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Judicial Interpretation of Legislative Changes to the Arkansas Medical Malpractice Act

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In 2013, the legislature amended the Arkansas Medical Malpractice Act with Act 1196—"an Act to subsume various causes of action for health care injuries against a medical care provider **under a single remedy**." Section 16-114-213 provides that the Medical Malpractice Act "is the **sole remedy** with respect to any injury against a medical care provider." Ostensibly, the legislature's changes to the Medical Malpractice Act mean that when a plaintiff brings a claim against a "medical care provider" alleging she sustained a "medical injury," her sole remedy is a cause of action for medical malpractice under the Act and all other claims must be dismissed. This argument was raised in a summary judgment motion in *Isham v. Booneville Community Hospital*, No. 2:14-CV-02018, 2015 WL 3965701. Although the court denied the motion, *Isham* is a good case to know because the court provided a thorough discussion of how the "sole remedy" argument should be analyzed.

Actions for Medical Injuries Against Medical Care Providers – From "Any" to "All"

Act 1196 changed the definition of an "action for medical injury" from "**any** action against a medical care provider" to "**all** actions against a medical care provider." Act 1196, Section 2; Ark. Code Ann. § 16-114-201(1). The term "medical care provider" means: a physician, certified registered nurse anesthetist, physician's assistant, nurse, optometrist, chiropractor, physical therapist, dentist, podiatrist, pharmacist, veterinarian, hospital, nursing home, community mental health center, psychologist, clinic, or not-for-profit home healthcare agency licensed by the state or otherwise lawfully providing professional medical care services, the course and scope of employment in the providing of such medical care or medical services[.]

Ark. Code Ann. § 16-114-201(2). The Act defines a "medical injury" as:

> any adverse consequences arising out of or sustained in the course of the professional services being rendered by a medical care provider to a patient or resident, whether resulting from negligence, error, or omission in the performance of such services; or from rendition of such services without informed consent or in breach of warranty or in violation of contract; or from failure to diagnose; or from premature abandonment of a patient or of a course of treatment; or from failure to properly maintain equipment or appliance necessary to the rendition of such services; or otherwise arising out of or sustained in the course of such services.

Ark. Code Ann. § 16-114-201(3). A "medical injury" is an injury that is the result of (1) a professional service; (2) a doctor's treatment or order; or (3) a matter of medical science. *Paulino v. QHG of Springdale, Inc.*, 2012 Ark. 55, 10, 386 S.W.3d 462, 467 (2012).

With this modification—from "any" to "all"—the legislature made clear there is only one cause of action against a "medical care provider" for a "medical injury" and that cause of action is for medical malpractice. All other causes of action should be dismissed. But as demonstrated in the case of *Isham v. Booneville Community Hospital*, the argument is not always clear cut.

Isham v. Booneville Community Hospital

Though the "sole remedy" argument failed in *Isham*, the district court's opinion presents a strong analysis of the issue and is worth noting. Because it is the only opinion to cite section 16-114-213, the analysis may serve as useful authority as the case law develops.

The *Isham* court first addressed an issue that is particularly relevant to the practitioner seeking dismissal under the "sole remedy" provision of the Act. The opinion explained that in order to accept the defendants' sole remedy argument "the Court would need to find that the 2013 amendment applies retroactively to Isham's claims for injury that allegedly occurred from 2009-2011." The Court cited to Arkansas Supreme Court precedent distinguishing the retroactive application of procedural and remedial legislation from the prospective application of other legislation to address whether the amendment would apply to injuries that occurred prior to its passage. On this question, the court "assume[d] that applying the 2013 amendment retroactively [was] proper under Arkansas law."

The next step of the analysis was to "find that Isham suffered a 'medical injury' as defined in Ark. Code Ann. § 16-114-201 in order for the claims to be properly subsumed into a single medical malpractice action." The Court denied the motion because the Act expressly provides that a "medical injury" is a consequence resulting from "professional services being rendered by a medical care provider to a patient or resident." Because the plaintiff was not a patient or resident of any defendant, she did not suffer a "medical injury," and thus she could proceed on a theory of ordinary negligence.

In sum, the *Isham* opinion may provide useful to defense practitioners making the "sole remedy" argument. *Isham* indicates that if it had been established that the plaintiff had suffered a "medical injury" as defined by the Act, then the claims would have been "properly subsumed into a single medical malpractice action." Further, it is useful that the Court suggested the "sole remedy" provision should be applied retroactively. *Isham* demonstrates that the court interpreted section 16-114-213 in keeping with the legislature's intent "to subsume various causes of action for health care injuries against a medical care provider under a single remedy." Act 1196.

At least one circuit court in Arkansas has denied a motion to dismiss and a motion for summary judgment where it was argued under that section 16-114-213, all the plaintiff's causes of action alleging medical injuries caused by a medical care provider should be subsumed into a single action for medical malpractice. *McCraw v. Premier Health*, No. 60CV-14-4572. It remains to be seen how the state's appellate courts will interpret the "sole remedy" provision of the Act.

The thanks of the AADC go out to Maggie Hobbs Benson of Kutak Rock LLP for writing this article.

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