

THE COURT OF APPEALS OF ARKANSAS HOLDS THAT
SUMMARY JUDGMENT IS IMPROPER WHEN QUESTIONS OF
MATERIAL FACT ARRISE IN MEDICAL MALPRACTICE ACTIONS

In *Villines v. North Arkansas Regional Medical Center*,¹ the Court of Appeals of Arkansas reversed the circuit court's grant of summary judgment for the defendant-appellee in a medical malpractice action, finding that factual issues existed on the theories of negligence and proximate cause, illustrating the proper and improper use of summary judgment.²

The facts central to this appeal began in November 2003, when Mr. Villines presented at North Arkansas Regional Medical Center ("NARMC") with kidney stones.³ After not passing the stones overnight, Dr. Scott Ferguson obtained consent for surgery from Mr. Villines.⁴ Accordingly, "NARMC contacted Certified Registered Nurse Anesthetist (hereinafter CRNA) Garry Melton to provide anesthesia services."⁵ At the time, NARMC's informed consent policy was to obtain consent from patients prior to surgery and the administration of anesthesia.⁶ "The written policy mandated separate consent forms for operative procedures and anesthesia," and it stated that the anesthesia provider or physician should obtain consent from the patient or his surrogate.⁷ The NARMC employees had a limited role in verifying that consent had been given, which required them to check the validity of the informed consent against a number of criteria, such as: (1) patient provided with information prior to procedure; (2) provider or doctor explained the procedure to patient; (3) patient gave consent to treatment after discussion; (4) patient given chance to ask questions and all questions answered fully; (5) all blanks on forms have been filled in with necessary information; and (6) all signatures required have been obtained.⁸

The required signatures included the patient, a witnessing nurse, and the anesthesia provider and or the physician.⁹ The policy further required that patients be informed of the "risks, drawbacks, complications, and expected benefits or effects of anesthesia; alternative choices to anesthesia;"

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1. 2011 Ark. App. 506, ___ S.W.3d ____.
 2. *Id.* at 1, ___ S.W.3d at ____.
 3. *Id.*, ___ S.W.3d at ____.
 4. *Id.*, ___ S.W.3d at ____.
 5. *Id.* at 1-2, ___ S.W.3d at ____.
 6. *Id.* at 1, ___ S.W.3d at ____.
 7. *Villines*, 2011 Ark. App. 506, at 2, ___ S.W.3d at ____.
 8. *Id.*, ___ S.W.3d at ____.
 9. *Id.*, ___ S.W.3d at ____.

that the patient was verbally informed about the anesthesia; and that the patient have an opportunity to ask questions.¹⁰

While Mr. Villines awaited surgery, a nurse provided him with a blank consent form, and no specific type of anesthesia service was indicated to him.¹¹ Additionally, Mr. Villines had not met with the anesthesia provider prior to being presented with the form.¹² Regardless, Mr. Villines signed the form at the nurse's request, to which the nurse bore witness.¹³ Afterwards, Mr. Villines was transported to the pre-operation area of NARMC where CRNA Melton arrived and prepared to administer a spinal block to Mr. Villines.¹⁴ Melton alleged that he verbally explained the type of anesthesia; however, Mr. Villines claimed no memory of ever meeting the CRNA.¹⁵ Melton later admitted that he did not sign the consent form, and that a different person affixed a signature to the form after the surgery.¹⁶

When Melton was administering the spinal block, he experienced difficulty and punctured Mr. Villines's back multiple times, creating a serious inflammatory condition called arachnoiditis.¹⁷ After his surgery, Mr. Villines brought a negligence action against CRNA Melton, Melton's employer, NARMC, and NARMC's insurer.¹⁸ Prior to trial, all Defendants settled with appellants with the exception of NARMC and NARMC's insurer, which Mr. Villines sued for negligent failure to ensure that informed consent was obtained for the administration of the spinal block.¹⁹

Following discovery, NARMC moved for summary judgment, alleging "that it neither negligently breached its informed-consent policy nor proximately caused appellants' damages."²⁰ Although appellants responded that factual questions remained on those issues, the circuit court granted summary judgment in favor of NARMC.²¹ Accordingly, appellants appealed the trial court grant of the motion in favor of appellees.²²

Appellants argued three points on appeal: (1) that questions of fact remained on the issue of NARMC's negligence;²³ (2) that factual questions

10. *Id.*, ___ S.W.3d at ____.

11. *Id.* at 3, ___ S.W.3d at ____.

12. *Id.*, ___ S.W.3d at ____.

13. *Villines*, 2011 Ark. App. 506, at 3, ___ S.W.3d at ____.

14. *Id.*, ___ S.W.3d at ____.

15. *Id.*, ___ S.W.3d at ____.

16. *Id.*, ___ S.W.3d at ____.

17. *Id.*, ___ S.W.3d at ____.

18. *Id.* at 3-4, ___ S.W.3d at ____.

19. *Villines*, 2011 Ark. App. 506, at 4, ___ S.W.3d at ____.

20. *Id.*, ___ S.W.3d at ____.

21. *Id.*, ___ S.W.3d at ____.

22. *Id.*, ___ S.W.3d at ____.

23. *Id.* at 5, ___ S.W.3d at ____.

remained on the issue of proximate cause and damages;²⁴ and (3) that the circuit court erred in applying the Uniform Contribution Among Joint Tortfeasors Act (“UCJTA”) after appellants settled with CRNA Melton.²⁵ In considering these three points, the court reviewed the grant of summary judgment with the well-established standard, placing the initial burden of proof upon the moving party, viewing all proof in the light most favorable to the non-moving party, and resolving all doubts against the moving party.²⁶

On the issue of negligence in failing to obtain informed consent, the court of appeals held that factual issues remained, and summary judgment was therefore improper on that issue.²⁷ To demonstrate a factual dispute, the court considered expert testimony made on behalf of the appellants, evidence tending to show that the consent procedure was not followed, and testimonial disputes between Mrs. Villines and CRNA Melton as to whether or not Melton verbally discussed the spinal block with Mrs. Villines.²⁸ Accordingly, the court of appeals stated that, as a matter of law, it could not be said that NARMC met the standard of care for obtaining informed consent.²⁹

In disagreement, NARMC argued that its personnel had no duty to actively obtain the patient’s informed consent.³⁰ Acknowledging NARMC’s argument, the court stated that NARMC was technically correct; however, the policy did require NARMC personnel to verify that informed consent was given.³¹ Alternatively, NARMC argued that Dr. Ferguson satisfied the informed consent policy, where the policy required consent “by the anesthesia provider *and/or* physician before the anesthesia and/or procedure is performed.”³² Rejecting this argument as “susceptible to the interpretation that separate and distinct duties are imposed with regard to surgical procedures and the administration of anesthesia,” the court found no merit to summary judgment on the negligence issue.³³

On the issue of proximate cause between appellant’s damages and NARMC’s negligence, the court of appeals again held that factual issues remained, thus, summary judgment was improper on the issue.³⁴ To demonstrate a factual dispute, the court stated that, in a medical-negligence case involving informed consent, a material issue on the question of proximate cause is “whether the injured party would have undergone the surgery or

24. *Id.* at 7, ___ S.W.3d at ____.

25. *Villines*, 2011 Ark. App. 506, at 9, ___ S.W.3d at ____.

26. *Id.* at 4, ___ S.W.3d at ____.

27. *Id.* at 5, ___ S.W.3d at ____.

28. *Id.*, ___ S.W.3d at ____.

29. *Id.* at 6, ___ S.W.3d at ____.

30. *Id.* at 5-6, ___ S.W.3d at ____.

31. *Villines*, 2011 Ark. App. 506, at 6, ___ S.W.3d at ____.

32. *Id.*, ___ S.W.3d at ____.

33. *Id.*, ___ S.W.3d at ____.

34. *Id.* at 7, ___ S.W.3d at ____.

procedure if he had known of the risks involved.”³⁵ Acknowledging that appellants “pled that they would not have consented to the spinal-block anesthesia had they been informed that it would be used,” the court stated that a material factual dispute existed.³⁶ Additionally, the court found that appellants met the burden of proving, by expert testimony, that NARMC’s breach of the applicable standard of care proximately caused their injuries.³⁷

NARMC argued that the experts’ opinions were not stated to a reasonable degree of medical certainty or probability, therefore, appellants failed to meet their burden.³⁸ The court rejected this argument, however, because the issue of weight and credibility of an expert witness is a matter for the fact-finder to resolve.³⁹

NARMC’s final argument was that the negligence of CRNA Melton intervened and became the sole proximate cause of appellants’ injuries.⁴⁰ The court also rejected this argument because proximate cause “is that cause which, in a natural and continuous sequence, produces damage.”⁴¹ The court stated that the law does not limit only one proximate cause of damage, that “acts or omissions of two or more persons may work together as concurring proximate causes,” and that each person may be found liable.⁴² Finally, the court stated that proximate cause is an issue committed to the fact-finder and that NARMC and CRNA Melton arguably constituted concurrent proximate causes which combined to produce the appellants’ damages.⁴³

The court of appeals refused to reach appellants’ third point on appeal—that the circuit court erred in applying the UCJTA after appellants settled with CRNA Melton—because any ruling would be “academic” and based on an agreement between the parties at the trial level.⁴⁴ Thus, because “our appellate courts do not decide moot or academic issues,” the court refused to hand down a ruling, reversed, and remanded the case back to circuit court.⁴⁵

*Villines v. North Arkansas Regional Medical Center*⁴⁶ upholds the summary judgment standard in medical-negligence cases by illustrating the existence of factual disputes that tend to be central to the non-movants case-in-chief. This case distinguishes between instances of no material factual

35. *Id.*, ___ S.W.3d at ____.

36. *Id.*, ___ S.W.3d at ____.

37. *Villines*, 2011 Ark. App. 506, at 7, ___ S.W.3d at ____.

38. *Id.* at 8, ___ S.W.3d at ____.

39. *Id.*, ___ S.W.3d at ____.

40. *Id.*, ___ S.W.3d at ____.

41. *Id.*, ___ S.W.3d at ____.

42. *Id.*, ___ S.W.3d at ____.

43. *Villines*, 2011 Ark. App. 506, at 9, ___ S.W.3d at ____.

44. *Id.* at 9-10, ___ S.W.3d at ____.

45. *Id.* at 10, ___ S.W.3d at ____.

46. *Id.* at 10., ___ S.W.3d at ____.

dispute and material factual dispute. This case affirms the summary judgment standard in the Arkansas courts and illustrates its uses.

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