IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTEENTH DIVISION

CARL SULLIVAN, as Attorney-In-Fact
for EDWARD WESSON, a Disabled
Adult PLAINTIFF

v. CASE NO. 60CV-24-5497

THE UNIVERSITY OF ARKANSAS (d/b/a
THE UNIVERSITY OF ARKANSAS for
MEDICAL SCIENCES), BOARD OF TRUSTEES
OF THE UNIVERSITY OF ARKANSAS SYSTEM;
KELLY EICHLER, in Her Official Capacity as Trustee;
STEVE COX, in His Official Capacity as Trustee;
TED DICKEY, in His Official Capacity as Trustee;
SHEFFIELD NELSON, in His Official Capacity as Trustee;
TOMMY BOYERS, in His Official Capacity as Trustee;
ED FRYER, Ph.D., in His Official Capacity as Trustee;
JEREMY WILSON, in His Official Capacity as Trustee;
COL. NATHANIEL TODD, in His Official Capacity as Trustee;
KEVIN CRASS, in His Official Capacity as Trustee;
SCOTT FORD, in His Official Capacity as Trustee;
JOSEPH MARGOLICK, M.D., WHITNEY
TAYLOR, M.D., NATALIE APPLEBAUM,
M.D., and JOHN DOE DIRECT INSURERS, CARRIERS,
AND INSURANCE COMPANIES 1-4 DEFENDANTS

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. Introduction

This medical malpractice case involves the care and treatment that Edward Wesson received at UAMS on August 12, 2022. *See* Plt.'s Am. Compl., ¶ 28. Plaintiff alleges that defendants were negligent in allowing a surgical sponge to remain within Mr. Wesson's abdominal cavity. *See, e.g.*, Plt.'s Am. Compl., ¶ 37. Plaintiff further

alleges that defendants' negligence proximately caused injury to Mr. Wesson. *See, e.g.*, Plt.'s Am. Compl., ¶ 38.

It is undisputed that the Arkansas Medical Malpractice Act imposes the burden of proving negligence, causation, and damages upon plaintiffs who bring claims for medical injury. *See* Ark. Code Ann. § 16-114-206. The Act further requires that the first two essential elements—negligence and causation—be proved through qualified expert testimony. *See id.* Without such testimony, plaintiffs cannot state a prima facie case, and their complaint must be dismissed.

The Court should grant summary judgment in favor of defendants because the undisputed material facts establish that (1) Dr. Margolick and Dr. Applebaum met the standard of care; and (2) that no act or omission on the part of Dr. Margolick or Dr. Applebaum proximately caused Mr. Wesson any injury. The medical records and affidavits of two expert witnesses—Dr. Charles Mabry and Nora Osborne, RN—establish that Dr. Margolick's and Dr. Applebaum's care of Mr. Wesson was appropriate and that his injuries had nothing to do with any negligent act or omission on the part of Dr. Margolick or Dr. Applebaum. In other words, there are no genuine issues of material fact to be tried against either defendant on either of the essential elements of (1) breach of the standard of care, or (2) proximate causation. Thus, Dr. Margolick and Dr. Applebaum are entitled to summary judgment as a matter of law.

II. Summary Judgment Standard

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show

that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Ark. R. Civ. P. 56(c)(2). When a movant demonstrates a prima facie entitlement to summary judgment, the non-movant must "discard the shielding cloak of formal allegations and meet proof with proof by showing a genuine issue as to a material fact." *Hughes W. World, Inc. v. Westmoor Mfg. Co.*, 269 Ark. 300, 301, 601 S.W.2d 826, 826-27 (1980).

"If a party responding to a summary-judgment motion cannot meet proof with proof on an essential element of his claim, the movant is entitled to judgment as a matter of law." *Dunaway v. Garland Co. Fair & Livestock Ass'n Inc.*, 97 Ark. App. 181, 189, 245 S.W.3d 678, 685 (2006) (citing *Caplener v. Bluebonnet Milling Co.*, 322 Ark. 751, 911 S.W.2d 586 (1995)); *see also Duncan v. Olive*, 2014 Ark. App. 152. The Arkansas Supreme Court no longer views summary judgment as a drastic remedy. Rather, "it is viewed simply as one of the tools in a trial court's efficiency arsenal." *Chavers v. Gen. Motors Corp.*, 349 Ark. 550, 558, 79 S.W.3d 361, 367 (2002).

III. Argument

A. Plaintiff cannot meet his burden of proof on the essential element of medical negligence.

In an action for medical injury, two-thirds of a plaintiff's burden of proof is establishing the following elements:

> (1) By means of expert testimony provided only by a medical care provider . . . , 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; [and]

> (2) By means of expert testimony provided only by a medical care provider . . . that the medical care provider failed to act in accordance with that standard[.]

Ark. Code Ann. § 16-114-206(a)(1)-(2).

Actions for medical injury "are dependent upon expert testimony" where plaintiff's claims are "based on allegations of a failure to provide needed medical care and attention or timely diagnosis of medical problems. . . ." *Spring Creek Living Ctr. v. Sarrett*, 319 Ark. 259, 262, 890 S.W.2d 598, 600 (1995); *see also Bailey v. Rose Care Ctr.*, 307 Ark. 14, 18, 817 S.W.2d 412, 414 (1991) (noting that a "plaintiff must have expert testimony" in order to prove that a "medical care provider failed to act in accordance with the degree of skill and learning possessed by other members of the profession in good standing"); *Aetna Cas. & Surety Co. v. Pilcher*, 244 Ark. 11, 424 S.W.2d 181 (1968). *Cf. Skaggs v. Johnson*, 323 Ark. 320, 325, 915 S.W.2d 253, 256 (1996) (expert testimony is not required only when the medical injury involves an issue within the jury's common knowledge, such as "a surgeon's failure to sterilize his instruments prior to operating or to remove a sponge before closing an incision") (citing *Lanier v. Trammel*, 207 Ark. 372, 180 S.W.2d 818 (1944)).

In *Sarrett*, a medical malpractice case, a plaintiff attempted to prove her claim for medical injury through lay witness testimony alone. 319 Ark. at 261, 890 S.W.2d at 599. Over the defendant's objection, the trial court allowed the plaintiff's medical injury claim to go to the jury, which found in favor of the plaintiff. *Id.*, 890 S.W.2d at 599. The Arkansas Supreme Court reversed, holding that the trial court erred in refusing to grant a directed verdict on the medical injury claim because it was not supported by expert testimony. *Id.* at 262, 890 S.W.2d at 600.

The rationale behind this rule is clear: medical injury claims raise issues "requiring scientific knowledge to determine." *Gray v. McDermott*, 188 Ark. 1, 6, 64 S.W.2d 94, 96 (1933). "It cannot and should not be left to the jury to speculate whether or not the experts in the practice of their profession have pursued the proper course of procedure." *Id.*, 64 S.W.2d at 96; *see also Durferr v. Dorr*, 131 Ark. 369, 375-96, 199 S.W.2d 376, 378 (1917) (holding that expert medical opinions are necessary to make a jury question in cases where the issue involves the "character of attention a patient should receive in the hospital").

In *National Bank of Commerce v. Quirk*, 323 Ark. 769, 790-91, 918 S.W.2d 138, 150 (1996); *Sexton v. St. Paul Fire & Marine Ins. Co.*, 275 Ark. 361, 362-63, 361 S.W.2d 270, 271-72 (1982); and *Napier v. Northrum*, 264 Ark. 406, 409-12, 572 S.W.2d 153, 155-56 (1978), the Arkansas Supreme Court affirmed directed verdicts in favor of medical care providers where plaintiffs failed to present expert medical testimony to support their allegations of negligence against medical care providers. The courts, jurors, counsel, and parties in these cases could have been spared the unnecessary time and expense of preparing for and trying those lawsuits had the respective trial courts granted summary judgment in favor of the medical care providers.

The Arkansas Supreme Court approved such judicial economy in *Skaggs v. Johnson*, when it affirmed a trial court's granting of summary judgment in favor of a medical care provider where the plaintiffs failed to provide expert medical testimony on the applicable standard of care or on whether the medical care provider breached that standard of care. 323 Ark. at 326, 915 S.W.2d at 256-57; *see also Quirk*, 323 Ark.

at 790-91, 918 S.W.2d at 149-50 (affirming summary judgment for a medical care provider where plaintiffs failed to produce expert testimony on the applicable standard of care); *Reagan v. City of Piggott*, 305 Ark. 77, 80-81, 805 S.W.2d 636, 637-38 (1991) (affirming summary judgment where plaintiff failed to produce expert testimony showing that the defendant failed to act in accordance with the standard of care).

In support of defendants' motion for summary judgment, attached is the affidavit of Nora Osborne, RN, the Director of Perioperative Services at Baptist Health Medical Center – North Little Rock. *See* Ex. A, ¶ 2. Nurse Osborne has reviewed Mr. Wesson's UAMS medical records pertaining to the August 12, 2022 surgery at issue in this case. *See* Ex. A, ¶ 6.

Nurse Osborne's sworn affidavit states that she is personally aware of the standard of care relating to the prevention of retained surgical items as it applies to Mr. Wesson's August 12, 2022 surgery. *See* Ex. A, ¶ 3. Based upon this awareness and upon her knowledge, skill, training, education, and over 40 years of experience as a peri-operative nurse, it is Nurse Osborne's opinion, which is stated to a reasonable degree of certainty, that the physician-defendants met the standard of care regarding verification of surgical counts. *See* Ex. A, ¶¶ 3-5, 11-12. The standard of care does not require the physician-defendants "to actually count and confirm the number of sponges used during Mr. Wesson's surgery. That is the RN circulator's responsibility. The lead surgeon is responsible for asking the RN circulator to verify counts prior to closing the surgical wound." *See* Ex. A, ¶ 11. The medical records

reflect that the RN circulator not only confirmed that the sponge counts were correct, but also relayed the "correctness" of the verification to the physicians. *See* Ex. A, ¶¶ 9-11. In other words, the physician-defendants met the standard of care when they asked for count verification and when the RN circulator relayed that the counts were correct.

In addition to Nurse Osborne, defendants submit the affidavit of Dr. Charles Mabry, a board-certified general surgeon in private practice who is also an Associate Professor of Surgery and Practice Management Advisor to the Chairman at the UAMS College of Medicine's Department of Surgery. *See* Ex. B, ¶ 2. Dr. Mabry has reviewed Mr. Wesson's medical records from UAMS. *See* Ex. B, ¶ 6.

Dr. Mabry's sworn affidavit confirms that he is familiar with the standard of care applicable to the physician-defendants in this case. *See* Ex. B, ¶ 3. Based on Dr. Mabry's knowledge, skill, experience, training, and education, he is of the opinion that the "physician-defendants met the standard of care in this case." *See* Ex. B, ¶ 6. Dr. Mabry confirms that the standard of care applicable to the physician-defendants does not require them "to count surgical sponges during Mr. Wesson's surgery. The standard of care applicable to these physicians requires that they ask the OR staff, which includes the circulator and scrub tech, to verify that sponge counts at the end of the procedure match the total number of sponges used during the case." *See* Ex. B, ¶ 5. This must be done prior to wound closure. *Id.* Based on his review of the records, Dr. Mabry is of the opinion that all of this was done. *See* Ex. B, ¶ 6. "Mr. Wesson's medical records show that the surgical counts were verified by Caitlynn Lanford, RN,

three separate times. The same records also show that the physicians were notified by the OR staff that the surgical counts were accurate and matched prior to wound closure." *Id.* Dr. Mabry is also of the opinion that "[i]t was appropriate for the physician-defendants to rely on the circulator and scrub tech's counts and verifications." *See* Ex. B, ¶ 7. Thus, the physician-defendants met the standard of care in this case.

The only proof of record in this case on the issue of standard of care is from Nurse Osborne and Dr. Mabry. Because the only expert testimony of record confirms that the physician-defendants met the standard of care in treating Mr. Wesson, and because the Arkansas Medical Malpractice Act requires proof, via expert testimony, that the physician-defendants did not meet the standard of care, summary judgment is appropriate and should be granted to defendants pursuant to Arkansas law.

B. Plaintiff cannot meet his burden on the essential element of proximate causation.

In addition to proving breach of the standard of care, the Arkansas Medical Malpractice Act requires that a plaintiff must prove that the medical negligence "was a proximate cause of the plaintiff's injuries." *Ford v. St. Paul Fire & Marine Ins. Co.*, 339 Ark. 434, 437, 5 S.W.3d 460, 462 (1999) (quoting *Blankenship v. Burnett*, 304 Ark. 469, 803 S.W.2d 539 (1991)) (internal quotations omitted). This is "the traditional tort standard of requiring proof that 'but for' the tortfeasor's negligence, the plaintiff's injury or death would not have occurred." *Id.*, 5 S.W.3d at 462-63. Proof required to survive a motion for summary judgment in a medical malpractice case "must be in the form of expert testimony." *Id.*, 5 S.W.3d at 463 (citing *Oglesby v.*

Baptist Med. Sys., 319 Ark. 280, 891 S.W.2d 48 (1995)). Moreover, the expert's opinion "must be stated within a reasonable degree of medical certainty or probability." *Id.*, 5 S.W.3d at 463 (citing *Montgomery v. Butler*, 309 Ark. 491, 834 S.W.2d 148 (1992)).

When a party cannot present proof on an essential element of his or her claim, the moving party is entitled to summary judgment as a matter of law. *Sanders v. Banks*, 309 Ark. 375, 830 S.W.2d 861 (1992). Even where there are genuine questions of fact on the issue of negligence, summary judgment is still appropriate where there is uncontroverted proof that the alleged negligence could not have been a proximate cause of the plaintiff's injury. *Oglesby*, 319 Ark. at 283-84, 891 S.W.2d at 49-50; *Bartlett v. Argonaut Ins. Co.*, 258 Ark. 221, 224-25, 523 S.W.2d 385, 387 (1975); *Pilcher*, 244 Ark. at 13-17, 424 S.W.2d at 183-85 (1968).

In *Ford*, the plaintiffs alleged that the defendant medical care provider's delay in performing surgery on the ruptured aneurysm of the plaintiffs' decedent constituted medical malpractice and resulted in the wrongful death of the plaintiffs' decedent. 339 Ark. at 435-36, 5 S.W.3d at 461-62. However, the plaintiffs' expert witness could not and did not state within a reasonable degree of medical certainty or probability that a delay in the performance of the surgery was the proximate cause of the injuries or death of the plaintiffs' decedent. *Id.* at 437-38, 5 S.W.3d at 463. The trial court granted summary judgment in favor of the defendants on the issue of proximate causation and dismissed the plaintiffs' claims. On appeal, the Arkansas Supreme Court affirmed, holding that the expert's failure to state within a reasonable degree of medical certainty that the plaintiffs' decedent would have survived earlier

surgery precluded the plaintiffs from being able to prove that a delay in the surgery was the proximate cause of the plaintiffs' alleged damages. *Id.* at 438-39, 5 S.W.3d at 463-64.

Even assuming plaintiff could create a question of fact to be tried against the physician-defendants on the issue of negligence, his claim would nonetheless fail in the absence of expert testimony to support the essential element of proximate causation. The undisputed expert testimony of record on this issue is contained in the affidavit of Dr. Charles Mabry. *See* Ex. B, ¶ 9. Based on his review, it is Dr. Mabry's opinion stated to a reasonable degree of medical certainty, that no acts or omissions of negligence on the part of the physician-defendants proximately caused harm or injury to plaintiff. *See* Ex. B, ¶ 9.

Dr. Mabry is of the opinion that Dr. Applebaum left the OR prior to the conclusion of the case. *See* Ex. B, ¶ 9. Because the surgical counts are not verified until the conclusion of the case, "nothing that [Dr. Applebaum] did or failed to do proximately caused any injury to Mr. Wesson." *Id.* "Similarly, given that Dr. Margolick and Dr. Taylor met the standard of care in ensuring that the OR staff verified surgical counts prior to wound closure, nothing that they did or failed to do proximately caused any injury to Mr. Wesson." *Id.*

Summary judgment in favor of the physician-defendants is appropriate on the issue of proximate causation. The proof accompanying this motion is even more conclusive than that presented in *Bartlett*, *Oglesby*, and *Ford*. Because expert testimony is an absolute requirement in determining whether any alleged negligence

on the part of the physician-defendants was a proximate cause of the injuries or damages alleged in this case, and because Dr. Mabry's affidavit confirms that there is no evidence whatsoever on this issue, *Bartlett*, *Oglesby*, and *Ford* indicate that summary judgment should be granted.

IV. Conclusion

The Arkansas Supreme Court has consistently held that a motion for summary judgment should be granted where undisputed evidence shows no genuine issue of material fact exists. The Arkansas Medical Malpractice Act requires that a plaintiff must prove the essential elements of medical negligence and proximate causation through qualified expert testimony.

The only qualified expert testimony in this case establishes that plaintiff cannot meet his burden on either essential element. Nora Osborne, RN, is of the opinion that the standard of care requires the RN circulator and surgical/scrub technician to count items introduced into the sterile field and verify that the same number of items were removed from the sterile field prior to wound closure. All that is required of the physician-defendants is that they confirm with the OR staff that counts have been verified. That was done in this case.

Similarly, Dr. Charles Mabry is of the opinion that the standard of care does not require the physician-defendants to count surgical sponges. They are simply required to confirm with the circulator and scrub techs that counts match prior to wound closure. The medical records establish that this was done. Thus, the physician-defendants met the standard of care.

Finally, Dr. Mabry is also of the opinion that no negligent act or omission on the part of the physician-defendants proximately caused any injury to Mr. Wesson. As to Dr. Applebaum, the surgical records establish that she left the case roughly two hours before surgery was complete, which is when the count verification would have occurred. As to the remaining physician-defendants, it was reasonable for them to rely on the OR staff's verification of counts prior to closure.

Therefore, Dr. Margolick and Dr. Applebaum respectfully request that their motion for summary judgment be granted, that plaintiff's claims against them be dismissed with prejudice, and for all other relief to which they are entitled.

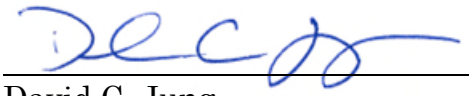
WRIGHT, LINDSEY & JENNINGS LLP
200 West Capitol Avenue, Suite 2300
Little Rock, Arkansas 72201-3699
(501) 371-0808
FAX: (501) 376-9442
E-MAIL: djung@wlj.com

By _____
David C. Jung (2013141)
Attorneys for Dr. Natalie Applebaum and Dr. Joseph Margolick

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2024, I electronically filed the foregoing with the Clerk of the Court using the Arkansas Judiciary Electronic Filing System, which shall send notification of such filing to the following:

Arkie Byrd
Mays, Byrd, & O'Guinn, PLLC
212 Center Street, Suite 700-A
Little Rock, AR 72201
abyrd@maysbyrdlaw.com
Attorney for Plaintiff



David C. Jung