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Arkansas Supreme Court Strikes Down “Tort Reform” Law

January 27, 2012 By [Keith Ecker](#)

Justices of the Arkansas Supreme Court



The Arkansas Supreme Court put the state’s legislature in its place with its decision in a recent [medical malpractice case](#). On Jan 19, the state’s highest court struck down provisions of the controversial 2003 Civil Justice Reform Act, a law that the legislature passed to place limitations on civil claims. The decision comes on the heels of a [December 2011 court](#) ruling that struck down the legislature’s instatement of damages caps on lawsuits.

The recent case, *Broussard v. St. Edward Mercy Health*, creates a definitive separation between the rights and power of the state’s legislature and the state’s court system. At issue

was whether the legislature had the power to create a law that would limit who could serve as an expert witness in civil suits. Expert witnesses are commonly relied upon for medical malpractice and [product liability](#) cases.

“I was not surprised by the Arkansas Supreme Court’s decision,” says [Gerry Schulze](#), a lawyer at [Baker Schulze & Murphy](#) and the attorney who argued the Broussard case before the court. “It seemed to me that in previous cases the court had already drawn a very clear line about what would be considered within the court’s jurisdiction and what would be in the legislature’s realm.”

A Win for Victims of Malpractice

The Broussard case concerned Dr. Stephen Seffense of Arkansas’ St. Edward Mercy Medical Center, who performed surgery on Teresa Broussard in April of 2006. Shortly after the operation, Broussard developed what she thought was a burn near the surgical site, which had become painfully swollen. The area only became worse within the week after her release, becoming covered in black and purple lines.

She then went back to the hospital and was put under the care of nephrologist Dr. Michael Coleman, Jr. While under Coleman’s care, Broussard sought and obtained a consultation with a dermatologist, who said her skin would slough off and heal. A little over a week later, she was checked into a burn center where she had the area removed and received skin grafts. Broussard then filed suit against both Dr. Seffense and Dr. Coleman.

The lower court threw the case out, citing that since Broussard’s expert witness was neither a surgeon nor a nephrologist, she and her attorney failed to meet the criteria established by the 2003 Civil Justice Reform Act’s provision that established an expert witness in a [medical malpractice case](#) must work within the same specialty as the defendant.

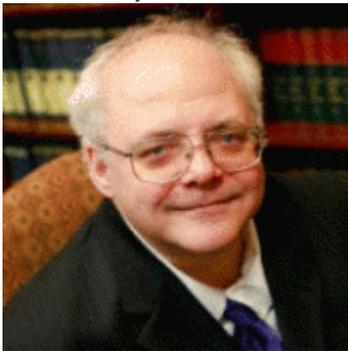
“Our theory was that any doctor practicing in a hospital regardless of their specialty should not necessarily have treated this burn because we don’t expect doctors to be universalists,” Schulze says. “But what any doctor should have done was to get her to someone who did know what they were doing.”

In the end, the Arkansas Supreme Court agreed with Schulze's argument writing, "The authority to decide who may testify and under what conditions is a procedural matter solely within the province of the courts." The case was then sent back to the lower court.

Battling Branches

The issues at play in the Broussard case are fairly technical. Basically, the legislature felt it was in its power to create laws that could instruct the court on how to conduct cases, specifically who should be accepted as an expert witness. Yet upon reviewing the state's constitution, the state Supreme Court determined the legislature was overstepping its authority.

Gerry Schulze



"This decision should not come as a surprise to the legislature," Schulze says. "When they first passed this law, there was a lot of public comment about how they need to restrict any changes to the law that would be consistent with the constitution because is it the obligation of the branches of government to comply with the state constitution. I think the problem here is they failed to do that."

The legislature presented the act to the public as a type of "[tort reform](#)," a popular term coined to describe legislation that restricts consumers' access to and rights within the courts. Schulze believes the expert witness section of the act was intended to make medical malpractice lawsuits too cost-prohibitive for patients to

pursue.

"If the provision had been constitutional, it would require three separate experts for our case: a general surgeon, a nephrologist and the expert we ended up getting," Schulze says. "This would have made the case much more expensive to try."

Similarly, in December, [a case](#) concerning rice farmers challenged damages caps provision in the 2003 act, citing that the Arkansas constitution explicitly bars any laws that place limitations on the amount "to be recovered for injuries resulting in death or for injuries to persons or property." Under the 2003 law, the farmers would have been limited to a total of \$1 million in punitive damages. In the end, they were awarded roughly \$48 million in punitive and compensatory damages.

Finding an Expert Witness

Thomas J. Simeone



Expert witnesses are essential in cases involving complex issues that are not easily understood by nonprofessionals. Medical professionals and engineers are often called into court to serve as expert witnesses and to bolster a party's argument.

Attorney [Thomas Simone](#) of [Simeone & Miller](#) provides some helpful guidance on how you and your attorney should go about finding an expert witness:

- **Get the medical bills and records that relate to your claim.** "We let the client do it because if the medical office sees a request from a lawyer they'll be put on notice," Simeone says.



- **Find a doctor in the appropriate area of medicine to review your records.** “The doctor will either say ‘Yes, this is malpractice’ or ‘No, this isn’t,’” Simeone says. The doctor who reviews your case may not necessarily be the doctor who serves as your expert witness.
- **Make sure your lawyer finds a testifying physician in the relevant field of medicine.** “You want someone who is sharp, good on cross-examination and in front of a jury, reputable, affordable, and responsive,” Simeone says.

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