwell Automation, Inc.,* 2009 Ark. 241, 308 S.W.3d 135. Accordingly, plaintiffs can "blackboard" all medical bills incurred provided they are fair and reasonably related to the injury at issue.

2) **Future medical bills**. A plaintiff is entitled to recover the reasonable expense of future medical care that is reasonably certain to be required in the future. Recovery of future medical bills will be reduced to present day value.

3) **Hedonic damages.** Arkansas divides hedonic damages into two categories: "loss of life," and "loss of enjoyment of life." Loss-of-life damages are those damages for the loss of life that begins at death and runs forward until the end of life expectancy. Loss-of-enjoyment-of-life damages are pre-death damages. *See Durham v. Marberry*, 356 Ark. 481, 491, 156 S.W.3d 242, 247–48 (2004).

Loss-of-life damages are an independent element of damages provided for under Arkansas's survival statute. ARK. CODE ANN. § 16-62-101(b) ("In addition to all other elements of damages provided by law, a decedent's estate may recover for the decedent's loss of life as an independent element of damages."). See *also One Nat. Bank v. Pope*, 372 Ark. 208, 214, 272 S.W.3d 98, 103 (Ark. 2008) ("We hold that an estate seeking loss-of-life damages pursuant to section 16-62-101(b) must present *some* evidence, that the decedent valued his or her life, from which a jury could infer and derive that value and on which it could base an award of damages. While the Estate urges that mere proof of life and then death is sufficient, we disagree. That being said, we do not suggest that the evidence required be limited to direct evidence, as circumstantial evidence may certainly be used as well.").

4) **Increased Risk of Harm.** Arkansas has not specifically addressed the issue of increased risk of harm. The Arkansas Supreme Court has stated that it will consider adopting a cause of action for lost chance of survival in a medical malpractice case. *Holt ex rel. Estate of Holt v. Wagner*, 344 Ark. 691, 697, 43 S.W.3d 128, 132 (2001).

5) **Disfigurement.** Arkansas recognizes disfigurement as an element of damages.

6) **Loss of normal life.** Arkansas recognizes loss of normal life as an element of damages.

7) **Disability.** Arkansas law recognizes that a disability may cause a loss of earning capacity, which is compensable.

8) **Past pain and suffering.** Arkansas recognizes past pain and suffering as a compensable element of damages. Pain and suffering can be inferred from the serious nature of the injury, and mental anguish can be inferred from the extent of physical pain. There are no definite rules or standards to measure compensation for pain and suffering. The extent of medical expenses is not a controlling factor. Arkansas allows plaintiffs to use a per diem basis to justify an award of pain and suffering. Arkansas does not, however, allow for an attorney to ask the jurors to put themselves in the shoes of the plaintiffs.

9) **Future pain and suffering.** Arkansas allows for a plaintiff to recover for pain and suffering that is reasonably certain to be experienced in the future, provided that the

evidence establishes with a reasonable degree of certainty that the future pain and suffering will occur. Awards for future pain and suffering are not reduced to present value.

10) **Loss of society.** Arkansas law allows for claims of loss of consortium between a husband and wife. The spouse is entitled to damages to fairly compensate him or her for the reasonable value of any loss of the services, society, companionship, and marriage relationship. *White v. Mitchell*, 263 Ark. 787, 568 S.W.2d 216 (1978). Claims for loss of consortium are derivative and must accompany an award to the injured partner. Children do not have claims for loss of consortium. *Gray v. Suggs*, 292 Ark. 19, 728 S.W.2d 148 (1987). Arkansas also allows for a wrongful death action to be brought by the personal representative or heirs at law of the deceased, to include a surviving spouse, children, father, mother, or siblings of a deceased. ARK. CODE ANN. § 16-62-102.

11) **Loss of income, wages, earnings.** Arkansas allows a plaintiff to recover for loss of income, wages, and earnings. Motivation, post-injury income, credibility, demeanor, and a multitude of other factors are matters to be considered in claims for wage-loss-disability benefits in excess of permanent-physical impairment. *Henson v. General Elec.*, 99 Ark. App. 129, 257 S.W.3d 908 (2008).

Last Clear Chance Doctrine

The "last clear chance" doctrine provides generally that the plaintiff who negligently subjects himself or herself to a risk of harm may recover when the defendant discovers or could have discovered the plaintiff's peril had he or she exercised due diligence, and thereafter fails to exercise reasonable care to avoid injuring the plaintiff. The last clear chance doctrine has been subsumed by the adoption of Arkansas's comparative negligence statutes. *See England v. Costa*, 364 Ark. 116, 122, 216 S.W.3d 585, 589 (2005); *Miller v. Hometown Propane Gas, Inc.*, 86 Ark. App. 189, 167 S.W.3d 172 (2004).

Mitigation

In Arkansas, a party cannot recover damages for a wrong, even if it is legally attributable to and proximately caused by another party, if the resulting damages could have been avoided or reduced. An injured party who fails to promptly seek medical attention may be barred from recovering those injuries that could have been prevented. Mitigation is an affirmative defense and the burden of proving that the plaintiff failed to exercise reasonable care to avoid or reduce damages is on the defendant. *See* Arkansas Model Jury Instructions–Civil, AMI 2230; *Jones v. McGraw*, 374 Ark. 483, 288 S.W.3d 623 (Ark. 2008).

Punitive Damages

A) **Punitive damages generally.** Punitive damages do not depend on the underlying theory or cause of action, but instead rest on the defendant's conduct. *See Gilmer v. Walt Disney Co.*, 915 F. Supp. 1001 (W.D. Ark 1996). Punitive damages are appropriate when the defendant acts with malice. *Satterfield v. Rebsamen Ford, Inc.*, 253 Ark. 181, 485 S.W.2d 192 (1972). In tort, a plaintiff must generally establish that the defendant "intentionally

pursued a course of conduct for the purpose of causing injury or damage." *See* Arkansas Model Jury Instructions–Civil, AMI 2218. Punitive damages may also be awarded if a defendant acts with such willfulness, wantonness, or conscious indifference to consequences that malice can be inferred. *Wallace v. Dustin*, 284 Ark. 318, 681 S.W.2d 375 (1984). The Arkansas Supreme Court has allowed punitive damages when the plaintiff has demonstrated a reckless disregard for the rights and safety of others. *Stein v. Lukas*, 308 Ark. 74, 823 S.W.2d 832 (1992).

Punitive damages are dependent upon the recovery of compensatory damages, as an award of actual damages is a predicate for the recovery of punitive damages. *Bayer CropScience LP v. Schafer*, 2011 Ark. 518, at 13, 385 S.W.3d 822, 832. Negligence alone, no matter how gross, is never enough to support punitive damages. *Nat'l Bank of Commerce v. McNeill Trucking Co., Inc.*, 309 Ark. 80, 828 S.W.2d 584 (1992). Punitive damages ordinarily are not recoverable for breach of a contract unless a willful or malicious act exists in connection with the contract. *Dews v. Halliburton Indus. Inc.*, 288 Ark. 532, 541, 708 S.W.2d 67, 71-72 (1986). This principle means that, when an action sounds in contract, there must be some affirmative tortious act on which punitive damages are predicated in addition to the claimed breach before punitive damages may be deemed recoverable. *Curtis v. Partain*, 272 Ark. 400, 614 S.W.2d 671 (1981) (holding that a bare allegation of fraud that results in monetary loss does not justify punitive damages in a contract action). The law has long recognized the view that a contracting party has the option to breach a contract and pay damages if it is more efficient to do so. *Id*. at 8, 665 S.W.2d at 280.

B) Standard for punitive damages. Arkansas has stated the following standard for reviewing a claim of excessive punitive damages:

> We consider the extent and enormity of the wrong, the intent of the party committing the wrong, all the circumstances, and the financial and social condition and standing of the erring party. Punitive damages are a penalty for conduct that is malicious or perpetrated with the deliberate intent to injure another. When punitive damages are alleged to be excessive, we review the proof and all reasonable inferences in the light most favorable to the appellees, and we determine whether the verdict is so great as to shock the conscience of this court or to demonstrate passion or prejudice on the part of the trier of fact. It is important that the punitive damages be sufficient to deter others from comparable conduct in the future. The conscious indifference of the alleged wrongdoer to the wrong committed is a pertinent factor in assessing punitive damages.

Union Pacific R.R. Co. v. Barber, 356 Ark. 268, 300–01, 149 S.W.3d 325, 346 (2004) (quoting *Advocat Inc. v. Sauer,* 353 Ark. 29, 50-51, 111 S.W.3d 346, 358 (2003)).

C) **Insurability of punitive awards.** Punitive damages arising out of an intentional tort are not insurable. However, punitive damages arising out of accident are insurable. *See S. Farm Bureau Cas. Ins. Co. v. Daniel*, 246 Ark. 849, 440 S.W.2d 582 (1969).

D) **Punitive damages caps.** Under the CJRA, a cap was placed on punitive damages; however, in *Bayer CropScience LP v. Schafer*, the Arkansas Supreme Court ruled

ARK. CODE ANN. § 16-55-208 of the CJRA unconstitutional under article 5, section 32 of the state constitution, finding that "precedents firmly establish that article 5, section 32 bestows upon the General Assembly the power to limit the amount of recovery *only* in matters arising between employer and employee." 2011 Ark. 518 (citing *Stapleton v. M.D. Limbaugh Constr. Co.*, 333 Ark. 381, 969 S.W.2d 648 (1998)).

Recovery of Pre- and Post-Judgment Interest

Pre-judgment interest is only awarded in Arkansas when the amount of damages is definitely ascertainable by mathematical computation, or if the evidence furnishes data that make it possible to compute the amount without reliance on opinion or discretion. *Woodline Motor Freight, Inc. v. Troutman Oil Co., Inc.*, 327 Ark. 448, 938 S.W.2d 565 (1997). Even when the amount is ascertainable, the inability to determine the time of the injury bars an award of pre-judgment interest. *Mitcham v. First State Bank of Crossett*, 333 Ark. 598, 970 S.W.2d 267 (1998). Pre-judgment interest is generally held to be capped at 6% when no rate of interest has been agreed upon by the parties. *Killiam v. Tex. Oil & Gas Corp*., 303 Ark. 547, 798 S.W.2d 419 (1990).

Post-judgment interest is awarded by statute at the rate provided by contract or 10% per annum, but not to exceed the maximum interest under the Arkansas Constitution, Article 19, § 13. *See* ARK. CODE ANN. § 16-65-114. The Arkansas Constitution limits interest to federal primary credit rate. *Pakay v. Davis*, 367 Ark. 421, 241 S.W.3d 257 (2006).

Recovery of Attorneys' Fees

Arkansas follows the "American Rule" that each litigant must pay his or her own attorneys' fees. Fee shifting is not allowed unless expressly authorized by statute. *McQuillan v. Mercedes-Benz Credit Corp*., 331 Ark. 242, 961 S.W.2d 729 (1998). While negligence cases are governed by the American Rule, the Arkansas General Assembly has provided for the award of attorneys' fees in cases for breach of contract. *See* ARK. CODE ANN. § 16-22-308.

Settlement Involving Minors

Settlements involving minors that exceed $5,000 require the establishment of a guardianship for the minor and then, upon application to the court, obtaining a court order approving any such settlement. ARK. CODE ANN. § 28-65-502; *see also Walker v. Stephens*, 3 Ark. App. 205, 626 S.W.2d 200 (1981) (holding that a parent has no power to authorize a settlement of a minor's tort claim without court approval).

"On petition of the guardian of the estate, the court, if satisfied that the action would be in the interest of the ward and his or her estate, may make an order authorizing the settlement or compromise of any claim by or against the ward or his or her estate, whether arising out of contract, tort, or otherwise, and whether arising before or after the appointment of the guardian." ARK. CODE ANN. § 28-65-318(a). "A settlement of a tort claim against a ward made by or on behalf of the guardian of the estate shall be binding, if otherwise valid, without authorization or approval by the court." *Id. at* 318(b). "A discharge, acquittance, or receipt given by a guardian of the estate

for any claim other than one arising out of tort shall be valid in favor of any person who takes it in good faith, but the guardian shall assume the burden of establishing that any compromise not previously approved by the court was made in the interest of the ward and his or her estate and shall be liable to his or her ward if he or she or his or her estate is injured thereby." *Id*. at § 28-65-318(c).

Taxation of Costs

The Arkansas Rules of Civil Procedure provide that costs shall be allowed to the prevailing party if the court so directs, unless a statute or rule makes an award mandatory. ARK. R. CIV. P. 54(d)(1). Costs are limited to the following: filing fees and other fees charged by the clerk; fees for service of process and subpoenas; fees for the publication of warning orders and other notices; fees for interpreters appointed under Rule 43; witness fees and mileage allowances as provided in Rule 45; fees of a master appointed pursuant to Rule 53; fees of experts appointed by the court pursuant to Rule 706 of the Arkansas Rules of Evidence; and expenses, excluding attorney's fees, specifically authorized by statute to be taxed as costs. ARK. R. CIV. P. 54(d)(2). The award of costs is within the discretion of the trial court. *Zhan v. Sherman*, 323 Ark. 172, 913 S.W.2d 776 (1996).

The Arkansas Rules of Civil Procedure also allow for the taxation of costs in the event a party declines an offer of judgment and receives a verdict less favorable than that offered at trial. *See* ARK. R. CIV. P. 68. Under an offer of judgment, costs include "reasonable litigation expenses, excluding attorneys' fees." This language has been interpreted to include such matters as attorneys' meals and travel expenses, outside consultants retained, preparation of trial exhibits, and office expenses directly related to the litigation. ARK. R. CIV. P. 68 (Reporter's Notes).

Income Tax

A court may not instruct a jury that the plaintiff's recovery for personal injury is tax free. However, the measure of damages for a wage loss is the gross amount of wages. Taxes, Social Security, retirement contributions or other withholdings may not be used to reduce a plaintiff's recovery for lost wages. Taxation is not a material issue to the determination of damages. *Cates v. Brown*, 278 Ark. 242, 248, 645 S.W.2d 658, 661-62 (1983).

Indivisibility of Jury Awards

When the jury's verdict is rendered on a general verdict form, it is an indivisible award. The Arkansas appellate courts will not speculate on what the jury found where a general jury verdict is used. Therefore, when special interrogatories concerning liability or damages are not requested, the appellate courts will neither question nor theorize about the jury's findings. As a result, a general verdict will be upheld if it can be supported by any claim in the case. *Union Pacific R.R. Co. v. Barber*, 356 Ark. 268, 293, 149 S.W.3d 325, 341 (2004).

Evidence to Support Damages

"A damages award is not a lottery ticket; the amount of damages must be supported by substantial evidence. If evidence does not support the amount awarded, and the amount is sufficiently

excessive in relation to the evidence presented at trial that it shocks the conscience of the appellate court, then we must order remittitur or remand for a new trial." *Vaccaro Lumber v. Fesperman*, 100 Ark. App. 267, 267 S.W.3d 619 (2007).

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.