

**2022 Ark. App. 255
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**Curtis SCOTT, Appellant
v.
Currin NICHOL, M.D., Appellee**

No. CV-21-296

**Court of Appeals of Arkansas, DIVISIONS I
& IV.**

**Opinion Delivered May 25, 2022
Rehearing Denied July 13, 2022**

Willard Proctor, Jr., P.A., by: Willard Proctor, Jr.,
Little Rock, for appellant.

Friday, Eldredge & Clark, LLP, Little Rock, by: T.
Michelle Ator and Kimberly D. Young, for
appellee.

RITA W. GRUBER, Judge

In this medical-malpractice action, appellant Curtis Scott appeals the circuit court's order granting summary judgment in favor of appellee Currin Nichol, M.D. Scott contends that the court erred in granting the motion for summary judgment because the affidavits submitted by his experts were sufficient to withstand the entry of summary judgment. We disagree and affirm.

On July 21, 2016, Scott filed this medical-malpractice action against numerous defendants, including Dr. Nichol.¹ The complaint alleged that on July 21, 2014, Scott, who was sixty-five years old and an everyday smoker, went to Jefferson Regional Medical Center in Pine Bluff and reported having numbness and tingling in his right arm and lips. His blood pressure

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was elevated, and the nursing staff noted that he had issues with blood pressure and was out of his blood-pressure medicine. According to the complaint, Dr. Nichol developed a working diagnosis of "CVA, Hemorrhagic, CVA, Ischemic, Electrolyte Abnormality, TIA, Hypertension

/Anxiety." A CT scan was ordered. On the basis of the results of the scan and clinical observations, Dr. Nichol made a diagnosis of "Hypertension, Stress reaction." Scott was discharged; given a prescription for blood-pressure medicine; and told to return if his condition worsened and to follow up with his primary-care doctor. Scott continued to have symptoms on July 22 and went to Baptist Medical Center in Little Rock. While at Baptist, doctors and staff ordered a carotid Doppler ultrasound, an MRI of Scott's brain, and an echocardiogram, which revealed that Scott had a stroke.

In his complaint, Scott alleged that Dr. Nichol negligently performed his duties and that his actions were the proximate cause of Scott's damages. Scott asserted that Dr. Nichol's actions fell below the standard of care for physicians engaged in the treatment of patients suffering from a stroke in Jefferson County. The actions alleged included failing to properly diagnose Scott's condition; causing a delay in the proper diagnosis of Scott's condition; failing to properly monitor Scott's condition; failing to manage Scott's medical condition; and failing to use the proper diagnostic tools available in the treatment of a person who presents with symptoms of a stroke.

Dr. Nichol filed requests for admission on March 22, 2017, requesting that Scott admit he did not have the required expert testimony to support his claim. Scott filed a response denying the requests for admission. On July 13, 2017, Dr. Nichol filed a motion to compel discovery indicating that Scott had yet to respond to the interrogatories and requests for production propounded to Scott on March 22, 2017. These interrogatories sought, among other things, information regarding Scott's expert witnesses and medical records.

On October 26, 2020, Dr. Nichol moved for summary judgment arguing that Scott's medical-negligence claim, which had been pending for four years, required expert testimony under Arkansas Code Annotated section 16-114-206 (Repl. 2016). The motion indicated that in response to the March 2017 discovery, Scott

identified Dr. Lee Davis as a potential expert but had not provided information requested about his opinions or his curriculum vitae (CV). Dr. Nichol argued that Scott could not meet his burden of proof in the absence of expert testimony and that summary judgment should be awarded. Scott filed a motion to extend his time in which to respond until December 4, which was granted.

After being granted an extension, Scott filed a response to the motion for summary judgment on December 4. He asserted that he intended to use Dr. Lee Davis as an expert but had been unable to obtain an affidavit due to circumstances of his counsel. Scott attached the affidavit of Dr. Douglas Geiger in support of his medical-negligence claim and argued the motion for summary judgment should be denied, and he asked for an additional week to provide the affidavit of Dr. Davis. Scott stated that should he not be given the additional week, he would rely on Dr. Geiger's affidavit. In reply, Dr. Nichol argued that Dr. Geiger's affidavit was insufficient to support the elements of the claim, Scott failed to meet proof with proof, and summary judgment should be granted.

On December 11, Scott filed the affidavit of Dr. Davis and his CV, along with a "response" to Dr. Nichol's reply brief. Dr.

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Nichol moved to strike the "response," arguing that it was an impermissible pleading under Rules 7 and 56 of the Arkansas Rules of Civil Procedure.

The circuit court entered an order granting the motion for summary judgment on March 3, 2021. Scott filed a motion for specific findings of fact and conclusions of law on March 12. In its findings and conclusions entered April 9, the court found that Dr. Geiger's affidavit failed to set forth any facts to indicate he is qualified to testify on matters concerning emergency medicine or care provided to a possible stroke victim; to establish that Dr. Geiger has any knowledge of the applicable standard of care, the facilities at Jefferson Regional, or how it may be similar to

communities where Dr. Geiger has practiced; to set forth the applicable standard of care at the time Dr. Nichol treated Scott; to establish that Dr. Nichol breached the standard of care in Jefferson County; and to establish proximate cause. Although noting that Dr. Nichol's objections to Dr. Davis's affidavit were most likely correct, the court found the affidavit did not change the outcome because it also failed to set forth the required expert proof to defeat summary judgment. Specifically, the court found that it failed to address the applicable standard of care; how Dr. Nichol breached the standard of care; and proximate cause.

On April 2, Scott filed a notice of appeal with respect to the March 3 order and an amended notice of appeal on April 12, appealing both orders.

A trial court may grant summary judgment only when it is clear that there are no genuine issues of material fact to be litigated and that the party is entitled to judgment as a matter of law. *Mitchell v. Lincoln*, 366 Ark. 592, 237 S.W.3d 455 (2006). Once the moving party has established a prima facie case showing entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material fact unanswered. *Id.* This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

In a medical-malpractice action, unless the asserted negligence could be comprehended by a jury as a matter of common knowledge, a plaintiff must prove the following:

- (1) By means of expert testimony provided only by a medical care provider of the same specialty as the defendant, the degree of skill and learning ordinarily possessed and

used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he or she practices or in a similar locality;

(2) By means of expert testimony provided only by a medical care provider of the same specialty as the defendant that the medical care provider failed to act in accordance with that standard; and

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

Ark. Code Ann. § 16-114-206(a)(1)–(3).² The statute implements the traditional tort

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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, 437, 5 S.W.3d 460, 462–63 (1999).

I. Dr. Geiger's Affidavit

Scott first contends that Dr. Geiger's affidavit established the standard of care for treating patients that present to the emergency room in Pine Bluff with similar complaints such as his. He argues that Dr. Geiger's affidavit established that he was qualified to give an opinion regarding the standard of care in Pine Bluff because the affidavit established that he is a medical doctor in good standing licensed in Georgia; is in a general practice; graduated from Emory Medical School in 1991; did a general surgery residency at Howard University Medical School; worked in emergency medicine as an emergency-room doctor; and was familiar with the standard of care at Jefferson Regional Medical Center and

communities similar to Jefferson Regional Medical Center. Scott further argues that the affidavit established that the standard of care was not to discharge such a patient, to observe the patient for twenty-four hours, and to perform an MRI, and that Dr. Nichol breached the standard of care by discharging him and failing to order an MRI. And finally, Scott contends that Dr. Geiger's affidavit established proximate cause.

Dr. Nichol responds that Dr. Geiger's affidavit fails in all three requirements of Ark. Code Ann. § 16-114-206(a)(1)–(3). We agree that Dr. Geiger's affidavit is insufficient to withstand summary judgment on the issue of proximate cause.

Dr. Geiger's affidavit attested that the "evaluation, treatment, and care of Curtis Scott by Dr. Nichol was below the standard of care expected of reasonable practitioners and physicians, which led to a delay of diagnosis, delay of receiving appropriate physician care, and increase [sic] chance of morbidity. The aforementioned acts resulted in a breach of the duty of care, which proximately causes injury to Curtis Scott." Scott contends this statement sufficiently establishes proximate cause. Although in his brief Scott refers to his medical records and argues that the delay in his diagnosis and treatment for a stroke caused blood cells to die and required him to have outpatient physical therapy and possibly would require more rehab, Dr. Geiger's affidavit does not mention any injury. Rather, the affidavit merely states that the delay in diagnosis and treatment caused an "increased chance of morbidity for Curtis Scott." Dr. Nichol responds that Dr. Geiger's affidavit lacks proof of causation by failing to identify an actual injury sustained by Scott and to state within a reasonable degree of medical certainty that Dr. Nichol caused such an injury. He also notes that "morbidity" is a vague term.

In medical-injury cases, it is not enough for an expert to opine that there was negligence that was the proximate cause of the alleged damages. *Thomas v. Meadors*, 2017 Ark. App. 421, 527 S.W.3d 724. The opinion must be stated within a reasonable of medical certainty. *Id.*

Morbidity is defined in *The Merriam-Webster Dictionary* as a "diseased state or symptom; ill health." *Merriam-Webster.com Dictionary* , (Accessed 23 May. 2022), archived at <https://perma.cc/4C6P-NLH3>. The assertion of an increased chance of morbidity fails to identify an injury. Moreover, Dr. Geiger's affidavit does not address how keeping him in the hospital or ordering an MRI would have prevented injury to Scott. Our supreme court has held that a "vague and conclusory statement" that a certain treatment "did not conform to the standard of care" is not sufficient to establish proximate

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cause in order to defeat summary judgment. *Fryar v. Touchstone Physical Therapy, Inc.* , 365 Ark. 295, at 302, 229 S.W.3d 7, at 13 (2006) (affirming summary judgment where medical expert's affidavit did not connect the physical therapist's alleged negligence with the plaintiff's injuries); *see also Johnson v. Schafer* , 2018 Ark. App. 630, 565 S.W.3d 144.

Dr. Geiger's affidavit does not create a material issue of fact on the question of proximate cause; therefore, the circuit court's grant of summary judgment in favor of Dr. Nichol was not in error. Because the affidavit fails on the issue of proximate cause, we do not address whether the affidavit satisfied the other requirements.

II. Dr. Davis's Affidavit

With respect to Dr. Davis's affidavit, Scott makes little to no argument that it was sufficient to defeat summary judgment. His argument consists of a recitation of Dr. Davis's qualifications to argue that he was qualified to give an opinion regarding the standard of care in Pine Bluff and one sentence with regard to proximate cause stating that Dr. Davis had come to the same conclusion as Dr. Geiger. Because we conclude that Dr. Geiger's affidavit was insufficient to establish proximate cause in order to defeat summary judgment, we also conclude that the identical assertion in Dr. Davis's affidavit is also insufficient.

In conclusion, we affirm the circuit court's order of summary judgment in favor Dr. Nichol.

Affirmed.

Abramson, Gladwin, Klappenbach, and Hixson, JJ., agree.

Harrison, C.J., dissents.

Notes:

¹ The other defendants included Jefferson Hospital Association, Inc., d/b/a Jefferson Regional Medical Center, Jefferson Regional Medical Center Preferred Provider Organization, three registered nurses, and Jane and John Does A through Z. The circuit court granted appellant's various motions to dismiss the complaint as to these defendants at different points during the case.

² Appellant did not assert that the alleged negligence lies within the jury's comprehension as a matter of common knowledge.
