CV-20-492

IN THE ARKANSAS SUPREME COURT

SAMANTHA EDWARDS, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF WILLIAM BOBBY WRAY EDWARDS, DECEASED, AND ARLIEGH GRAYCE EDWARDS, DECEASED; AND AS PARENT AND NEXT FRIEND FOR PEYTON HILL, A MINOR — **APPELLANT**

vs.

ERIC JAMES CORNELL THOMAS AND McELROY TRUCK LINES, INC. — **APPELLEES**

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, CHIEF JUDGE SUSAN O. HICKEY PRESIDING

APPELLANT'S BRIEF AND ADDENDUM

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POINT ON APPEAL

1. Under the facts of this case, whether Ark. Code Ann. § 27-34-106(a) violates the separation-of-powers doctrine under article 4, section 2, and Amendment 80, section 3, of the Arkansas Constitution.

TABLE OF AUTHORITIES

Cases

Statutes, Rules, and Constitutional Provisions

STATEMENT OF THE CASE

This case is before this Court to answer a question certified by the United States District Court for the Western District of Arkansas, Chief Judge Susan O. Hickey, presiding. **Add. 1.** The case arises out of a deadly motor vehicle accident between a semi pulling a trailer and a pick-up truck in Howard County, Arkansas. **Add. 2.** Plaintiff is the Administratrix of the Estates of her husband and daughter who were killed in the accident, and the parent and next friend of her son who was injured. They were all three in the pick-up truck. Defendants are the driver of the semi, Eric James Cornell Thomas, and his employer McElroy Truck Lines, Inc.

Defendant Thomas ran a stop sign on August 2, 2018, while driving the semi pulling a trailer in the course and scope of his employment with Defendant McElroy Truck Lines. **Add. 2.** He collided with the pick-up truck driven by Plaintiff's husband, William Bobby Wray Edwards, in which Plaintiff's daughter, Arleigh, and son, Peyton, were riding. **Add. 2.** Mr. Edwards and Arleigh were killed, and Peyton was injured. **Add. 2.** These facts are undisputed.

Defendant Thomas admits he was negligent and his negligence was the cause of the collision. **Add. 2.** Defendant McElroy admits the same and

admits it is vicariously liable for any injuries caused by Mr. Thomas's negligence. **Add. 2-3.** These facts are also undisputed.

Nevertheless, both defendants assert "fault" on the part of Mr. Edwards for failing to put Arleigh in a child safety seat. **Add. 3.** Arleigh was just two-years old at the time of the wreck, and Plaintiff's proof will be that she weighed less than 60 pounds. **Add. 2.** Thus, Arleigh was required to be restrained in a child passenger safety seat secured to the vehicle. **Add. 3**; Ark. Code Ann. § 27-34-104(b). She was not so restrained at the time of the wreck. **Add. 2.**

Plaintiff moved the district court for partial summary judgment on Defendants' allocation-of-fault defense. Plaintiff argued that under Ark. Code Ann. § 27-34-106(a) Mr. Edwards' failure to place Arleigh in a child safety seat is not negligence as a matter of Arkansas substantive law, so that failure cannot be compared with Defendant Thomas' negligence that caused the wreck. **Add. 1, 30-39, 60-71.** Defendants countered that Ark. Code Ann. § 27-34-106(a) is an unconstitutional legislative rule of pleading, practice, or procedure under Ark. Const. Amend. 80, § 3. **Add. 1, 40-59.** Finding no controlling Arkansas precedent, the district court certified the following question to this Court:

Under the facts of this case, whether Ark. Code Ann. § 27-34-106(a) violates the separation-of-powers doctrine under article 4, section 2, and Amendment 80, section 3, of the Arkansas Constitution.

Add. 1, 2.

ARGUMENT

The answer to the certified question turns on the constitutionality of Ark. Code Ann. § 27-34-106(a). This Court's standards for reviewing whether statutes are unconstitutional place a heavy burden on Defendants. Statutes are presumed to be valid and carry a strong presumption of constitutionality. To declare an act unconstitutional, "the incompatibility between it and the constitution must be clear. … Any doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality," and the burden of proving a defect lies with the attacker. *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, at 4, 308 S.W.3d 135, 139 (2009) (internal citation omitted). Whenever possible, a statute will be construed so that it does not offend the constitution. *Ibid.*

Defendant Thomas admits he ran a stop sign and caused the collision that killed Arleigh Edwards. **Add. 2.** Defendant McElroy Trucking admits it is liable for Defendant Thomas's negligence. **Add. 2-3.** But both want to shift some or all of the fault for Arleigh's death onto her father by having the jury compare Mr. Thomas's fault in causing the collision with fault they allege Arleigh's father committed when he failed to strap Arleigh into a child safety seat. **Add. 1, 28-19.**

The problem with this argument is Arkansas's legislature declared as a matter of state substantive law that failing to use a child safety seat is not an act of negligence for which fault may be compared. Ark. Code Ann. § 27-34-106(a). That statute reads,

> The failure to provide or use a child passenger safety seat shall not be considered, under any circumstances, as evidence of comparative or contributory negligence, nor shall failure be admissible as evidence in the trial of any civil action with regard to negligence.

This statute is part of Arkansas' Child Passenger Protection Act. Ark. Code Ann. §§ 27-34-101, *et seq.* Defendants counter argument that Ark. Code Ann. § 27-34-106(a) is an unconstitutional legislative rule of pleading, practice, or procedure under Ark. Const. Amend. 80, § 3, **Add. 1, 40-59**, is misplaced and incorrect. Ark. Code Ann. § 27-34-106(a) declares what the substantive law of negligence is, and thus is not a rule of pleading, practice, or procedure.

1. The Statute Defines the Substantive Law of Comparative Fault.

Defendants and Plaintiff agree with respect to one central premise. Following the enactment of Ark. Const. Amend. 80, § 3, a clear separation-of-powers demarcation exists limiting the power of the legislature. Amendment 80, § 3 grants to this Court the exclusive power and duty to

enact rules of pleading, practice, and procedure, and the legislature cannot encroach upon that power by enacting "procedural" rules like rules of evidence. *Johnson*, 2009 Ark. 241, at 7, 308 S.W.3d at 141. Conversely, the legislature may enact, in fact is tasked with enacting, substantive rules of law. *Ibid*.

The critical question for this case, then, is whether Ark. Code Ann. § 27-34-106(a) is a rule of pleading, practice, or procedure forbidden to the legislature or a declaration of the substantive law, which is within the legislature's prerogative. Substantive law is "[t]he part of the law that creates, defines, and regulates the rights, duties, and powers of the parties." *Johnson*, 2009 Ark. 241, at 8, 308 S.W.3d at 141. Procedural law is "[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves." *Summerville v. Thrower*, 369 Ark. 231, 237, 253 S.W.3d 415, 420 (2007).

This statute is a substantive rule of law. It "defines and regulates" the "rights and duties" with respect to providing and using child safety seats. And it declares that the failure to utilize a child safety seat is not an act of negligence. Conversely, it has nothing to do with "prescrib[ing] the steps

for having a right or duty judicially enforced." It doesn't say anything about the steps that must be taken to have a particular right enforced. And because the statute simply declares the failure to use a child safety seat is not negligent, that failure cannot be compared to a defendant's negligence in causing an automobile accident. Stated another way, because failing to utilize a child safety seat is, as a matter of substantive law, not negligent, the failure is irrelevant for fault purposes. A statute simply saying that is perfectly within the legislature's power to enact.

This Court's reasoning in *Mendoza v. WIS Int'l, Inc.*, 2016 Ark. 157, 490 S.W.3d 298 (2016), strongly supports the conclusion that Ark. Code Ann. § 27-34-106(a) is a rule of substantive law. The question in that case was the validity of the part of Arkansas's Mandatory Seatbelt Use statute excluding seatbelt non-use from negligence cases, Ark. Code Ann. § 27-37-703. Citing *Potts v. Benjamin*, 882 F.2d 1320 (8th Cir. 1989), which, as discussed more fully below, held Ark. Code Ann. § 27-34-106(a) is a rule of substantive law, the *Mendoza* plaintiff argued Ark. Code Ann. § 27-37-703 was also part of Arkansas's substantive law defining comparative fault not a rule of evidence forbidden to the legislature by Amendment 80, § 3. This Court disagreed, but it did so because of critical differences in wording between

Ark. Code Ann. § 27-37-703 and Ark. Code Ann. § 27-34-106(a). Focusing on those differences in wording, this Court pointed out how Ark. Code Ann. § 27-34-106(a) is a rule of substantive law and Ark. Code Ann. § 27-37-703 is a rule of evidence.

> The relevant portion Ark. Code Ann. § 27-37-703 simply reads,
>
> > The failure of an occupant to wear a properly adjusted and fastened seat belt shall not be admissible into evidence in a civil action.

Ark. Code Ann. § 27-37-703(a)(1). Ark. Code Ann. § 27-34-106(a), on the other hand, "provides that the failure to place children in child-restraint seats may not be admitted as evidence of comparative or contributory negligence." *Mendoza*, 2016 Ark. 157, at 7, 490 S.W.3d at 302. This wording difference made Ark. Code Ann. § 27-34-106(a) a rule of substantive law and "distinguishable from" Ark. Code Ann. § 27-37-703, a rule of evidence. *Ibid.*

This distinction is compounded by the legislative history of the two statutes. Ark. Code Ann. § 27-37-703 initially read:

> The failure to provide or use a seat belt shall not be considered under any circumstances as evidence of comparative or contributory negligence, nor shall such failure be admissible as evidence in the trial of any civil action with regard to negligence.

Ibid. The legislature amended Ark. Code Ann. § 27-37-703 in 1995 and removed from it "the language 'shall not be considered under any circumstances as evidence of comparative or contributory negligence' and 'with regard to negligence.'" *Ibid* (citing 1995 Ark. Acts 1118). But "the analogous language from the child safety-seat statute was not removed." *Ibid.* This further established that Ark. Code Ann. § 27-34-106(a) is a rule of substantive law whereas Ark. Code Ann. § 27-37-703 is a rule of evidence. Notably, that very language remains in Ark. Code Ann. § 27-34-106(a) today.

The point of the discussion of the reasoning in *Mendoza* is this. *Mendoza* explained this statute *is* a substantive rule of Arkansas comparative-fault law because of the legislature's distinctive wording of the statute, and the Seat Belt Use Statute *is not* because of the legislature's deletion of similar wording in an amendment to it. *Mendoza* strongly counsels that Ark. Code Ann. § 27-34-106(a) is Arkansas substantive law.

Potts v. Benjamin, 882 F.2d 1320 (8th Cir. 1989), is consistent with this conclusion. Again, it also held Ark. Code Ann. § 27-34-106(a) is a rule of substantive law. That case involved a tractor truck piggybacking two other tractor trucks on a freeway in Arkansas failing to stop and causing a chain-

reaction crash in which the car carrying Mrs. Potts and her children was hit. One child, who was not restrained in a safety seat, was thrown from the vehicle, run over by the tractor truck, and killed. The evidence of child safety restraint nonuse was excluded at trial, and a verdict was returned for the plaintiff. The defendants claimed exclusion was error on appeal and that they should have been allowed to introduce the safety seat non-use to reduce or eliminate their liability.

The United States Court of Appeals for the Eighth Circuit disagreed and affirmed the trial court. Ark. Code Ann. § 27-34-106(a) is

> a rule of substantive law. It is part of the Child Passenger Protection Act, Ark. Code Ann. §§ 27-34-101 to -107, a law which places a legal duty upon specified persons to use child safety seats, provides for fines where that duty is breached, and which … removes as a defense in a negligence case any breach of the duty created. A statute modifying the content of state tort law doctrines of contributory and comparative negligence seems to us to be a classic example of the type of substantive rule of law binding upon a federal court in a diversity case.

Potts, 882 F.2d at 1324. That last point is critical: federal courts sitting in diversity are required to accept and apply rules of state substantive law. *Ibid* (citing *Adams v. Fuqua Industries, Inc.*, 820 F.2d 271, 273 (8th Cir. 1987)). Thus, not only was no error committed by forbidding the non-use defense, the law required that decision.

Defendants will likely contend, as they did below, that the *Potts* analysis should be ignored because it was developed within the context of the *Erie* doctrine, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and is only applicable there. Respectfully, this argument misses the point. Why federal courts deem it necessary to distinguish between procedural laws and substantive laws is not determinative. How the law is characterized, as procedural or substantive, is. The cases do not indicate that how a particular law is characterized, as procedural or substantive, varies depending on the context in which the characterization is made. A law is either procedural or it is not; it is either substantive or it is not. The *Erie* analysis is the same analysis this Court undertakes under Amendment 80, § 3 and cases like *Johnson*, therefore *Potts'* holding that Ark. Code Ann. § 27-34-106(a) is substantive law is strong persuasive authority.

This substantive rule of Arkansas law declares failure to use a child safety seat is not negligence that can be compared to a defendant's fault in causing a collision. That's what the statute says, it's what *Potts* holds, and it's what *Mendoza* clarified.

2. The Substantive Law Defines Evidence that is Admissible.

It is true, as Defendants will doubtlessly point out, that the statute has some control over what evidence is admissible. That does not mean it reaches beyond the power of Arkansas's legislature. The substantive law always has at least some control over what evidence is admissible because the substantive law determines what facts are relevant to liability or to defenses.

The dividing line between legislative and judicial authority with respect to evidence has been the source of significant litigation since the enactment of Amendment 80, § 3 and the passage of 2003 Acts of Ark. No. 649, Arkansas' tort reform statute. Again, this Court correctly defined that line as being between substantive law and procedure. *Johnson*, *supra.* This Court has the exclusive power to enact rules of pleading, practice, and procedure. Conversely, the legislature is empowered to enact substantive law and such enactments are valid unless they offend some other portion of the federal or state constitutions.[2]

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[2] For example, a statute limiting the amount that can be recovered for damages in a personal injury case is a change in the substantive law, but it offends Ark. Const. Art. V, § 32. A statute forbidding political speeches in

That is the core of *Johnson's* holding. This Court has employed it to strike down statutes that cross over this line and invade the rulemaking authority. *E.g., Johnson, supra*; *Mendoza, supra, Summerville, supra*; *Broussard v. St. Edward Mercy Health Sys.*, 2012 Ark. 14, 386 S.W.3d 385 (2012). But that holding does not mean that every statute that controls the admission of evidence in a case is forbidden legislative rulemaking. Statutes commonly define what evidence is relevant and admissible either by defining the elements of a cause of action or by defining defenses to a cause of action.

Arkansas' Dram Shop Statute is an example of a statute containing both the elements of a cause of action and defenses to the cause of action each defining what evidence is relevant and therefore admissible. That statute reads,

> In cases where it has been proven that an alcoholic beverage retailer knowingly sold alcoholic beverages to a person who was clearly intoxicated at the time of such sale or sold under circumstances where the retailer reasonably should have known the person was clearly intoxicated at the time of the sale, a civil jury may determine whether or not the sale constitutes a proximate cause of any subsequent injury to other persons. For purposes of this section, a person is considered clearly intoxicated when the person is so obviously intoxicated

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favor of only one party in public parks is a change in the substantive law but surely offends U.S. Const. Amend. 1.

> to the extent that, at the time of such sale, he presents a clear danger to others. It shall be an affirmative defense to civil liability under this section that an alcoholic beverage retailer had a reasonable belief that the person was not clearly intoxicated at the time of such sale or that the person would not be operating a motor vehicle while in the impaired state.

Ark. Code Ann. § 16-126-104.

This statute sets forth certain facts that must be proven to establish the elements of the cause of action.[3] A plaintiff must offer evidence, for example, that a "retailer" sold alcohol to a person who was "clearly intoxicated," or who the retailer should have known was "clearly

[3] As an aside, sort of, the statute also controls what must be pleaded in the complaint. Facts establishing that the plaintiff is entitled to relief must be pleaded with particularity under the Arkansas fact pleading rules. Ark. R. Civ. P. (8)(a)(1). Thus, while the legislature cannot promulgate a rule of pleading, *Summerville, supra*, it can still control what must be pleaded in order to make out a cause of action by defining the substantive law. At least one fact supporting each element of the statutory cause of action must be pleaded or the complaint is subject to dismissal. Ark. R. Civ. P. 12(b)(6). This control over what must be pleaded by defining the substantive law is not an offense to Ark. Const. Amend. 80, § 3.

intoxicated" at the time of the sale. It requires evidence that the person who purchased the alcohol was "so obviously intoxicated" that he or she presented "a clear danger to others." It also sets forth facts that can be proven as a defense to the cause of action, including that the seller "had a reasonable belief" that the purchaser was not clearly intoxicated at the time of the purchase, and that the seller reasonably believed that the purchaser "would not be operating a motor vehicle" while intoxicated.

Thus, the statute effectively defines what evidence is relevant and therefore admissible (absent some other evidentiary exclusion). Proof that a purchaser was staggering or slurring speech is relevant and admissible because it supports the proposition that the purchaser was clearly intoxicated at the time of the purchase, or that a seller ought to have known that he or she was clearly intoxicated at the time. See *Balentine v. Sparkman*, 327 Ark. 180, 185-86, 937 S.W.2d 647, 650 (1997). Likewise, the statute makes relevant proof that the purchaser had another, sober, person driving him or her at the time of the purchase, or that the purchaser was on foot at the time of the purchase, because a "reasonable belief" that the purchaser would not be "operating a motor vehicle in an impaired state" is a defense to the cause of action.

Facts like these in the context of a Dram Shop case have a tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed. R. Evid. 401; Ark. R. Evid. 401. That is the very definition of relevance, and each of these facts is relevant because of the elements of the cause of action or defenses to it. And the legislature effectively defined that relevance in a statute it obviously had the power to enact because it establishes the substantive law.

The Medical Malpractice Statute is a more pointed example because it contains provisions that reside on both sides of the substance/procedure line. A portion of that statute defines a plaintiff's "burden of proof" as follows:

> (a) In any action for medical injury, when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge, the plaintiff shall have the burden of proving:
>
> (1) **By means of expert testimony provided only by a medical care provider of the same specialty as the defendant**, the degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, *engaged in the same type of practice or specialty in the locality in which he or she practices or in a similar locality*;
>
> (2) **By means of expert testimony provided only by a medical care provider of the same specialty as the defendant** that the

> medical care provider *failed to act in accordance with that standard*; and
>
> (3) By means of expert testimony provided only by a qualified medical expert that as a proximate result thereof the injured person suffered injuries that would not otherwise have occurred.

Ark. Code Ann. § 16-114-206(a) (emphasis added). The highlighted portions of the statute are key to this analysis. The *italicized* portions define the substantive law and are valid even though they significantly control what evidence may be admitted in a case. The **bolded** portions tread on this Court's rulemaking authority and are not valid. *Broussard, supra.*

With respect to the italicized portions, the legislature determined that a cause of action for medical negligence is defined by a medical care provider failing to meet a particular standard of care. That standard of care is the standard in the medical community where the defendant provider practices or a similar medical community. This proof is a substantive element of a plaintiff's case that must be met or the case must be dismissed. *Gilbow v. Richards*, 2010 Ark. App. 780 (2010); *Williamson v. Elrod*, 348 Ark. 307, 72 S.W.3d 489 (2002).

Admissibility is thus dictated by the statute. Testimony about a generic standard of medical care, or a standard of care in some specialized

medical community in no way similar to the medical community where the defendant provider practices, is not relevant and is not admissible. The only relevant testimony concerning standard of care is the standard of care in the medical community where the defendant provider practices or a similar medical community. That is so because of the substantive law defining what medical negligence is and is not.

This definition of medical negligence in the substantive law significantly touches on the admissibility of expert testimony. If an expert witness fails to equate his or her opinions to the standard of care in the defendant provider's medical community or a similar medical community, the testimony is not competent, should be excluded, and absent some other expert testimony filling the void, the plaintiff's case is subject to dismissal. See *e.g., Skaggs v. Johnson*, 323 Ark. 320, 915 S.W.2d 253 (1996). That is so not because the expert is not qualified to give an opinion but because the opinion he or she is giving does not have anything to do with proving medical negligence as that term is statutorily defined. It's irrelevant to the question.

Thus, by defining the elements of a valid cause of action, the legislature also controls what evidence is admissible. Evidence relating the

standard of care in the defendant provider's medical community or a similar medical community is admissible because it informs the medical-negligence question. Experts who relate their opinions to that local standard may give their opinions. But evidence about an unrelated standard of care does not inform the medical-negligence question, and expert opinions outside this "locality rule" are excluded. This control over the evidence that may be admitted in a case is a valid exercise of legislative power arising from its enactment of substantive law.

The bolded portions of the statute are something quite different. These portions do not define the elements of a cause of action or a defense to a cause of action. Rather, they attempt to limit *who is qualified to testify about the standard of care* to certain medical care providers, namely those in the "same specialty" as the defendant provider and no one else. They set "qualifications a witness must possess before he or she may testify in court," *Broussard*, 2012 Ark. 14, at 6, 386 S.W.3d at 389, which invades the Arkansas Supreme Court's rulemaking authority.

That is the established dividing line. The legislature can legitimately control admissible evidence by defining the substantive law. The substantive law defines what evidence is meaningful. That definition can

reach even as far as whether an expert opinion is admitted. But where the legislature reaches into who may testify in terms of qualifications, or how and when certain items of evidence are to admitted on purely procedural grounds, it invades this Court's rulemaking authority and the measure cannot stand.

Ark. Code Ann. § 27-34-106(a) falls on the substantive side of the dividing line. It is a legislative pronouncement that failing to use a child safety seat is not a negligent act and therefore cannot be used to compare the injured plaintiff's fault to the fault of the person who caused the accident so as to reduce an award of damages to the plaintiff. Non-use, in other words, is not relevant to fault because of how the legislature defined negligence and fault in this context.

CONCLUSION

This Court should answer the certified question "No." Ark. Code Ann. § 27-34-106(a) is a substantive rule of law declaring that failing to utilize a child safety seat is not negligent and is therefore irrelevant to comparative fault. This Court should so state.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the forgoing was submitted for filing electronically under the eFlex filing system and served upon counsel of record on the 30th day of October, 2020:

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Addendum

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

SAMANTHA EDWARDS, Individually, and as
SPECIAL ADMINISTRATRIX of the ESTATE
of WILLIAM BOBBY WRAY EDWARDS, Deceased,
and ARLEIGH GRAYCE EDWARDS, Deceased; and as
PARENT and NEXT FRIEND for Peyton Hale, a Minor PLAINTIFF

v. Case No. 4:19-cv-4018

ERIC JAMES CORNELL THOMAS
and MCELROY TRUCK LINES, INC. DEFENDANTS

CERTIFICATION ORDER

On February 10, 2020, Plaintiff filed a motion for partial summary judgment, arguing that Defendants' affirmative defense of apportionment of fault should be barred because Arkansas Code Annotated § 27-34-106(a) prohibits parties from offering the failure to provide or use a child safety restraint as evidence of comparative or contributory negligence in civil negligence actions. Defendants opposed the motion, arguing that section 106(a) is unconstitutional. Finding no controlling Arkansas precedent on the issue, the Court denied the motion on July 10, 2020, indicating that it intended to certify a question to the Supreme Court of Arkansas regarding the unsettled area of Arkansas law raised by the parties. The Court ordered the parties to confer and produce an agreed statement of relevant facts for purposes of certification. The parties did so and filed their proposed facts on July 31, 2020. This order now issues.

Pursuant to Rule 6-8 of the Rules of the Supreme Court of Arkansas, this Court, on its own motion, certifies to the Supreme Court of Arkansas a question of law that may be determinative of this case and as to which it appears there is no controlling precedent in the decisions of the Supreme Court of Arkansas.

I. QUESTION OF LAW TO BE ANSWERED

Under the facts of this case, whether Ark. Code Ann. § 27-34-106(a) violates the separation-of-powers doctrine under article 4, section 2, and Amendment 80, section 3, of the Arkansas Constitution.

II. FACTS RELEVANT TO THE QUESTION[1]

This wrongful death and survival action arose out of an August 2, 2018, two-vehicle accident that took place in Howard County, Arkansas. Defendant Eric James Cornell Thomas failed to obey a stop sign while driving a tractor trailer in the course and scope of his employment with Defendant McElroy Truck Lines, Inc. The tractor Mr. Thomas was operating struck a pick-up truck driven by William Bobby Wray Edwards, in which Mr. Edwards' daughter, Arleigh, and stepson, Peyton, were riding. Following the initial impact, the pick-up struck a tree. Arleigh was then ejected from the cab of the pick-up. Mr. Edwards and Arleigh were killed as a result of the accident.

At the time of the collision, Arleigh was two years old. Plaintiff will offer proof at trial that at the time of the collision, Arleigh weighed less than sixty pounds. Arleigh was not restrained in a child passenger safety seat or any other passenger restraint system at the time of the collision. A "Cosco Scenera Next" brand child safety seat was in the back seat of the pick-up at the time of the collision.

For purposes of this civil action, Defendant Thomas admits he was negligent and his negligence was the cause of the collision between the tractor and the pick-up. Defendant McElroy admits the same and admits it is vicariously liable for any injuries proximately caused by Mr.

[1] Pursuant to Ark. Sup. Ct. & Ct. App. R. 6-8(c)(2), the Court ordered the parties to confer and produce an agreeable statement of facts. The parties did so, largely agreeing on the facts, with exception of one fact proposed by each side that the other side would not agree to. In accordance with Rule 6-8(c)(2), the Court has reviewed those facts and will include both, as they help frame the question of law to be certified and are not mutually exclusive.

Thomas's negligence. However, both defendants allege (as a defense) fault on the part of Mr. Edwards for failing to put or maintain Arleigh in a child passenger safety seat. Defendants will offer expert biomechanical proof at trial that, had Arleigh been properly restrained, then she would not have been ejected and would have survived the accident.

Pursuant to Ark. Code Ann. § 16-111-111, Defendants have given notice to the Arkansas Attorney General of their challenge to the constitutionality of Ark. Code Ann. § 27-34-106(a) insofar as it would bar or limit admission of evidence at trial of the failure to use a child passenger safety seat.

III. ARKANSAS LAW

With limited exceptions that are not applicable here, Arkansas's Child Passenger Protection Act ("CPPA") imposes a duty on motor vehicle operators in Arkansas to protect any child passenger under the age of fifteen by securing and maintaining the child in a child passenger restraint system that meets applicable federal safety standards. Ark. Code Ann. § 27-34-104(a). The CPPA requires the use of different restraint systems depending on the age and weight of the child. Any child less than six years of age and who weighs less than sixty pounds must "be restrained in a child passenger safety seat properly secured to the vehicle." Ark. Code Ann. § 27-34-104(b).

The CPPA also provides, in relevant part, that "[t]he failure to provide or use a child passenger safety seat shall not be considered, under any circumstances, as evidence of comparative or contributory negligence, nor shall failure be admissible as evidence in the trial of any civil action with regard to negligence." Ark. Code Ann. § 27-34-106(a). This provision is the parties' primary fighting point. Defendants want to argue and offer evidence at trial that Mr. Edwards was, at least partially, at fault for Arleigh's death because he failed to secure and maintain her in a suitable child

passenger safety seat at the time of the collision. Plaintiff contends that Defendants cannot do so because section 106(a) of the CPPA prohibits parties from offering an individual's failure to provide or use a child passenger safety seat as evidence of comparative or contributory negligence in civil negligence cases. Defendants argue that section 106(a) should be disregarded and not applied in this case because it violates the separation-of-powers doctrine and Amendment 80 to the Arkansas Constitution, and as such, is an unconstitutional legislative incursion into the Supreme Court of Arkansas's rulemaking power.

Historically, the Supreme Court of Arkansas took the position that the Arkansas judiciary and legislature shared judicial rulemaking authority. *See Jackson v. Ozment*, 283 Ark. 100, 101-03, 671 S.W.2d 736, 738 (1984) (holding that the Arkansas Constitution did not give the Supreme Court of Arkansas the exclusive authority to make rules of court procedure). However, since that time, the Supreme Court of Arkansas has overruled that line of cases and subsequently held that Amendment 80 to the Arkansas Constitution gave the Supreme Court of Arkansas the exclusive power to set rules of pleading, practice, and procedure for Arkansas state courts, and that both direct and indirect intrusions into that domain by the state legislature are unconstitutional. *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, at 8, 308 S.W.3d 135, 141; *see also* Ark. Const. art. 4, § 2 ("No person or collection of persons, being of one of these [branches of government], shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted."). In other words, the Arkansas legislature can enact "substantive" rules of law but cannot enact "procedural" rules of law.

Law is substantive when it is "[t]he part of the law that creates, defines, and regulates the rights, duties, and powers of the parties." *Johnson*, 2009 Ark. 241, at 8, 308 S.W.3d at 141 Procedural law is defined as "[t]he rules that prescribe the steps for having a right or duty judicially

enforced, as opposed to the law that defines the specific rights or duties themselves." *Summerville v. Thrower*, 369 Ark. 231, 237, 253 S.W.3d 415, 420 (2007) (citing Black's Law Dictionary 1221 (7th ed. 1999)). It is undisputed that in Arkansas, rules of evidence are "rules of pleading, practice and procedure." *Johnson*, 2009 Ark. 241, at 10, 308 S.W.3d at 142. Accordingly, if a statute establishes a rule of evidence, it violates the separation-of-powers doctrine and is unconstitutional. *Mendoza v. WIS Int'l, Inc.*, 2016 Ark. 157, 5, 490 S.W.3d 298, 301 (2016).

Plaintiff argues that Ark. Code Ann. § 27-34-106(a) is a substantive rule of law, while Defendants argue that it is procedural. Neither party, however, has pointed to precedent of the Supreme Court of Arkansas directly addressing this issue.

The Court is aware of only two cases that discuss Ark. Code Ann. § 27-34-106(a). The first is *Potts v. Benjamin*, a case from 1989 where the Eighth Circuit conducted an *Erie* analysis[2] to determine that the district court, sitting in diversity, properly applied section 106(a) to exclude evidence of the nonuse of a child safety restraint system as evidence of comparative or contributory negligence in a civil negligence case. 882 F.2d 1320, 1324 (8th Cir. 1989). Putting aside that a decision from the Eighth Circuit is not binding on the Supreme Court of Arkansas, *Potts* relied on no Arkansas caselaw to form its conclusion and appeared to instead make an *Erie*-educated guess that the statute is a substantive rule of law for *Erie* purposes. *See id.* ("[Section 106(a)] seems to us to be a classic example of the type of substantive rule of law binding upon a federal court in a diversity case."). *Potts* was also decided before Amendment 80 to the Arkansas Constitution gave the exclusive rulemaking authority for Arkansas courts to the Supreme Court of Arkansas. *Potts* was not asked to perform a separation-of-powers analysis, so that case cannot be read to definitively establish that section 106(a) is "substantive" for purposes of a separation-of-powers

[2] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

analysis because, under that analysis, any statute that conflicts with or alters the courts' procedural rules is unconstitutional. *See Johnson*, 2009 Ark., at 8, 308 S.W.3d at 141. Thus, *Potts* is not determinative of the issue at hand.

The other case, *Mendoza v. WIS Int'l, Inc.*, is no more instructive. In that case, the Supreme Court of Arkansas was asked to decide whether a separate statute, Ark. Code Ann. § 27-37-703, violated Amendment 80 to the Arkansas Constitution by limiting the admissibility of a party's non-use of a seatbelt as evidence in civil actions. *Mendoza*, 2016 Ark. at 9, 490 S.W.3d at 303. The *Mendoza* plaintiff relied heavily on *Potts* as analogous caselaw and argued that the statute was constitutional because it was a substantive rule of law. *Id.* The Supreme Court of Arkansas rejected that argument, finding that Ark. Code Ann. § 27-37-703 was a legislative attempt to dictate court procedure, and thus, was unconstitutional. *Id.* at 9-10, 490 S.W.3d at 303-04.

Mendoza mentioned briefly that *Potts* found "that section 27-34-106 established a rule of substantive law." *Id.* at 6, 490 S.W.3d at 302. However, as the Court reads it, *Mendoza* expressed no opinion on *Potts*' holding regarding section 106(a) and did not formally adopt or otherwise recognize *Potts*' holding as law. *Mendoza* also distinguished the language of Ark. Code Ann. § 27-37-703 from that of Ark. Code Ann. § 27-34-106(a).[3] *See id.* at 7, 490 S.W.3d at 302. However, *Mendoza* neither explained why it distinguished the two statutes, nor did it appear to base its holding on the difference between the two statutes. Thus, *Mendoza*'s discussion of section 106(a) is merely dicta.

As a result, there appears to be no controlling precedent from the Supreme Court of Arkansas deciding whether Ark. Code Ann. § 27-34-106(a) violates the separation-of-powers

[3] In short, *Mendoza* noted that Ark. Code Ann. § 27-37-703 originally read almost identically to Ark. Code Ann. § 27-34-106(a) but in 1995, "the language 'shall not be considered under any circumstances as evidence of comparative or contributory negligence' and 'with regard to negligence' was removed" from section 27-37-703. *Mendoza*, 2016 Ark. 157 at 7, 490 S.W.3d at 302.

doctrine under article 4, section 2, and Amendment 80, section 3, of the Arkansas Constitution. This question of law appears to be a matter of substantial public importance that would merit certification to the Supreme Court of Arkansas. The question touches on public policy concerns that are of particular interest to Arkansas state law. Further, the question concerns an unsettled issue of the constitutionality or construction of an Arkansas statute. Thus, the Court finds that it is in the best administration of justice to seek further guidance from the Supreme Court of Arkansas.

IV. REFORMULATION OF THE QUESTION

The United States District Court acknowledges that the Supreme Court of Arkansas, acting as the receiving court, may reformulate the question presented.

V. COUNSEL OF RECORD AND PARTIES

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VI. CONCLUSION

For aforementioned reasons, the question herein is hereby certified to the Supreme Court of Arkansas pursuant to Rule 6-8 of the Rules of the Supreme Court of Arkansas. The Clerk of this Court is hereby directed to forward this Order to the Supreme Court of Arkansas under his official seal.

IT IS SO ORDERED, this 7th day of August, 2020.

/s/ Susan O. Hickey
Susan O. Hickey
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

SAMANTHA EDWARDS, Individually, and as SPECIAL ADMINISTRATRIX of the ESTATE of WILLIAM BOBBY WRAY EDWARDS, Deceased, and ARLEIGH GRAYCE EDWARDS, Deceased; and as PARENT and NEXT FRIEND for PEYTON HALE, a Minor — **PLAINTIFF**

VS. NO. 19-4018

ERIC JAMES CORNELL THOMAS and McELROY TRUCK LINES, INC. — **DEFENDANTS**

COMPLAINT

COMES NOW the Plaintiff Samantha Edwards, Individually and as Special Administratrix of the Estates of William Bobby Wray Edwards, deceased, and Arleigh Grayce Edwards, deceased, and as Parent and Next Friend of Peyton Hale, a Minor, by and through her attorneys, RAINWATER, HOLT & SEXTON, P.A., and for her Complaint against the Defendants, states and alleges the following:

I. RESIDENCY & PARTIES

1. Plaintiff Samantha Edwards was at all times relevant a citizen and resident of Mineral Springs, Howard County, Arkansas.

2. Plaintiff Samantha Edwards is the duly appointed Special Administratrix of the Estate of William Bobby Wray Edwards, deceased, having been appointed by the Circuit Court of Howard County, Arkansas on August 31, 2018. **Exhibit 1.**

3. The deceased, William Bobby Wray Edwards, prior to his death, resided with his wife, Plaintiff Samantha Edwards, in Mineral Springs, Howard County, Arkansas.

4. Plaintiff Samantha Edwards is the duly appointed Special Administratrix of the Estate of Arleigh Grayce Edwards, deceased, having been appointed by the Circuit Court of Howard County, Arkansas on August 31, 2018. **Exhibit 2**.

5. The deceased, Arleigh Grayce Edwards, prior to her death, resided with her mother, Plaintiff Samantha Edwards and her father, the deceased William Bobby Wray Edwards, in Mineral Springs, Howard County, Arkansas.

6. Plaintiff Samantha Edwards is the natural mother and natural guardian of Peyton Hale, a minor, and as such will be suing on his behalf as Next Friend pursuant to Federal Rule of Civil Procedure 17.

7. At all times relevant, Peyton Hale, resided with his mother, Plaintiff Samantha Edwards, and his step-father, the deceased William Bobby Wray Edwards in Mineral Springs, Howard County, Arkansas.

8. Separate Defendant Eric James Cornell Thomas was at all times relevant a citizen and resident of Natchez, Adams County, Mississippi.

9. At all times relevant, Separate Defendant McElroy Truck Lines, Inc. was a registered corporation with the Secretary of State of Alabama, with its principal place of business at 111 US Highway 80 Spur Road, Cuba, Alabama 36907. Separate Defendant McElroy's registered agent for service of process is J C McElroy, Jr., whose principal business address is P.O. Box 104, Cuba, Alabama 36907 or 111 US Highway 80 Spur Road, Cuba, Alabama 36907.

10. At all times relevant, Defendant McElroy conducted its trucking business in and around Arkansas and maintained significant contacts with the state of Arkansas through its trucking business.

11. The incident giving rise to this cause of action occurred at the intersection of Highway

371 and Highway 355, Howard County, Arkansas.

II. JURISDICTION AND VENUE

12. All of the allegations previously plead herein are re-alleged as though stated word-for-word.

13. The United States District court for the Western District of Arkansas, Texarkana Division, has original jurisdiction of this case pursuant to 28 U.S.C. §1332 as the Plaintiff, Samantha Edwards, the decedents William Bobby Wray Edwards and Arleigh Grayce Edwards and the minor Peyton Hale, all were residents of Mineral Springs, Howard County, Arkansas at the time of the incident; Defendant Thomas was a resident of Natchez, Adams County Mississipi, and; Defendant McElroy's principal place of business was Cuba Alabama, and the amount in controversy exceeds $75,000, the amount required for federal court jurisdiction in diversity of citizenship cases.

14. Venue for this case is governed by 28. U.S. C. § 1391. Venue lies properly in the Western District of Arkansas, Texarkana Division, as the Plaintiff is a resident of Howard County, Arkansas, and the incident from which this complaint arises occurred in Howard County, Arkansas.

III. BASIC PREMISE

15. This is a negligence case arising from a motor vehicle collision that occurred at the intersection of Highway 371 and Highway 355, Howard County, Arkansas, on or about August 2, 2018, when Separate Defendant Thomas, while working in the scope of his employment with Defendant McElroy, failed to stop at a stop sign which caused his 2016 International tractor and trailer to collide with the vehicle the deceased Mr. William Bobby Wray Edwards was driving (Arleigh Grayce Edwards and Peyton Hale were passengers in Edwards' vehicle).

IV. FACTS

16. All of the allegations previously plead herein are re-alleged as though stated word-for-

word.

17. On or about August 2, 2018, at approximately 10:46 am, the decedent William Bobby Wray Edwards was traveling westbound on US Highway 371 in Howard County, Arkansas in a 2003 Ford F-150.

18. At such time, Bobby Edwards's daughter, Arleigh Edwards, and his step-son, Peyton Hale, were passengers in his vehicle.

19. On or about August 2, 2018, Separate Defendant Thomas was an employee of McElroy Truck Lines, Inc. and at the time of the collision, Defendant Thomas was working in the course and scope of his employment and/or agency with Defendant McElroy.

20. On or about August 2, 2018, at approximately 10:46 am, Separate Defendant Thomas was traveling northbound on Highway 355 in Howard County, Arkansas in a 2016 International Prostar Semi Truck with a flatbed trailer in tow.

21. As Separate Defendant Thomas approached the intersection of Highway 355 and Highway 371, he failed to stop at the posted stop sign which caused him to run through the intersection and collide with William Bobby Wray Edwards's vehicle.

22. As a result of the collision, William Bobby Wray Edwards and his daughter, Arleigh Edwards, were killed, and Edwards's step-son, Peyton Hale, suffered severe personal injuries.

23. Prior to his death, William Bobby Wray Edwards was gainfully employed and earing a livelihood for himself and contributing to his family.

24. William Bobby Wray Edwards was 33 years of age and was a healthy, able-bodied man with a normal life expectancy.

25. The deceased, William Bobby Wray Edwards, left surviving him, his wife, Plaintiff Samantha Edwards, his sons, David Edwards and Aiden Edwards, and step-son Peyton Hale (with

whom Bobby Edwards stood in loco parentis), each of whom have suffered and will continue to suffer mental anguish by reason of such wrongful death.

26. Prior to her death, Arleigh Grayce Edwards was 2 years of age, a happy, able-bodied young girl with a normal life expectancy.

27. The deceased, Arleigh Grayce Edwards, left surviving her, her mother, Plaintiff Samantha Edwards, and her three brothers, David Edwards, Aiden Edwards, and Peyton Hale, each of whom have suffered and will continue to suffer mental anguish by reason of such wrongful death

28. At the time of the collision, William Bobby Wray Edwards stood in loco parentis to his step-son, Peyton Hale, by way of providing financial, emotional and parental support and guidance to Peyton Hale.

V. CAUSE OF ACTION - NEGLIGENCE OF SEPARATE DEFENDANT THOMAS

29. All of the allegations previously plead herein are re-alleged as though stated word-for-word.

30. Separate Defendant Thomas was negligent when he failed to stop at the posted stop sign, and drove through the intersection at Highway 371 and Highway 355 in a willful and wanton manner and in total disregard for the rights and safety of others.

31. Defendant Thomas was negligent in the following particulars:

(a) Driving in such a careless manner as to evidence a failure to keep a proper lookout for other traffic, in violation of Ark. Code Ann. § 27-51-104(a);

(b) Driving in such a careless manner as to evidence a failure to maintain proper control, in violation of Ark. Code Ann. § 27-51-104(a), (b)(6) & (b)(8);

(c) Driving at a speed greater than was reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing, in violation of Ark. Code Ann. § 27-51-201(a)(1);

(d) Operating a vehicle in such a manner which would cause a failure to maintain

control, in violation of Ark. Code Ann. § 27-51-104(b)(6);

(e) Driving in a manner that was inattentive and such inattention was not reasonable and prudent in maintaining vehicular control, in violation of Ark. Code Ann. § 27-51-104(b)(8);

(f) Failing to keep a lookout for other vehicles, in violation of the common law of Arkansas;

(g) Failing to keep his vehicle under control, in violation of the common law of Arkansas;

(h) Failing to drive at a speed no greater than was reasonable and prudent under the circumstances, having due regard for any actual or potential hazards, in violation of the common law of Arkansas;

(i) Using and talking on a phone at the time of the collision which distracted him from driving and keeping proper lookout; and

(j) Otherwise failing to exercise ordinary care under the circumstances.

VI. CAUSE OF ACTION - NEGLIGENCE OF SEPARATE DEFENDANT MCELROY

32. All of the allegations previously plead herein are re-alleged as though stated word-for-word.

33. Defendant McElroy was negligent in the following particulars:

(a) Failing to have adequate policies and procedures regarding its drivers driving and using a phone simultaneously;

(b) Failing to adequately train, educate, direct, prepare, set policy or give guidance to its drivers regarding driving and using a phone simultaneously;

(c) Failing to adequately train, educate, direct, prepare, set policy or give guidance to its drivers regarding safe driving practices;

(d) Failing to exercise ordinary care with respect to training, educating, directing, preparing, setting policy or giving guidance to its drivers regarding safe driving practices; and

(e) Otherwise failing to exercise ordinary care under the circumstances.

VII. CAUSE OF ACTION - RESPONDEAT SUPERIOR LIABILITY

34. All of the allegations previously plead herein are re-alleged as though stated word-for-word.

35. At all times relevant, Separate Defendant Thomas was an employee of Separate Defendant McElroy Truck Lines, Inc.

36. At the time of the incident, Separate Defendant Thomas was acting within the scope of his employment with Defendant McElroy.

37. Separate Defendant McElroy Truck Lines, Inc. is legally responsible and vicariously liable for the negligence of its agent and employee, Defendant Thomas, under the legal doctrines of joint enterprise, respondeat superior, and the principles of agency as adopted in the State of Arkansas.

38. The negligence of Defendant Thomas is imputed to Defendant McElroy Truck Lines, Inc. as a matter of law.

VIII. PROXIMATE CAUSATION

39. All of the allegations previously plead herein are re-alleged as though stated word-for-word.

40. The Defendants' negligence was an actual and proximate cause of the collision described herein and of the personal injuries and damages sustained by Plaintiffs.

IX. INJURIES AND COMPENSATORY DAMAGES

41. All of the allegations previously plead herein are re-alleged as though stated word-for-word.

42. William Bobby Wray Edwards and Arleigh Grayce Edwards sustained severe personal injuries and died, and Plaintiffs sustained damages, as a result of the collision.

43. William Bobby Wray Edwards and his daughter, Arleigh Grayce Edwards, experienced extreme terror immediately before and after the collision.

44. William Bobby Wray Edwards and Arleigh Grayce Edwards incurred medical expenses as a result of the incident.

45. The Estate of William Bobby Wray Edwards and Arleigh Grayce Edwards, who are represented in this litigation by Plaintiff Samantha Edwards, Special Administratrix, have incurred funeral expenses and medical expenses.

46. Peyton Hale, a minor, has suffered physical injury, emotional injury and required medical and other health treatment and will require said treatment into the future.

47. Plaintiff, Samantha Edwards, has incurred medical expenses and other expenses for and on behalf of her son, Peyton Hale, all of which were proximately caused by the Defendants' negligence.

48. Plaintiff is entitled to recover under Arkansas law for William Bobby Wray Edwards's and Arleigh Grayce Edwards's wrongful death and survival damages for their heirs at law under A.C.A. §16-62-102 and A.C.A. §16-62-101, which includes, but are not limited to, the following measure of damages:

(a) pecuniary injuries sustained, including benefits, goods, and services that the decedents would have contributed, including the instruction, moral training, and supervision of education that might have reasonably been given;

(b) mental anguish suffered in the past and reasonably certain to be suffered in the future;

(c) Reasonable value of funeral expenses;

(d) conscious pain and suffering of the decedents prior to their death;

(e) conscious pain and suffering Peyton Hale has suffered in the past and is reasonably

certain to suffer in the future;

(f) value of any earnings, profits or salary lost by the decedents' and their heirs;

(g) loss of earning capacity suffered by Peyton Hale;

(h) any scars, disfigurement and visible results of the injuries sustained by the decedents and Peyton Hale;

(i) the decedents' loss of life.

49. Plaintiff hereby demands loss of life damages to the full extent allowed under Arkansas law for the death of William Bobby Wray Edwards and Arleigh Grayce Edwards.

50. Plaintiff claims all damages allowed by Arkansas law for the wrongful death of William Bobby Wray Edwards and Arleigh Grayce Edwards.

51. The heirs at law of William Bobby Wray Edwards, including Peyton Hale with whom Edwards stood in loco parentis, and the heirs at law of Arleigh Grayce Edwards are entitled to recover damages for the wrongful death of William Bobby Wray Edwards and Arleigh Grayce Edwards.

52. Plaintiff, Samantha Edwards, was married to the decedent, Bobby Edwards at the time of his death and Samantha Edwards is entitled to recover for loss of consortium and be awarded damages for the reasonable value of any loss of the services, society, companionship, and marriage relationship of her husband proximately caused by the Defendants' negligence.

53. The injuries and damages described herein have been suffered in the past and will be continuing in the future.

X. DEMAND FOR JURY TRIAL

54. Plaintiff Samantha Edwards respectfully requests a trial by jury.

XI. DEMAND & PRAYER

WHEREFORE, Plaintiff Samantha Edwards respectfully prays for judgment against the Defendants for a sum in excess of that required for federal court jurisdiction in diversity of citizenship cases and which is sufficient to fully compensate Plaintiff for any and all damages Plaintiff is entitled to recover under Arkansas law, including pre-judgment interest and post judgment interest at the maximum rate allowed by law; for reasonable expenses; costs; and for all other proper relief to which she may be entitled.

Respectfully Submitted,

Attorneys for Plaintiff

By: _____

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

SAMANTHA EDWARDS, Individually, and as SPECIAL ADMINISTRATRIX of the ESTATE of WILLIAM BOBBY WRAY EDWARDS, Deceased, and ARLEIGH GRAYCE EDWARDS, Deceased; and as PARENT and NEXT FRIEND for Peyton Hale, a Minor — PLAINTIFF

VS. NO. 4:19-CV-4018-SOH

ERIC JAMES CORNELL THOMAS and McELROY TRUCK LINES, INC. — DEFENDANTS

ANSWER

Defendants Eric James Cornell Thomas and McElroy Truck Lines, Inc., for their Answer to Complaint, as supplemented:

1. Admit that Plaintiff was at the time of the accident a resident of Howard County, Arkansas, as alleged in Paragraph 1 of the Complaint

2. Deny that a document referred to as "Exhibit 1" was attached to the original Complaint served on (or otherwise presented to) Defendants, but admit that "Exhibit 1" was attached to the Supplement to Complaint. Lack sufficient information at this time to admit to the accuracy of the information contained in Exhibit 1, but admit that William Bobby Wray Edwards died on August 2, 2018, and admit that in 2018, Samantha Edwards was appointed by the Circuit Court of Howard County as Administratrix of the Estate of William Bobby Wray Edwards, deceased, as referenced in Paragraph 2 of the Complaint

3. Upon information, admit that William Bobby Wray Edwards lived in Howard County, Arkansas, but currently lack sufficient information to admit to the remaining material allegations contained in Paragraph 3 of the Complaint and therefore deny them.

4. Deny that a document referred to as "Exhibit 2" was attached to the original Complaint served on (or otherwise presented to) Defendants, but admit that Exhibit 2 was attached to the Supplement to Complaint. Lack sufficient information at this time to admit to the accuracy of the information contained in Exhibit 2, but admit that Arleigh Grace Edwards died on August 2, 2018, and admit that on August 31, 2018, Samantha Edwards was appointed by the Circuit Court of Howard County as Administratrix of the Estate of Arleigh Grayce Edwards, deceased.

5. Upon information, admit that, prior to her death, Arleigh Grayce Edwards lived in Howard County, Arkansas, but currently lack sufficient information to admit to the remaining material allegations contained in Paragraph 5 of the Complaint and therefore deny them.

6. Lack sufficient information at this time to admit to the material allegations contained in Paragraph 6 of the Complaint and therefore deny them.

7. Lack sufficient information at this time to admit to the material allegations contained in Paragraph 7 of the Complaint and therefore deny them.

8. Admit the material allegations contained in Paragraph 8 of the Complaint.

9. Admit the material allegations contained in Paragraph 9 of the Complaint.

10. Deny that Defendant McElroy conducted all or much of its trucking business in Arkansas, but admit that at certain times it periodically sent trucks to and through the State of Arkansas in connection with its trucking business as alleged in Paragraph 10 of the Complaint.

11. Admit to the material allegations contained in Paragraph 11 of the Complaint.

12. In response to Paragraph 12 of the Complaint, adopt by reference the admissions and denials previously set forth in Paragraphs 1-11 of this Answer.

13. Admit the material allegations contained in Paragraph 13 of the Complaint.

14. Admit to the material allegations contained in Paragraph 14 of the Complaint.

15. Deny that the 2016 International tractor or the trailer attached to it were owned by separate Defendant Thomas, but admit that he was driving the 2016 International Tractor and admit to the remaining material allegations contained in Paragraph 15 of the Complaint.

16. In response to Paragraph 16 of the Complaint, adopt by reference the admissions and denials previously set forth in Paragraphs 1-15 of this Answer.

17. In response to Paragraph 17 of the Complaint, admit that at times during the morning of August 2, 2018, decedent Bobby Wrap Edwards was traveling

westbound on US Highway 371 in Howard County, Arkansas, in a 2003 Ford F-series pickup,.

18. Admit that Arleigh Edwards and Peyton Hale were passengers in the vehicle as alleged in Paragraph 18 of the Complaint.

19. Admit to the material allegations contained in Paragraph 19 of the Complaint.

20. In response to Paragraph 20 of the Complaint., admit that on the morning of August 2, 2018, separate Defendant Thomas was traveling northbound on Highway 355 in Howard County, Arkansas, in a 2016 International with a flatbed trailer in tow.

21. Admit that, as Defendant Thomas approached the intersection of Highway 355 and Highway 371, he did not notice the stop sign, admit that he entered the intersection, and admit that his truck collided with the William Bobby Wray Edwards's vehicle as alleged in Paragraph 21 of the Complaint.

22. Admit that as a result of the collision, William Bobby Wray Edwards and Arleigh Edwards were killed and that Peyton Hale suffered personal injuries, but lack sufficient information at this time to admit to the remaining material allegations contained in Paragraph 22 of the Complaint.

23. Upon information, admit that prior to his death William Bobby Wray Edwards had been employed, but currently lack sufficient information at this time to admit to the remaining material allegations contained in Paragraph 23 of the Complaint and therefore deny them.

24. Upon information, admit that William Bobby Wray Edwards was nearly 34 years of age at the time of his death, but lack sufficient information at this time to admit to the remaining material allegations contained in Paragraph 24 of the Complaint and therefore deny them.

25. Lack sufficient information at this time to admit to the material allegations contained in Paragraph 25 of the Complaint and therefore deny them.

26. Admit that at the time of the accident, Arleigh Grayce Edwards was nearly three years of age, but lack sufficient information at this time to admit to the remaining material allegations contained in Paragraph 26 of the Complaint and therefore deny them.

27. Admit that Arleigh Grace Edwards died as a result of the accident, but currently lack sufficient information to admit to the remaining material allegations contained in Paragraph 27 of the Complaint.

28. Lack sufficient information at this time to admit to the material allegations contained in Paragraph 28 of the Complaint and therefore deny them.

29. In response to Paragraph 29 of the Complaint, adopt the admissions and denials previously set forth in Paragraphs 1-28 of this Answer.

30. Admit that Defendant Thomas was negligent insofar as he did not notice the stop sign and drove into the intersection of Highways 371 and 355, but deny that he acted in a willful or wanton manner and deny the remaining material allegations contained in Paragraph 30 of the Complaint.

31. Admit that Defendant Thomas was negligent as set forth in Paragraph 30 of this Answer and admit that he had been using a hands-free telephone at times prior to the accident, but deny the remaining material allegations contained in Paragraph 31 of the Complaint.

32. In response to Paragraph 32 of the Complaint, adopt the admissions and denials previously set forth in Paragraphs 1-31 of this Answer.

33. Deny the material allegations contained in Paragraph 33 of the Complaint.

34. In response to Paragraph 34 of the Complaint, adopt the admissions and denials previously set forth in Paragraphs 1-33 of this Answer.

35. Admit the material allegations contained in Paragraph 35 of the Complaint.

36. Admit the material allegations contained in Paragraph 36 of the Complaint.

37. In response to Paragraph 37 of the Complaint, admit that for purposes of the subject accident and Defendants' admissions set forth in Paragraph 30 of this Answer, the doctrines of vicarious liability and *respondent superior* apply to the relationship between Defendant McElroy Trucks Lines, Inc., and Defendant Thomas, who at the time of the incident was McElroy Truck Lines, Inc.'s agent and employee.

38. State that Paragraph 38 of the Complaint sets forth a conclusion f law and therefore no response is necessary. To the extent that a response is deemed

necessary, Defendants admit that, for purposes of the subject accident, the doctrines of vicarious liability and *respondent superior* apply to the relationship between Defendant McElroy Truck Lines, Inc., and Defendant Thomas, who at the time of the incident was McElroy Truck Lines Inc.'s agent and employee.

39. In response to Paragraph 39 of the Complaint, adopt the admissions and denials previously set forth in Paragraphs 1-38 of this Answer.

40. Admit that William Bobby Wray Edwards and Arleigh Grayce Edwards died as a result of the collision and that Peyton Hale received certain injuries as a result of the collision, admit that Defendant Thomas was negligent as set forth in Paragraph 30 of the Answer and that, in connection with the subject accident, the doctrine of *respondeat superior* applies to the relationship between McElroy Truck Lines, Inc,, and Defendant Thomas, but deny that McElroy Truck Lines, Inc., was itself directly negligent and therefore deny the remaining material allegations contained in Paragraph 40 of the Complaint.

41. In response to Paragraph 41 of the Complaint, adopt the admissions and denials previously set forth in Paragraphs 1-40 of this Answer.

42. Admit that William Bobby Wray Edwards and Arleigh Grace Edwards received fatal injuries and died as a result of the accident, but currently lack sufficient information to admit to the remaining material allegations contained in Paragraph 42 of the Complaint and therefore deny them.

43. Lack sufficient information at this time to admit to the material allegations contained in Paragraph 43 of the Complaint and therefore deny them.

44. Lack sufficient information at this time to admit to the material allegations contained in Paragraph 44 of the Complaint and therefore deny them.

45. Lack sufficient information at this time to admit to the material allegations contained in Paragraph 45 of the Complaint and therefore deny them.

46. Upon information, admit that Peyton Hale was a minor who sustained certain physical injuries that required medical treatment, but lack sufficient information at this time to admit to the remaining material allegations contained in Paragraph 46 of the Complaint and therefore deny them.

47. Admit that Peyton Hale sustained injuries as a result of the accident, but lack sufficient information at this time to admit to the remaining material allegations contained in Paragraph 47 of the Complaint and therefore deny them.

48. Admit that William Bobby Wray Edwards and Arleigh Grayce Edwards died as a result of the accident and that Peyton Hale sustained injuries as a result of the accident, but lack sufficient information at this time to admit to the remaining material allegations contained in Paragraph 48 of the Complaint and therefore deny them.

49. State that the contents of Paragraph 49 of the Complaint assert no material factual allegations and therefore no response is necessary. To the extent that a response to Paragraph 49 is deemed necessary, it is admitted that William Bobby Wray Edwards and Arleigh Grayce Edwards died as a result of the accident, but the remaining material allegations in that paragraph are denied.

50. State that the contents of Paragraph 50 of the Complaint assert no material factual allegations and therefore no response is necessary. To the extent that a response to Paragraph 50 is deemed necessary, it is admitted that William Bobby Wray Edwards and Arleigh Grayce Edwards died as a result of the accident, but the remaining allegations in that paragraph are denied.

51. State that the contents of Paragraph 51 of the Complaint assert no material factual allegations and therefore no response is necessary. To the extent that a response to Paragraph 49 is deemed necessary, it is admitted that William Bobby Wray Edwards and Arleigh Grayce Edwards died as a result of the accident, but the remaining allegations in that paragraph are denied.

52. State that the contents of Paragraph 52 of the Complaint assert no material factual allegations and therefore no response is necessary. To the extent that a response to Paragraph 52 is deemed necessary, it is admitted that William Bobby Wray Edwards and Arleigh Grayce Edwards died as a result of the accident, but the remaining allegations in that paragraph are denied.

53. Lack sufficient information at this time to admit to the material allegations contained in Paragraph 53 of the Complaint and therefore deny them.

54. Admit that Plaintiff may request a trial by jury for genuine issues of material fact as alleged in Paragraph 54.

55. Deny each and every material allegation of the Complaint not specifically admitted herein.

56. Upon information, state that at the time of the accident, there was negligence and fault on the part of William Bobby Wray Edwards in that, while operating the vehicle, he failed to use a shoulder belt, lap belt, or other suitable passenger restraint system in violation of Ark. Code Ann. § 27-37-702, and that he likewise unfortunately failed to insure that Arleigh Grayce Edwards was restrained in a suitable child restraint or other restraint system. Such acts or omissions on the part of Mr. Edwards constitute negligence that proximately caused injuries and damages and that would be imputed to his Estate and, therefore, to Plaintiff.

57. State that at least some of the claims Plaintiff is asserting herein are barred by the doctrine of payment and/or waiver insofar as certain costs were previously advanced by or on behalf of Defendants.

58. Reserve the right to file cross claims or other amended pleadings pending discovery.

59, In accordance with Ark. Code Ann. § 16-61-201 & 202, Defendants Thomas and McElroy Truck Lines, Inc., give notice as to the identity of an at-fault non-party and the factual basis for that non-party's fault. Defendants hereby identify William Bobby Wray Edwards, formerly of Howard County, Arkansas, as a non-party whose fault led to fatal injuries to Arleigh Grayce Edwards. That fault includes the fact that, in spite of the requirements of Ark. Code Ann. § 27-34-104, he did not properly place Arleigh Grayce Edwards into a properly functioning child passenger safety seat or other suitable passenger restraint system or otherwise failed to insure that she remain in such a child passenger safety seat or passenger

restraint system at times leading up to the accident, and that upon impact, due to her not being properly restrained, she received fatal injuries that were proximately caused by her being unrestrained and therefore ejected from the pickup truck that William Bobby Wray Edwards was driving. Furthermore, fault should be allocated *inter alia* in accordance with the Uniform Contribution Among Tortfeasors Act, as amended, Ark. Code Ann. § 16-61-201 & 202, and Act 1116 of 2013.

WHEREFORE, Defendants Eric James Cornell Thomas and McElroy Truck Lines, Inc., pray that the Complaint of the Plaintiff be dismissed, that they recover their costs, fees, and all other good and proper relief.

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By _____
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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

SAMANTHA EDWARDS, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF WILLIAM BOBBY WRAY EDWARDS, DECEASED, AND ARLIEGH GRAYCE EDWARDS, DECEASED; AND AS PARENT AND NEXT FRIEND FOR PEYTON HILL, A MINOR — **PLAINTIFF**

v. — **No. 4:19-CV-4018-SOH**

ERIC JAMES CORNELL THOMAS AND McELROY TRUCK LINES, INC. — **DEFENDANTS**

MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO COMPARATIVE FAULT AND NON-PARTY FAULT RELATED TO CHILD SAFETY RESTRAINT NONUSE

Plaintiff moves for partial summary judgment with respect to Defendants' asserted defense of failure to use a child safety restraint. Plaintiff pleads as follows in support of this motion:

1. Defendant Eric James Cornell Thomas ran a stop sign on August 2, 2018, and collided with a pick-up truck driven by William Bobby Wray Edwards in which Mr. Edwards' daughter, Arleigh, and step-son, Peyton, were riding. Mr. Edwards and Arleigh were killed.

2. Defendant Thomas admits he was negligent and his negligence was the cause of the collision. Defendant McElroy Truck Lines, Inc. admits the same and admits it is vicariously liable for any injuries caused by Mr. Thomas's negligence.

3. Nevertheless, both defendants assert "fault" on the part of Mr. Edwards for failing to put Arleigh in a child safety seat. Answer ¶¶ 56 and 59. This is an attempt to

shift some or all of the blame for Arleigh's death to Mr. Edwards and reduce or eliminate Defendants' liability for the wreck.

4. Defendants' defense is precluded as a matter of law by Ark. Code Ann. § 27-34-106(a) and *Potts v. Benjamin*, 882 F.2d 1320 (8th Cir. 1989). Therefore, Plaintiff is entitled to summary judgment as to the defense.

5. The bases for the relief sought are set forth in the memorandum brief accompanying this motion.

Wherefore, Plaintiff asks that summary judgment be entered in her favor on the defense of failure to utilize a child safety restraint for Arleigh.

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT
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v. — **No. 4:19-CV-4018-SOH**

ERIC JAMES CORNELL THOMAS AND McELROY TRUCK LINES, INC. — **DEFENDANTS**

BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO COMPARATIVE FAULT AND NON-PARTY FAULT RELATED TO CHILD SAFETY RESTRAINT NONUSE

Plaintiff offers this brief in support of her motion for partial summary judgment with respect to Defendants' asserted defense of failure to use a child safety restraint. Clearly-established Circuit law precludes this defense, thus judgment should be entered on it in favor of Plaintiff.

INTRODUCTION

Defendant Thomas ran a stop sign on August 2, 2018, while driving a semi pulling a trailer in the course and scope of his employment with Defendant McElroy Truck Lines. He collided with a pick-up truck driven by William Bobby Wray Edwards in which Mr. Edwards' daughter, Arleigh, and step-son, Peyton, were riding. Mr. Edwards and Arleigh were killed. These facts are undisputed.

Defendant Thomas admits he was negligent and his negligence was the cause of the collision. Defendant McElroy admits the same and admits it is vicariously liable for any injuries caused by Mr. Thomas's negligence. These facts are also undisputed.

Nevertheless, both defendants assert "fault" on the part of Mr. Edwards for failing to put Arleigh in a child safety seat. Answer ¶¶ 56 and 59. This is an attempt to shift some or all of the blame for Arleigh's death to Mr. Edwards and reduce or eliminate Defendants' liability for the wreck Defendant Thomas admits he caused and for which Defendant McElroy admits it is responsible. This sidestep is precluded as a matter of Arkansas substantive law, which applies in this diversity case. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

ARGUMENT

A party may move for summary judgment on any "claim or defense." Fed. R.Civ. P. 56(a). The motion "shall" be granted when the movant shows "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Ibid.* The facts relevant to this motion are not in dispute. The question is purely one of law, namely, can Defendants rely on the failure of Mr. Edwards to employ a child safety restraint system to reduce their liability? A statute and controlling Eighth Circuit precedent hold they cannot.

The statute is Ark. Code Ann. § 27-34-106(a). It reads,

> (a)The failure to provide or use a child passenger safety seat shall not be considered, under any circumstances, as evidence of comparative or contributory negligence, nor shall failure be admissible as evidence in the trial of any civil action with regard to negligence.

On its face, this statute precludes what Defendants want to do. They cannot compare Mr. Thomas's running of the stop sign and colliding with the pick-up with Mr. Edwards' failure to place Arleigh in a child safety restraint.

Indeed, the Eighth Circuit so held in the controlling case, *Potts v. Benjamin*, 882 F.2d 1320 (8th Cir. 1989). That case involved a tractor truck piggybacking two other tractor trucks on a freeway in Arkansas failing to stop and causing a chain-reaction crash in which the car carrying Mrs. Potts and her children was hit. One child, who was not restrained in a safety seat, was thrown from the vehicle, run over by the tractor truck, and killed. The evidence of child safety restraint nonuse was excluded at trial, and a verdict was returned for the plaintiff. The defendants claimed exclusion was error on appeal and that they should have been allowed to introduce the safety seat non-use to reduce or eliminate their liability.

The Eighth Circuit disagreed and affirmed the trial court. Ark. Code Ann. § 27-34-106(a) is

> a rule of substantive law. It is part of the Child Passenger Protection Act, Ark. Code Ann. §§ 27-34-101 to -107, a law which places a legal duty upon specified persons to use child safety seats, provides for fines where that duty is breached, and which … removes as a defense in a negligence case any breach of the duty created. A statute modifying the content of state tort law doctrines of contributory and comparative negligence seems to us to be a classic example of the type of substantive rule of law binding upon a federal court in a diversity case.

Potts, 882 F.2d at 1324. That last point is critical: federal courts sitting in diversity are required to accept and apply rules of state substantive law. *Ibid* (citing *Adams v. Fuqua Industries, Inc.*, 820 F.2d 271, 273 (8th Cir. 1987)). Thus, not only was no error committed by forbidding the non-use defense, the law required that decision.

Defendants Thomas and McElroy may try to side-step the statute and *Potts* by arguing Ark. Code Ann. § 27-34-106(a) is a legislative incursion into rule-making in violation Ark. Const. Amend. 80 § 3 and cite *Mendoza v. WIS Int'l, Inc.*, 2016 Ark. 157, 490 S.W.3d 298 (2016), as support. But *Mendoza* actually supports Plaintiff's position and rejects theirs. The question in that case was the validity the part of Arkansas's Mandatory Seatbelt Use statute excluding seatbelt non-use from negligence cases, Ark. Code Ann. § 27-37-703. Citing the discussion above from *Potts*, the *Mendoza* plaintiff argued Ark. Code Ann. § 27-37-703 was part of Arkansas's substantive law defining comparative fault not a rule of evidence forbidden to the legislature by Amendment 80 § 3. The Arkansas Supreme Court disagreed, but it did so because of the differences in wording between Ark. Code Ann. § 27-37-703 and Ark. Code Ann. § 27-34-106(a) making Ark. Code Ann. § 27-34-106(a) a rule of substantive law and Ark. Code Ann. § 27-37-703 a rule of evidence.

The relevant portion Ark. Code Ann. § 27-37-703 read, "The failure of an occupant to wear a properly adjusted and fastened seat belt shall not be admissible into evidence in a civil action." Ark. Code Ann. § 27-37-703(a)(1). Ark. Code Ann. § 27-34-106(a), on the other hand, "provides that the failure to place children in child-restraint seats may not be admitted as evidence of comparative or contributory negligence." *Mendoza*, 2016 Ark. 157, at 7, 490 S.W.3d at 302. This wording difference made Ark. Code Ann. § 27-34-106(a)

a rule of substantive law and "distinguishable from" Ark. Code Ann. § 27-37-703, a rule of evidence. *Ibid.*

This distinction was compounded by the legislative history of the two statutes. Ark. Code Ann. § 27-37-703 initially read:

> The failure to provide or use a seat belt shall not be considered under any circumstances as evidence of comparative or contributory negligence, nor shall such failure be admissible as evidence in the trial of any civil action with regard to negligence.

Ibid. The legislature amended Ark. Code Ann. § 27-37-703 in 1995 and removed from it "the language 'shall not be considered under any circumstances as evidence of comparative or contributory negligence' and 'with regard to negligence.'" *Ibid* (citing 1995 Ark. Acts 1118). But "the analogous language from the child safety-seat statute was not removed." *Ibid.* This further established that Ark. Code Ann. § 27-34-106(a) is a rule of substantive law whereas Ark. Code Ann. § 27-37-703 is a rule of evidence.

The failure to place a child in a safety restraint is not an act that can be compared to the negligence of another driver who causes a collision injuring the child. Ark. Code Ann. § 27-34-106(a) so establishes and *Potts* so holds. That choice is a legislative choice of substantive law not a rule of evidence. The defense defendants wish to assert is not available to them.

CONCLUSION

Summary judgment should be entered in favor of Plaintiff and against Defendants on the defense of failure to utilize a child safety restraint for Arleigh.

Respectfully Submitted,

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v. — **No. 4:19-CV-4018-SOH**

ERIC JAMES CORNELL THOMAS AND McELROY TRUCK LINES, INC. — **DEFENDANTS**

STATEMENT OF MATERIAL UNDISPUTED FACTS OFFERED IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO COMPARATIVE FAULT AND NON-PARTY FAULT RELATED TO CHILD SAFETY RESTRAINT NONUSE

Plaintiff offers this statement of undisputed material facts in support of her motion for partial summary judgment with respect to Defendants' asserted defense of failure to use a child safety restraint.

1. Defendant Eric James Cornell Thomas ran a stop sign on August 2, 2018, while driving a semi pulling a trailer in the course and scope of his employment with Defendant McElroy Truck Lines, Inc. He collided with a pick-up truck driven by William Bobby Wray Edwards in which Mr. Edwards' daughter, Arleigh, and step-son, Peyton, were riding. Mr. Edwards and Arleigh were killed. Complaint ¶¶ 15, 17-22; Answer ¶¶ 15, 17-22.

2. Defendant Thomas admits he was negligent and his negligence was the cause of the collision. Defendant McElroy admits the same and admits it is vicariously liable for any injuries caused by Mr. Thomas's negligence. Answer ¶¶ 30, 31, 35-38.

3. Both defendants assert as a defense "fault" on the part of Mr. Edwards for failing to put Arleigh in a child safety seat. Answer ¶¶ 56 and 59.

Respectfully Submitted,

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VS. **NO. 4:19-CV-4018-SOH**

ERIC JAMES CORNELL THOMAS and McELROY TRUCK LINES, INC. **DEFENDANTS**

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants Eric James Cornell Thomas and McElroy Truck Lines, Inc., hereby respond to Plaintiff's motion for partial summary judgment and state:

1. Plaintiff's motion for partial summary judgment all but ignores the impact of Amendment 80 to the Arkansas Constitution and the seminal ruling in *Johnson v. Rockwell Automation*, 2009 Ark. 241, 308 S.W.3d 135.

2. Her reliance on dictum in *Potts v. Benjamin*, 882 F.2d 1320 (8th Cir. 1989), is misplaced because the "substantive"/"procedural" dichotomy aluded to there arose in the context of an *Erie* analysis, not in the markedly different constitutional separation-of-powers context. Amendment 80, as interpreted in *Rockwell,* permits no legislative intrusion – directly or indirectly – into evidentiary issues, and Ark. Code Ann. § 27-34-106(a) does precisely that.

3. Plaintiff's motion fails for an even simpler reason. She claims that section 106(a) bars all proof of the failure to use any sort of child passenger restraint system. But it doesn't. Rather, section 106 is explicitly limited to child car seats – not to other types of passenger restraint systems. Thus, even if the constitutional infirmities of section 106 could be ignored, its limitation in scope to child car seats is dispositive of plaintiff's motion. Simply stated, even if defendants could be barred from claiming that Mr. Edwards had to have used a car seat to protect Arleigh, the plain language of section 106(a) has no impact on Defendants' ability to claim that he had to have used at least *some* form of passenger restraint system, as required under Ark. Code Ann. § 27-34-104(a).

4. Defendants rely on the brief (and Exhibits) as well as on the Statement of Facts being filed in conjunction with this motion.

WHEREFORE, Defendants pray that Plaintiff's motion for partial summary judgment be denied, and for all other good and proper relief.

Respectfully submitted,

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DEFENDANTS' RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS

Defendants do not quibble with plaintiff's statement of facts, though they are incomplete. Defendants point to the following facts, which are probative of the issues raised in Plaintiff's motion and in Defendant's response.

1. Although Plaintiff characterizes Defendants' defense as being limited to Mr. Edwards' "failing to put Arleigh in a child safety seat", Doc 62, ¶ 3, Defendants' allegations in that regard are broader. They include allegations that Mr. Edwards "failed to insure that Arleigh Grayce Edwards was restrained in a suitable child restraint or other restraint system", Doc. 6, Answer at ¶ 56, and that "in spite of the requirements of Ark. Code Ann. § 27-34-104, he did not properly place Arleigh Grayce Edwards into a properly functioning child passenger safety seat or other suitable passenger restrain system or otherwise failed to insure that she remain in such a child passenger safety seat or passenger restraint system at times leading up to the accident …." *Id.* at ¶59. And based on relatively recently developed proof, Defendants

will similarly raise failure to mitigate damages/the doctrine of avoidable consequences.

2. Proof adduced to date established that a passenger, Peyton Hale was wearing a seat belt and survived the same accident. *See* Doc. 1, Complaint, ¶¶15, 18, 22, 46-47.

3. It is undisputed that at the time of the accident, Arleigh was under 15 years of age. Doc. 1 Complaint ¶26.

4. Plaintiff does not dispute the fact that Arleigh was unrestrained. Indeed, expert testimony has established that Arleigh was unrestrained at the time of the collision, and that had Arleigh been belted, her outcome would have been better than Peyton's . *See* Exhibit 1 (Dr. Cormier Deposition at 104, 96).

5. Expert testimony also establishes that, had Arleigh been properly restrained, she would not have been ejected and would not have sustained a fatal injury. *See* Exhibit 2 ((Lewis Deposition at 70-71) and Exhibit 1 (at 136-37).

Respectfully submitted,

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BRIEF IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff urges the Court to dismiss Defendants' "seat belt" defense on grounds that it is foreclosed by Ark. Code Ann. § 27-34-106(a) and *Potts v. Benjamin*, 882 F.2d 1320 (8th Cir. 1989). She also urges the Court to disregard the State constitutional principle that a legislatively imposed evidentiary ban is unconstitutional under the Separation-of-Powers doctrine.

Plaintiff is wrong on both counts. And while this Court need not resolve that constitutional issue to reject plaintiff's motion – section 106(a) plainly does not bar proof that a driver failed to use *some form* of child restraint system – the evidentiary ban in section 106(a) cannot survive a separation of powers analysis under *Johnson v. Rockwell Automation,* 2009 Ark 241, 308 S.W. 3d 135.

Plaintiff's core argument is that Section 106(a) precludes consideration of Defendants' seat belt defense. Even though section 106 is a legislatively created evidentiary rule, she nevertheless claims that it bars Defendants from raising Mr.

Edwards' "failure to place Arleigh in a child safety restraint." Doc. 61 at 5. She also claims to derive support for this proposition from a 1989 Eighth Circuit decision, *Potts v. Benjamin*, 882 F.2d 1320 (8th Cir. 1989).

Whatever vitality that argument might have had as of 1989, the subsequent passage of Amendment 80 in 2000, has laid to rest. Simply stated, section 106 cannot survive a separation-of-powers analysis.

Evolution of the Separation-of-Power Doctrine

To be sure, the Arkansas approach to the separation of powers doctrine has undergone transformation over the years. A series of opinions dating back before The Child Passenger Safety Act was enacted inconsistently applied Article 7, section 4. Even as late as 1984, the Supreme Court in *Jackson v. Ozment*, 283 Ark. 100, 101-03, 671 S.W.2d 736, 738 (1984), held that the Arkansas Constitution did *not* confer exclusive authority to the Arkansas Supreme Court to set rules of court procedure. Instead, Supreme Court rulings suggested that the two bodies shared the authority to create rules of evidence.

Such was the Arkansas constitutional topography when *Potts* was decided. But shortly after *Potts*, that topography changed. The Arkansas Supreme announced in *State v. Sypult*, 304 Ark. 5, 7, 800 S.W.2d 402 (1990), that its past decisions suggesting such "shared" jurisdiction over rules of evidence were unsound. Two years later, the Supreme Court definitively acknowledged the mistakes it had made in *Jackson* and therefore formally overruled it. *Weidrick v. Arnold*, 310 Ark. 138, 142-

47, 835 S.W.2d 843, 845-48 (1992)(asserting the judiciary's preeminence in areas dealing with court procedure).

Amendment 80 and Its Application

It was against this backdrop that Amendment 80 was adopted. While the Arkansas's longstanding tripartite form of government was retained, Amendment 80 picked up where *Weidrick* left off—taking the added step of clarifying the Judiciary's preeminent role in creating rules that govern the operation of courts. It made explicit what the Arkansas Constitution had never specifically stated before: "The Supreme Court shall prescribe the rules of pleading, practice and procedure for all courts . . . " Amendment 80, section 3.

Then came *Johnson v. Rockwell Automation, Inc.*, 2009 Ark 241, at 7, 308 S.W.3d 135, at 141 (2009). In *Rockwell* the Supreme Court invoked Section 3 of Amendment 80 for two major propositions: first, to clarify that "rules regarding pleading, practice, and procedure are *solely* the responsibility of this court"; and second, to make clear that both direct *and indirect* intrusions into the judiciary's domain are unconstitutional. *Id.* at 8, 308 S.W.3d at 141 (emphasis added). As the Court pointed out, if "a legislative provision dictates procedure, that provision need not directly conflict with our procedural rules to be unconstitutional. *Id.* at 8, 308 S.W.3d at 141. And *Rockwell* further disabused any notion that legislatively created rules affecting *evidence* can survive Amendment 80.

Plaintiff's Argument

Instead of confronting *Rockwell* and Amendment 80, Plaintiff invokes dictum from the Eighth Circuit's *Potts* decision to justify her reliance on section 106. Indeed, Plaintiff's motion and brief mention nothing about *Rockwell* or Amendment 80. But just because Plaintiff ignores them does not mean that this Court can. And for numerous reasons, her reliance on *Potts* is hopelessly flawed.

First and as alluded to above, *Potts* was decided when Arkansas was still laboring along under the old – and subsequently overruled – notion that the Legislature and the Judiciary jointly shared evidentiary rule-making authority. *See* discussion of *Jackson v. Ozment, supra.* Thus, *Potts* arose under a now-obsolete constitutional scheme. To be fair to the Eighth Circuit, *Jackson* had not yet been overruled, nor had Amendment 80 been passed when *Potts* was decided. But by the time of the *Rockwell* ruling in 2009, that rejection of shared legislative/judicial evidentiary authority had been constitutionally enshrined.

Plaintiff urges this Court to sidestep the evidentiary-predominance principle underlying Amendment 80 and *Rockwell* and instead resolve the issue at hand by declaring that section 106 is a rule of substantive law. She submits that *Potts* definitively resolved the issue. That indeed is a clever argument. However, it deftly (but wrongly) conflates two completely different legal questions. And that dichotomy is critical.

In *Potts,* the question did not turn on the separation-of-powers doctrine. Instead, the pivotal issue in *Potts* was application of the *Erie* doctrine. That doctrine

determines whether to apply federal instead of state rules of decision in a diversity-of-citizenship action. To be sure, similar nomenclature is used in both the Erie analysis and the separation of powers analysis. But the two involve markedly divergent analyses.

The defendants in *Potts* had argued that the "rules of relevancy of the federal Rules of Evidence" controlled the outcome. *Id.* at 1324. The Eighth Circuit acknowledged that in diversity cases, state rules affecting evidence would often have to give way in the face of the federal rules of evidence. *Id.* (citing *Adams v. Fuqua Industries, Inc,* 820 F.2d 271, 273 (8th Cir. 1987). But the *Erie* analysis is not absolute.

Indeed, in the context of an *Erie* analysis, even in the face of the Federal Rules of Evidence, state rules of evidence are sometimes applied if those rules are closely connected to a substantive state policy. *See, e.g., Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 666 (9th Cir. 2003) ("Moreover, some state law rules of evidence 'in fact serve substantive state policies and are more properly rules of substantive law within the meaning of *Erie*.'"). And where the issue is a close one, conflicts between the substantive and procedural dichotomy are resolved by giving the proponent the benefit of the rule more favorable to that proponent. *Adams, supra* at 273.

But *that* is the focus of an *Erie* analysis. And that fact exposes the first major flaw in Plaintiff's argument. In essence, she contends that, since *Potts* dictum indicates that section 106 is substantive for purposes of an *Erie* analysis, it necessarily controls this Court's *Rockwell*/separation-of-powers analysis. There she

is in error. Aside from a similarity of words, the analysis is completely different. *Rockwell* underscores the point definitively:

> [W]e take this opportunity to note that so long as a legislative provision dictates procedure, that provision need not directly conflict with our procedural rules to be unconstitutional. This is because rules regarding pleading, practice, and procedure are solely the responsibility of this court.

Rockwell Automation, 2009 Ark. 241, at 8, 308 S.W.3d at 141. Unlike in an *Erie* analysis, under *Rockwell* there is no weighing of relative importance or prudence and no declaring that a tie-goes-to-the-runner (or proponent). Indeed, *Rockwell* imposes a strict up-or-down standard. Even if the state statute involves an inherently substantive issue (like a measure of damages), Amendment 80 and *Rockwell* forbid it since that would represent a legislative intrustion into the judicial domain.

That in fact was the key point at stake in *Rockwell*, where the state statute purported to circumscribe – albeit narrowly – the collateral source rule. The statute at issue, Ark Code Ann. 16-55-212(b) provided:

> Any 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.

See 2009 Ark. 241 at 10, 308 S.W.3d at 142 (quoting ACA 16-55-212(b)). The constitutional defect was the fact that the provision "***clearly limits the evidence that may be introduced*** relating to the value of medical expenses to the amount of medical expenses paid or the amount to be paid by a plaintiff or on a plaintiff's behalf, ***thereby dictating what evidence is admissible***." *Id*. at 11, 308 S.W.3d at 142 (emphasis added). The Court reached that conclusion despite the defendant's

argument there – like the Plaintiff argues here – that the challenged statute reflected the legislative's substantive determination about how damages should be calculated. But that argument failed. The statute controlled the admissibility of evidence, so it violated separation of powers, even if the argument could be made that it simply established a substantive rule about the reasonable value of medical services.

Another Arkansas statute was struck down for similar reasons in *Broussard v. St. Edward Mercy Health System, Inc.*, 2012 Ark. 14, 386 S.W.3d 385. There the Supreme Court recognized that a statute may be considered "substantive" to the extent that it sets forth a burden of proof or otherwise regulates "the party's right to recovery", but that status will not save the statute from succumbing to the separation-of-powers doctrine if it impacts determination of proof or otherwise intrudes on determinations of proof. *Id.* at 6, 386 S.W.3d at 389.

The same reasoning applies to section 106 because it also "limits the evidence that may be introduced" in a case. As such, it is unconstitutional.[1]

One other aspect of *Rockwell* reinforces this principle. *Rockwell* invalidated not only the attempted legislative narrowing of the collateral source rule. It also invalidated Ark. Code Ann. §16-55-202, which provided for consideration of non-party fault. The Court invalidated that statute because it "bypassed" the Supreme Court's rules of pleading, practice, and procedure "by setting up a procedure to determine the

[1] It would be anomalous if a court could invoke a state statute as "substantive" when that statute cannot survive an Amendment 80 separation-of-powers analysis. A similar type argument was proposed and rejected by Judge Hendren in *Burns v. Ford Motor Co.*, 549 F. Supp. 2d 1081 (W.D. Ark. 2009), where the court noted a similarly circular reasoning offered for sustaining part of the Civil Justice Reform Act. As the Court observed, the legislature's substantive power to modify rules of common law cannot stand if it would infringe upon the judiciary's "constitutional prerogative to prescribe rules of evidence."

fault of a nonparty ***and mandating the consideration of that nonparty's fault in an effort to reduce a plaintiff's recovery***." *Id.* at 9, 308 S.W.3d at 141 (emphasis added). If *mandating* the consideration of an issue violates separation of powers, *prohibiting* consideration of an issue as does Section 106, likewise violates separation of powers.

What *Potts* did **not** say is that, from an Arkansas constitutional separation- of-powers standpoint, section 106(a) was constitutional. The Court did not attempt to address the issue of whether it was substantive vs. procedural from the standpoint of the separation-of-powers doctrine. And *Rockwell* and *Mendoza v. WIS International,* 2016 Ark 157, 490 S.W. 3d 298 (2016), answer that question. If via section 106(a), the Arkansas Legislature attempted to dictate (or limit) what evidence is admissible, then it violates separation of powers and is unconstitutional. 490 S.W. 3d at 301. And as *Mendoza* makes clear, if a challenged statute "dictated what evidence is admissible" then it is unconstitutional. *Mendoza* at 302.

In summary, the threshold flaw in Plaintiff's analysis is that she seeks to rely on *Potts* as controlling on the current separation-of-powers issue even though *Potts* (1) made no pronouncement on the separation-of-powers doctrine; (2) did not *employ* the *Rockwel*l separation-of-powers analysis; (3) did not even *address* the separation-of-powers doctrine; (3) arose when *Jackson* was still the controlling precedent; (4) was decided long before Amendment 80 was passed; and (5) was rendered 20 years before *Rockwell* was handed down. Thus, Plaintiff's reliance on *Potts* as a constitutional

precedent is misplaced. It obviously did not decide such an issue and furthermore, it arose under a completely different constitutional scheme.

Section 106(a) Impermissibly Dictates What Evidence is Admissible

So what does Section 106(a) do? Does it "dictate what evidence is admissible? Yes, that is *precisely* what it does. It point-blank says that "the failure to use a child passenger safety seat shall not be considered, under any circumstances, *as evidence* of comparative or contributory negligence" and "nor shall failure [to provide or use a child passenger safety seat] *be admissible as evidence* in the trial of any civil action with regard to negligence." (emphasis added). And *that* language attempts to dictate what *is* evidence and what evidence *is admissible* at the trial of any civil action.

As noted above, the Court need not resolve the constitutional issue in order to reject Plaintiff's motion. For she inexplicably suggests that section 106 forecloses all evidence of the failure place the child in any type of child restraint system, when the plain language of the statute pertains exclusively to the use of child car *seats*. As discussed below, section 106 pertains exclusively to the use (or non-use) of a specific type of car restraint system: the "child passenger safety seat." It does not pertain to the other types of child passenger restraint systems that are referred to and required under section 104(a).

To address that point, it is useful to canvass the structure of The Child Passenger Protection Act and section 106's relationship within that Act.[2]

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[2] The Statute in question has a long pedigree. As initially enacted in 1983, Act No 749 ("The "Child Passenger Protection Act") required every driver who regularly transports a child under five

The underlying Child Passenger Protection Act contains three main components: (1) a mandatory duty; (2) a criminal fine; and (3) an evidentiary rule. Section 104 imposes mandatory duties on a vehicle driver to protect all minor passengers under 15 years of age. Specifically, section 104(a) requires the driver to secure all children under the age of 15 years in at least *some* form of passenger restraint system (that meets federal safety standards) [3]. Section 104(c) provides that for children at least 6 years old (or who weigh over 60 lbs.) securing them in a safety belt will suffice. But for children *under* 6 years or 60 lbs., the child passenger safety system used *must* be a child safety seat. *See* Section 104(b).

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years of age in a passenger automobile, van or pickup truck to provide for the protection of the child "by properly placing, maintaining and securing such child in a child passenger safety seat system." For a child of at least three years of age, a seat belt was deemed sufficient.

In 1995, Ark. Stat. Ann. section 27-34-104(a) was amended (Act No. 1274) to provide that "Every driver who transports a child under the age of five (5) years in a passenger automobile, van, or pickup truck, other than one operated for hire … shall provide, while the motor vehicle is in motion and operated on a public road street, or highway of this state, for the protection of the child by properly placing, maintaining, and securing the child in a child passenger restraint system meeting applicable federal motor vehicle safety standards in effect on January 1, 1995."

The 1995 Act also provided that "A child who is less than four (4) years of age and who weighs less than forth (40) pounds shall be restrained in a child passenger safety seat." But the 1995 Act also recognized that if the child is at least 4 years old or weighs at least 40 pounds, then "a safety belt shall be sufficient to meet the requirements of this section."

Act 470 of 2001 then amended the statute again, raising from 5 years to 15 years the age at which drivers must have their passengers secured "in a child passenger restraint system…." Prior to that 2001 amendment, compliance with the statute could be achieved via use of a seat belt provided that the child was at least 4 years old (or weighed at least 40 pounds). But with the passage of Act 470, a mere seat belt would not suffice unless the child was at least 6 years old (or weighed at least 60 pounds. Thus, for children under those two thresholds, they were still required to be in a child passenger restraint system other than a seat belt.

In 2003, Act 1776 made technical corrections to the Act to address an ambiguity. It clarified that whether it be a child passenger safety seat or any other child passenger restraint system, the device had to be "properly secured to the vehicle." It also amended Ark Code Ann. Section 27-37-702 by adding requirements for securing a person who is seated in a wheelchair.

[3] Section 105 creates various exceptions to those requirements (for such applications as in ambulances/emergency vehicles, or in certain emergency situations)– none of which apply here.

Section 103 establishes fines to be assessed to those who do not comply with section 104's requirements.[4] Then, in section 106, the Act attempts to legislate evidentiary consequences of non-compliance with certain aspects of section 104.

The plain language of section 106(a) purports to foreclose consideration of the failure to use a child safety seat as evidence of comparative or contributory negligence. And its last clause provides that the driver's failure to provide or use a child safety seat shall not "be admissible in evidence in the trial of any civil action with regard to negligence."

If the lessons (and edicts) of *Rockwell* and *Mendoza* could be completely ignored, then at least for purposes of assessing comparative negligence, section 106(a) legislatively renders proof of such failure to use a child's safety seat inadmissible.

But its critical to note what section 106 does *not* say. First, it does not foreclose such proof as to the issue of mitigation of damages or to the doctrine of avoidable consequences[5] (which, based on expert proof recently obtained, Defendants will be raising herein). Second, and even more importantly, Section 106 only forecloses proof about the failure to use a "child passenger safety *seat*" as required under Section

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[4] In one subsection it essentially adopts a "some-is-better-than-none" feature insofar as it authorizes a judge to reduce a non-compliant driver's fine if the driver that has failed to *strictly* comply with required safety restraint systems has nevertheless used at least *some* sort of child passenger restraint (such as a seat belt). *See* Section 103(b).

[5] *See* 49 Fed. Reg. 28962-01 (July 17, 1984)(amending Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 S4.1.5.2(c), by requiring that, in addition to making seat-belt use mandatory, States provide "that the violation of the belt usage requirement may be used to mitigate damages with respect to any person who is involved in a passenger car accident while violating the belt usage requirement and who seeks in any subsequent litigation to recover damages for injuries resulting from the accident."). The ruling Plaintiff seeks here would effectively circumvent that element of the federal-state regulatory scheme.

104(b)(emphasis added). It does not address or purport to foreclose proof that a driver violated Section 104(a) by failing to employ some type of "child passenger restraint system." See *Chem-Ash, Inc. v. Arkansas Power & Light Co.*, 296 Ark. 83, 85, 751 S.W.2d 353, 354 (1988)("It is fundamental statutory construction law that the express designation of one thing may properly be construed to mean the exclusion of another.")

In short, what section 106(a) does *not* do – or even purport to do - is foreclose evidence that the driver failed to comply with Section 104(a). Section 106(a) does not bar proof that the driver failed to secure a child – indeed any child up to 15 years of age - in a properly secured "child passenger restrain system. Rather, if section 106 can be enforced at all, its scope is limited to child safety seats as required under section 104(b). It does not foreclose proof as to a driver's violation of Section 104(a). Thus, a defendant may not be able to argue that a driver *had to use* a child car seat. But by its very terms, section 106 does not bar a defendant from arguing that, by *not* using a child passenger restraint system *of any kind*, the driver was negligent.

For purposes of the instant case, it does not really matter whether section 106 survives a separation-of-powers analysis in the wake of *Rockwell* and *Mendoza*. Even if Defendants could not assert that Mr. Edwards *had* to have secured Arleigh with a child safety seat per se, they still can point to Mr. Edwards' failure to have Arleigh restrained in at least *some* form of child passenger restraint system. After all, section 104(a) specifically required him to use *some* passenger restraint system (even if it did not have to be a child safety seat).

The undisputed proof is that (1) Arleigh was under 15 years old; (2) while the pickup had a child safety seat, Arleigh was not restrained in it; (3) nor was she restrained in a booster or a child carrier; (4) nor was she restrained in a lap belt with shoulder harness; (5) nor was she even restrained in a plain old lap belt. Mr. Edwards used none of those options to protect Arleigh even though section 104(a) explicitly required him to do so. That was both reckless and illegal as per section 104(a). And because Mr. Edwards failed to obey Section 104(a), Arleigh was thrown about and ejected from the pickup's rear passenger compartment. In short, whether viewed in terms of pure negligence – indeed recklessness – or in terms of Mr. Edwards' failure to avoid the consequences/mitigate any damage to his daughter, section 106 does not preclude Defendant from offering proof that Mr. Edwards' violation of section 104(a) constitutes either negligence/recklessness or failure to avoid (or "mitigate" damages).

CONCLUSION

As it has done in other contexts, the Arkansas Legislature has attempted to dictate what evidence may be admissible in an automobile negligence action. Whether this is through a limit on the collateral source rule (as in *Rockwell*), a limit on proof in a medical malpractice case (as in *Broussard*), or a limit on admissibility of seat belt evidence (as in *Mendoza*), there simply is no legitimate way to characterize Section 106(a) other than as a limit on and foreclosure of specific evidence that may be admitted in a civil action. In the wake of Amendment 80, Section 3, and *Rockwell*, such an enactment improperly intrudes into the judiciary's domain and violates the separation-of-powers doctrine.

Yet, even if that constitutional infirmity could somehow be ignored, Plaintiff's Motion fails because Section 106(a) does not bar Defendants from invoking a defense under Section 104(a). At most, it would prevent Defendants from claiming that Mr. Edwards *had to* restrain Arleigh in a child seat. But by its very terms, section 106 does not preclude Defendants from invoking Section 104(a)'s requirements that minors under age 15 be restrained in *some* type of passenger restraint system. Since Mr. Edwards failed to take this action and since Defendants have proof that this behavior precipitated Arleigh's unfortunate death, Defendants are permitted to raise his reckless behavior at trial. As a result, Plaintiff's Motion for Partial Summary Judgment must be denied.

Respectfully submitted,
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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

SAMANTHA EDWARDS, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF WILLIAM BOBBY WRAY EDWARDS, DECEASED, AND ARLIEGH GRAYCE EDWARDS, DECEASED; AND AS PARENT AND NEXT FRIEND FOR PEYTON HILL, A MINOR — **PLAINTIFF**

v. — **No. 4:19-CV-4018-SOH**

ERIC JAMES CORNELL THOMAS AND McELROY TRUCK LINES, INC. — **DEFENDANTS**

REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO COMPARATIVE FAULT AND NON-PARTY FAULT RELATED TO CHILD SAFETY RESTRAINT NONUSE

Plaintiff offers this reply in support of her motion for partial summary judgment with respect to Defendants' asserted defense of failure to use a child safety restraint.

INTRODUCTION

Defendant Thomas admits he ran a stop sign and caused the collision that killed Arleigh Edwards. Defendant McElroy Trucking admits it is liable for Defendant Thomas's negligence. But both want to shift some or all of the fault for Arleigh Edwards' death onto her father by having the jury compare Mr. Thomas's fault in causing the collision with fault they allege Arleigh Edwards' father committed when he, allegedly, failed to strap Arleigh Edwards into a child safety seat. The problem with this argument is the Arkansas legislature declares as a matter of state substantive law that failing to use

a child safety seat is not an act of negligence for which fault may be compared. Ark. Code Ann. § 27-34-106(a).

This legal reality was explained in Plaintiff's initial brief. This reply focuses on the arguments asserted in response, namely that a rule of substantive law for *Erie* purposes is different from a rule of substantive law for purposes of the analysis of Ark. Const. Amend. 80, § 3; that Ark. Code Ann. § 27-34-106(a) is a rule of pleading, practice, procedure beyond the power of Arkansas's legislature to enact; that Defendants offer the evidence for purposes other than comparative fault; and that the defense is broader than failing to use a child safety restraint.

ARGUMENT

1. The Statute Defines the Substantive Law of Comparative Fault.

Defendants and Plaintiff agree with respect to one central premise. Following the enactment of Amendment 80, § 3 to the Arkansas Constitution, a clear separation-of-powers demarcation exists limiting the power of the legislature. Amendment 80, § 3 grants to the Arkansas Supreme Court the exclusive power and duty to enact rules of pleading, practice, and procedure, and the legislature cannot encroach upon that power by enacting "procedural" rules like rules of evidence. *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241 at 7, 308 S.W.3d 135, 141 (2009). Conversely, the legislature may enact, in fact is tasked with enacting, substantive provisions of the law. *Ibid*. A critical question for this case, then, is whether Ark. Code Ann. § 27-34-106(a) is a rule of pleading, practice, or procedure forbidden to the legislature or declaration of the substantive law, which is within the legislature's prerogative.

The statute is a substantive rule of law. It declares that the failure to utilize a child safety seat is not an act of negligence. Therefore, that failure cannot be compared to a defendant's negligence in causing an automobile accident. Because failing to utilize a child safety seat is, as a matter of substantive law, not negligent, the statute excludes that fact from evidence in a civil case. Comparative fault, of course, is an affirmative defense available to a defendant. Fed. R. Civ. P. 8(c); Ark. R. Civ. P. 8(c). Where the substantive law makes a particular action not negligent, proof of it for purposes of comparative fault is not relevant. A statute simply saying that is perfectly within the legislature's power to enact.

Indeed, the Eighth Circuit already declared this statute to be substantive in *Potts v. Benjamin*, 882 F.2d 1320 (8th Cir. 1989), as Plaintiff's opening brief pointed put. Thus, it must be applied by the federal courts. *Potts*, 882 F.2d at 1324 (citing *Adams v. Fuqua Industries, Inc.*, 820 F.2d 271, 273 (8th Cir. 1987)). This question is analogous to the Arkansas separation-of powers question. If a legislative enactment is "procedural" it is invalid and may be ignored by the courts, but if it is substantive, it is valid (absent some other constitutional barrier) and must be applied.

Defendants' response contends the *Potts* analysis should be ignored because it was developed within the context of the *Erie* doctrine, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and is only applicable there. Defendants brief at 5-6. Respectfully, this argument misses the point. Why federal courts deem it necessary to distinguish between procedural laws and substantive laws is not determinative. How the law is characterized, as procedural or substantive, is. The cases do not indicate how a particular law is

characterized, as procedural or substantive, varies depending on the context in which the characterization is made. A law is either procedural or it is not; it is either substantive or it is not. The *Erie* analysis is the same analysis the Arkansas Supreme Court undertakes under Amendment 80, section 3 and *Johnson* therefore *Potts* remains controlling on this Court.

Defendants' also completely ignore the Arkansas Supreme Court's discussion of the distinction between this statute and the Seatbelt Use Statute in *Mendoza v. WIS Int'l, Inc.*, 2016 Ark. 157, 490 S.W.3d 298 (2016). *Mendoza* explained why this statute *is* a substantive rule of Arkansas comparative-fault law because the legislature's distinctive wording of the statute, and the Seat Belt Use Statute is not because of the legislature's deletion of similar wording in an amendment to it. This portion of the *Mendoza* opinion was detailed in Plaintiff's opening brief. Opening brief at 4-5 (discussing *Mendoza*, 2016 Ark. 157, at 7, 490 S.W.3d at 302). *Mendoza* strongly counsels that Ark. Code Ann. § 27-34-106(a) Arkansas substantive law.

Defendants claim, nevertheless, that they can rely on this defense as evidence of failure to mitigate damages or the doctrine of unavoidable consequences. Defendants' brief at 11. These two theories are nothing but variations on comparing Arleigh Edwards' father's alleged negligence with their own. But as a matter of Arkansas substantive law, Arleigh Edwards' actions were not negligent. Thus, whether stated in terms of failure to mitigate, unavoidable consequences, or any other legal doctrine, it is not fault that cannot be compared to Defendants' negligence.

Finally, Defendants claim they skirt around *Potts* and *Mendoza* by alleging more than failing to use a safety seat is fault on Mr. Edwards' part. Their allegation includes not putting Arleigh Edwards in a seatbelt. Defendants' brief at 11-12. But Defendants have no proof of any kind that Arleigh Edwards would have survived if she had been belted in as opposed to strapped into a child car seat. This proof is a prerequisite for admission that an occupant failed to wear a seatbelt. *Potts* and *Baker v. Morrison*, 309 Ark. 457, 829 S.W.2d 421 (1992), both so hold.

This substantive rule of Arkansas law declares failure to use a child safety seat is not negligence that can be compared to a defendant's fault in causing a collision. That's what the statute says, it's what *Potts* holds, and it's what *Mendoza* clarified. Summary judgment should be granted.

2. The Substantive Law Defines Evidence that is Admissible.

Defendants are undeterred. They contend the statute is beyond the power of Arkansas's legislature because it controls what evidence is admissible. This, say Defendants, makes Ark. Code Ann. § 27-34-106(a) a rule of pleading, practice and procedure. This logic takes Arkansas's Amendment 80, § 3 jurisprudence at least one step too far.

The dividing line between legislative and judicial authority with respect to evidence has been the source of significant litigation since the enactment of Amendment 80, § 3 and the passage of Act 649 of 2003, Arkansas' tort reform statute. Again, the Arkansas Supreme Court defined that line as being between substantive law and procedure. *Johnson*, *supra.* The Arkansas Supreme Court has the exclusive power to enact

rules of pleading, practice, and procedure. Conversely, the legislature is empowered to enact substantive law and such enactments are valid unless they offend some other portion of the federal or state constitutions.[1]

That is the core of *Johnson's* holding. The Arkansas Supreme Court has employed it to strike down statutes that cross over this line and invade the rulemaking authority. *E.g., Johnson, supra*; *Mendoza, supra, Summerville v. Thrower*, 369 Ark. 231, 253 S.W.3d 415 (2007); *Broussard v. St. Edward Mercy Health Sys.*, 2012 Ark. 14, 386 S.W.3d 385 (2012). But that holding does not mean that every statute that controls the admission of evidence in a case is forbidden legislative rulemaking. Statutes commonly define what evidence is relevant and admissible either by defining the elements of a cause of action or by defining defenses to a cause of action.

Arkansas' Dram Shop Statute is an example of a statute containing both the elements of a cause of action and defenses to the cause of action each defining what evidence is relevant. That statute reads,

> In cases where it has been proven that an alcoholic beverage retailer knowingly sold alcoholic beverages to a person who was clearly intoxicated at the time of such sale or sold under circumstances where the retailer reasonably should have known the person was clearly intoxicated at the time of the sale, a civil jury may determine whether or not the sale constitutes a proximate cause of any subsequent injury to other persons. For purposes of this section, a person is considered clearly intoxicated when the person is so obviously intoxicated to the extent that, at the time of such sale, he presents a clear danger to others. It shall be an affirmative defense to

[1] For example, a statute limiting the amount that can be recovered for damages in a personal injury case is a change in the substantive law, but it offends Article V, section 32 of the State Constitution. A statute forbidding political speeches in favor of only one party in public parks is a change in the substantive law but surely offends the First Amendment to the Federal Constitution.

> civil liability under this section that an alcoholic beverage retailer had a reasonable belief that the person was not clearly intoxicated at the time of such sale or that the person would not be operating a motor vehicle while in the impaired state.

Ark. Code Ann. § 16-126-104.

This statute sets forth certain facts that must be proven to establish the elements of the cause of action.[2] A plaintiff must offer evidence, for example, that a "retailer" sold alcohol to a person who was "clearly intoxicated," or who the retailer should have known was "clearly intoxicated" at the time of the sale. It requires evidence that the person who purchased the alcohol was "so obviously intoxicated" that he or she presented "a clear danger to others." It also sets forth facts that can be proven as a defense to the cause of action, including that the seller "had a reasonable belief" that the purchaser was not clearly intoxicated at the time of the purchase, and that the seller reasonably believed that the purchaser "would not be operating a motor vehicle" while intoxicated.

Thus, the statute effectively defines what evidence is relevant and therefore admissible (absent some other evidentiary exclusion). Proof that a purchaser was staggering or slurring speech is relevant and admissible because it supports the proposition that the purchaser was clearly intoxicated at the time of the purchase, or that a seller ought to have known that he or she was clearly intoxicated at the time. See *Balentine v. Sparkman*, 327 Ark. 180, 185-86, 937 S.W.2d 647, 650 (1997). Likewise, the

[2] As an aside, the statute also controls what must be pleaded in the complaint. Facts establishing that the plaintiff is entitled to relief must be pleaded with particularity under the Arkansas fact pleading rules. Ark. R. Civ. P. (8)(a)(1). Thus, while the legislature cannot promulgate a rule of pleading, *Summerville, supra*, it can control what must be pleaded in order to make out a cause of action by defining the substantive law.

statute makes relevant proof that the purchaser had another, sober, person driving him or her at the time of the purchase, or that the purchaser was on foot at the time of the purchase, because a "reasonable belief" that the purchaser would not be "operating a motor vehicle in an impaired state" is a defense to the cause of action.

Facts like these in the context of a Dram Shop case have a tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed. R. Evid. 401; Ark. R. Evid. 401. That is the very definition of relevance, and each of these facts is relevant because of the elements of the cause of action or defenses to it. And the legislature effectively defined that relevance in a statute it obviously had the power to enact because it establishes the substantive law.

The Medical Malpractice Statute is a more pointed example because it contains provisions that reside on both sides of the substance/procedure line. A portion of that statute defines a plaintiff's "burden of proof" as follows:

> (a) In any action for medical injury, when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge, the plaintiff shall have the burden of proving:
>
> (1) **By means of expert testimony provided only by a medical care provider of the same specialty as the defendant**, the degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, *engaged in the same type of practice or specialty in the locality in which he or she practices or in a similar locality*;
>
> (2) **By means of expert testimony provided only by a medical care provider of the same specialty as the defendant** that the medical care provider *failed to act in accordance with that standard*; and

> (3) By means of expert testimony provided only by a qualified medical expert that as a proximate result thereof the injured person suffered injuries that would not otherwise have occurred.

Ark. Code Ann. § 16-114-206(a) (emphasis added). The highlighted portions of the statute are key to this analysis. The *italicized* portions define the substantive law and are valid even though they significantly control what evidence may be admitted in a case. The **bolded** portions tread on the Arkansas Supreme Court's rulemaking authority and are not valid. *Broussard, supra.*

With respect to the italicized portions, the legislature determined that a cause of action for medical negligence is defined by a medical care provider failing to meet a particular standard of care. That standard of care is the standard in the medical community where the defendant provider practices or a similar medical community. This proof is an element of a plaintiff's case that must be met or the case must be dismissed. *Gilbow v. Richards*, 2010 Ark. App. 780 (2010); *Williamson v. Elrod*, 348 Ark. 307, 72 S.W.3d 489 (2002).

Admissibility is thus dictated by the statute. A generic standard of medical care, or a standard of care in some specialized medical community in no way similar to the medical community where the defendant provider practices, is not relevant and testimony about it is not admissible. The only relevant testimony concerning standard of care is the standard of care in the medical community where the defendant provider practices or a similar medical community. That is so because of the substantive law defining what medical negligence is and is not.

This definition of medical negligence in the substantive law significantly touches on the admissibility of expert testimony. If an expert witness fails to equate his or her opinions to the standard of care in the defendant provider's medical community or a similar medical community, the testimony is not competent, should be excluded, and absent some other expert testimony filling the void, the plaintiff's case is subject to dismissal. See *e.g., Skaggs v. Johnson*, 323 Ark. 320, 915 S.W.2d 253 (1996). That is so not because the expert is not qualified to give an opinion but because the opinion he or she is giving does not have anything to do with proving medical negligence as that term is statutorily defined.

Thus, by defining the elements of a valid cause of action, the legislature also controls what evidence is admissible. Evidence relating the standard of care in the defendant provider's medical community or a similar medical community is admissible because it informs the medical-negligence question. Experts who relate their opinions to that local standard may give their opinions. But evidence about an unrelated standard of care does not inform the medical-negligence question, and expert opinions outside this "locality rule" are excluded. This control over the evidence that may be admitted in a case is a valid exercise of legislative power arising from its enactment of substantive law.

The bolded portions of the statute are something quite different. These portions do not define the elements of a cause of action or a defense to a cause of action. Rather, they attempt to limit *who is qualified to testify about the standard of care* to certain medical care providers, namely those in the "same specialty" as the defendant provider and no

one else. They set "qualifications a witness must possess before he or she may testify in court," *Broussard*, 2012 Ark. 14, at 6, 386 S.W.3d at 389, which invades the Arkansas Supreme Court's rulemaking authority.

That is the established dividing line. The legislature can legitimately control admissible evidence by defining the substantive law. The substantive law defines what evidence is meaningful. That definition can reach even as far as whether an expert opinion is admitted. But where the legislature reaches into who may testify in terms of qualifications, or how and when certain items of evidence are to admitted on purely procedural grounds, it invades this Court's rulemaking authority and the measure cannot stand.

Ark. Code Ann. § 27-34-106(a) falls on the substantive side of the dividing line. It is a legislative pronouncement that failing to use a child safety seat is not a negligent act and therefore cannot be used to compare the injured plaintiff's fault to the fault of the person who caused the accident so as to reduce an award of damages to the plaintiff. Non-use, in other words, is not relevant to fault because of how the legislature defined negligence and fault in this context.

CONCLUSION

Summary judgment should be entered in favor of Plaintiff and against Defendants on the defense of failure to utilize a child safety restraint for Arleigh Edwards.

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

SAMANTHA EDWARDS, Individually, and as SPECIAL ADMINISTRATRIX of the ESTATE of WILLIAM BOBBY WRAY EDWARDS, Deceased, and ARLEIGH GRAYCE EDWARDS, Deceased; and as PARENT and NEXT FRIEND for Peyton Hale, a Minor — PLAINTIFF

v. Case No. 4:19-cv-4018

ERIC JAMES CORNELL THOMAS and MCELROY TRUCK LINES, INC. — DEFENDANTS

ORDER

Before the Court is Plaintiff's Motion for Partial Summary Judgment With Respect to Comparative Fault and Non-Party Fault Related to Child Safety Restraint Nonuse. (ECF No. 60). Defendants have responded. (ECF No. 73). Plaintiff has replied. (ECF No. 76). The Court finds the matter ripe for consideration.

I. BACKGROUND

This case arises from an automobile collision that occurred on August 2, 2018. Defendant Eric James Cornell Thomas ("Thomas") was driving a tractor trailer in the course and scope of his employment with Defendant McElroy Truck Lines, Inc. ("McElroy"). Thomas drove through a stop sign and collided with a vehicle driven by William Bobby Wray Edwards ("William"), who suffered fatal injuries. Arleigh Grayce Edwards ("Arleigh"), a two-year old passenger in the Edwards vehicle, also suffered fatal injuries and Peyton Hale, a teenage passenger in the Edwards vehicle, suffered personal injuries. On February 11, 2019, Plaintiff filed this wrongful death and survival action, asserting separate claims of negligence against Defendants.

Defendants admitted in their answer that Thomas caused the collision and that McElroy is

vicariously liable for any injuries caused by Thomas's negligence. However, Defendants assert the affirmative defense of apportionment of fault, contending that William failed to place and maintain Arleigh in a suitable child safety seat or restraint system, which was at least partially the proximate cause of her death.

On February 10, 2020, Plaintiff filed the instant motion for partial summary judgment, arguing that Defendants' apportionment defense should be barred because Arkansas law prohibits parties from offering the failure to provide or use a child safety restraint as evidence of comparative or contributory negligence in civil negligence actions. Defendants oppose the motion.

II. STANDARD

The standard for summary judgment is well established. A party may seek summary judgment on a claim, a defense, or "part of [a] claim or defense." Fed. R. Civ. P. 56(a). When a party moves for summary judgment, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact, and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Krenik v. Cnty. of LeSueur*, 47 F.3d 953, 957 (8th Cir. 1995). This is a "threshold inquiry of . . . whether there is a need for trial—whether, in other words, there are genuine factual issues that properly can be resolved only by a finder of fact because they reasonably may be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A fact is material only when its resolution affects the outcome of the case. *Id.* at 248. A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party. *Id.* at 252.

In deciding a motion for summary judgment, the Court must consider all the evidence and all reasonable inferences that arise from the evidence in a light most favorable to the nonmoving party. *Nitsche v. CEO of Osage Valley Elec. Co-Op*, 446 F.3d 841, 845 (8th Cir. 2006). The moving party bears the burden of showing that there is no genuine issue of material fact and that

it is entitled to judgment as a matter of law. *See Enter. Bank v. Magna Bank*, 92 F.3d 743, 747 (8th Cir. 1996). The nonmoving party must then demonstrate the existence of specific facts in the record that create a genuine issue for trial. *Krenik*, 47 F.3d at 957. However, a party opposing a properly supported summary judgment motion "may not rest upon mere allegations or denials . . . but must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256.

III. DISCUSSION

As a preliminary matter, the Court must first address the parties' statements of facts to determine whether the instant summary judgment motion is properly supported. Then, if necessary, the Court will discuss the statutory framework underlying the instant motion and turn to the merits of the instant motion.

A. Parties' Statements of Facts

An initial question arises as to whether the instant motion is properly supported by cites to the record. As stated above, a party seeking summary judgment must show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Enter. Bank*, 92 F.3d at 747. The movant establishes that a fact cannot be genuinely disputed by "citing to particular parts of materials in the record." Fed. R. Civ. P. 56(c)(1)(A). Failure to cite to record evidence supporting the movant's asserted facts is an independent ground for denial of a summary judgment motion. *See Scadden v. Nw. Iowa Hosp. Corp.*, 747 F. Supp. 2d 1130, 1132 (N.D. Iowa 2010) (denying a summary judgment motion for failure to support the motion with cites to record evidence in support of the movant's asserted facts).

Although the instant motion concerns a question of law, Plaintiff must nonetheless establish that the material facts underlying the motion are all undisputed. Plaintiff's statement of undisputed facts contains no citations to record evidence, other than various numbered allegations

made in her complaint and numbered admissions made in Defendants' answer.

Generally, admissions in pleadings are binding on the parties unless withdrawn or amended. *Mo. Housing Dev. Comm'n v. Brice*, 919 F.2d 1306, 1314 (8th Cir. 1990). Thus, "even if the post-pleading evidence conflicts with the . . . pleadings, admissions in the pleadings are binding on the parties and may support summary judgment." *Id.* at 1315. Thus, Plaintiff's allegations are not by themselves summary judgment evidence. However, Defendants' admissions of certain allegations in their answer will suffice as summary judgment evidence. *See NuTech Seed, LLC v. Roup*, 212 F. Supp. 3d 783, 787 (S.D. Iowa 2015) (deeming admitted for summary judgment purposes all allegations that were admitted in the defendant's answer); *Jorgensen v. Schneider*, No. CIV. 10-5021-JLV, 2012 WL 13173045, at *2 (D.S.D. Sept. 27, 2012) (forming the undisputed material facts from, *inter alia*, the answer's admission of certain allegations made in the complaint).

Defendants' answer admits that Thomas negligently caused a collision with the Edwards' vehicle, and that McElroy is vicariously liable for any injuries caused by Thomas's negligence. Defendants' answer also admits that William and Arleigh died. Thus, Plaintiff's motion is accompanied by a supported statement of undisputed facts and, as such, is properly before the Court for consideration.[1] With that settled, the Court will discuss the statutory framework underlying the instant motion and then move to the merits of the motion.

B. Relevant Statutory Framework

Before delving into the parties' arguments, it would be helpful to discuss the statutory

[1] The only fact relevant to the instant motion that Plaintiff fails to establish is that Arleigh was unrestrained at the time of the collision. However, Defendants make that assertion in what is styled as their Response to Plaintiff's Statement of Facts. Defendants also provide expert deposition testimony that Arleigh was unrestrained at the time of the accident. Plaintiff's reply brief does not attempt to controvert that assertion or Defendants' supporting record evidence, so to the extent that consideration of this fact is required for purposes of ruling on the instant motion, the Court considers the fact to be undisputed.

framework at issue in the instant motion. There is no dispute that the Court, currently sitting in diversity, must apply the substantive law of Arkansas, the forum state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The instant motion concerns various provisions of Arkansas's Child Passenger Protection Act ("CPPA"), codified at Ark. Code Ann. § 27-34-101 *et seq*.

"[I]n recognition of the problems, including death and serious injury, associated with unrestrained children in motor vehicles," the Arkansas legislature passed the CPPA "to encourage and promote the use of child passenger safety seats." Ark. Code Ann § 27-34-102. With limited exceptions that are not applicable here, the CPPA imposes a duty on motor vehicle operators in Arkansas to protect any child passenger under the age of fifteen by securing and maintaining the child in a child passenger restraint system that meets applicable federal safety standards. Ark. Code Ann. § 27-34-104(a). The CPPA requires the use of different restraint systems depending on the age and weight of the child. Any child less than six years of age and who weighs less than sixty pounds must "be restrained in a child passenger safety seat properly secured to the vehicle." Ark. Code Ann. § 27-34-104(b). Any child who is at least six years old or at least sixty pounds in weight may instead be buckled in with "a safety belt properly secured to the vehicle." Ark. Code Ann. § 27-34-104(c). The CPPA provides that anyone who violates its provisions will, upon conviction, be subject to fines. Ark. Code Ann. § 27-34-103.

The CPPA also provides inadmissibility standards for a failure to use a child safety seat. The CPPA states, in relevant part, that "[t]he failure to provide or use a child passenger safety seat shall not be considered, under any circumstances, as evidence of comparative or contributory negligence, nor shall failure be admissible as evidence in the trial of any civil action with regard to negligence." Ark. Code Ann. § 27-34-106(a). This provision is the parties' primary fighting point in the instant motion.

C. Defendants' Allocation-of-Fault Defense

As discussed above, Defendants want to argue at trial that William was, at least partially, the proximate cause of Arleigh's death because he failed to secure and maintain her in a suitable child safety seat or restraint system at the time of the collision. Plaintiffs contend that they are entitled to summary judgment on this defense as a matter of law because section 106(a) of the CPPA prohibits parties from offering an individual's failure to provide or use child restraints as evidence of comparative or contributory negligence in civil negligence cases.

Defendants disagree, offering two arguments in response. First, they argue that section 106(a) is irrelevant for purposes of the instant motion because it only prohibits them from arguing that William was negligent for failing to use a child safety seat, while nothing prevents them from arguing at trial that William was negligent for failing to place Arleigh in some other type of restraint system. They argue, alternatively, that section 106(a) should be disregarded altogether—allowing them to argue for apportionment of fault based on William's failure to restrain Arleigh in a child safety seat—because section 106(a) violates the separation-of-powers doctrine and Amendment 80 to the Arkansas Constitution, and as such, is an unconstitutional legislative incursion into the Arkansas Supreme Court's rulemaking power. The Court will separately address these arguments.

1. Whether Section 106(a) Prohibits Defendants' Entire Allocation Defense

Defendants argue that the Court need not address whether section 106(a) is constitutional because that statute does not foreclose all evidence of failure to secure a child in a safety restraint system. They state that section 104(a) of the CPPA requires that all children under the age of fifteen who ride in vehicles must be secured by some type of child restraint system. Ark. Code Ann. § 27-34-104(a). They seize on the language of section 106(a), which expressly states, "[t]he failure to provide or use a child passenger *safety seat* shall not be considered, under any

circumstances, as evidence of comparative or contributory negligence, nor shall failure be admissible as evidence in the trial of any civil action with regard to negligence." Ark. Code Ann. § 27-34-106(a) (emphasis added). Defendants contend that section 106(a)'s plain language only bars evidence of the non-use of a child passenger safety seat, so regardless of whether section 106(a) is constitutional, nothing prohibits them from arguing that William should have secured Arleigh in another type of restraint system contemplated by section 104(a), such as an ordinary seatbelt. Plaintiff's reply brief addresses this argument glancingly, arguing that Defendants have no proof that Arleigh would have survived the accident had she been seatbelted in, as opposed to secured in a child safety seat, and that a failure to utilize a seatbelt is inadmissible absent any such proof.

As previously discussed above, the Arkansas legislature passed the CPPA "to encourage and promote the use of child passenger safety seats." Ark. Code Ann § 27-34-102. To accomplish this, the CPPA imposes a duty on any motor vehicle operator in Arkansas to secure and maintain any child passenger under the age of fifteen in a child passenger restraint system that meets applicable federal safety standards. Ark. Code Ann. § 27-34-104(a). Any child passenger younger than six years old and who weighs less than sixty pounds must "be restrained in a child passenger safety seat properly secured to the vehicle." Ark. Code Ann. § 27-34-104(b). Any child who is at least six years old or at least sixty pounds in weight may be secured with a seatbelt instead.[2] Ark. Code Ann. § 27-34-104(c).

Defendants are correct that section 106(a)'s plain language only prohibits the non-use of a child seat as evidence of comparative or contributory fault. Section 106(a) makes no mention of

[2] As the Court reads it, nothing in section 104(a) prohibits a driver from choosing to use a child safety seat to secure a child who is at least six years old or at least sixty pounds in weight. Rather, the statute provides only that a seatbelt "shall be sufficient to meet the requirements of [section 104(a)]" for children who are at least six years old or sixty pounds in weight. Ark. Code Ann. § 27-34-104(c).

other restraint systems, like seatbelts. Defendants are also correct that section 104(a) sets out a duty to secure all child passengers under age fifteen using some form of safety restraint system. However, section 104(a) cannot be read in isolation. When section 104(a) is read in conjunction with the remainder of section 104, it becomes clear that 104(a)'s general duty to secure children is delineated in sections 104(b-c), which provide specific methods of restraint systems that must be used, depending on the child's age and weight.

It is undisputed that Arleigh was two years old at the time of the accident. Thus, unless her weight exceeded sixty pounds at that time, the CPPA imposed on William a specific duty to secure Arleigh in a child passenger safety seat. Ark. Code Ann. § 27-34-104(b). If Arleigh weighed less than sixty pounds, securing her with any restraint system other than a child seat would violate Arkansas law. To the Court's knowledge, the parties have not pointed to any record evidence establishing Arleigh's weight at the time of the accident. Thus, the Court is without sufficient information to determine whether section 106(a) completely forecloses Defendants' apportionment defense because the record does not reflect whether Arleigh's weight exceeded sixty pounds at the time of the accident. Thus, a question of fact remains as to that issue and the Court will deny the instant motion to the extent that it seeks to prevent Defendants from arguing that William should have secured Arleigh with a seatbelt or some other type of restraint system other than a child seat.

However, if subsequent evidence shows that Arleigh weighed less than sixty pounds at the time of the accident, the Court is unlikely to let Defendants argue at trial for apportionment of fault pursuant to section 104(a) of the CPPA. To do so would allow a defense that amounts to arguing that William was negligent because he failed to violate Arkansas law by securing Arleigh in a way other than what the CPPA expressly mandated for her age and weight. Defendants suggest that the CPPA implicitly adopts a "some-is-better-than-none" policy instead of requiring strict

compliance because, if a driver is found to have violated the CPPA, a judge may reduce the imposed fine for that offense if evidence shows that the driver secured the child in some form of child passenger restraint system other than what the CPPA requires for the child's age and weight. *See* Ark. Code Ann. § 27-34-103(b). Even so, this does not change the fact that, if Arleigh weighed less than sixty pounds, William would have violated the CPPA by securing her in any system other than a child safety seat. The Court is uninclined to allow an apportionment defense that is based on William's failure to take an action that would have violated Arkansas law, no matter how it is couched.

2. Whether Section 106(a) is Enforceable

This brings the Court to the question of whether section 106(a) of the CPPA violates the Arkansas Constitution, and accordingly, whether it may be used to bar Defendants from offering evidence at trial of William's failure to secure Arleigh in a child safety seat for purposes of arguing for comparative fault or contributory negligence.

Plaintiff argues that section 106(a) clearly prohibits the allocation-of-fault defense that Defendants want to present. She states that, in *Potts v. Benjamin*, the Eighth Circuit affirmed an Arkansas federal district court's use of section 106(a) to exclude the non-use of a child safety seat as evidence of comparative or contributory negligence. 882 F.2d 1320, 1324 (8th Cir. 1989). In *Potts*, the district court, sitting in diversity, applied section 106(a) to exclude testimony that the plaintiff had not placed her children in child safety seats prior to a motor vehicle collision. *Id.* The defendant later appealed that ruling pursuant to the *Erie* doctrine,[3] arguing that the district court erred in applying section 106(a) because it was not a substantive rule of the forum state that the federal court was bound to apply but, rather, was a procedural rule that is not binding in

[3] The *Erie* doctrine instructs that federal courts sitting in diversity are obliged to apply federal procedural law and the substantive law of the forum state. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 416 (1996).

diversity suits. *Id.* *Potts* affirmed the lower court's decision, reasoning that section 106(a) was a rule of Arkansas substantive law that the district court rightly determined under *Erie* that it was obliged to apply in diversity cases. *Id.* In this case, Plaintiff urges the Court to reach the same conclusion: that it is bound to apply section 106(a) as a substantive rule of Arkansas law and, consequently, Defendants' allocation-of-fault defense should be barred.

Defendants respond that section 106(a) is an unconstitutional legislative incursion into the Arkansas Supreme Court's rulemaking power and, as such, is unenforceable. Defendants contend that *Potts* was decided in 1989, when existing Arkansas caselaw held that the Arkansas judiciary and legislature shared judicial rulemaking authority. *See Jackson v. Ozment*, 283 Ark. 100, 101-03, 671 S.W.2d 736, 738 (1984) (holding that the Arkansas Constitution did not give the Arkansas Supreme Court the exclusive authority to make rules of court procedure). Defendants state that, since that time, the Arkansas Supreme Court overruled that line of cases and subsequently held that Amendment 80 to the Arkansas Constitution gives the Arkansas Supreme Court the exclusive power to set rules of pleading, practice, and procedure for Arkansas state courts, and that both direct and indirect intrusions into that domain by the state legislature are unconstitutional. *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, at 8, 308 S.W.3d 135, 141. Defendants conclude that section 106(a) of the CPPA offends the principal of separation of powers and intrudes into the judicial rulemaking domain by limiting what is admissible evidence, and as such, it is unconstitutional and cannot be applied by the Court here. Although Defendants do not formally move the Court to declare section 106(a) unconstitutional, they are clearly challenging the constitutionality of the statute. They repeatedly refer to section 106(a) as unconstitutional and ask the Court to disregard the statute on that basis. Thus, as the Court reads the parties' briefing, a ruling in Defendants' favor on this issue would necessitate a finding that section 106(a) is indeed

unconstitutional.[4]

In reply, Plaintiff argues that notwithstanding Amendment 80, section 106(a) is still a rule of substantive law pursuant to the Eighth Circuit's *Potts* opinion, and thus, section 106(a) is not a legislative incursion into the judiciary's rulemaking domain over the state court rules of pleading, practice, and procedure. Plaintiff argues that section 106(a) does not limit the admissibility of evidence but, rather, establishes that the failure to use a child safety seat is, as a matter of substantive law, not negligence, so such a failure cannot be offered as evidence for purposes of contributory negligence or comparative fault. Plaintiff also argues that the Eighth Circuit's *Potts* opinion is still controlling because the *Erie* analysis conducted in that case is the same analysis undertaken to determine whether a law violates Amendment 80.

The Court agrees with the parties that, following the adoption of Amendment 80 to the Arkansas Constitution, a clear separation-of-powers demarcation exists, limiting the power of the legislature. The Arkansas Supreme Court now has the exclusive power and duty to enact rules of pleading, practice, and procedure, and the legislature cannot encroach on that by enacting "procedural" rules. *Johnson*, 2009 Ark. 241, at 8, 308 S.W.3d 135, 141; *see also* Ark. Const. art. 4, § 2 ("No person or collection of persons, being of one of these [branches of government], shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted."). Thus, the question becomes whether section 106(a) is a substantive or procedural rule of law.

Law is substantive when it is "[t]he part of the law that creates, defines, and regulates the rights, duties, and powers of the parties." *Johnson*, 2009 Ark. 241, at 8, 308 S.W.3d at 141 Procedural law is defined as "[t]he rules that prescribe the steps for having a right or duty judicially

[4] The Court sees no other basis for ignoring an otherwise valid and applicable statute, which is the result Defendants seek here.

enforced, as opposed to the law that defines the specific rights or duties themselves." *Summerville v. Thrower*, 369 Ark. 231, 237, 253 S.W.3d 415, 420 (2007) (citing Black's Law Dictionary 1221 (7th ed. 1999)). It is undisputed that in Arkansas, rules of evidence are "rules of pleading, practice and procedure." *Johnson*, 2009 Ark. 241, at 10, 308 S.W.3d at 142. Accordingly, if a statute establishes a rule of evidence, it violates the separation-of-powers doctrine and is unconstitutional. *Mendoza v. WIS Int'l, Inc.*, 2016 Ark. 157, 5, 490 S.W.3d 298, 301 (2016).

Defendants argue that section 106(a) is procedural because it establishes that the failure to provide or use a child safety seat cannot be admitted into evidence at trial for purposes of arguing for contributory negligence or comparative fault, or admitted into evidence at all in a civil trial with regard to negligence. Plaintiffs argue that the statute is substantive and cite primarily to two cases in support of their position: the *Potts* opinion, and *Mendoza v. WIS Int'l, Inc.*, a case in which the Arkansas Supreme Court determined that Ark. Code Ann. § 27-37-703 violated Amendment 80 to the Arkansas Constitution by limiting the admissibility of the non-use of seatbelts as evidence in civil actions. *Id.* at 9, 490 S.W.3d at 303. The Court has carefully reviewed both cases and is not persuaded that either supports Plaintiff's position.

In *Potts*, the Eighth Circuit conducted an *Erie* analysis to determine that section 106(a) was properly applied by a federal court sitting in diversity to exclude evidence of the nonuse of a child safety restraint system. 882 F.2d at 1324. The Eighth Circuit relied on no Arkansas caselaw to form this conclusion and appeared to instead make an *Erie*-educated guess that the statute is a substantive rule of law. *See id.* ("[Section 106(a)] seems to us to be a classic example of the type of substantive rule of law binding upon a federal court in a diversity case.").

The parties dispute whether the terms "substantive" and "procedural," as used in *Potts*' *Erie* analysis, hold the same meaning as those same terms as they are used in a separation-of-powers analysis for purposes of Amendment 80 to the Arkansas Constitution. Plaintiff argues that

there is no distinction and that "substantive" means substantive, regardless of whether the analysis was performed under *Erie* or the separation-of-powers doctrine. Defendants argue that an *Erie* analysis is different from a separation-of-powers analysis, so *Potts* cannot be read to definitively establish that section 106(a) is "substantive" for purposes of a separation-of-powers analysis because, under that analysis, any statute that conflicts with or alters the court's procedural rules is unconstitutional. *See Johnson*, 2009 Ark., at 8, 308 S.W.3d at 141. However, neither party cites Arkansas state precedent speaking directly on the issue.

The Court does not find *Mendoza* to be determinative of the issue, either. As stated above, *Mendoza* decided whether a separate statute, Ark. Code Ann. § 27-37-703, violated Amendment 80 to the Arkansas Constitution by limiting the admissibility of a party's non-use of a seatbelt as evidence in civil actions. *Mendoza*, 2016 Ark. at 9, 490 S.W.3d at 303. The *Mendoza* plaintiff argued that the statute was constitutional because it was a substantive rule of law, and the plaintiff relied heavily on *Potts* as analogous caselaw.[5] *Id.* The Arkansas Supreme Court rejected that argument, finding that Ark. Code Ann. § 27-37-703 was a legislative attempt to dictate court procedure, and thus, was unconstitutional. *Id.* at 9-10, 490 S.W.3d at 303-04.

Plaintiff states that *Mendoza* distinguished the language of Ark. Code Ann. § 27-37-703 from that of Ark. Code Ann. § 27-34-106(a). Plaintiff contends that *Mendoza* explained that Ark. Code Ann. § 27-37-703 is a statement of procedural law and that Ark. Code Ann. § 27-34-106(a) is a statement of substantive law because of the difference in wording between the two statutes.

The Court disagrees with that assessment. The plaintiff in *Mendoza* relied heavily on the Eighth Circuit's *Potts* opinion, so the Arkansas Supreme Court addressed the opinion briefly,

[5] The plaintiff also argued alternatively that Arkansas Rule of Evidence 402 specifically empowers the state legislature to determine the relevance of evidence by statute and that the legislature properly exercised that power when enacting the statute at issue. *Id.* at 7, 409 S.W.3d at 302. The Arkansas Supreme Court rejected that argument, holding that the legislature could not encroach on the judiciary's exclusive rulemaking authority by, even indirectly, determining the relevancy of evidence in court proceedings. *Id.* at 9, 409 S.W.3d at 303.

mentioning that *Potts* found "that section 27-34-106 established a rule of substantive law." *Mendoza*, 2016 Ark. 157 at 6, 490 S.W.3d at 302. However, the Arkansas Supreme Court expressed no opinion on *Potts*' holding regarding section 106(a) and did not formally adopt or otherwise recognize *Potts*' holding as law. Plaintiff is correct that *Mendoza* took the time to distinguish the language of Ark. Code Ann. § 27-37-703 from that of Ark. Code Ann. § 27-34-106(a).[6] *See id.* at 7, 490 S.W.3d at 302. However, *Mendoza* did not explain the purpose of that analysis and did not appear to base its holding on the difference between the two statutes. Thus, the Court is not convinced that *Mendoza*'s discussion of section 106(a) is anything other than dicta.

This brings the Court to the issue at hand, for which there seems to be no clear answer found in Arkansas precedent. If a federal court sitting in diversity is confronted with an unresolved issue of state law, it has two options: (1) it may make an "*Erie*-educated guess" as to how the forum state's highest court would rule on the issue or (2) it may certify the question to the state's highest court for resolution. *Blankenship v. USA Truck, Inc.*, 601 F.3d 852, 856 (8th Cir. 2010). Neither side has provided the Court with on-point Arkansas caselaw analyzing whether section 106(a) runs afoul of the separation-of-powers doctrine and Amendment 80 to the Arkansas Constitution. Rather than make an *Erie*-educated guess, the Court believes for the following reasons that the best course of action is to certify a question to the Arkansas Supreme Court and allow it the opportunity to definitively resolve the issue.

The Court may certify a question to the Arkansas Supreme Court on its own motion or on motion of the parties before it. Ark. Sup. Ct. & Ct. App. R. 6-8(b). Whether to certify a question is within the Court's sound discretion. *Allstate Ins. Co. v. Steele*, 74 F.3d 878, 881 (8th Cir. 1996).

[6] In short, the Arkansas Supreme Court noted that Ark. Code Ann. § 27-37-703 originally read almost identically to Ark. Code Ann. § 27-34-106(a) but in 1995, "the language 'shall not be considered under any circumstances as evidence of comparative or contributory negligence' and 'with regard to negligence' was removed" from section 27-37-703. *Mendoza*, 2016 Ark. 157 at 7, 490 S.W.3d at 302.

The key factor is whether the Court is "genuinely uncertain about a question of state law." *Johnson v. John Deere Co., a Div. of Deer & Co.*, 935 F.2d 151, 153 (8th Cir. 1991). Absent a close question of state law or a lack of state guidance, the Court should determine all the issues before it. *Perkins v. Clark Equip. Co.*, 823 F.2d 207, 209 (8th Cir. 1987). "While judgment and restraint are to be used in deciding whether to certify a question, when the state law is in doubt and touches on public policy concerns that are of particular interest to state law, it is in the best administration of justice to seek further guidance from state courts." *Adams v. Cameron Mut. Ins. Co.*, No. 2:12-cv-02173-PKH, 2013 WL 1876660, at *2 (W.D. Ark. May 3, 2013) (citing *Lickteig v. Kolar*, 2009 U.S. App. LEXIS 29111 at *9 (8th Cir. Sept. 17, 2009)).

The Arkansas Supreme Court has the power to hear questions of law certified to it by a federal court when there is no controlling precedent. Ark. Sup. Ct. & Ct. App. R. 6-8(a)(1). The Arkansas Supreme Court has recognized several benefits of this certification process, which:

> (i) allows federal courts to avoid mischaracterizing state law (thereby avoiding a misstatement that might produce an injustice in the particular case and potentially mislead other federal and state courts until the state supreme court finally, in other litigation, corrects the error); (ii) strengthens the primacy of the state supreme court in interpreting state law by giving it the first opportunity to conclusively decide an issue; (iii) avoids conflicts between federal and state courts, and forestalls needless litigation; and (iv) protects the sovereignty of state courts.

Longview Prod. Co. v. Dubberly, 352 Ark. 207, 209, 99 S.W.3d 427, 428 (2003) (quoting *Los Angeles All. for Survival v. City of Los Angeles*, 993 P.2d 334, 338 (Cal. 2000)).

The Arkansas Supreme Court will only accept a certified question when the question of law may be determinative of issues pending before the certifying court, all facts material to the question of law are undisputed, and there are special and important reasons to accept the certification. *Id.* at 210, 99 S.W.3d at 429. "Special and important" reasons include, but are not limited to: (1) a question of law that is one of first impression and is of such substantial public importance as to require a prompt and definitive resolution by the Arkansas Supreme Court; (2) a

question of law on which there are conflicting decisions in the courts; (3) a question of law concerning an unsettled issue of the constitutionality or construction of an Arkansas statute. *Id.*

The Court believes that those requirements are satisfied in this instance. As discussed above, the Court is faced with a close question of state law that lacks any on-point, controlling Arkansas precedent.[7] Resolution of the question of law would be determinative of the issue currently pending before this Court. The facts material to the question of law are few and, as discussed earlier in this opinion, are undisputed. The question concerns an unsettled issue regarding the constitutionality of an Arkansas statute, so special and important reasons justify certification of the question. This is doubly so because the Arkansas statute in question arguably intrudes on the Arkansas Supreme Court's exclusive state-court rulemaking power as set out in the Arkansas Constitution. Thus, the Court finds it appropriate to give the Arkansas Supreme Court the first opportunity to conclusively decide the issue.

For these reasons, the Court intends to, on its own motion, issue a certifying order.[8] "If the parties cannot agree upon a statement of facts, the certifying court shall determine the relevant facts and state them as a part of its certification order." Ark. Sup. Ct. & Ct. App. R. 6-8(c)(2). The parties will be given until the close of business on July 27, 2020 to confer and provide the Court with an agreed statement of undisputed facts that are material to the resolution of this issue.

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[7] *Potts* remains the only case cited by the parties to directly analyze section 106(a). However, that analysis does not square neatly with the analysis required for the current issue. *Potts* only conducted an *Erie* analysis and was not asked to decide whether section 106(a) offended the Arkansas Constitution, likely because when *Potts* was decided, Amendment 80 did not yet exist and the Arkansas Supreme Court did not yet have the sole state-court rulemaking authority in Arkansas. If the Arkansas Supreme Court accepts the certification of this question of law, it might agree with Plaintiffs' position and hold that section 106(a) is substantive for purposes of both *Erie* and separation of powers. However, for the various policy reasons listed above, the Court believes that decision is best made by the Arkansas Supreme Court, not this Court.

[8] The Court recognizes the possibility that Plaintiff might take exception to the fact that this will prolong this case. The Court is cognizant of Plaintiff's right to have her day in court, but nonetheless finds that the public policy concerns discussed above justify certification under these circumstances. Moreover, certifying this question will prejudice Plaintiff less than usual because discovery in this case has been stayed pending the resolution of pending state criminal charges against Separate Defendant Thomas, so this case cannot proceed further until the criminal matter concludes.

If they do not provide the Court with any such statement of facts by that time, the Court will determine the relevant facts on its own and include them in the certification order. *Id.*

IV. CONCLUSION

For the above-stated reasons, Plaintiff's motion for partial summary judgment (ECF No. 60) is hereby **DENIED**.

The Court intends to, on its own motion, certify a question to the Arkansas Supreme Court regarding whether, under the facts of this case, Ark. Code Ann. § 27-34-106(a) violates the separation-of-powers doctrine under article 4, section 2, and Amendment 80, section 3, of the Arkansas Constitution. The parties are **ORDERED** to confer and provide the Court with an agreeable statement of undisputed facts material to the resolution of this question by the close of business on July 27, 2020. If the parties do not provide the Court with an agreed statement of facts by that time, the Court will determine the relevant facts on its own and include them in the certification order.

IT IS SO ORDERED, this 10th day of July, 2020.

/s/ Susan O. Hickey
Susan O. Hickey
Chief United States District Judge