

[A.C.A. § 16-114-206](#)

Current through all 2018 laws; and including unofficial updates through laws effective Mar. 8, 2019 of the 2019 Regular Session (unofficial updates do not include corrections and edits by the Arkansas Code Revision Commission).

Arkansas Code Annotated > Title 16 Practice, Procedure, And Courts > Subtitle 7. Particular Proceedings And Remedies > Chapter 114 Malpractice Actions > Subchapter 2-- Actions for Medical Injury

16-114-206. Burden of proof.

(a)In any action for medical injury, when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge, the plaintiff shall have the burden of proving:

- (1)**By means of expert testimony provided only by a medical care provider of the same specialty as the defendant, the degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he or she practices or in a similar locality;
- (2)**By means of expert testimony provided only by a medical care provider of the same specialty as the defendant that the medical care provider failed to act in accordance with that standard; and
- (3)**By means of expert testimony provided only by a qualified medical expert that as a proximate result thereof the injured person suffered injuries that would not otherwise have occurred.

(b)

(1)Without limiting the applicability of subsection (a) of this section, when the plaintiff claims that a medical care provider failed to supply adequate information to obtain the informed consent of the injured person, the plaintiff shall have the burden of proving that the treatment, procedure, or surgery was performed in other than an emergency situation and that the medical care provider did not supply that type of information regarding the treatment, procedure, or surgery as would customarily have been given to a patient in the position of the injured person or other persons authorized to give consent for such a patient by other medical care providers with similar training and experience at the time of the treatment, procedure, or surgery in the locality in which the medical care provider practices or in a similar locality.

(2)In determining whether the plaintiff has satisfied the requirements of subdivision (b)(1) of this section, the following matters shall also be considered as material issues:

- (A)**Whether a person of ordinary intelligence and awareness in a position similar to that of the injured person or persons giving consent on his or her behalf could reasonably be expected to know of the risks or hazards inherent in such treatment, procedure, or surgery;
- (B)**Whether the injured party or the person giving consent on his or her behalf knew of the risks or hazards inherent in such treatment, procedure, or surgery;
- (C)**Whether the injured party would have undergone the treatment, procedure, or surgery regardless of the risk involved or whether he or she did not wish to be informed thereof; and
- (D)**Whether it was reasonable for the medical care provider to limit disclosure of information because such disclosure could be expected to adversely and substantially affect the injured person's condition.

History

Acts 1979, No. 709, § 2; A.S.A. 1947, § 34-2614; [Acts 2003, No. 649, § 18](#).

Annotations

Notes

Publisher's Notes.

Provisions in subsection (a) of this section, which provide that expert testimony may only be given by medical care providers "of the same specialty as the defendant", were held unconstitutional in [Broussard v. St. Edward Mercy Health Sys., 2012 Ark. 14, 386 S.W.3d 385 \(2012\)](#).

Amendments.

The 2003 amendment inserted "when the asserted negligence ... of common knowledge" in the introductory paragraph of (a); inserted "By means of expert testimony... the defendant" in (a)(1) and (a)(2); inserted "By means of expert... medical expert that" in (a)(3); and made gender neutral and minor punctuation changes.

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Constitutionality.

Plaintiff's argument that this subchapter violates the prohibition against special legislation in Ark. Const., Art. 5, § 25 held without merit. [Haase v. Starnes, 323 Ark. 263, 915 S.W.2d 675 \(1996\)](#).

Even assuming that patient and physician had a contract for physician to perform hair transplant, it was not an existing contract when the General Assembly enacted this subchapter; accordingly, this section did not violate the federal contract clause in the case. [Haase v. Starnes, 323 Ark. 263, 915 S.W.2d 675 \(1996\)](#).

Subsection (b) of this section, which sets forth the burden of proof for plaintiffs in medical malpractice cases involving informed consent, is constitutional because there is a rational relationship between the burden of proof required and the achievement of a legitimate governmental objective; therefore, summary judgment was properly granted in favor of a physician who submitted an affidavit of an expert regarding proper standard of care because a patient failed to offer an affidavit from his own expert witness. [Eady v. Lansford, 351 Ark. 249, 92 S.W.3d 57 \(2002\)](#).

Because the language, "By means of expert testimony provided only by a medical care provider of the same specialty as the defendant" in subsection (a) of this section adds requirements to Ark. R. Evid. 702, attempts to dictate procedure, and invades the province of the judiciary's authority to set and control procedure, it violates the separation-of-powers doctrine, Ark. Const. Amend. 80, § 3, and the inherent authority of the courts to protect the integrity of proceedings and the rights of the litigants. [Broussard v. St. Edward Mercy Health Sys., 2012 Ark. 14, 386 S.W.3d 385 \(2012\)](#).

Applicability.

An action by an administrative board, reviewing the conduct of a professional and ultimately punishing that professional, was not an "action for medical injury," because it was not an action to recover damages; this section was therefore inapplicable. [Livingston v. Ark. State Medical Bd., 288 Ark. 1, 701 S.W.2d 361 \(1986\)](#).

Where patient was under a doctor's care while in nursing home, but his death was from leaving unnoticed in a wheelchair and being struck by a car, it was not the result of a "medical injury". [Bailey v. Rose Care Ctr., 307 Ark. 14, 817 S.W.2d 412 \(1991\)](#).

Although the United States argued that the current version of this section applied to a medical malpractice suit filed by Arkansas plaintiffs, it did not present any authority showing that the section was intended to apply retroactively. The current version of the section did not apply to plaintiffs' claims because they accrued prior to March 25, 2007, which was when the current version took effect. [The current version of this section, as amended by [Acts 2003, No. 649, § 18](#), was effective March 25, 2003.] [McMullin v. United States, 515 F. Supp. 2d 909 \(E.D. Ark. 2007\)](#).

Affidavit.

Medical malpractice complaint that was not accompanied by an expert's affidavit was properly dismissed; although plaintiffs alleged that the negligence of the doctor in allowing a sharp instrument to fall into patient's spinal cord was within a jury's comprehension as a matter of general knowledge, the court found that an expert was required for the jury to understand what a cervical discectomy and fusion was, what instruments were used to perform the procedures, what procedures and risks were involved, and whether the doctor's actions proximately caused the injury alleged by appellants. [Robbins v. Johnson, 367 Ark. 506, 241 S.W.3d 747 \(2006\)](#) (decided in part under [§ 16-114-209](#), now deemed superseded).

Breach of Warranty.

This section does not apply to actions for medical injury based on breach of express warranty when the issue is whether the medical-care provider guaranteed the results, for to do so would defy common sense and produce absurd results. [Haase v. Starnes, 323 Ark. 263, 915 S.W.2d 675 \(1996\).](#)

The three requirements of subsection (a), namely the "degree of skill and learning ordinarily possessed and used by members of the profession," failure to "act in accordance with that standard," and "proximate result," typify three requirements of a cause of action sounding in tort: duty, breach, and cause; these three requirements have no relevance in a contract-based cause of action arising out of a guarantee of specific, favorable results, and the standard of care used by medical-care providers in similar communities and situations simply has no relevance in a case where the sole issue is whether a medical-care provider breached this particular express warranty. [Haase v. Starnes, 323 Ark. 263, 915 S.W.2d 675 \(1996\).](#)

Duty to Disclose Risks.

The physician's duty to disclose risks is measured by the customary practice of physicians in the community in which he practices or in a similar community. [Fuller v. Starnes, 268 Ark. 476, 597 S.W.2d 88 \(1980\).](#)

In a medical malpractice action, the issue of informed consent is foundational to individual claims and cannot be tried on a class basis. [Arthur v. Zearley, 320 Ark. 273, 895 S.W.2d 928 \(1995\).](#)

Doctor's failure to supply to patient that type of information regarding the treatment and surgery as would have been customarily given to a patient in patient's position by other medical providers with similar training and experience at the time of the treatment and surgery in Little Rock or in a similar locality was a proximate cause of patient's damages. [Aronson v. Harriman, 321 Ark. 359, 901 S.W.2d 832 \(1995\).](#)

Evidence.

Trial court erred in granting doctor's motion to dismiss a complaint that alleged sufficient facts to state a claim for medical malpractice where the complaint alleged that (1) the doctor required plaintiff mother, after achieving maximum dilation, to go through over four hours of hard labor before performing a caesarean section, (2) the doctor's failure to timely schedule and perform a caesarean section was a breach of the applicable standard of care, and (3) the child suffered neurological damage and the mother suffered injury to her bladder and associated nerves. [Thomas v. Pierce, 87 Ark. App. 26, 184 S.W.3d 489 \(2004\).](#)

Where the expert witnesses failed to testify regarding the standard of care in the state, the widow failed to establish the requisite standard of care for purposes of this section. [Young v. Gastro-Intestinal Ctr., Inc., 361 Ark. 209, 205 S.W.3d 741 \(2005\).](#)

Expert Testimony.

The question of whether to use a Posey vest (a safety restraint) on a patient involved a professional service where only a doctor could authorize its use, although actual placement on the patient was left to the nurse's discretion; accordingly, expert testimony as to the degree of skill used by other hospitals in the locality was required in a suit alleging negligence based on the hospital's failure to use such a vest, and in the absence of such evidence, a directed verdict for the hospital was warranted. [Sexton v. St. Paul Fire & Marine Ins. Co., 275 Ark. 361, 631 S.W.2d 270 \(1982\).](#)

The provisions of this section providing that a plaintiff must prove that the defendant failed to act in accordance with the degree of skill ordinarily used by doctors in good standing in the local area do not mean that the standing of

plaintiff's medical expert is a direct, rather than collateral, issue in a medical malpractice case. [Garst v. Cullum, 291 Ark. 512, 726 S.W.2d 271 \(1987\).](#)

Expert testimony is required when the asserted negligence does not lie within the jury's comprehension, when the applicable standard of care is not a matter of common knowledge, and when the jury must have the assistance of expert witnesses to decide the issue of negligence. [Prater ex rel. Estate of Prater v. St. Paul Ins. Co., 293 Ark. 547, 739 S.W.2d 676 \(1987\); Courteau v. Dodd, 299 Ark. 380, 773 S.W.2d 436 \(1989\); Skaggs v. Johnson, 323 Ark. 320, 915 S.W.2d 253 \(1996\).](#)

In a case involving the diagnosis of appendicitis, expert medical testimony was essential to establish the standard of care required of the diagnosing physician and that the physician failed to act in accordance with that standard. Absent such testimony by a medical expert, plaintiff did not meet his burden of proof and no issue of fact existed for trial. [Reagan v. City of Piggott, 305 Ark. 77, 805 S.W.2d 636 \(1991\).](#)

[Section 16-114-201](#) defines "medical injury" sufficiently broadly; claims based on allegations of a failure to provide needed medical care and attention or the timely diagnosis of medical problems come within the ambit of this subchapter and are dependent upon expert testimony as outlined in subsection (a) of this section. [Spring Creek Living Ctr. v. Sarrett, 319 Ark. 259, 890 S.W.2d 598 \(1995\).](#)

Case presented an issue outside the jury's common knowledge that required expert testimony in that physicians made a conscious, medical decision to leave the piece of penrose drain tube in patient's leg, as opposed to the typical foreign object case, which involves the inadvertent leaving of objects in a patient's body, and does not involve a physician's judgment. [Skaggs v. Johnson, 323 Ark. 320, 915 S.W.2d 253 \(1996\).](#)

Where testifying doctor's opinion was general and based on his experience as an infectious disease expert and did not address a surgical decision by an orthopedist, and where the doctor did not offer testimony that the conduct of the orthopedic surgeons in this case fell below the standard of care for orthopedic surgeons in Little Rock, the defendants met their burden of proving a prima facie case for summary judgment by showing that the plaintiffs had no expert to testify as to the breach of the applicable standard of care. [Skaggs v. Johnson, 323 Ark. 320, 915 S.W.2d 253 \(1996\).](#)

An expert witness need not be one who has practiced in the particular locality, or one who is intimately familiar with the practice in it in order to be qualified as an expert in a medical malpractice action, if an appropriate foundation is established to demonstrate that the witness is familiar with the standard of practice in a similar locality, either by his testimony or by other evidence showing the similarity of localities. [First Commercial Trust Co. v. Rank, 323 Ark. 390, 915 S.W.2d 262 \(1996\).](#)

Where a duly licensed and practicing physician has gained knowledge of the standard of care applicable to a specialty in which he is not directly engaged but as to which he has an opinion based on education, experience, observation or association with that specialty, his opinion is competent. [First Commercial Trust Co. v. Rank, 323 Ark. 390, 915 S.W.2d 262 \(1996\).](#)

The trial court abused its discretion in excluding the medical expert testimony of physician where he was able to testify as to the standard of care for a family practitioner and where there was an appropriate foundation established to demonstrate witness's familiarity with the standard of practice in a similar locality. [First Commercial Trust Co. v. Rank, 323 Ark. 390, 915 S.W.2d 262 \(1996\).](#)

When the particular issue relates to a question within the general practitioner's own area of expertise, he is not prohibited by the malpractice statute from testifying upon that question as an expert. [First Commercial Trust Co. v. Rank, 323 Ark. 390, 915 S.W.2d 262 \(1996\).](#)

Expert testimony is not necessary per se in every medical malpractice case; expert testimony is required only when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge, when the

applicable standard of care is not a matter of common knowledge, and when the jury must have the assistance of experts to decide the issue of negligence. [Haase v. Starnes, 323 Ark. 263, 915 S.W.2d 675 \(1996\)](#).

Plaintiff's argument that subsection (a) is in direct conflict with Evid. Rule 702 was based on a false premise, that subsection (a) mandates the presentation of expert testimony while the rule permits such testimony; however, it is the facts of any given case that determine whether expert testimony is required in a medical malpractice claim for negligence, and accordingly, plaintiff's argument was without merit. [Haase v. Starnes, 323 Ark. 263, 915 S.W.2d 675 \(1996\)](#).

When expert testimony is required for proof of a plaintiff's claim for medical malpractice, and the defendant demonstrates the plaintiff's failure to produce the requisite expert testimony, then the defendant has demonstrated that no genuine issues of material fact exist for presentation to a jury and is therefore entitled to summary judgment as a matter of law. [Robson v. Tinnin, 322 Ark. 605, 911 S.W.2d 246 \(1995\)](#).

Exclusion of the deposition testimony of expert witnesses was prejudicial error since this subchapter provides that in any action for medical injury the plaintiff must prove the applicable standard of care, that the medical provider failed to act in accordance with that standard, and that such failure was a proximate cause of the plaintiff's injuries. The plaintiff's burden of proving the applicable standard of care and the defendant's failure to comply with that standard requires expert testimony when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge. [National Bank of Commerce v. Quirk, 323 Ark. 769, 918 S.W.2d 138 \(1996\)](#), overruled in part, [Ark. Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 \(2006\)](#).

The violation of the standard of care in a medical malpractice case must be established by expert testimony when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge. [Hall v. Arthur, 141 F.3d 844 \(8th Cir. 1998\)](#).

Where the expert testimony tended to show that a surgeon violated the relevant standard of care, the jury could reasonably conclude that a surgeon assisting him similarly violated the standard of care; additional expert testimony as to the standard of care applicable to an assistant was not required. [Hall v. Arthur, 141 F.3d 844 \(8th Cir. 1998\)](#).

Affidavit of estate administrator's expert was not sufficient to overcome the motion for summary judgment where it failed to demonstrate that the expert was knowledgeable by either training or experience as to the standard of care for psychiatric patients. [Dodd v. Sparks Reg'l Med. Ctr., 90 Ark. App. 191, 204 S.W.3d 579 \(2005\)](#).

Summary judgment was properly awarded to a physician in a patient's medical malpractice action where the patient failed to identify an expert witness; the patient had a significant amount of time to identify a medical expert to support the claims but failed to do so. [Neal v. Farris, 101 Ark. App. 375, 278 S.W.3d 129 \(2008\)](#).

District court did not abuse its discretion by excluding the expert testimony of a nurse because the record reflected that she either had repudiated the conclusions expressed in her written report, or at a minimum, had not developed her conclusions to the point where she could provide a qualified expert opinion at trial. Without expert testimony to support the allegation of negligence against the hospital, as required by this section, the district court acted appropriately in excluding evidence relating to alleged institutional negligence. [Csiszer v. Wren, 614 F.3d 866 \(8th Cir. 2010\)](#).

Trial court erred in ruling that [§ 16-114-207\(3\)](#) was unconstitutional; the statute simply created a privilege for purposes of trial. It gave medical care providers, or their representatives, the privilege to refuse to testify as to the matters set forth in this section. [Bedell v. Williams, 2012 Ark. 75, 386 S.W.3d 493 \(2012\)](#).

Summary judgment was appropriately granted to the medical providers on a negligence claim where the couple, in failing to respond to the requests for admissions, admitted that they had no expert testimony as required by this section. [Hardesty v. Baptist Health, 2013 Ark. App. 731, 431 S.W.3d 327 \(2013\)](#).

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Plaintiff, allegedly injured during a physical therapy session, failed to establish the elements of his medical malpractice case by expert testimony, as required by this section; a doctor's testimony referred to the failure to report, yet plaintiff did not establish any injury from failure to report, other testimony was too vague as the standard of care was not stated with specificity and did not establish that defendant proximately caused plaintiff's injuries, and an orthopedic surgeon never testified about the standard of care for physical therapists treating knee-surgery patients or that defendant's actions constituted a breach. [Johnson v. Schafer, 2018 Ark. App. 630 \(2018\).](#)

Plaintiff's case required the explanation of knee anatomy, knee surgery, physical therapy rehabilitation practices and procedures, and pharmacology of anticoagulants, which did not justify a departure from the general rule that a plaintiff must prove a medical-malpractice claim through expert testimony. [Johnson v. Schafer, 2018 Ark. App. 630 \(2018\).](#)

--Feeding Tube Placement.

Although the representative argued that she needed no expert testimony because it was common knowledge that a feeding tube was misplaced if it was in a patient's lung instead of her stomach, to fully understand the standard of care and the allegations of negligence against these doctors, the fact-finder would require an understanding of medical terminology and anatomy as well as medical protocol, such as what an attending physician or radiologist must do upon learning of a mis-positioned feeding tube and what information one physician must impart to another; thus, the representative had to produce expert testimony to assist the fact-finder. [Lee v. Martindale, 103 Ark. App. 36, 286 S.W.3d 169 \(2008\).](#)

--Informed Consent.

Testimony of doctor, when given its fullest weight, lacked essential constituent of proof required by subdivision (b)(1), where he made no attempt to compare facilities, practices or advantages in similar localities, but merely asserted that he was familiar with the information which would customarily have been given in order to obtain informed consent. [Grice v. Atkinson, 308 Ark. 637, 826 S.W.2d 810 \(1992\).](#)

Where upon its review of the deposition of plaintiff's expert, the trial court determined that he could not offer expert testimony on the issue of informed consent as required by subsection (b) of this section, the trial court properly concluded that plaintiff had not met her burden of proof and that no material issue of fact existed with respect to informed consent which required presentation of the case to a jury. [Brumley v. Naples, 320 Ark. 310, 896 S.W.2d 860 \(1995\).](#)

Common knowledge exception did not apply to subsection (b) of this section; therefore, a patient was required to produce expert testimony in order to survive a physician's motion for summary judgment in a medical malpractice case involving the issue of informed consent. [Eady v. Lansford, 351 Ark. 249, 92 S.W.3d 57 \(2002\).](#)

Trial court properly granted summary judgment for defendant doctors on plaintiff patient's informed consent and medical battery claims where patient failed to provide expert testimony on her informed consent claim, and her battery claim, in turn, was based on her informed consent claim. [Parkerson v. Arthur, 83 Ark. App. 240, 125 S.W.3d 825 \(2003\).](#)

--Locality Rule.

Medical expert could testify in a medical malpractice suit because plaintiffs presented evidence showing that Atlanta, Georgia, where the expert practiced, was similar to the rural Arkansas locality where their deceased son was treated. Both the expert and the son's treating physician were board certified pediatricians; and the expert's deposition testimony and supplemental affidavit sufficiently established the similarity of the localities because he

stated that the same diagnostic services were available to both himself and the son's treating physician, except for one specialized test that was not necessary to diagnose the son's infective bacterial endocarditis, and that the son would have been properly diagnosed if the treating physician had ordered some of those basic diagnostic tests to be performed. [McMullin v. United States, 515 F. Supp. 2d 909 \(E.D. Ark. 2007\)](#).

In a wrongful death action against a physician, the trial court properly granted a directed verdict to the physician based on the locality rule, subsection (a) of this section, because the expert witness provided by an administratrix demonstrated a total lack of knowledge concerning the local medical community, medical facilities, and local standard of care. [Gilbow v. Richards, 2010 Ark. App. 780 \(2010\)](#).

In a medical malpractice action, the trial court did not err in granting the doctor's motion for directed verdict because the evidence did not show that the patient's medical expert was informed as to the standard of care in the locality as required by subsection (a) of this section. [Plymate v. Martinelli, 2013 Ark. 194 \(2013\)](#).

Expert knew the differences between the locality where he practiced and the town where the patient passed away, plus the expert was one of the primary teaching faculty members for general surgical residents, and those who graduated went throughout the county, plus there were no situations where the patient would have been treated differently in a different locality, and thus the expert's testimony met the requirements of the statute. [Heritage Physician Group, P.A. v. Minton, 2014 Ark. App. 155, 432 S.W.3d 682 \(2014\)](#).

Even if the locality rule was applicable to defense experts in a medical negligence action, the testimony of the witness was sufficient to satisfy the rule as he testified about his extensive experience practicing medicine in Arkansas, his education in Arkansas, and his service on the Arkansas Medical Society Board of Trustees, all of which provided the basis for his understanding of the standard of practice in Rogers/Bentonville. He expressly stated that the standard of practice in Rogers/Bentonville was the same as in Van Buren, where he practiced. [Brazeal v. Cooper, 2016 Ark. App. 442, 503 S.W.3d 829 \(2016\)](#).

--Nursing Home.

Where decedent's estate alleged that a nursing care facility engaged in medical malpractice and the estate's expert nurse practitioner testified to familiarity with the standard of care for nursing homes, based upon knowledge of federal guidelines and state regulations governing long-term care and knowledge of the policies and procedures of the facility, the testimony did not indicate that the expert's knowledge of the standards of care for nursing homes was limited to federal and state guidelines; the expert practiced in a nearby town of similar population and affirmatively testified to familiarity with the standard of care in the area where the facility was located. [Dooley v. Cap-Care of Ark., Inc., 338 F. Supp. 2d 962 \(E.D. Ark. 2004\)](#).

--Nursing Staff.

Where the patient alleged that a doctor and a medical center's nursing staff were negligent in connection with a fall she sustained while a patient at the medical center, the trial court did not err by denying the patient's proffered instruction that would have allowed the jury to consider the testimony of her physician expert on the standard of care for the nursing staff; the physician was never qualified as an expert on nursing. Furthermore, the patient did not appeal the circuit judge's ruling that subsection (a) of this section controlled the admissibility of the doctor's testimony as to the standard of care for nurses rather than Ark. R. Evid. 702. [Nelson v. Stubblefield, 2009 Ark. 256, 308 S.W.3d 586 \(2009\)](#).

--Staph Infection.

In a patient's medical malpractice suit, summary judgment in favor of her surgeon and the hospital was proper as the patient's allegations regarding her surgery were not matters of common knowledge, and she failed to provide expert testimony pursuant to this section so that the jury could evaluate her claims; absent testimony supporting her allegations, she had no proof of the standard of care, deviation, or proximate cause. Similarly, the care reasonably required by the hospital regarding the patient's staph infection and wound complications were not within the common knowledge of most jurors and needed expert testimony. [Taylor v. Landherr, 101 Ark. App. 279, 275 S.W.3d 656 \(2008\).](#)

Informed Consent.

Where the patient testified that he would not have had surgery to remove part of his bowel had he known that no general surgeon would be in attendance to assist the urologist, it was for the jury to decide whether he gave his informed consent under subdivision (b)(1) of this section; therefore, the trial court erred by granting the urologist a directed verdict in the patient's medical malpractice case. [Haupt v. Kumar, 103 Ark. App. 298, 288 S.W.3d 704 \(2008\).](#)

Genuine issues of material fact remained as to whether a hospital was negligent in failing to obtain a patient's informed consent for the administration of spinal-block anesthesia prior to surgery, because the patient signed a blank form, with no information as to the anesthesia to be used, while he was under the influence of pain medication. [Villines v. N. Ark. Reg'l Med. Ctr., 2011 Ark. App. 506, 385 S.W.3d 360 \(2011\).](#)

Jury Instructions.

The submission of Arkansas Model Jury Instruction 203, in its standard form, correctly instructed the jury as to the burden of proof to be met under any theory of recovery in a medical malpractice action, and it was not error for the trial court to have refused proffered instructions where the model instructions accurately stated the law and where the proposed instructions were potentially misleading. [Blankenship v. Burnett, 304 Ark. 469, 803 S.W.2d 539 \(1991\).](#)

Doctor gave justifications for his medical decisions, and if Arkansas courts considered justifications for medical decisions as affirmative defenses, it would result in imposing a judicially created burden-shifting procedure onto medical defendants to prove why they made their decisions, which is contrary to the intent of the Arkansas Medical Malpractice Act; there was no error in the trial court's refusal to give a particular jury instruction on the burden of proof proffered by appellants, in which they claimed it was the doctor's burden to prove certain facts. [Hartman v. Edwards, 2014 Ark. App. 480, 442 S.W.3d 13 \(2014\).](#)

Lay Testimony.

The trial court erred in treating a medical malpractice claim as an ordinary negligence claim, and in permitting the issues raised by the medical malpractice claim to rest on lay testimony. [Spring Creek Living Ctr. v. Sarrett, 319 Ark. 259, 890 S.W.2d 598 \(1995\).](#)

Preservation for Review.

Claimants failed to preserve for appellate review the arguments that appellees' motion for summary judgment was unsupported by sufficient evidence to create a material issue of fact. The arguments were not timely raised since the arguments were made for the first time in the motion for reconsideration. [Quattlebaum v. McCarver, 2013 Ark. App. 376 \(2013\).](#)

Proximate Cause.

This section implements the traditional tort standard of requiring proof that "but for" the tortfeasor's negligence, the plaintiff's injury or death would not have occurred. [Ford v. St. Paul Fire & Marine Ins. Co., 339 Ark. 434, 5 S.W.3d 460 \(1999\).](#)

In a medical malpractice case, where the appellate court remanded a case following entry of a default judgment for a trial on the issue of damages only, the trial court erred in permitting the doctor to introduce evidence regarding proximate causation because proximate causation was an element of liability, not an element of damages. [Jones v. McGraw, 374 Ark. 483, 288 S.W.3d 623 \(2008\).](#)

Although appellees stipulated that they were negligent in failing to remove a surgical clamp from appellant's abdomen, there was substantial evidence to support the jury's verdict that appellant failed to prove that she sustained any damages as a result of the negligence; therefore, she did not meet her burden of proof under subdivision (a)(3) of this section. [Thomas v. Sharon, 2013 Ark. App. 305, 427 S.W.3d 756 \(2013\).](#)

Expert explained why he believed the doctor's negligence led to the patient's death, saying the prolonged period of low blood pressure and his low blood count led to an emergency operation, where a large amount of blood was found in his abdomen, the bleeding and the surgery caused him to have a heart attack and die, and the patient was salvageable up until his blood pressure bottomed out; there was sufficient evidence for the jury to find that the doctor's negligence proximately caused the patient's death. [Heritage Physician Group, P.A. v. Minton, 2014 Ark. App. 155, 432 S.W.3d 682 \(2014\).](#)

Trial court properly granted a doctor and a medical practice summary judgment in an administratrix's action alleging medical negligence because the expert testimony failed to establish proximate cause; the expert testimony the administratrix cited failed to clearly articulate that the doctor's negligence was the proximate cause of the patient's death. One expert opined that the patient's awakening from the anesthesia was more likely if the surgery had been stopped, but the issue was whether the patient would have lived, not whether he would have awakened. [Thomas v. Meadors, 2017 Ark. App. 421, 527 S.W.3d 724 \(2017\).](#)

Res Ipsa Loquitur.

The doctrine of res ipsa loquitur may apply in cases of medical malpractice on the part of any and all medical care providers as defined by the Medical Malpractice Act if the essential elements for application of the doctrine exist. [Schmidt v. Gibbs, 305 Ark. 383, 807 S.W.2d 928 \(1991\).](#)

The doctrine of res ipsa loquitur did apply where the defendant was an insurer for a medical center and the operating room, equipment, and nurses involved were all under the control or management of the medical center. [Schmidt v. Gibbs, 305 Ark. 383, 807 S.W.2d 928 \(1991\).](#)

The doctrine of res ipsa loquitur did not apply to anesthesiologists where the expert witness testified in clear and unequivocal terms that the care and treatment offered by the anesthesiologists was not below the standard of care required. [Schmidt v. Gibbs, 305 Ark. 383, 807 S.W.2d 928 \(1991\).](#)

The trial court did not err in refusing to give a jury instruction on res ipsa loquitur for a plaintiff who developed a vesicovaginal fistula following her abdominal hysterectomy. [Taylor v. Riddell, 320 Ark. 394, 896 S.W.2d 891 \(1995\).](#)

Standard of Care.

The definition of standard of care found in this section creates an objective standard, and the court improperly instructed the jury on Arkansas law by using a model instruction which added the language "using his best

judgment", inserting subjective considerations into the objective standard. [Pearce v. Cornerstone Clinic for Women, 938 F.2d 855 \(8th Cir. 1991\).](#)

An objective standard for determining the effect of complete information on patient's decision is used; this approach permits the jury to take into account patient's testimony with regard to whether he would have consented to risks but will not predicate the outcome of the case solely on that testimony. [Aronson v. Harriman, 321 Ark. 359, 901 S.W.2d 832 \(1995\).](#)

Physicians were entitled to summary judgment as a matter of law in an action for medical malpractice where plaintiffs offered no argument that either physician deviated below the required standard of care. [National Bank of Commerce v. Quirk, 323 Ark. 769, 918 S.W.2d 138 \(1996\).](#) overruled in part, [Ark. Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 \(2006\).](#)

To sustain a claim for medical malpractice a plaintiff must prove, among other elements, the applicable standard of care and the defendant's breach thereof. [Skaggs v. Johnson, 323 Ark. 320, 915 S.W.2d 253 \(1996\).](#)

Simply because treatment is available for a medical injury, it does not follow that it is negligence for a medical care provider not to provide the treatment. [Robson v. Tinnin, 322 Ark. 605, 911 S.W.2d 246 \(1995\).](#)

Summary judgment was properly awarded to defendants in husband's wrongful death action under the Arkansas Medical Malpractice Act because, even if husband's expert had been qualified to offer an opinion, his affidavit did not include any statements setting forth the standard of care. [Dodd v. Sparks Reg'l Med. Ctr., 90 Ark. App. 191, 204 S.W.3d 579 \(2005\).](#)

Widow had not established the requisite standard of care where her expert witnesses, both from Texas, failed to testify regarding the standard of care in [Little Rock, Arkansas. Young v. Gastro-Intestinal Ctr., Inc., 361 Ark. 209, 205 S.W.3d 741 \(2005\).](#)

Trial court properly found that a medical center and nurse did not owe a duty to widow's husband, a patient at the center, where the husband left against medical advice and the nurse had no right or legal duty to impose restrictions on the husband; there was no statute imposing a duty on a medical care provider to control a patient and the court refused to do so. [Young v. Gastro-Intestinal Ctr., Inc., 361 Ark. 209, 205 S.W.3d 741 \(2005\).](#)

Expert testimony was required for widow's medical malpractice claim as it was not common knowledge that transfusion of a leukemia patient with an allegedly improper blood type could cause injury to the patient and the widow's expert's affidavit was devoid of mention of the standard of care in Baxter County; thus, the widow's affidavit was insufficient to create a question of fact on the issue and the trial court did not err in granting doctor's motion for summary judgment. [Mitchell v. Lincoln, 366 Ark. 592, 237 S.W.3d 455 \(2006\).](#)

In a medical negligence case filed against an orthopedic surgeon practicing in Berryville, Arkansas, the trial court did not err in granting the surgeon's motion for a directed verdict, because the patient's medical experts did not satisfy the requirements of subdivision (a)(1) of this section as they did not show a familiarity with the standard of care applicable in Berryville or a similar locality. [Bailey-Gray v. Martinson, 2013 Ark. App. 80 \(2013\).](#)

Substantial Evidence.

Despite appellants' claims, there was substantial evidence to support a verdict for the doctor, and thus the circuit court did not err in denying a motion for a new trial; the doctor testified that he considered the potential risk of blood clotting when he chose not to administer blood thinners, and the defense expert opined that the amount and timing of the dosage did not affect the decedent's survival. [Hartman v. Edwards, 2014 Ark. App. 480, 442 S.W.3d 13 \(2014\).](#)

Summary Judgment Granted.

Trial court did not abuse its discretion by deeming a doctor's requests for admission admitted and in granting summary judgment to the doctor because by failing to timely file their responses to the doctor's requests for admission, the patient and her husband admitted that they could not meet their burden of proving the essential elements of medical malpractice. [Duncan v. Olive, 2014 Ark. App. 152 \(2014\).](#)

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[Carroll-Boone Water Dist. v. M. & P. Equip. Co., 280 Ark. 560, 661 S.W.2d 345 \(1983\); Cathey v. Williams, 290 Ark. 189, 718 S.W.2d 98 \(1986\); HCA Health Servs. of Midwest, Inc. v. National Bank, 294 Ark. 525, 745 S.W.2d 120 \(1988\); Alexander v. Chapman, 299 Ark. 126, 771 S.W.2d 744 \(1989\); Cash v. Lim, 322 Ark. 359, 908 S.W.2d 655 \(1995\); Wal-Mart Stores, Inc. v. Tucker, 353 Ark. 730, 120 S.W.3d 61 \(2003\); Wal-Mart Stores, Inc. v. Kilgore, 85 Ark. App. 231, 148 S.W.3d 754 \(2004\); Whorton v. Dixon, 363 Ark. 330, 214 S.W.3d 225 \(2005\); Fryar v. Touchstone Physical Therapy, Inc., 365 Ark. 295, 229 S.W.3d 7 \(2006\); Newton v. Clinical Reference Lab., 517 F.3d 554 \(8th Cir. 2008\).](#)

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HIERARCHY NOTES:

Tit. 16, Subtit. 7, Ch. 114 Note

Tit. 16, Subtit. 7, Ch. 114, Subch. 2 Note

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