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## SUMMARY JURY TRIALS IN CHARLESTON COUNTY, SOUTH CAROLINA

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### INTRODUCTION

The “frontiers of tort law” are procedural, as well as doctrinal and theoretical. Sooner or later, influential views of the tort system develop doctrinal and, thus, procedural manifestations. For instance, the claims of tort reformers who argued that the civil litigation system permits plaintiffs with weak claims to fool juries led to rules tightening the admissibility of evidence.<sup>1</sup> For another example, reformers’ claims that meritless medical malpractice claims drove up physicians’ insurance premiums led some jurisdictions to adopt rules requiring medical malpractice plaintiffs to file affidavits of merit (signed by a physician) along with their complaint.<sup>2</sup> In short, critical views of the tort system that take hold eventually translate into differences in the way tort cases are litigated, which is, of course, exactly what reformers intend.

Procedural change also reflects other features of the law. In particular, where the costs of litigating are high, parties will seek cheaper ways to air their claims. Thus in recent decades, alternative dispute resolution (“ADR”) has been promoted as a useful method of resolving some types of civil claims.<sup>3</sup> Developments in ADR do not

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\* © Steven P. Croley, Professor of Law, University of Michigan Law School. Thanks to participants of the Loyola Law School Civil Justice Program’s symposium on the Frontiers of Tort Law, January 25–26, 2008, for helpful comments.

1. See, e.g., Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation* 17, n.76 (Brooklyn Law School Legal Studies Research Papers Working Paper Series, Paper No. 71, 2007), available at <http://ssrn.com/abstract=968834>.

2. See, e.g., Tort Reform Act of 2005 Relating to Medical Malpractice, S. 83, 116th Gen. Assem., Reg. Sess. (S.C. 2005); S.B. 2199, 59th Legis. Assem., Reg. Sess. (N.D. 2005); MICH. COMP. LAWS §600.2912d(1) (West 2000).

3. See generally DONNA STIENSTRA & THOMAS E. WILLGING, ALTERNATIVES TO LITIGATION: DO THEY HAVE A PLACE IN THE FEDERAL DISTRICT COURTS? (Fed. Judicial Ctr. 1995) (weighing the pros and cons of alternative dispute resolution); Joseph R. Biden, Jr., *Equal*,

reflect changes in doctrine so much as litigants' self-interested efforts to find less expensive ways to settle their claims, though as ADR took root (and developed a constituency) it also became legally required in some jurisdictions.<sup>4</sup> Today, most trial courts employ some kind of ADR mechanism.<sup>5</sup> Indeed, many state courts, and some federal district courts, now have mandatory ADR programs.<sup>6</sup>

Although ADR is now an established feature of the civil litigation system, one species of it—the “summary jury trial”—never gained much lasting traction.<sup>7</sup> In the early 1980s, some courts experimented with this procedure,<sup>8</sup> allowing (or in some cases requiring) parties to present abbreviated versions of their case to a live jury. As explained below, the point of this summary procedure was to give each side a chance to test its case before a jury, to hear the other side do the same, and to get the benefit of feedback in the form of the jury's decision following the miniature trial.<sup>9</sup> The process thus aimed to provide litigants with important information about the value of their cases, thereby encouraging settlement.<sup>10</sup> The procedure was not binding, however, and thus its success depended on participants choosing to adopt the summary jury's verdict as their settlement. They did not often do so, so litigants and judges turned to less cumbersome ways to press their claims and promote settlement.<sup>11</sup>

While the summary jury trial is largely a footnote in the annals of ADR, variations on this procedure are successfully used in a few places today.<sup>12</sup> The trial court of Charleston County, South Carolina

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*Accessible, Affordable Justice Under Law: The Civil Justice Reform Act of 1990*, 1 CORNELL J.L. & PUB. POL'Y 1, 6 (1992) (recognizing the disparate impact of discovery expenses).

4. STIENSTRA & WILLGING, *supra* note 3, at 5.

5. *See id.* at 5.

6. *See, e.g.*, DAVID F. HERR, ROGER S. HAYDOCK & JEFFREY W. STEMPEL, MOTION PRACTICE § 8.04[A] (Aspen Publishers, Supp. 2007); Patricia M. Wald, *ADR and the Courts: An Update*, 46 DUKE L.J. 1445, 1446–47 (1997).

7. Thomas B. Metzloff, *Reconfiguring the Summary Jury Trial*, 41 DUKE L.J. 806, 806 (1992).

8. *See, e.g.*, D. MARIE PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 68 (Fed. Judicial Ctr. 1986) (noting that by the mid 1980s more than two dozen federal judges had experimented with summary jury trials).

9. Metzloff, *supra* note 7, at 812–13.

10. *Id.* at 815.

11. *Id.* at 807–08.

12. *See* Nora Lockwood Tooher, *Summary Jury Trials Slowly Catching On as Form of Alternative*, LAWYERS WEEKLY USA, Apr. 27, 2005.

is one such place. There, summary jury trials are frequently used to resolve certain categories of civil cases, especially low-dollar tort cases. Because the stakes in such cases are often low relative to the costs of litigating the cases through traditional methods, the summary jury trial provides an opportunity for trial that would otherwise be cost-prohibitive. And, because the process is fast and cheap relative to ordinary litigation, it enjoys the strong support not only of local plaintiff's lawyers but the local defense bar as well.

The narrow purpose of this Article is to explain and defend Charleston County's version of the summary jury trial. Charleston's summary jury trial provides access to justice for one category of civil litigants who would otherwise lack such access, and better, it does so without presenting any of the problems that critics of the tort system claim plague civil litigation. Although Charleston's summary jury trial comes with one controversial feature—explained below—the process warrants consideration by other jurisdictions for a certain category of civil cases.

The broader purpose of this Article, though, is to begin (barely) to merge the topic of civil justice reform, on the one hand, with concerns for greater access to justice, on the other hand. Notwithstanding their emphasis on the high costs of litigation, civil justice reformers selectively ignore the problems faced by plaintiffs with meritorious claims for whom the costs of litigation are too high relative to the small size of their damages. Meanwhile, those calling for greater access to civil justice have given little attention to tort plaintiffs with low-damages cases, as opposed to other kinds of civil plaintiffs who also lack access to civil justice. Yet tort plaintiffs in low-damages cases constitute an important set of underrepresented civil litigants: given the costs of litigation, and the attendant difficulties of finding legal representation for cases involving modest damages, tort plaintiffs with strong liability claims but not exorbitant damages have little access to justice. Civil justice reformers should acknowledge as much, while advocates for greater access to justice should take up their cause as well.

## I. SUMMARY JURY TRIALS

A. *A Primer*

With some forum-to-forum variation, summary jury trials in their first incarnation generally had several features.<sup>13</sup> First, as their name suggests, they were short.<sup>14</sup> In some jurisdictions that experimented with summary jury trials, litigants had to start and finish their trials within one hour.<sup>15</sup> Such jurisdictions gave litigants little more than an opportunity to summarize their cases to the jury, perhaps with evidentiary exhibits.<sup>16</sup> More commonly, though, summary jury trials could last up to one full trial day.<sup>17</sup> Either way, summary jury trials emphasized the “summary” and downplayed the “trial.”

Their short duration was in part a consequence of another central feature: in a summary jury trial, many evidentiary rules were relaxed.<sup>18</sup> For example, lawyers could read deposition testimony to the jury for nearly any purpose, not only for impeachment.<sup>19</sup> They could read the deposition testimony of friendly witnesses, for instance, or have that testimony read by a stand-in “witness” pretending to be the deponent by reading deposition answers to the jury while being asked deposition questions by the lawyer. In other words, these stand-in witnesses replayed portions of the actual deposition before the jury, as if the deponent were testifying live.

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13. See generally Thomas D. Lambros, *Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.D.R. 461 (1984) (discussing the use of alternative methods of dispute resolution but focusing on the summary jury trial); Metzloff, *supra* note 7, at 807 (acknowledging that the summary jury trial can fulfill a distinct and useful role once it is “freed from artificial limitations placed upon it by its earliest users”); S. Arthur Spiegel, *Summary Jury Trials*, 54 U. CIN. L. REV. 829 (1986) (explaining the summary jury trial, “its evolution, philosophy, and effectiveness”).

14. See, e.g., Metzloff, *supra* note 7, at 808.

15. See, e.g., “Mini-Trials” Prove Cost-Effective Way to Seek Justice, JURY POOL NEWS, Spring 2003, at 1 (newsletter of the N.Y. State Unified Court System). “In summary jury trials each side is permitted an hour to present its case—plus 10 minutes each for opening and closing statements—and a maximum of two witnesses.” *Id.*

16. Lucille M. Ponte, *Putting Mandatory Summary Jury Trial Back on the Docket: Recommendations on the Exercise of Judicial Authority*, 63 FORDHAM L. REV. 1069, 1076–77 (1995).

17. Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 369 (1986).

18. See, e.g., Thomas B Metzloff, *Improving the Summary Jury Trial*, 77 JUDICATURE 9, 9 (1994).

19. See, e.g., Spiegel, *supra* note 13, at 831.

Alternatively, lawyers could simply summarize or characterize deposition testimony to the jury, without either reading the transcript or play-acting with a stand-in witness.<sup>20</sup> They could do so even during closing arguments.<sup>21</sup>

The rules of hearsay were also relaxed.<sup>22</sup> For instance, medical hearsay was often permitted, so that parties could explain to the jury what medical records said, or what a doctor said about a particular issue. Relaxing the rules of evidence in this way also saved time, allowing parties to cut to the chase rather than establish foundations, authenticate records, and, most of all, call numerous witnesses in order to establish some factual element of their case. No less importantly, it also allowed parties to avoid paying witnesses to appear in court, which is to say to travel to court and wait until they were called to testify. In short, the summary jury process was designed to be not only quick, but inexpensive.

A judge presided over the summary trial, as in an ordinary case, though the judge's role in ensuring proper application of the rules of evidence was diminished. Otherwise, the judge functioned as in an ordinary trial—ruling on motions, instructing the jury, and so on. Lawyers showed the same deference toward the presiding judge as they would in an ordinary civil trial.

Following trial, the judge instructed and charged the jury.<sup>23</sup> While the jury functioned much as an ordinary jury would, usually summary jury trials were heard by minijuries, sometimes by as few as four jurors. After deliberation, the jury rendered its verdict.<sup>24</sup> Often, the jury was instructed to render a verdict on liability and damages separately, and to assess damages even if it found no liability.<sup>25</sup> The jury's assessment of damages even where it found no liability gave litigating parties the benefit of more information about their cases.

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20. *Id.*

21. *Id.*

22. *See, e.g.*, San Luis Obispo County Trial Rule 27.04, [http://www.netlawlibraries.com/slob/slob\\_027.html](http://www.netlawlibraries.com/slob/slob_027.html). *See generally* Lambros, *supra* note 13, at 471 (“No testimony is taken from sworn witnesses. Counsel simply summarize the anticipated testimony of trial witnesses and are free to present exhibits to the jury.”).

23. Spiegel, *supra* note 13, at 831.

24. *Id.*

25. *See, e.g., id.* at 829.

In the end, the parties to a summary jury trial could elect to adopt the verdict rendered or not. In other words, the process was not binding.<sup>26</sup> The fact that summary jury trials were not binding was a central feature of the process of the 1980s.<sup>27</sup> So was their involuntary nature.<sup>28</sup> That is, judges often required parties to participate in summary jury trials before they could try their cases before an ordinary jury.<sup>29</sup> For a time, that requirement proved more controversial than other forms of mandatory ADR.<sup>30</sup> In fact, some commentators argued that federal judges lacked the power to require litigants to participate in summary jury trials.<sup>31</sup> In the Civil Justice Reform Act of 1990,<sup>32</sup> Congress eliminated that objection by explicitly authorizing the use of mandatory summary jury trials, provided that judges employed the procedure as part of some comprehensive case management plan.<sup>33</sup>

### B. Justifications

Those advocating—and judges requiring—the use of the summary jury trial justified the process on two main grounds. First,

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26. See, e.g., STIENSTRA & WILLGING, *supra* note 3, at 64; Thomas D. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. Pitt. L. Rev. 789, 798–99 (1989); Spiegel, *supra* note 13, at 831. According to Lambros:

The summary jury trial is not intended to supplant the traditional jury trial. Instead, judges should employ the device when conventional lawyer-judge negotiations fail to produce settlement. This effective judicial procedure fosters meaningful settlement discussions between parties whose uncompromising bargaining positions require a deliberate and controlled context to move toward agreement.

Lambros, *supra*, at 798–99.

27. Lambros, *supra* note 26, at 798–99.

28. See, e.g., Ponte, *supra* note 16, at 1085 (“But in an effort to deal with burgeoning caseloads, some federal courts have approved compulsory SJT use, without the parties’ mutual agreement, based on the Rules and the courts’ inherent authority.”).

29. *Id.*

30. *Id.* at 1085 (“Differing court views hinge primarily on the interpretation of the explicit language of Rule 16 and its underlying policies as stated in the notes of the advisory committee.”).

31. See, e.g., Marla Moore, *Mandatory Summary Jury Trials: Too Hasty a Solution to the Growing Problem of Judicial Inefficiency?*, 14 REV. LITIG. 495, 506–508 (1995) (arguing that in some cases, mandatory summary jury trials may violate litigants’ due process rights).

32. Civil Justice Reform Act of 1990, 28 U.S.C.A. §§ 471–482 (West 2008).

33. *Id.* §473(a)(6)(B); see also Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285, 1293 (1994); Metzloff, *supra* note 18, at 11.

summary jury trials would help with docket control.<sup>34</sup> Especially during a period when many argued that civil dockets were overburdened, resolving cases through summary jury trials, like any other forms of ADR, was seen as a significant potential advantage.<sup>35</sup> Some judges thus turned to the process to trim dockets.<sup>36</sup>

Second, the summary jury trial was said to encourage settlement.<sup>37</sup> The process gave opposing litigants the benefit not only of presenting and thus testing their own cases, but also of hearing the other side's case as well.<sup>38</sup> As a result, both sides would reassess the strength of their own case in light of their opponent's presentation.<sup>39</sup> Litigants could then make better informed and more realistic settlement calculations.<sup>40</sup>

To be sure, other forms of ADR also provide litigants an opportunity to "present" their cases and to measure their opponent's. But the summary *jury's* reaction to the case was thought to promote settlement even more.<sup>41</sup> The benefit of a real jury's reaction was precisely why the summary trial was a jury trial, and most distinguished the procedure from other forms of ADR.<sup>42</sup> Of course, parties have long used "mock juries" to test their cases before lay jurors. But again, the summary jury trial allowed for more realistic assessments of jury reactions, given the presence of both a real opponent and a live jury who answered to the presiding judge and was not paid by a mock litigant.<sup>43</sup> Because the summary jury trial

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34. *See, e.g.*, Joseph Gerace, Preface to NEW YORK STATE SUPREME COURT EIGHTH JUDICIAL DISTRICT SUMMARY JURY TRIAL PROGRAM, PROGRAM MANUAL 4, 5 (Joseph Gerace & Kathleen D. Krauza eds., N.Y. Supp. 2004), available at <http://www.nycourts.gov/courts/8jd/pdfs/SJTmanual3.pdf> ("The SJT program resulted in the scheduling of 90 fewer cases for regular jury trials between those years resulting in significant saving of trial days. . . . [T]here is no doubt that the Summary Jury Trial project was a key factor."); Vesselin Mitev, *Staying Afloat: More Cases Challenge Suffolk Courts*, N.Y. L. J., Jan. 15, 2008 ("[The summary jury trial was] one way of moving cases along and it is certainly much more expeditious," said Suffolk chief Assistant District Attorney John L. Buonora, who pioneered the effort last year while serving as bar association president.").

35. *See, e.g.*, Mitev, *supra* note 34.

36. *Id.*

37. *See, e.g.*, Lambros, *supra* note 13, at 468–69; Ponte, *supra* note 16, at 1073.

38. Ponte, *supra* note 16, at 1072–73.

39. Metzloff, *supra* note 7 at 812–13.

40. *Id.*

41. *Id.* at 815–16.

42. *Id.* at 816.

43. *Id.* at 816.

verdict was sure to disappoint at least one side, and perhaps partly both sides, it would give parties reason to think carefully about settlement.<sup>44</sup>

These two justifications for the summary jury trial were of course related. If the procedure promoted settlement, it would reduce judicial dockets. Even so, proponents counted separately the benefits to the judiciary of reducing crowded litigation dockets on the one hand, and the private benefits to settling parties of resolving their cases on the other.<sup>45</sup> In other words, while the two benefits of summary jury trials would be realized together, one focused on aiding courts, while the other focused on helping litigants.

### C. Disappointment

The summary jury trial process never caught on.<sup>46</sup> While the use of other forms of ADR grew, the summary jury trial faded. Even at their peak, summary jury trials were not very common outside of a few jurisdictions.<sup>47</sup> Today, the process is rarely used.<sup>48</sup>

Summary jury trials faded from obscurity into oblivion for several reasons. For one, some of the procedure's most enthusiastic judicial supporters retired. Its greatest enthusiast and pioneer was Judge Thomas Lambros of the U.S. District Court for the Northern District of Ohio.<sup>49</sup> First among federal judges, and years before Congress specifically authorized the practice, Judge Lambros required litigants in his court to participate in summary jury trials.<sup>50</sup> He believed litigants who learned what a jury could do would have

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44. *Id.*

45. *See, e.g.*, Jennifer O'Hearne, Comment, *Compelled Participation in Innovative Pretrial Proceedings*, 84 NW. U. L. REV. 290, 318 (1989).

46. *See, e.g.*, Toohar, *supra* note 12. As reported:

[E]ven its staunchest proponents concede that the summary jury trial has been slow to catch on. Florida, Texas and Virginia have incorporated summary jury trials into their civil practice statutes. A dozen other states and some federal courts also conduct them sporadically. But nearly a decade after its introduction, the summary jury trial has failed to win over the majority of trial lawyers and judges.

Molly McDonough, *Summary Time Blues*, ABA JOURNAL, Oct. 2004.

47. McDonough, *supra* note 46.

48. *Id.*

49. *See, e.g.*, Ponte, *supra* note 16, at 1072; *see also supra* notes 13, 22.

50. Thomas D. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L. REV. 789, 799–800 (1989).



strong incentives to settle, which would in turn trim court dockets.<sup>51</sup> He argued that federal judges had authority to require summary jury trials under Rules 1 and 16 of the Federal Rules of Civil Procedure, and by virtue of courts' inherent powers.<sup>52</sup> Exercising that power, he included dates for summary jury trials in his Rule 16 scheduling orders, as the penultimate procedural stage in a case before an ordinary trial.<sup>53</sup> While Judge Lambros had his critics, his advocacy led the Judicial Conference of the United States to endorse the experimental use of summary jury trials by federal judges.<sup>54</sup> Judge Lambros retired, however, in 1996, and his enthusiasm proved not to be widely infectious. With such advocates of the process no longer occupying the federal bench, Congress's express authorization of the process has had little lasting effect.<sup>55</sup>

But summary jury trials would have outlasted their original proponents if they had vindicated those proponents' justifications by trimming dockets and settling claims. They did neither. Or at least, they did neither demonstrably. In 1986, Judge Richard Posner argued that then-available data (which Posner rightly pointed out were sparse and crude) did not show that summary jury trials led to a decrease in trials, an increase in settlements, or a decrease in the disposition time for suits.<sup>56</sup> He thus invited supporters of the summary jury trial to demonstrate its successes,<sup>57</sup> a challenge that went unanswered. To the present, there are no studies confirming that summary jury trials reduced dockets or promoted settlement. While other forms of ADR have many advocates—and provide the focus for numerous studies—the summary jury trial by contrast has few champions. Thus, processes based on the model of summary trials are used in only a handful of state jurisdictions, on a voluntary basis, and in most instances without a jury.

While summary jury trials are no longer required, however, there is nothing to stop enterprising litigants from electing to use the

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51. *Id.*

52. Ponte, *supra* note 16, at 1075–76.

53. *Id.* at 1080.

54. See Metzloff, *supra* note 7, at 811–12 & n.19 (citing JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT ON THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 88 (1984)).

55. See Ponte, *supra* note 16, at 1085; Metzloff, *supra* note 7, at 812–15.

56. Posner, *supra* note 17, at 382–85.

57. See *id.* at 393.

process. Litigants seeking to resolve their cases through some procedure short of an ordinary civil trial, but with the benefit of a real jury who might break an impasse in settlement negotiations, could use the summary jury trial to do so. Litigants so motivated might even elect to make the summary jury's verdict binding, just as litigants might choose binding arbitration. In that light, the summary jury trial resembles other forms of voluntary ADR, with a judge in place of an arbitrator, and a real jury present to render a verdict on liability and, if necessary, award damages.<sup>58</sup>

Such litigants could create such a procedure for themselves by contract. Such a contract could specify that their case would be resolved through a summary jury trial with specified features. It would be enforceable like any other contract providing for binding ADR processes. The obstacles litigants seeking to resolve their cases in this way would face, then, would not be legal, but purely practical, i.e. where will they get a real jury, a judge, and a place to try their case? A state court in South Carolina has answered that question.

## II. A SPECIAL CASE: SUMMARY JURY TRIALS IN CHARLESTON, SOUTH CAROLINA

Charleston County, South Carolina, together with neighboring Berkeley County, comprise South Carolina's Ninth Circuit Court.<sup>59</sup> The circuit courts are South Carolina's trial courts, with jurisdiction over non-misdemeanor criminal cases (known then as the "Court of General Sessions") and civil cases involving money or property exceeding \$7,500 in value (the "Court of Common Pleas").<sup>60</sup> The circuit courts are supported administratively by county Clerks of the Court, part of county government. Although the circuit court judges are selected by election of the state legislature and are paid by the state, the Ninth Circuit, like every other, has a small number of

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58. See Metzloff, *supra* note 7, at 806.

59. See South Carolina Judicial Department, Map of Circuit Court Judges, <http://www.judicial.state.sc.us/circuitCourt/circuitMap.cfm> (last visited Nov. 17, 2008).

60. See South Carolina Judicial Department, Circuit Court, <http://www.judicial.state.sc.us/CircuitCourt> (last visited Nov. 17, 2008); see also Clerk of the Court: Charleston County, South Carolina, General Information, <http://www3.charlestoncounty.org/docs/CoC/general.html> (last visited Nov. 17, 2008).

“resident judges”.<sup>61</sup> Otherwise, circuit judges (of which there are forty-six) rotate among the state’s different circuit courts.<sup>62</sup>

Here, the summary jury trial is not only alive, but well. Working together, the local plaintiff and defense bars of Charleston County have developed a version of the summary jury trial that not only resolves cases quickly and inexpensively, but also provides a class of civil litigants with access to civil justice they would otherwise lack.

#### A. PROCEDURE

Charleston’s summary jury trial resembles the modal summary jury trial described above, but with two crucial exceptions.<sup>63</sup> First, the process is entirely voluntary. Unlike the federal judges who first developed the summary jury trial, the South Carolina bench does not compel parties to use the process. Moreover, there is no other mandatory ADR process in the Charleston County Circuit Court. In other words, litigants there do not choose summary jury trials because they are required to try some form of ADR or another anyway.

Second, for those who elect to use the process, it is binding. Or put differently, summary jury trials are used in Charleston County only by parties who elect to make the outcome fully binding. They do so by agreeing in writing to be bound by the verdict, as explained in more detail below. Thus, the two main features of the summary jury trial used by some federal judges in the 1980s—a process involuntary and nonbinding—are reversed in Charleston.

Otherwise, the process would look familiar to the early advocates of summary jury trials. First, although Charleston’s summary jury trial has no time limit, in fact most summary trials are concluded within a day, and most of those that last longer are completed during the second day. Litigants, not facing tight time

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61. South Carolina Judicial Department, Circuit Court, *supra* note 60.

62. *Id.*

63. The descriptions of Charleston’s summary jury trial above and throughout are based on confidential telephone and personal interviews of Charleston lawyers and judges extremely familiar with the process, as well as conversations with court personnel, and observations of jury selection and trial. The description of summary jury trials offered here is not intended as a rigorous, authoritative documentation of the practice. On the other hand, the legal subculture in question is small and accessible. Surely the account of Charleston’s summary jury trial provided here would be unobjectionable to anybody familiar with it.

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constraints, may call live witnesses. They may also, instead, summarize what testimony a witness would give if called, based on the absent witness's prior deposition testimony, which litigants may summarize or read. In practice, the ability to read or summarize witness testimony instead of calling live witnesses means that the only live witnesses tend to be the parties themselves.

In Charleston's summary jury trials, too, the rules of evidence are substantially relaxed. Litigants can make some hearsay objections, for example, but there is no rule barring hearsay in the context of medical reports and opinions. Thus, litigants and their witnesses may inform the jury about what a doctor said, or what is contained within medical records. This rule applies to medical experts as well, so that in a personal injury case, for example, neither side must pay a medical expert to appear and testify in court.

In court, indeed: Charleston's summary jury trials are conducted in the county courthouse, in the same courtrooms used for ordinary civil and criminal trials. In every way, they *look* like ordinary civil trials. Anyone who walked into a summary jury trial in Charleston—with the exception of experienced trial lawyers and evidence experts—would think he or she had walked into an ordinary trial.

Most interestingly, and somewhat controversially, it looks that way to the jurors themselves, too. For the jurors used in Charleston's summary jury trials are drawn from the same pool of prospective jurors as those used in ordinary trials. In the Charleston County Circuit Court, criminal and civil juries are selected from the same jury pool on the same day, during a selection process overseen by a judge assigned to manage jury selection for all trials scheduled for a given period. Summary jurors are selected the exact same way from the same pool. In other words, only chance determines if a given prospective juror is ultimately chosen for a criminal trial, an ordinary civil trial, a summary jury trial, or for no trial at all.

Charleston's summary jury trials are presided over by a "judge," chosen by agreement of the litigating parties. Those serving as summary jury trial judges are in fact lawyers, who have their own practices which may or may not include ADR as a component. The relevant legal community from which summary jury trial lawyers and judges come is small, close knit, and sophisticated. Its members know one another, and a summary jury trial judge in one case could be a summary jury trial lawyer in the next. Not surprisingly,

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summary jury trial judges are selected in part because of their perceived evenhandedness, even if they themselves happen to practice with the local plaintiff bar or defense bar. To that extent, the presiding judge plays a role much like that of an arbitrator, but not formally.

Formally, once the parties agree upon a summary jury trial judge, they file a stipulated motion asking the real judge to designate the selected “judge” as a “special judge” for the limited purposes of their case, with “the authority to rule on all matters with regard to procedures and evidence as if [he or she] were a sitting Circuit Court Judge.”<sup>64</sup> In other words, the summary jury trial judge is essentially deputized by order of the court. Evidently, Charleston County Circuit Court judges have the power to designate special judges for limited purposes, roughly like federal judges might empower special masters or advisory judges. Or, if they lack such power, no one minds, and no one contests the orders making such a designation.

The deputized judges wear robes during the summary jury trial process. In front of the jury, summary jury trial lawyers show the same formalities and deference they would to an ordinary judge. In the jury’s absence, though, the procedure takes on a slightly less formal air. Lawyers may or may not stand when addressing the court and their tone resembles that which a lawyer might adopt before a mediator or arbitrator, very respectful but not wholly deferential. After all, the parties are paying the judges, though they are paying them to perform as judges would.

An armed deputy marshal also occupies the courtroom, as in an ordinary trial. The marshal’s function is less clear, however. Presumably the marshal would secure the courtroom, but it is difficult to know who would threaten its security. Again, the parties are there by agreement. So are witnesses; subpoenas for witnesses are never necessary. Members of the public and the press do not attend, nor would they know that a summary jury trial was taking place. Although summary jury trials happen in real courtrooms, using real jurors, they are not otherwise reflected on the court’s official calendar.

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64. The quoted language comes from such a stipulated motion and order (on file with author).

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The only usual participant missing from the summary jury trial courtroom is the court reporter. For summary jury trials are not only binding, but final. Because there is no appeal, there is no need for a record, and thus the parties do not enlist a reporter. Once the jury has rendered its verdict, the case is fully over, and the parties and their lawyers go home with nothing left to do but carry out the judgment.

In other words, there are no post-trial motions, for example. In one interesting case, a summary jury trial judge granted a motion for additur on the grounds that he had all the powers of a circuit court judge for the purposes of the case, and those included the power to entertain motions for additur or remittitur. But parties to summary jury trials have since refined their agreements seeking designation of a summary jury trial judge to make clear that the jury's decision is fully final. Among the many cases resolved through summary jury trials, the process has never derailed, or required intervention from an ordinary circuit court judge. Upon completion of a summary jury trial, the case is recorded on the official circuit court docket as "resolved by settlement" as is any other case resolved by private settlement.<sup>65</sup>

### *B. Controversy*

As might be expected given the manner in which Charleston's summary jurors are selected and how little they know about the process of which they are the heart, Charleston's summary jury trials have brought some controversy, although not a great deal. On the whole, the process enjoys the support of participating parties (naturally), the plaintiff bar, the defense bar, court staff, and court administrators, including the elected Clerk of the Court. Participating lawyers and "judges" speak about the process in enthusiastic terms. Some have traveled by invitation to other states to explain the process to interested bar associations.<sup>66</sup>

Even so, others have objected, most importantly on the grounds that jurors should not be summoned by the state to do their civic duty

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65. In a neighboring county—Dorchester County—within a different judicial circuit, which also uses the summary jury trial process, the concluded summary jury trial is docketed instead as a final judgment of the court, much as a judicially approved settlement or consent decree might be.

66. See Tooher, *supra* note 12.

(of course, ultimately under threat of compulsion) and then used, unknowingly, to assist parties employing what is essentially a private procedure to settle their dispute. According to this objection, if parties want to employ the summary jury trial process, they should be explicit with jurors that that is what they are doing, perhaps pay jurors who agree to participate for their time, and allow those not interested in participating to leave. In Charleston, summary jurors are instead led to believe they are jurors in an ordinary case. They are selected in what appears to be the ordinary process, told they have been chosen to sit in a civil trial, and told what courtroom to report to and when. When they arrive, they are greeted by a person who appears to be a judge, wearing a robe. They are escorted between the jury room and the court room by court personnel. Lawyers stand in their presence. Thus, from a juror's perspective, the summary jury trial has all the trappings of an ordinary trial, and thus any juror would reasonably believe he was part of an ordinary trial. In short, Charleston's summary jury trial arguably misleads the jurors it employs.

While the objection that Charleston's summary jury process misleads jurors carries some force, the objection is not strong enough to warrant abandoning the process. Moreover, minor modifications of Charleston's summary process can fully respond to such objections. The balance of this Article thus defends this revived procedural frontier and, in so doing, uses the occasion to raise questions about access to civil justice more broadly.

### III. TORT REFORM AND ACCESS TO JUSTICE

First, however, back up. To appreciate the virtues of Charleston County's summary jury trial, it is necessary first to focus on the problems of the civil litigation system, purported and real, which this innovative procedure avoids. A big topic: what is wrong—and right—about the civil litigation system is far too large a subject to treat in any detail here. Even so, the merits of Charleston's procedure are best appreciated in light of conventional wisdom about the ills of ordinary civil litigation.

### A. Tort Law and Civil Justice Reform

Among the many critiques of the civil litigation system, none is voiced as frequently or forcefully as the criticism that there is simply too much litigation.<sup>67</sup> According to dominant images of civil litigation, the system itself breeds too many cases. Populated by undeserving litigants, unscrupulous lawyers, unpredictable juries, and indifferent judges, the civil litigation system rewards those most able to invent or exaggerate harms.<sup>68</sup> Looking to enrich themselves, litigants are too often willing to bring cases of very questionable legal merit, which the system invites by imposing liability for nearly every slight.<sup>69</sup>

Plaintiff's lawyers oblige. Because the contingency fee system creates such a powerful incentive for plaintiff's lawyers to bring bad cases, and overstate good ones, lawyers (aided by expert witnesses willing to stretch the truth for a price) file claim after claim.<sup>70</sup> Juries close the deal: moved by sympathy for injured plaintiffs, unable to see through weak testimony or make fine causal distinctions, and unaware of the adverse economic consequences of large damage awards, juries reward the litigious with a frequency that is socially harmful.<sup>71</sup>

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67. See, e.g., AM. TORT REFORM FOUND., DEFROCKING TORT DEFORM: STOPPING PERSONAL INJURY LAWYERS FROM REPEALING EXISTING TORT REFORMS AND EXPANDING RIGHTS TO SUE IN STATE LEGISLATURES (2008), [http://www.atra.org/reports/Defrocking\\_Tort\\_Deform.pdf](http://www.atra.org/reports/Defrocking_Tort_Deform.pdf); STAFF OF JOINT ECON. COMM., 105TH CONG., IMPROVING THE AMERICAN LEGAL SYSTEM: THE ECONOMIC BENEFITS OF TORT REFORM 2 (Comm. Print., Mar. 1996) ("Excessive litigation has an adverse effect on economic growth, not only in direct costs but in the way the tort system alters individuals' behavior.").

68. See, e.g., STAFF OF JOINT ECON. COMM., 105TH CONG., THE BENEFITS AND SAVINGS OF AUTO-CHOICE 3-5 (Comm. Print., Apr. 1997), available at <http://www.house.gov/jec/tort/auto/auto.pdf> ("Moreover, the plaintiff's attorneys have an incentive to inflate medical expenses and wage loss in order to reach a settlement which may not be warranted by the actual economic damages . . . . One of the greatest problems is the incentive to inflate claimed economic damages. Part of this incentive is to recover more money in compensation.").

69. See PETER WILLIAM HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1990); WALTER OLSON, THE RULE OF LAWYERS; HOW THE NEW LITIGATION ELITE THREATEN AMERICA'S RULE OF LAW (2003).

70. See, e.g., Edward L. Holloram, III, *Medical Malpractice Litigation in Florida: Discussion of Problems and Recommendations*, 26 Nova L. Rev. 331, 353-54 (2001); Christine Hunt, *The Undercivilization of Corporate Law*, 33 J. CORP. L. 361, 382 (2008); Glen G. Lammi, *States Face Many Pitfalls When Hiring Contingency Fee Lawyers*, in 1997 Andrews Tobacco Indus. Litig. Rep. 16218 (1997); Anthony Sebok, *Dispatches from the Tort Wars Distorting the Law: Politics, Media, and the Litigation Crisis*, 85 TEX. L. REV. 1465, 1494 (2007).

71. See, e.g., Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 Tex. L. Rev. 345, 347 (1995); Wendy E. Wagner,



This general picture underlies the influential movement for tort reform and, more generally, for civil justice “reform.” Above all else, advocates of civil justice reform seek to reduce the amount of civil litigation.<sup>72</sup> To that end, they propose reducing the number of legally cognizable injuries, limiting recoverable damages, strengthening legal defenses, and imposing other procedural restrictions that make civil litigation more difficult and, thus, less common.<sup>73</sup> In other words, the “reform” attached to “civil justice reform” prescribes limiting resort to the civil litigation system altogether. By making it harder for plaintiffs to bring successful claims and by reducing the benefits of doing so, civil litigation will be less common. The movement calls for contraction.

Civil justice reformers usually point to tort litigation to illustrate their claims about the excesses of civil litigation. Indeed, for civil justice reformers, the paradigm case capturing what is wrong with the civil litigation system is the tort plaintiff with exaggerated injuries who, thanks to a greedy trial lawyer and unscrupulous expert, recovers a seven-figure damages award from an overly sympathetic jury, notwithstanding that there is little evidence establishing a causal connection between the plaintiff’s purported injury and the deep-pocketed defendant’s conduct.<sup>74</sup> Civil justice reformers thus seek to purge the civil litigation system of what they consider to be excessive torts cases.

Yet civil justice reformers prescribe reforms that would alter more than tort litigation. For the defects of the civil litigation system they identify—unscrupulous plaintiff’s lawyers, high damage awards, biased juries, liability standards and evidentiary rules too favorable towards plaintiffs—are global, not limited to torts cases in particular. Thus tort reformers and their allies have also sought (with

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*Choosing Ignorance in the Manufacture of Toxic Products*, 82 CORNELL L. REV. 773, 828 (1997).

72. See, e.g., John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021, 1087 (2005).

73. See, e.g., PRESIDENT’S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1991); American Corporate Counsel Association, Policy Statement of Civil Justice Reform, <http://www.acc.com/public/accapolicy/polstat.html> (last visited Dec. 18, 2008); American Tort Reform Association, <http://www.atra.org> (last visited Nov. 17, 2008) (statement of reform agenda); see also CONGRESSIONAL BUDGET OFFICE, THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES (2004).

74. See, e.g., Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 18 (1990).

success), for example, reforms curbing certain civil rights cases,<sup>75</sup> securities suits,<sup>76</sup> and class action litigation generally.<sup>77</sup> Tort reform is the pillar of civil justice reform, but not its sum. Because the civil litigation system as a whole is too indulgent of plaintiffs, tort reformers prescribe not merely changes in tort doctrine, but systemic reforms affecting other types of civil litigation as well.

In any event, according to the critics, the high costs of litigation is a—if not *the*—major reason the system requires wholesale reform. Reformers frequently stress how costly civil litigation is, especially for civil defendants.<sup>78</sup> They argue, for example, that because litigation costs are regrettably high, defendants often pay undeserved settlements to plaintiffs with weak claims in order to avoid the even higher costs of litigation.<sup>79</sup> Even though such defendants would likely prevail were they to litigate their cases to the end, the excessive costs of the process make fully defending cases economically irrational. So they capitulate, even where on the merits they should not.<sup>80</sup> Almost as bad, where defendants instead litigate and win, the civil litigation system requires them to spend a lot to prevail.

Civil litigation is not just too costly, however. Again, civil justice reformers claim that it is too common as well. Litigation is too common in part because damage awards are unjustifiably high, and also too easy to obtain.<sup>81</sup> Juries are too sympathetic towards

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75. See, e.g., Prison Litigation Reform Act of 1995, Pub. L. No. 104-134.

76. See, e.g., Private Securities Litigation Reform Act of 1995, 15 U.S.C.A. §78u-4 (West 2008).

77. See, e.g., *id.* at 78u-4(a)(3) (restrictions on class actions in securities cases); 45 C.F.R. 1617.1-4 (2000) (prohibiting class actions by Legal Service Corporation funding recipients). See generally Class Action Fairness Act, 28 U.S.C. §§ 1332 (d), 1453, 1711-1715 (2005).

78. See, e.g., Matthew G. Vansuch, *Icing the Judicial Hellholes: Congress' Attempt to Put Out "Frivolous" Lawsuits Burns a Hole Through the Constitution*, 30 SETON HALL LEGIS. J. 249, 260-63 (2006).

79. See *id.*; see also Lance P. McMillian, *The Nuisance Settlement "Problem": The Elusive Truth and a Clarifying Proposal*, 31 AM. J. TRIAL ADVOC. 221, 252 (2007).

80. See, e.g., Martha L. Cochran, *Sweeping Reform: Litigating and Bespeaking Caution Under the New Securities Law*, Appendices, 924 PLI/CORP 31, 728 (1996); Roger S. Haydock, *Civil Justice and Dispute Resolution in the Twenty-First Century: Mediation and Arbitration Now and for the Future*, 27 WM. MITCHELL L. REV. 745, 754 (2000); Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1879 (2004).

81. See, e.g., Amy Kolz, *Are Punitive Damage Awards Too High?: Two Leading Scholars Crunch the Numbers and Come Up with Very Different Answers on Jury Awards*, AM. LAWYER,

plaintiffs,<sup>82</sup> they do not fully understand the economic consequences of adding zeros to damage awards, and thus they tend to overcompensate plaintiffs. Easy compensation breeds excessive litigation.

Plaintiffs with weak or even frivolous cases also benefit from evidentiary standards that are too lax;<sup>83</sup> plaintiffs press their cases with “junk science.”<sup>84</sup> Or, short of junk science, the civil litigation system’s indulgence of fringe science enables plaintiffs with weak claims to move their cases past summary judgment. As a result, plaintiffs prevail based on causal theories that are scientifically unsupported. In short, because the rules of the game are biased against defendants, plaintiffs recover both too frequently and too much.

Plaintiffs are not the only ones overcompensated. Plaintiff’s lawyers too are a favorite target of civil justice reformers.<sup>85</sup> Because they stand to receive such a large portion of any money their prevailing clients are awarded, tort lawyers file dubious cases.<sup>86</sup> They need not win every case, or even most of them. As long as they hit it big once in a while, they have the incentive to bring lots of cases of questionable merit, not knowing until after the fact which particular cases strike gold.<sup>87</sup> Thus plaintiffs and plaintiff’s lawyers play the civil litigation “lottery,” filing many weak cases, all of which require defendants to mount expensive defenses, and profiting from the exceptional big wins.<sup>88</sup> Here again, the target of reformers extends beyond tort lawyers. Reformers argue that plaintiff’s lawyers in general—including, for example, securities lawyers, consumer class-action lawyers, “clientless” public-interest lawyers,

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Jan. 27, 2006, available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1138269913844> (last visited Nov. 17, 2008).

82. See generally VALERIE HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY (2000) (examining and testing common perception of excessive jury sympathy towards plaintiffs).

83. See, e.g., PETER W. HUBER, GALILEO’S REVENGE: JUNK SCIENCE IN THE COURTROOM 20 (1991).

84. *Id.* at 3.

85. See AM. TORT REFORM FOUND., *supra* note 67, at 7.

86. See, e.g., STAFF OF JOINT ECON. COMM., 105TH CONG., IMPROVING THE AMERICAN LEGAL SYSTEM: THE ECONOMIC BENEFITS OF TORT REFORM, *supra* note 67, at 2.

87. See AM. TORT REFORM FOUND. *supra* note 67, at 2.

88. See *id.* at 14–15.

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and impact litigators—all contribute to an overly litigious and excessively expensive civil litigation system.<sup>89</sup>

The reformers' critique raises difficult questions, however. For example, if tort reformers are correct that litigation costs are so high, why do those costs not discourage plaintiffs from bringing their weak and frivolous suits in the first place? If litigation costs are high, then they are high for all potential litigants. As such, they should discourage parties from initiating litigation, as the higher the costs of initiating litigation, the lower the expected net returns.

While tort reformers commonly identify the nuisance suit as one of the civil litigation system's main defects, it is thus not clear how plaintiffs could get away with such suits, given high litigation costs. A party seeking a nuisance recovery must credibly present the case as if that party would fully litigate the claim absent settlement. In other words, nuisance suits have to constitute *credible* nuisances. But the very incentive for defendants to settle cases that are strong for them should also discourage plaintiffs from pursuing cases that are weak for them. After all, for every defendant who refuses to settle, some plaintiffs have to litigate or else abandon the case. In other words, the plaintiff must incur significant costs (of discovery, motion practice, and so on) in order to press on. If those costs deter parties with strong defenses from litigating, presumably they also deter parties with weak claims from litigating. By focusing on how high litigation costs affect only defendants and not plaintiffs, tort reformers ignore half of the analysis.

Yet the burdens of proof and persuasion carried by civil plaintiffs put the onus on them to substantiate claims that a defendant committed a legal wrong. This burden translates to a greater—and often earlier—discovery burden for plaintiffs. For example, the plaintiff has to put together a case before the defendant does, which is to say finance the factual and legal research leading up to filing a claim. Once a case is filed, the plaintiff has to play offense, whereas the defendant largely responds to investments in a case the plaintiff makes first. Thus, the plaintiff must produce expert reports and expert testimony before the defendant does. If the plaintiff's expert fails to provide adequate support for some element of the case, the defendant can focus on that one element. In short, playing defense

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89. See, e.g., CATHERINE CRIER, *THE CASE AGAINST LAWYERS* (2002).

means that defendants often can make more focused and, therefore, often smaller, investments in a case.

None of this is to argue that defendants are unburdened by high litigation costs. The point, rather, is that while those burdens fall on plaintiffs as well as defendants, tort reformers do not explain why those costs hurt defendants so much more. They might have an explanation, but by not considering how litigation costs discourage plaintiffs from filing suits or litigating them fully, tort reformers do not really confront the issue.

After all, the nuisance suit tort reformers emphasize finds a counterpart—the “nuisance defense”—wherever high litigation costs effectively force a plaintiff to settle a strong suit too early. In other words, high costs may lead some plaintiffs to settle before they should, simply because they cannot afford to press their strong claims to completion. Some defendants, anticipating that a plaintiff may be unable to afford to overcome a nuisance defense, are therefore well positioned to offer a modest settlement, irresistible to the plaintiff given the costs of litigating to the bitter end. Even if the plaintiff can afford the absolute costs of pressing an expensive but legally strong claim, the net benefits of doing so may be smaller than accepting the defendant’s lowball settlement. Thus, quick settlements due to high litigation costs do not obviously hurt defendants more than plaintiffs. Given the costs of litigation, some defendants may be getting off cheap. Assuming high litigation costs, the nuisance offer could be harmful to either side.

Whereas civil justice reformers’ claims about the implications of high litigation costs seem incomplete, their claims about excessive damage awards seem questionable. Available data do not show that damage awards are excessive.<sup>90</sup> To the contrary, there is considerable evidence that certain types of plaintiffs are, on average, undercompensated.<sup>91</sup> For that matter, there is considerable evidence

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90. See generally Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort Reform: Scheduling “Pain and Suffering”*, 83 NW. U.L. REV. 908, 909 (1989) (“Some [tort] reformers, however, would go even further, barring pain and suffering altogether as an element of personal injury awards. Nonetheless, empirical findings tend to support the importance of non-economic losses, even showing that prevailing damage valuations may in fact be too low.”).

91. See, e.g., Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1116–20 (1996).

that certain types of potential plaintiffs do not file suit as often as they are legally injured.<sup>92</sup>

In addition, aggregate data show median damage awards for common types of tort actions to be quite modest.<sup>93</sup> To be sure, there are always exceptions. But the exceptions are just that—exceptional. And here again, civil justice reformers' claims about high damages are global, not confined to tort litigation. The difficulty is that their sweeping claims about excessive damage awards find little support in the data.

But the purpose of this Article is not to evaluate all of the arguments underlying civil justice reform. The point, instead, is to highlight some of the core themes of that movement, though to do so not without awareness of their conceptual and empirical weaknesses. Notwithstanding such weaknesses, though, civil justice reform has its strength as a legal and political movement. That movement has led to numerous legislative and judicial reforms of the civil litigation system, on both the state and national levels.<sup>94</sup> It has powerfully shaped lay perceptions of the system as well.<sup>95</sup>

### B. Access to Justice

In certain circles, the civil justice reform movement's influence competes with a very different picture of civil litigation. According to this alternative, civil litigation is not common enough. Among legal aid lawyers, civil rights lawyers, and legal advocates for the poor, in particular, but also among many parts of the organized bar, there is broad consensus that many deserving would-be civil litigants lack legal representation,<sup>96</sup> even though they would have strong legal claims if only they could manage to bring them. On this view, many types of civil claims are, therefore, underlitigated. The tort

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92. *See generally* LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 4, 11 [http://www.lsc.gov/press/documents/LSC%20Justice%20Gap\\_FINAL\\_1001.pdf](http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf) (Sept. 2005) (providing several quantitative measures of under-representation of the poor and the middle classes).

93. *See generally* BUREAU OF JUSTICE STATISTICS, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 1996 (1999); BUREAU OF JUSTICE STATISTICS, TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 2001 (2004);

94. *See generally* Nockleby & Curreri, *supra* note 72, at 1031–33.

95. *Id.*

96. *See* LEGAL SERVICES CORPORATION, *supra* note 92.

reformers' image of excessive litigation and frivolous claims thus competes with a contrasting picture of unrepresented potential plaintiffs and meritorious claims.<sup>97</sup>

Proponents of greater "access to justice" want to change this. They therefore advocate for greater representation of individuals who do not file civil suits that they should. Greater access to justice requires more than lawyers willing to take pro bono cases, however. Just as tort reformers pursue their goal of minimizing civil litigation by prescribing reforms that make civil litigation more difficult and less attractive for plaintiffs, so do those who advocate for greater access to justice prescribe reforms that would make civil litigation more feasible for underrepresented parties and more attractive to lawyers who would take their cases. Such calls routinely take the form of arguments for increased funding for legal-aid and legal-services organizations.<sup>98</sup> More dramatically, the American Bar Association has supported a "civil *Gideon*" right to counsel for certain categories of civil litigants.<sup>99</sup>

Just like tort reformers, access-to-justice advocates emphasize the high costs of litigation,<sup>100</sup> though for them the victims of higher costs are found on the other side of the "v.," or would be, but for excessive costs. Because litigation costs are high, would-be plaintiffs cannot find adequate representation, as lawyers unable to cover those costs cannot afford to take cases, especially where recoverable damages are modest. Even though many would-be plaintiffs would likely prevail were they to litigate, the costs of the process itself make bringing cases economically irrational.

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97. See generally DEBORAH RHODE, ACCESS TO JUSTICE (2004). For visions of litigation challenging those of civil litigation reformers see, for example, TOM BAKER, THE MEDICAL MALPRACTICE MYTH (2005); CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW (2001); WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW, POLITICS, MEDIA, AND THE LITIGATION CRISIS (2004).

98. See, e.g., Letter from Robert J. Grey, Jr., President, American Bar Assoc., to Sen. Richard C. Shelby and Sen. Barbara A. Mikulski (June 20, 2005), available at <http://www.abanet.org/poladv/letters/109th/legalserv/lscfunds062005.pdf> (last visited Nov. 17, 2008).

99. See AMERICAN BAR ASSOCIATION, REPORT TO THE HOUSE OF DELEGATES (112A) 7 (Aug. 7, 2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf> (last visited Nov. 17, 2008) (resolution unanimously approved by the ABA House of Delegates). "To shorthand it, we need a civil *Gideon*, that is, an expanded constitutional right to counsel in civil matters." *Id.*

100. See, e.g., LEGAL SERVICES CORPORATION, *supra* note 92, at 13–14.

Like civil justice reformers, access-to-justice advocates also emphasize damage awards. According to them, however, high damages are rare. Unable to sue, many would-be plaintiffs go uncompensated for their injuries. Even when they do bring suit, plaintiffs often do not recover for the full extent of their injuries.

Again, like civil justice reformers, access-to-justice advocates also emphasize attorney compensation, though for them plaintiff's attorneys are not over- but undercompensated. Precisely because they are, plaintiff's attorneys often cannot afford to represent many deserving plaintiffs. Especially where plaintiffs seek injunctive or declaratory relief instead of damages,<sup>101</sup> and cannot themselves afford to pay for hourly representation—the unavailability of attorney's fees or recent limits on attorney's fees again means plaintiffs with strong cases often cannot find willing representation.

But access-to-justice advocates are not concerned with attorney compensation in the abstract. Attorney compensation matters because proving plaintiffs' cases can be a laborious, resource-intensive task. That is, contrary to tort reformers claims about the burdens of litigation on defendants, those advocating for greater access to justice argue that the rules of civil litigation are often biased in favor of defendants, not plaintiffs. For example, exhaustion requirements and high evidentiary burdens tilt the playing field in defendants' favor in many types of cases.<sup>102</sup> As a result, the costs of bringing such cases are high and, where plaintiff's lawyers are only modestly paid, insurmountable.

### *C. Access to Justice for Tort Plaintiffs?*

Tort reformers and access-to-justice advocates thus paint contrasting pictures of the civil litigation system—to say the least—and accordingly seek very different changes to that system. Interestingly, however, neither camp much engages the claims made by the other. Tort reformers simply ignore claims concerning lack of adequate legal representation for many potential plaintiffs, painting

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101. See, e.g., *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 610 (2001); *Evans v. Jeff D.*, 475 U.S. 717, 723 (1986).

102. See, e.g., Andrew B. Gagen, *What Is an Environmental Expert? The Impact of Daubert, Joinder and Kumho Tire on the Admissibility of Scientific Expert Evidence*, 19 *UCLA J. ENVTL. L. & POL'Y* 401, 427 (2001) (“Defendants still are placed in a favorable position because the burden of proof of admissibility rests with the plaintiffs.”).



instead with the broadest of reform strokes, as if every civil plaintiff is an undeserving tort plaintiff. Advocates of greater access to justice, meanwhile, ignore the arguments of the tort reformers, leaving to others the task of defending civil litigation as such.

It is no accident that tort reformers and access-to-justice advocates have seen little direct engagement. For their part, access-to-justice advocates have steered clear of responding to many of the tort reformers' arguments probably because doing so would be impolitic. Those championing access to justice do not need the extra—and substantial—burden of defending the tort system. Nor would defending tort plaintiffs win many sympathizers. Access-to-justice advocates' failure to include tort victims to their roster of the underrepresented is one strong measure of the tort reform movement's influence: That debate is too big to take on, notwithstanding that legal representation is often unavailable to would-be tort plaintiffs as well as those facing eviction, seeking public assistance, or requiring civil protection from domestic abuse.

On the other side of the divide, tort reformers' agenda leads them simply to ignore issues concerning access to civil justice. Civil justice reformers seek not exactly to "reform" the civil litigation system so much as to minimize it,<sup>103</sup> although that distinction is not one they would emphasize. Because they view the system on the unwavering assumption that it produces too many lawsuits resulting in excessive damages, they do not distinguish between types of plaintiffs who bring too much litigation and those who bring too little. For tort reformers, all plaintiffs belong to the former group; the civil litigation system spawns undesirable litigiousness across the board. Because the institution of civil litigation is too indulgent of plaintiffs across the board, litigation reform is an across-the-board project.

Moreover, were tort reformers to characterize some types of litigation as too infrequent, or some class of plaintiffs as underrepresented, that would undermine their global claims about the ills of litigation. That is, distinguishing among types of cases that are brought too often and those that are brought too infrequently would

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103. See, e.g., Jeffrey O'Connell & David F. Partlett, *An America's Cup for Tort Reform? Australia and America Compared*, 21 U. MICH. J.L. REFORM 443, 448–49 (1988); Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673, 681 (1996).

raise questions about why—and whether—the same civil litigation system creates both. Or, put differently, because civil justice reformers' arguments are cast in general terms, conceding that some types of plaintiffs file too few lawsuits would call into question not only the scope of the reformers' claims, but also the premises underlying them. Better to keep their message simple.

Yet, civil rights plaintiffs, tenants, consumer debtors, and social-welfare beneficiaries are not all who find inadequate legal representation. Rather, the high costs of litigation commonly emphasized by civil justice reformers imply that one class of tort plaintiffs is also very likely to be unrepresented—tort plaintiffs who have suffered harms that do not exceed the costs of bringing suit. High litigation costs may burden defendants, but unless tort litigation is free, those costs are most problematic for plaintiffs whose expected damage awards are unlikely to exceed the cost of litigating. Because tort plaintiffs who have suffered low-damage harms also deserve legal vindication—for a variety of reasons sounding in deterrence and fairness—tort reformers as well as advocates for greater access to justice should embrace their cause.

#### IV. THE MERITS OF CHARLESTON'S SUMMARY JURY TRIALS

Fortunately, Charleston's summary jury trial provides access to justice for plaintiffs who, given the small size of their claims relative to the costs of traditional civil litigation, would otherwise lack access. What is more, it does so without presenting any of the problems identified by tort reformers. Thus, even assuming for the purposes of argument that tort reformers paint an accurate critical picture of civil litigation, those skeptical of tort litigation generally should have no objection to summary jury trials.

##### A. *Advantages*

In particular, Charleston's summary jury trials provide access to plaintiffs, almost all tort plaintiffs, whose potential damage awards usually range from the low thousands to several tens of thousands of dollars. Million-dollar lawsuits, even low six-digit lawsuits, are not litigated through the summary jury trial process. Although the proponents of the summary jury trial of the 1980s saw the process as

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perfectly suitable for complex, high-stakes litigation,<sup>104</sup> that is not the type of litigation for which summary jury trials are used in Charleston.

Rather, the paradigm summary jury trial case in Charleston is a simple torts case, involving an automobile accident or a slip-and-fall, in which a plaintiff allegedly suffered significant but not life-altering injuries as a result of the defendant's conduct. To the plaintiff, those harms are real and substantial—they typically include some lost wages, medical bills, and some pain and suffering—but they are not astronomical. Summary jury trials provide one avenue of potential relief for such a plaintiff.

Consider, for example, the situation of a plaintiff involved in a minor auto-pedestrian accident where traditional litigation provides his only recourse. A plaintiff might allege that he suffered significant but not permanent injuries due to the defendant driver's negligence. Assume that, given the pedestrian's injuries (time off work, pain and suffering, etc.), roughly twenty thousand dollars would compensate him fully. Finally, assume that this plaintiff's liability case is strong though not certain—it would be fairly easy to show that the driver was negligent, if a factfinder believed the plaintiff's credible testimony—and that demonstrating twenty thousand dollars of harm would also be straightforward, but that it is improbable the plaintiff could demonstrate harm greater than that.

Such a plaintiff is in no easy position. Suppose this plaintiff sought legal representation, necessary to bring a successful suit. At a contingency fee rate of one-third, a lawyer contemplating taking the plaintiff's case would have to conclude that he or she would not spend much more than six thousand dollars on the case (that is, on ordinary overhead and the opportunity cost of time). Were the prospective lawyer uncertain the plaintiff would prevail—and a contingency-fee lawyer can be *certain* of very little—he or she would discount the expected contingency fee by the probability of victory. Given these realistic assumptions, the difficulty here is simple: an uncertain (i.e., discounted) six thousand dollars is often too little to justify the overhead costs of the case. For lawyers who absorb their clients' out-of-pocket costs in the event the client does not prevail, the overall expected value of the case is even lower.

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104. See Lambros, *supra* note 13, at 472.

Many lawyers would not take such a case, given its low expected value, realizing that such cases are unlikely to prove profitable in the end. But assume for the purposes of argument that the plaintiff could find a lawyer willing to take the case. Now the plaintiff's share of the damage award is just over thirteen thousand dollars ( $\$20,000 \times .666$ ), on the strong assumption that the plaintiff is certain to prevail. Assuming instead that the plaintiff is 75 percent likely to prevail—a strong case indeed—the plaintiff's expected award is under ten thousand dollars (and the attorney's compensation under five thousand, making it even more unlikely to be worth any attorney's time, overhead, and possible expenses). But assume the plaintiff also has to cover the out-of-pocket costs of the lawsuit, including all expenses incident to discovery (deposition costs, expert fees, etc.). The problem is now that those costs mount quickly, and even in simple cases can easily approach or exceed the plaintiff's share of the expected damage award. Where they do, the plaintiff—as opposed to the plaintiff's lawyers—cannot afford to litigate the case. What this plaintiff really needs is an opportunity to litigate in a way that does not cost as much as he could hope to recover. Summary jury trials provide that opportunity.

To suggest that summary jury trials are beneficial to a class of plaintiffs—high-liability, low-damages plaintiffs—raises the question whether they could also benefit defendants. After all, if the procedure helps plaintiffs, presumably by inverse logic it harms defendants. Not necessarily: in the typical Charleston summary jury trial case, the defendant is covered by a liability insurance policy, usually with a fairly low policy limit. The nominal defendant is the tortfeasor, but his or her insurance company is not far in the background (like in most tort cases). Were the plaintiff to prevail and be awarded damages exceeding the coverage amount, the defendant would be liable for the amount of damages exceeding the policy limit, and the insurer would be liable up to the policy limit.

In virtually every case tried by summary jury in Charleston, however, the plaintiff and defendant agree to a "high/low." If the plaintiff prevails, the plaintiff receives whatever amount the jury awards, unless that amount is higher than the "high" or lower than the "low." In other words, the parties agree in advance upon a damages floor and ceiling. The agreed upon "low" is typically around five thousand dollars—an amount, one strongly suspects, that

roughly covers the out-of-pocket costs of this inexpensive form of litigation. The agreed upon “high” is virtually always an amount equal to the insurance policy limit. Therefore, the defendant’s own exposure is virtually always zero, for even if the defendant loses the summary jury trial, damages are capped at the policy maximum. Of course, individual defendants still prefer not to lose, as there are collateral consequences—higher insurance rates for drivers, the stigma of having been sued and lost, and so on. But the immediate economic exposure is next to nothing. So the summary jury trial is attractive to defendants, as well as to plaintiffs.

The insurance companies who finance the legal defense through volume contracts with local defense firms also benefit. When a defendant wins, the insurance companies pay nothing. When a plaintiff prevails on liability but the jury returns a small verdict on damages, the insurance companies pay something, but less than the amount of their exposure. What the insurance companies require, then, are local counsel who can try the cases and minimize the total amount the companies have to pay. Because the summary jury trial process is fast and inexpensive, insurance companies get a cheap opportunity to minimize their liability. Moreover, local defense firms pass on savings to the insurance companies. They do so because they make smaller bids for the companies’ volume contracts than they would make if they had to litigate their cases through traditional processes.

There is a more subtle dynamic at work as well. In a world where ordinary civil trials are rare, in both the state systems (including South Carolina) as well as in the federal system,<sup>105</sup> defense attorneys appreciate the chance to try cases, including summary jury trials. Their enthusiasm for the process owes in part, then, to the experience it provides, which also motivates the defense bar to make even more attractive bids for the insurance companies’ volume work.

In short, all three sides benefit. Plaintiffs get their day in court, which they (and their lawyers) could (or would) not otherwise afford. In exchange for having their day in court, plaintiffs agree to “highs” defined by liability policy limits that allow defendants to avoid

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105. See, e.g., Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Judith Resnick, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783 (2003).

personal exposure. And insurance companies reap the benefit of inexpensive dispute resolution processes in the form of cheaper volume contracts with local defense counsel.

There is more: individual defendants and their insurance companies enjoy another benefit from an inexpensive adjudication process. To return to the auto-pedestrian example above, a defendant (or insurance company) who had to pay to defend a case worth at most twenty thousand dollars would, like the plaintiff, also be in a difficult position. Because litigating such a case could quickly become more expensive than settling it, especially given that the defendant or insurance company is paying legal fees by the hour, the defendant might prefer a quick resolution. To the extent tort reformers are right, defendants might even be willing to settle weak claims rather than incur the cost of defense.

The summary jury trial provides defendants and insurance companies with a quick and inexpensive alternative. Without making a large investment to mount a defense, and without having to incur the costs of playing “expense chicken” with plaintiff’s attorneys, summary jury trials provide defendants a low-cost opportunity to prevail. In other words, by using a summary jury trial, the defendant too gets cheaper access to justice. In the worst case, the defendant pays whatever amount the jury determines (though within the agreed upon high/low). Under such circumstances, the summary process provided an inexpensive mechanism for resolving a settlement impasse (without which there would be no need for a summary jury trial, or any trial).

To be sure, it all could fall out differently. Charleston defendants might instead play hardball, attempting to price plaintiffs out of litigation, even where a plaintiff’s liability case is strong. Plaintiffs might play hardball too, seeking to run up defendants’ legal expenses in hopes of a settlement, especially when a plaintiff’s case is weak. In general, where litigation costs can go high enough to outweigh the expected benefit either side would receive from prevailing, litigation becomes a contest about which side can credibly show that it can afford to—and will—litigate further.<sup>106</sup> But Charleston defendants and plaintiffs frequently opt not to play

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106. See generally Hedieh Nasheri & David L. Rudolph, *Equal Protection Under the Law: Improving Access to Civil Justice*, 20 AM. J. TRIAL ADVOC. 331, 335–36 (1996) (“Accordingly, settlement figures are sometimes determined by which side runs out of money first.”).

hardball. Often, plaintiffs and defendants apparently find it in their mutual interest not to wage a war of attrition, perhaps because in low-stakes cases both sides can so easily lose (by spending more on the fight than the fight is worth). Especially where liability policy limits are low, which makes insurance companies low-stakes litigants as well, the plaintiff and defendant bars have found a way to cooperate rather than run up the other side's litigation costs.

Undoubtedly, many cases do fall out differently. After all, not all cases go to summary jury trial. And like everywhere else, many civil cases in Charleston County settle, and still other cases are resolved through ordinary civil trials. Maybe some defendants offer plaintiffs unjustifiably low settlements, sensing that those plaintiffs cannot afford to litigate their meritorious claims very far. Maybe—if tort reformers are right—some plaintiffs receive settlements for weak cases from defendants who simply want to avoid the high costs of traditional litigation. Comparing summary jury trial cases against all other cases that settle or go to trial through normal processes (and holding everything else equal) would be extremely difficult. Some South Carolina litigants may pay too much, or receive too little. Others may spend more litigating than they gain by litigating, intentionally or not.

Yet many Charleston plaintiffs and defendants opt for the summary jury trial process. In fact, roughly half of all civil trials in Charleston County (a small percentage of all civil cases, obviously) are summary jury trials. This level of support for the process among both local plaintiff's attorneys and defense attorneys is striking.

If the analysis here is correct, this finding makes some sense: Given the profile of the typical summary jury trial plaintiff, and the costs of ordinary litigation, it seems likely that plaintiffs who elect the summary process would generally be unable to afford the ordinary trial process. For them, the availability of summary jury trials means greater access to civil justice. For their adversaries, summary jury trials mean lower litigation costs, which is economical in low-dollar cases where such costs can quickly exceed liability payments even near policy limits.

But there is more good news. Providing access to justice for tort plaintiffs through summary jury trials does not exacerbate the problems with civil litigation that civil justice reformers—rightly or wrongly—emphasize. Recall three of their favorite themes:

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litigation is too expensive (a theme shared by access-to-justice advocates), damages are unpredictable and frequently excessive, and procedural and evidentiary rules are biased against defendants. None of these complaints stick to the summary jury trial. To the contrary, the summary process avoids all of them.

As already mentioned, summary jury trials are inexpensive, which is the very reason parties use them. Whereas the original federal summary jury trials championed by Judge Lambros added costs to litigation because they constituted an additional step in the ordinary litigation process—one that may or may not (and in practice usually did not) avoid ordinary trials—Charleston's summary jury trial instead fully replaces the ordinary trial. In addition, the out-of-pocket costs of the summary jury trial itself are very low. For participating attorneys, the cost of summary jury trials is time. But because they are scheduled on a date certain, start on time, and run through to the end, the time spent on summary jury trials is very small relative to that consumed by ordinary trials.

Summary jury trials are not simply shorter than ordinary trials in elapsed trial time, however. They are also shorter in the sense that litigants spend no time traveling back and forth to court, waiting for their turn on the docket, adjourning while the court conducts other business, and so on. Unlike all other litigants, summary jury trial litigants have their judge's undivided attention. Summary jury trials are fast because they compete with no other cases on any court docket or calendar.

While the smaller costs of the trial itself are significant, however, they are not the only reason the process is cheaper. First, trial preparation costs, which are significant for ordinary trials, are lower as well. For example, summary jury trial attorneys need not spend time on the many facets of witness preparation—going over testimony, reviewing documents, conducting mock examinations or cross-examinations, and so on—given that they can provide summary testimony without witnesses. Avoiding laborious witness preparation is a significant savings.

Trial preparation cost-savings is not the only one. Because summary jury trials relax the rules of evidence, litigants do not spend a lot of time filing and responding to pretrial evidentiary motions. This is not to say never, however. Summary jury trial litigants can and do file motions in limine, for example. Even so, summary jury



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trial litigants do not litigate evidentiary issues—or any others—to death. There is no need, nor occasion, to do so.

Pretrial discovery, which also generates major expenses in ordinary civil litigation, is also less expensive. Parties may elect the summary jury trial early in the life of a case, which they often do, or later, after the case has progressed for a while. The earlier they elect a summary jury trial, the more their discovery can be tailored to the summary process. Like the summary jury trial itself, discovery in cases suitable for the summary process is less extensive. That is, knowing that a case will be summary-jury tried means litigants can economize on discovery as well. For all of these reasons, the high costs of litigation that tort reformers emphasize are not much present in cases using the summary jury trial process.

Civil justice reformers also claim that tort damages are often too high, and in any event too uncertain to be low. The prospect of excessive damages, in their view, both inspires too much litigation by plaintiffs and punishes defendants too often. Neither can be said about summary jury trials. As explained, damages are capped by the high/low the parties set in advance. Thus, damages are never very high, and never unexpectedly high. Nor is there much uncertainty about damages; the sole function of the jury in a summary case is to determine liability and assess damages somewhere within a chosen range.

Given their low cost, summary jury trials are well designed for combating the nuisance suits that civil justice reformers also decry. Given that summary jury trials are inexpensive, defendants are not faced with the choice between high litigation costs and quick settlement. Instead, defendants can call nuisance plaintiffs' bluffs. By forcing such plaintiffs to air their weak claims in a summary trial, defendants are likely to prevail against frivolous litigation, and the cost of prevailing is not likely to be greater than the settlement avoided.

Civil justice reformers also claim that the rules of evidence and other institutional biases work in plaintiffs' favor, and thus also encourage excessive litigation and impose unjustifiable liability on defendants. Here again, none of this can plausibly be said of summary jury trials. As already explained, the rules of evidence are equally relaxed for both sides, at the initiative of both and, moreover, to the specifications of both. Furthermore, if juries are biased at all,

their bias is cabined by the damages range to which the parties have agreed. In short, there is nothing about the procedure itself that works systematically in favor of plaintiffs or against defendants. Instead, summary jury trials provide plaintiffs and defendants the benefit of resolution of their cases by unbiased decision-makers, applying neutral procedural and evidentiary rules of the parties' own choosing.

### *B. Objection and Response*

Notwithstanding these considerable advantages, the process is susceptible to criticism. In particular, some might object on the grounds that Charleston's summary jury process conscripts jurors. According to some reports—which are hard to verify and hard to disprove—one or more summary jurors has complained for not having been told about the nature of the process in which they—at the time unwittingly—participated. True or not, one might object to the use of real jurors in summary jury trials.

This objection to using summoned jurors for summary jury trials sees the summary jury trial process as purely private. On this view, the state court allows parties to use county courtrooms, marshals, and other court personnel to engage in what is essentially a private process to resolve their dispute. The process could just as well take place, as other private dispute mechanisms do, in the private office of the quasi-judge hired to resolve the dispute. Allowing the parties to use state resources instead amounts to a public subsidy of their private activity.

But parties to a summary jury trial get more than the free use of a courtroom. They also get the coercive power of the state over jurors. As explained, summary jury trial jurors answer a summons by reporting to the circuit court on their scheduled day. Like prospective jurors anywhere, they hear about the importance of performing their civic duty to help administer justice from the circuit court judge who manages jury selection. To determine their eligibility to serve on jury panels for the cases scheduled, prospective jurors are asked questions about whether they know any parties. Prospective jurors are also asked whether there are other reasons they would be unable to serve, including questions about their health and whether they are the primary care giver of a child under seven years of age. Prospective jurors who indicate they may be unable to serve

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are further questioned by the presiding circuit judge. As mentioned above, jurors are selected for all trials scheduled for a given week, including the summary jury trials. Paneled jurors are told to report in their assigned courtrooms.

Summary jury trial jurors had better not forget their courtroom assignments. While the Charleston County courthouse—a beautiful, high-tech courthouse—has screens mounted throughout indicating the courtroom numbers for all trials taking place at a given time, summary jury trials do not appear on the monitors, a fact that captures their semi-private status. Likewise, when a summary jury trial is over, the results are recorded as settlements, not as judgments of the court. The whole process thus blurs the line between public and private dispute resolution. Certainly there is little question that many summary jury trial jurors would fail to understand the nature of the process of which they are part.

Given that summary jury trials come with most of the trappings of an ordinary civil trial, many jurors would instead assume they were hearing an ordinary civil case. Among other reasons they would think so, summary jury trial jurors are commanded by the summary jury trial judge. For example, at the beginning of a summary jury trial, as with any other trial, the judge both explains to the jury how important the case is to the parties before them, and instructs the jury to give the case their undivided attention. Additionally, the judge also admonishes the jury not to discuss the case among themselves during recesses, an admonition typically repeated at the lunch break. The summary jury trial judge thus conveys a certain authority over the jury.

There are compelling responses to any objection about the use of summary jurors, however. First, parties could, were they so inclined, stipulate to conduct a summary trial before an ordinary circuit court judge, and agree not to be bound by ordinary evidentiary rules and not to make evidentiary objections. And they could do so without informing the jury. Indeed, in the typical final settlement conference in ordinary cases, parties make informal arguments to the judge without applying formal rules of procedure or evidence. There is no reason that parties could not do much the same in open court, using an ordinary judge and jury to adjudicate, informally, their dispute. And, the parties could do so without informing the jury that that is what they are doing. In fact, parties could also contractually agree

not to appeal a summary trial verdict, much as criminal defendants can agree to waive their rights to a criminal appeal of certain issues in exchange for a plea agreement. Thus, it is not the *nature* of the summary process itself that gives rise to any compelling objection about the use of summary jurors. Instead, the objection must focus on the absence of a real judge, and perhaps relatedly, on the fact that Charleston's summary verdicts are entered as settlements rather than as judgments of the circuit court.

But can the absence of a real presiding circuit court judge make a crucial difference, such that jurors have no objection to the summary process as long as a real circuit court judge presides? Do jurors have a valid objection if a deputized judge presides over the process instead? One response highlights the parties' stipulated order designating the summary jury trial judge as a circuit court judge for the limited purposes of the case. On one view of the parties stipulated order, the summary jury trial judge *is* a judge, made so by court order giving the summary jury trial judge the powers of an ordinary judge. Thus, there is nothing objectionable about a summary jury trial judge looking like a judge and acting like one. To be sure, a summary jury trial judge, acting alone, would not have the power to require jurors' attendance in court, to enforce summonses, or to hold in contempt jurors who fail to appear. But the circuit court itself has such power. And the court itself, not the summary trial judge, has sensibly saw fit to use its power to require citizens to report for jury duty and serve in summary jury trials.

Moreover, the source of a citizen's interest *not* to serve on a summary jury trial is unclear. For one thing, summary jury trials are less burdensome on jurors, who fulfill their jury duty more quickly. Relative to ordinary trials, summary jury service thus requires less of the juror. Of course, a system such as Charleston's that uses summary jury trials is likely to have more total trials—because they are less expensive—so that the chance that a citizen will be called to serve on any jury is greater. But it seems implausible that the Court owes citizens any duty not to increase the number of trials for which they might be required to serve, or likewise that citizens have any interest, in the abstract, in not serving on any jury. To the contrary, the legal system considers jury service to be a duty of citizenship, and how many or how few trials the Court deems desirable is not an issue on which citizens as such have any obvious stake. Moreover,

the court plainly has the power to alter its procedural and evidentiary rules in a way that would make trials more frequent, for example, by conducting summary trials with real judges. In that event, the juror's objection to summary jury duty disappears (or else reduces exactly to the objection to a deputized rather than real judge).

Yet, the objection continues, summary jurors are misled; they are not told they are participants in a summary jury trial. Here again, however, the source of a juror's interest not to be misled is not entirely clear. For one thing, withholding information from jurors is a standard practice. Jurors often are not told about damages caps, treble damages rules, and whether the parties before them have insurance coverage. In fact, the rules of evidence generally are well understood as rules governing what information jurors may be told and what will instead be withheld. In addition, jurors are not told when a judge knows she is very likely to enter a judgment notwithstanding the verdict, or grant a new trial, if the jury comes out a certain way. In short, the legal system routinely withholds information from juries, and thus the fact that information is withheld from summary jurors is not, by itself, a powerful objection to the process.

The objection must hinge not on the court withholding information from summary jurors, but instead on the fact that they are not told about the very nature of the process of which they are part. Withholding that kind of information, it might be argued, is qualitatively different from withholding the fact that, for example, a party has a liability insurance policy. Summary jurors are misled about what it is *they* are doing.

As it happens, many Charleston summary jury trial judges have responded to this form of the objection by being more explicit with summary jury trial jurors about the process. While most wear robes, some no longer do so, though they continue to occupy the bench and otherwise function as judges. But the lack of a robe does communicate something important, if perhaps subtle, about the nature of the process. Others enter the courtroom not wearing a robe, and then put it on in front of the jury while explaining to the jury that the parties before them have agreed to try their cases using an expedited process more informal than an ordinary trial, and have enlisted the judge to act as a judge in their case. In short, while the summary jury trial in most ways follows the choreography of an

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ordinary trial, they now often begin with an explanation to jurors that they are part of a different process, chosen by the parties. Such introductory explanations go far to assuage any concerns about misleading the summary jury.

The Charleston Court could go one step further. It could ask jurors at venire whether they would be willing to sit on a summary jury trial panel, if they were so selected. Those who refuse could then be put back into the jury pool, possibly to be selected for an ordinary civil or criminal trial. This approach would eviscerate any objection to the summary jury trial on the grounds that jurors are unknowingly conscripted into the process, for only those willing to serve (for the benefit of a shorter trial) would do so.

On the other hand, one should not overlook the administrative challenges courts already face in summoning jurors, qualifying prospective jurors, and managing jury selection. That process would only be further complicated by requiring courts to perform the additional task of distinguishing prospective jurors willing to serve on summary panels from those who are not. That additional burden should not be imposed lightly. Instead, the higher costs courts would face should be justified as fully necessary to overcome some compelling objection, not yet articulated.

#### CONCLUSION

The high costs of litigation have led to many reforms of substantive tort law, including damages caps, contractions of liability, enforcement of liability waivers, defenses and immunities of various types, and so on. Partially because litigation is so expensive, civil justice reformers have sought to reduce the scope of legal liability. Such reforms come as a non sequitur, however. An alternative response focuses not on curtailing civil liability, but delivering civil justice at lower costs. That goal motivated the ADR revolution, which also responded to concerns about the costs of litigation, though civil justice reformers themselves never much advocated for ways to deliver civil justice more cheaply.

Advocates for greater access to justice have argued for delivering civil justice at lower costs. But those calling for greater access to justice do not often do so on behalf of tort plaintiffs. Rather, these advocates focus on the poor, who deserve and badly need their attention. Meanwhile, though, the high cost of litigation

means that many low-dollar tort plaintiffs, except in the simplest of cases, are also often priced out of the market for legal representation. Because competent plaintiff's attorneys seldom take low-dollar tort cases, and certainly not where there are disputed facts that will require substantial discovery or the introduction of contested expert opinion, low-dollar would-be tort plaintiffs often go unrepresented. Or, where they do find representation, the expense of ordinary litigation consumes much of their potential recovery.

The summary jury trial—or, at least, Charleston County's version of it—provides access to civil justice for a class of plaintiffs whose damages are not large enough to justify ordinary litigation. Those concerned about access to justice should thus embrace summary jury trials, at least until improved ways to provide access through ordinary litigation is developed. Better still, voluntary, binding summary jury trials also avoid the problems that preoccupy civil justice reformers. Summary jury trial verdicts are predictable, and lend themselves to no evidentiary or procedural biases. Indeed, litigants in a summary jury trial define their own range of recoverable damages, thereby eliminating surprise damage awards, and they largely choose their own evidentiary and procedural rules as well.

To be sure, the summary jury trial is neither a perfect procedure, nor suitable for every kind of case. But where both plaintiffs and defendants have freely chosen it, their adoption of the process should be encouraged. More than that, the virtues of the process merit state subsidization, at least in the form of employing otherwise unoccupied courtrooms and underemployed court personnel.

The employment of unwitting jurors presents a more complicated question, but only slightly so. In principle, concealing from summary jurors the nature of the process is not so different from other types of information concealed from ordinary jurors. More importantly, jurors, as such, do not have any compelling claim to avoid summary jury duty, nor do citizens as such have any claim to avoiding jury duty altogether. Or, if that is wrong, then minor modifications of the process, disclosing more to summary jurors, would be far preferable to abandoning summary jury trials. South

Carolina has developed a system well worth emulating in appropriate cases.<sup>107</sup>

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107. As of this writing, attorney groups in California, having heard about Charleston's summary jury process, are considering preparing a proposal for their Supreme Court to pilot a summary jury trial program. Meanwhile, the South Carolina Supreme Court has just approved a pilot program for summary jury trials throughout that state. Finally, the well respected American Board of Trial Advocates is also considering advocating greater use of summary jury trials throughout the states. These are welcome developments.