Legal Note: Informed Consent

One of the key legal concepts for healthcare providers is the doctrine of informed consent. Under this doctrine, a provider must disclose to a patient adequate information, including available alternatives and potential risks, to allow the patient to make an educated and intelligent decision about whether to undergo a treatment or procedure.

The Arkansas Code states that “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.” Ark. Code Ann. § 16-114-206(b)(1).

The statute goes on to list the following criteria for making this determination:

1. 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;

2. 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;

3. 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

4. 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.

The Arkansas Supreme Court has taken a more liberal view of item #3. According to a 1995 case, patients who cannot state that they would have refused the treatment had they known of the risks can maintain a lawsuit based upon lack of informed consent if a “reasonable and prudent patient” that has all material information would have withheld consent. See, Aronson v. Harriman, 321 Ark. 359, 901 S.W.2d 832 (1995).

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