Medical Malpractice Jury Instructions

Our Mandate:

The trial court is responsible for ensuring that the jury is properly instructed before deliberations begin. *Mosley & Mosley Builders, Inc. v. Landin Ltd.*, 87 N.C. App. 438, 445, 361 S.E.2d 608, 612 (1987) ("It [is] the duty of the [trial] court to instruct the jury upon the law with respect to every substantial feature of the case."). A trial court's primary purpose in instructing the jury is "the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *Littleton v. Willis*, 205 N.C. App. 224, 228, 695 S.E.2d 468, 471 (2010). In considering whether to give a requested jury instruction, the evidence must be viewed in the light most favorable to the party requesting the instruction. *Carrington v. Emory*, 179 N.C. App. 827, 829, 635 S.E.2d 532, 534 (2006). On appeal, this Court should consider the jury charge contextually and in its entirety. *Hammel v. USF Dugan, Inc.*, 178 N.C. App. 344, 347, 631 S.E.2d 174, 178 (2006).

The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Wiggins v. E. Carolina Health-Chowan, Inc., 234 N.C. App. 759, 762-63, 760 S.E.2d 323, 325-26 (2014).

Basics

- A capital “A” after the PJI number denotes an instruction to be used for causes of action arising on or after October 1, 2011.
- Top left of instruction: That date is the date the committee last reviewed the instruction.
- “Note well”: important information and directives that need to be read before using that instruction.
- Endnotes: identifies the authority for the language used in the instruction/ provides background information useful to the use of the instruction/ may include recent opinions addressing that area of the law that did not change the instruction or require modifications to be made in the original instruction.
- **Note:** Most of the instructions generated by the committee in 2011 and 2012 have not been challenged and addressed in cases heard by the Court of Appeals and the Supreme Court. Because of that, if there is a request for modifications or additions by counsel, listen carefully to the parties’ arguments

as they may be informative or raise valid issues with the instructions that were not considered at the time the instructions were drafted.

- Suggestion: If you do not do it already, I found it useful to provide the written instructions to the attorneys before they give their final summation. I also provide to each juror a copy before I instruct them so that they can follow along with me as I charge the jury, and then use them in their deliberations. In my opinion it reduces the number of questions and requests for further instructions. It is also my opinion that providing only one copy to the jury allows one juror to dominate the deliberations to the exclusion of those jurors who do have access to a written copy. See N.C.G.S. §1A-1 Rule 51(b) discussed below.

Pretrial request for jury instructions:

N.C.G.S. §1A-1 Rule 16(a) provides that:

(a) in any action, the court may in its discretion direct the attorneys for the parties to appear before the court for a conference to consider

(1) The simplification and formulation of the issues;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(7) Such other matters as may aid in the disposition of the action.

N.C.G.S. §1A-1 Rule 16(b) provides that "in a medical malpractice action as defined in G.S. 90-21.11, at the close of the discovery period, the judge shall schedule a final conference. At such conference the court, pursuant to Rule 16(a)(7) above, can require that the Order on Final Pre-Trial Conference include all proposed jury instructions. Any requests for special instructions, pursuant to Rule 51(b) (see below), must be in writing." In addition, the court can order that those special instructions include the legal authority that forms the basis for that request.

N.C.G.S. §1A-1 Rule 51(b) and N.C.G.S. §1-181: "*Requests for special instructions*. **—** Requests for special instructions must be in writing, entitled in the cause, and signed by the counsel or party submitting them. Such requests for special instructions must be submitted to the judge before the judge's charge to the jury is begun. The judge may, in his discretion, consider such requests regardless of the time they are made. Written requests for special instructions shall, after their submission to the judge, be filed with the clerk as a part of the record."

Note: Requests for special instructions not made in compliance with N.C.G.S. §1A-1 Rule 51(b) and N.C.G.S. §1-181 may be denied in the trial court's discretion. See *Beroth Oil Co. v. Whiteheart,* 173 N.C. App. 89, 98, 618 S.E.2d 739, 746 (2005).

. . .

N.C.G.S. §1A-1 Rule 51(d): *Final instructions to the jury.* **—** In civil cases subject to G.S. 90-21.11(2), the court shall reduce the oral instructions given to the jury to writing. Upon the jury retiring for deliberation, the court is encouraged to and may provide the jury a written copy of the oral instructions for the jury to take into the jury room during deliberation.

Note: "A trial court's answer to a jury question is treated as an instruction to the jury." *Martin v. Pope,* 257 N.C. App. 641, 648, 811 S.E.2d 191, 197 (2018).

If you are going to provide written instructions to the jury, it would appear to be necessary to reduce your answer to a jury question to writing and deliver it to the jury. Also, before the jury returns to their deliberations, outside of the jury's presence, ask each party on the record if there are any objections, corrections or additions to the court's response to the question.

Direct Evidence of Medical Negligence

1. Medical negligence foundation:

The scope of a physician's duty to his patient has been variously described by this Court, but perhaps most succinctly by Justice Higgins in *Hunt v. Bradshaw*, 242 N.C. 517, 88 S.E. 2d 762 (1955).

A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient. If the physician or surgeon lives up to the foregoing requirements, he is not civilly liable for the consequences. If he fails in any one particular, and such failure is the proximate cause of injury or damage, he is liable. *Id.* at 521-22, 88 S.E. 2d at 765.

The applicable standard, then, is completely unitary in nature, combining in one test the exercise of "best judgment," "reasonable care and diligence" *and* compliance with the "standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities."

Wall v. Stout, 310 N.C. 184, 192-93, 311 S.E.2d 571, 576-77 (1984).

809.00 MEDICAL NEGLIGENCE - DIRECT EVIDENCE OF NEGLIGENCE ONLY.

(Use for causes of actions arising **before** 1 October 2011.)

Under common law every health care provider is under a duty to:

(1) use best judgment in the treatment and care of the patient;

(2) use reasonable care and diligence in the application of his/her knowledge and skill in the patient's care; and/or

Under NCGS §90-21.12(a) every health care provider is under a duty:

(3) to provide health care in accordance with the standards of practice

(a) among members of the same health care profession

(b) with similar training and experience

(c) situated in the same or similar communities

(d) at the time the health care is rendered.

809.00A MEDICAL MALPRACTICE—DIRECT EVIDENCE OF NEGLIGENCE ONLY.

(Use for claims arising **on or after** 1 October 2011.

Under common law every health care provider is under a duty to:

(1) use best judgment in the treatment and care of the patient;

(2) use reasonable care and diligence in the application of his/her knowledge and skill in the patient's care; and/or

Under NCGS §90-21.12(a) every health care provider is under a duty:

(3) provide health care in accordance with the standards of practice

(a) among members of the same health care profession

(b) with similar training and experience

(c) situated in the same or similar communities

(d) ***under the same or similar circumstances***

(e) at the time the health care is rendered.

N.C.G.S. §90-21.11(1) defines health care provider.

Note: There is not a pattern instruction to address the factual issue as to whether the defendant is a health care provider under N.C.G.S. §90-21.11 or whether the defendant was actually furnishing professional health care services to the plaintiff (see "duty to attend" below). If that is an issue, modifications must be made to the instructions to require such proof, or a separate issue has to be crafted.

Note: Use of N.C.P.I.-Civ. 809.00 was approved in *Wilson v. Ashley Women's Ctr., P.A.,* 253 N.C. App. 409, 798 S.E.2d 815, 2017 WL 1650129 (unpublished) (N.C. Ct. App. 2017).

Note: Although N.C.G.S. §90-21.11(1) provides a comprehensive definition of "health care provider," it is prefaced by "without limitation."

Note: Effective July 20, 2017, any paramedic as defined in NCGS §131E-155(15a) was included in the definition of health care provider. Although a paramedic is defined as a health care provider, that definition appears in subpart (1)(e) rather than (1)(a). Therefore, a person who supervises a paramedic is not included within the definition of health care provider by virtue of that supervision alone (see sub-subdivision "c" and "d" of N.C.G.S. §90-21.11).

2. Same health care profession

Because questions regarding the standard of care for health care professionals ordinarily require highly specialized knowledge, the plaintiff must establish the relevant standard of care through expert testimony. *See Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 625, 504 S.E.2d 102, 108 (1998); *Weatherford v. Glassman*, 129 N.C. App. 618, 621, 500 S.E.2d 466, 468 (1998); *see also* N.C. Gen. Stat. § 8C-1, Rule 702(a) (2001). Further, the standard of care must be established by other practitioners in the particular field of practice of the defendant health care provider or by other expert witnesses equally familiar and competent to testify as to that limited field of practice. *See* N.C. Gen. Stat. § 8C-1, Rule 702(b), (d); *Heatherly*, 130 N.C. App. at 625, 504 S.E.2d at 108. *Smith v. Whitmer*, 159 N.C. App. 192, 195, 582 S.E.2d 669, 671-72 (2003).

3. Expert witness' personal preferences and standard of care

Personal preferences and remarks concerning how an expert would have treated a patient are not evidence of the standard of care but may be relevant for purposes other than defining the standard of care. "The mere fact that one [expert witness] testifies that he would have acted contrarily to or differently from the action taken by defendant is not sufficient to establish a prima facie case of defendant's negligence." *Rorrer v. Cooke,* 313 N.C. 338, 357, 329 S.E.2d 355, 367 (1985). Our Supreme Court has found to be relevant testimony of personal practices when used to explain the standard of care. *See Rouse v. Pitt County Mem'l Hosp., Inc.,* 343 N.C. 186, 195-96, 470 S.E.2d 44, 49-50 (1996); *Swink v. Weintraub*, 195 N.C. App. 133, 148-49, 672 S.E.2d 53, 64 (2009). Also, it might be relevant to that expert's credibility as to the expert's opinion as to standard of care, particularly when those practices do not entirely conform to the expert's opinion as to the standard of care.

Note: Testimony as to personal preferences or how an expert would have treated a patient may require a limiting instruction to the jury.

4. Situated in the same or similar communities

Although it is not necessary for the witness testifying as to the standard of care to have actually practiced in the same community as the defendant, *see Warren v. Canal Industries*, 61 N.C. App. 211, 215-16, 300 S.E.2d 557, 560 (1983), the witness must demonstrate that he is familiar with the standard of care in the community where the injury occurred, or the standard of care of similar communities. *See*, *e.g.*, *Henry v. Southeastern OB-GYN Assocs.*, *P.A.*, 145 N.C. App. 208, 210, 550 S.E.2d 245, 246-47, *affirmed per curiam*, 354 N.C. 570, 557 S.E.2d 530 (2001); *Tucker v. Meis*, 127 N.C. App. 197, 198, 487 S.E.2d 827, 829 (1997). The "same or similar community" requirement was specifically adopted to avoid the imposition of a national or regional standard of care for health care providers. *See Henry*, 145 N.C. App. at 210, 550 S.E.2d at 246; *Page v. Hospital*, 49 N.C. App. 533, 535, 272 S.E.2d 8, 10 (1980). *Smith v. Whitmer,* 159 N.C. App. 192, 196, 582 S.E.2d 669, 672 (2003).

The "similar community" standard "encompasses more than mere physician skill and training[.]" *Henry v. Southeastern OB-GYN Assocs., P.A.*, 145 N.C. App. 208, 211, 550 S.E.2d 245, 247 (2001). It also encompasses variations in facilities, equipment, funding, and also the physical and financial environment of a particular medical community. *Id*. The population and industrial base of a community are not relevant *per se* to meeting the "similar community" standard. It is not the size of a town or its economic resources that are to be considered, but rather how those resources are reflected in the "conditions, facilities and equipment available to a healthcare professional[.]" *Id*. at 213, 550 S.E.2d at 248; *Pitts v. Nash Day Hosp., Inc.*, 167 N.C. App. 194, 201, 605 S.E.2d 154, 159 (2004).

The "critical inquiry" in determining whether a medical expert's testimony is admissible under the requirements of N.C. Gen. Stat. § 90-21.12 is "whether the doctor's testimony, taken as a whole" establishes that he "is familiar with a community that is similar to a defendant's community in regard to physician skill and training, facilities, equipment, funding, and also the physical and financial environment of a particular medical community." *Pitts v. Nash Day Hosp., Inc.*, 167 N.C. App. 194, 197, 605 S.E.2d 154, 156 (2004), *aff'd per curiam*, 359 N.C. 626, 614 S.E.2d 267 (2005). *Kearney v. Bolling*, 242 N.C. App. 67, 76, 774 S.E.2d 841, 848 (2015).

5. Proximate cause and evidence regarding delay in diagnosis or treatment or different treatment was called for

NOTE: "In cases where the evidence may give rise to a finding that there was a negligent delay in diagnosing or treating the plaintiff, and there is conflicting evidence on whether the delay increased the probability of injury or death sufficiently to amount to proximate cause of the injury or death, the trial court should further explain proximate cause." [From N.C.P.I.-Civ. 809.00 and N.C.P.I.-Civ. 809.00A]

A similar requirement applies in cases where there is conflicting evidence on whether a different treatment probably would have improved the chances of survival or recovery.

The following special instruction (found on page 2 of both P.J.I. 809.00 and P.J.I. 809.00A) should be given in these circumstances:

[It is not enough for the plaintiff to show that [different treatment] [earlier [diagnosis] [treatment] [hospitalization]] of [name plaintiff] [name decedent] would have improved his chances of survival and recovery. Rather, the plaintiff must prove that it is **probable** that a different outcome would have occurred with [different treatment] [earlier [diagnosis] [treatment] [hospitalization]]. The plaintiff must prove by the greater weight of the evidence that the [treatment] [alleged delay in [diagnosis] [treatment] [hospitalization]] **more likely than not** caused the [name the injury or precipitating condition] [and death] of [name plaintiff] [name decedent].

The connection or causation between the negligence and death [injury] must be probable, not merely a remote possibility. *Bridges v. Shelby Women's Clinic, P.A., supra*. A plaintiff could not prevail at trial by merely showing that a different course of action would have improved the plaintiff's chances of survival. Proof of proximate cause in a malpractice case requires more than a showing that a different treatment would have improved the patient's chances of recovery. *Gower v. Davidian*, 212 N.C. 172, 193 S.E. 28 (1937); *Bridges v. Shelby Women's Clinic, P.A.*, 72 N.C. App. 15, 20-22, 323 S.E. 2d 372, 376 (1984), *disc. rev. denied*, 313 N.C. 596, 330 S.E. 2d 605 (1985); *White v. Hunsinger*, 88 N.C. App. 382, 386, 363 S.E.2d 203, 206 (1988).

6. "Loss of Chance"

In *Parkes v. Hermann*, 376 N.C. 320, 322, 852 S.E.2d 322, 323-25 (2020), the evidence in the light most favorable to plaintiff only showed a 40% chance that defendant's negligence caused plaintiff's injury. In other words, there was only a 40% chance that plaintiff's condition would have improved if defendant had properly diagnosed plaintiff and timely administered [medication]. By presenting evidence of only a 40% chance, plaintiff failed to show it was more likely than not that defendant's negligence caused plaintiff's current condition.

"The issue presented to this Court in *Parkes* is whether losing the chance for an increased opportunity for an improved outcome is a cognizable and compensable claim in North Carolina. We hold that it is not." The expert opinion simply failed to establish proximate cause between the defendant's delay in diagnosis and the injury sustained by the plaintiff. The defendant's negligence resulted in the lost chance of an increased opportunity for an improved outcome but that does not constitute a compensable injury separate from traditional negligence.

The court in *Gower v. Davidian*, 212 N.C. 172, 193 S.E. 28 (1937) "firmly framed medical malpractice claims within the confines of traditional proximate

cause, which allows a negligence claim to proceed when the evidence shows that the negligent act more likely than not caused the injury. If the evidence falls short of this causation standard, then there is no recovery. The Court did not relax the proximate cause requirement for a medical malpractice claim when presented with the opportunity. *See, e.g., Buckner v. Wheeldon*, 225 N.C. 62, 65, 33 S.E.2d 480, 483 (1945) (A physician is liable "only when the injurious result flows proximately" from the physician's negligence.). Under a lesser standard, a plaintiff alleging medical malpractice need only offer evidence tending to show that the defendant's negligence "possibly" caused his injury, rather than "probably" caused it. Such a standard would create an anomaly in medical malpractice actions. Moreover, damages for a possible chance simply cannot fit within our traditional framework." Parkes, 376 N.C. at 325, 852 S.E.2d at 325.

7. Proximate Cause

In a medical negligence case, "[t]he connection or causation between the negligence and [injury] death must be probable, not merely a remote possibility." *White v. Hunsinger,* 88 N.C. App. 382, 387, 363 S.E.2d 203, 206 (1988) (citing *Bridges v. Shelby Women's Clinic, P.A.,* 72 N. C. App. 15, 21, 323 S.E.2d 372, 376 (1984), disc. rev. denied, 313 N.C. 596, 330 S.E.2d 605 (1985)). "[O]ur courts rely on medical experts to show medical causation because 'the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen[.]'" *Azar v. Presbyterian Hosp.*, 191 N.C. App. 367, 371, 663 S.E.2d 450, 453 (2008) (quoting *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980)), *cert. denied*, 363 N.C. 372, 678 S.E.2d 232 (2009).

The expert testimony must establish that the connection between the medical negligence and the injury is "'probable, not merely a remote possibility.'" *Id.* (quoting *White v. Hunsinger*, 88 N.C. App. 382, 387, 363 S.E.2d 203, 206 (1988)). If, however, "this testimony is based merely upon speculation and conjecture, . . . it is no different than a layman's opinion, and as such, is not sufficiently reliable to be considered competent evidence on issues of medical causation." *Id.* (citing *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000)).

Our Supreme Court in *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003), warned that "the standards for admissibility of expert opinion testimony have been confused with the standards for sufficiency of such testimony." Expert testimony as to causation "is admissible if helpful to the jury," although it may be "insufficient to prove causation, particularly 'when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation.'" *Id.* at 233, 581 S.E.2d at 753 (quoting *Young*, 353 N.C. at 233, 538 S.E.2d at 916). *Day v. Brant*, 218 N.C. App. 1, 12-13, 721 S.E.2d 238, 247 (2012)).

"[W]hen the challenged expert testimony relates to *causation* such admitted testimony is competent 'as long as the testimony is helpful to the jury and based sufficiently on information reasonably relied upon under Rule 703[.]'" *Id.* at 416-17, 651 S.E.2d at 399 (quoting *Johnson v. Piggly Wiggly of Pinetops, Inc.*, 156 N.C. App. 42, 49, 575 S.E.2d 797, 802 (2003)). *Day v. Brant*, 218 N.C. App. at 14, 721 S.E.2d at 248.

"Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred[.]" *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984). Specifically, "[e]xpert medical witnesses are called to testify on issues of causation in disease or illness for the purpose of giving their expert opinions as to the reasonable scientific certainty of a causal relation or the lack thereof." *Ballenger v. Burris Industries, Inc.*, 66 N.C. App. 556, 567, 311 S.E.2d 881, 887 (1984); *see also Tice v. Hall*, 63 N.C. App. 27, 28, 303 S.E.2d 832, 833 (1983) ("expert testimony is required to establish . . . that such negligent violation [of the requisite standard of care] was the proximate cause of the injury complained of."). Because causation is, in essence, a factual inference to be garnered from attendant facts and circumstances, it is a question generally best answered by a jury. *Leatherwood v. Ehlinger*, 151 N.C. App. 15, 24, 564 S.E.2d 883, 889 (2002). [***8] However, expert testimony based merely on speculation and conjecture "is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000).

8. Proximate Cause and Superseding or Insulating Negligence

N.C.P.I. Civil 102.65

Proximate cause is "an established element of negligence, the burden rests upon a plaintiff to prove 'by the greater weight of the evidence' that a defendant's conduct was the proximate cause of the injuries alleged in an action for negligence." *Clarke v. Mikhail*, 243 N.C. App. 677, 686, 779 S.E.2d 150, 158 (2015). "The doctrine of insulating negligence is an elaboration of a phase of proximate cause." *Id.* at 686, 779 S.E.2d at 158 (*purgandum*). "The burden of proof does not shift to the defendant when an instruction on superseding negligence is requested. Superseding or insulating negligence is an extension of a plaintiff's burden of proof on proximate cause." *Id.* at 686, 779 S.E.2d at 158.

Although "intervening negligence" is also referred to as "superseding or insulating negligence" in our case law, *Barber v. Constien*, 130 N.C. App. 380, 383, 502 S.E.2d 912, 914 (1998), "negligence" in any of those three names originates from "cause." In *Harton v. Tel. Co.*, 141 N.C. 455, 54 S.E. 299 (1906), our Supreme Court explained the concept of intervening cause as follows:

> An efficient intervening *cause* is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the causation remote. It is immaterial how many new elements or forces have been introduced, if the original cause remains active, the liability for its result is not shifted. . . . If, however, the intervening responsible cause be of such a nature that it would be unreasonable to expect a prudent man to anticipate its happening, he will not be responsible for damage resulting solely from the intervention. The intervening *cause may be culpable, intentional, or merely negligent*. 141 N.C. at 462-63, 54 S.E. at 301-02; *Balcum v. Johnson*, 177 N.C. 213, 216, 98 S.E. 532, 534 (1919) (noting that the new independent cause "must be in itself negligent *or at least culpable*".

In order to warrant an instruction on intervening negligence, there needs to be evidence tending to show an intervening cause, whether culpable, intentional, or negligent, broke the connection of the original wrongdoer and that the original wrongdoer had no reasonable ground to anticipate it.

In a medical malpractice case, a *prima facie* evidentiary showing of the standard of care, breach of the standard of care, proximate causation, and damages is required. *Clark v. Perry*, 114 N.C. App. 297, 305, 442 S.E.2d 57, 61 (1994); *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 477, 624 S.E.2d 380, 383 (2006); *Hawkins v. Emergency Med. Physicians of Craven Cty., PLLC*, 240 N.C. App. 337, 341, 770 S.E.2d 159, 162 (2015) ("evidence connecting medical negligence to injury also must be probable, not merely a remote possibility." However, intervening negligence is an *extension* of proximate cause. Plaintiff points to no case that states a *separate and heightened* evidentiary showing is required regarding an alleged insulating cause. Instead, our case law demonstrates that if the evidence at trial, whether plaintiff's own evidence or other evidence, reveals that a cause may have been a sufficient intervening cause of the injuries alleged, an instruction on intervening negligence is proper. As long as the intervening cause is "an independent force, entirely superseding the original action and rendering its effect in the causation remote," an instruction may be warranted.

Insulating negligence is not a separate issue. The defendant does not have to prove his negligence, if any, was insulated by the negligence of another party. Rather, the burden in on the plaintiff to prove, by the greater weight of the evidence, that the negligence of the defendant was a proximate cause of the plaintiff's injury. *Hampton v. Hearn*, 269 N.C. App. 397, 402-03, 838 S.E.2d 650, 655-56 (2020).

9. Contributory Negligence

N.C.P.I. Civil 104.10- 104.50 CONTRIBUTORY NEGLIGENCE ISSUE

The proximate cause issue of contributory negligence does not necessarily or in all cases require medical expert testimony. Since the standard of care by which the usual plaintiff is to be judged in medical malpractice cases is simply that of a person of ordinary prudence acting under the same or similar circumstances, in the case *sub judice* we are even more convinced that the jury, based on its own knowledge and experience, i.e., common sense, could understand and determine that had plaintiff followed the advice of defendant and either returned for follow-up care or called, his treatment could have begun earlier and thus the rate of spread of his disease might have lessened. Therefore, we conclude that medical expert testimony, although useful, is not required to show the causal connection between plaintiff's alleged contributory negligence and his injuries. *McGill v. French*, 333 N.C. 209, 219, 424 S.E.2d 108, 114 (1993).

"Contributory negligence . . . is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." *Jackson v. McBride*, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967). Thus, "when a patient's negligent conduct occurs subsequent to the physician's negligent treatment . . ., recovery by the patient should be mitigated and not completely defeated pursuant to a contributory negligence theory." *Cobo v. Raba*, 125 N.C. App. 320, 324, 481 S.E.2d 101, 104 (1997), *aff'd*, 347 N.C. 541, 495 S.E.2d 362 (1998) (citations omitted) (activities of patient took place prior to and contemporaneously with physician's treatment and thus constituted contributory negligence); *see McCracken v. Smathers*, 122 N.C. 799, 805, 29 S.E. 354, 356 (1898) (when liability established for malpractice, proof that patient disobeyed doctor's orders and aggravated the injury, after liability was incurred, does not discharge liability; but simply goes to mitigation of damages); *see also Powell v. Shull*, 58 N.C. App. 68, 77, 293 S.E.2d 259, 264, (patient's failure to keep appointments with treating physician did not constitute contributory negligence when failure occurred after doctor's negligent treatment), *disc. review denied*, 306 N.C. 743, 295 S.E.2d 479 (1982); *cf. McGill v. French*, 333 N.C. 209, 220, 424 S.E.2d 108, 114-15 (1993) (patient's failure to keep appointments and report symptoms to treating physician, occurring simultaneous with treating physician's negligence, constituted contributory negligence).

Andrews v. Carr, 135 N.C. App. 463, 467-68, 521 S.E.2d 269, 272-73 (1999).

In this state, a plaintiff's right to recover in a personal injury action is barred upon a finding of contributory negligence. *Brewer v. Harris,* 279 N.C. 288, 298, 182 S.E.2d 345, 350 (1971). The trial court must consider any evidence tending to establish plaintiff's contributory negligence in the light most favorable to the defendant, and if diverse inferences can be drawn from it, the issue must be submitted to the jury. *Atkins v. Moye,* 277 N.C. 179, 184, 176 S.E.2d 789, 793 (1970). If there is more than a scintilla of evidence that plaintiff is contributorily negligent, the issue is a matter for the jury, not for the trial court. *Boyd v. Wilson,* 269 N.C. 728, 730, 153 S.E.2d 484, 486 (1967). Therefore, any evidence

that Dr. Cobo [plaintiff] was contributorily negligent in that he failed to use ordinary care to protect himself from the asserted injury, or that his behavior was a proximate cause of his injury, would dictate the submission of this issue to the jury.

This Court has held that "in order for a contributory negligence issue to be presented to the jury, the defendant must show that plaintiff's injuries were proximately caused by his own negligence." *McGill v. French*, 333 N.C. 209, 217, 424 S.E.2d 108, 113 (1993). "It is not necessary that plaintiff be *actually aware* of the unreasonable danger of injury to which his conduct exposes him. Plaintiff may be contributorily negligent if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety." *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980).

Cobo v. Raba, 347 N.C. 541, 545-46, 495 S.E.2d 362, 365 (1998).

Expert testimony, although useful, is not needed in all medical malpractice cases to establish proximate causation on the issue of contributory negligence when the jury, based on its own common knowledge and experience, is able to understand and judge the patient's actions. *McGill v. French*, 333 N.C. 209, 220, 424 S.E.2d 108, 114 (1993). In *McGill*, this Court noted that a patient has an active responsibility for his own care and well-being. *Id.* at 220, 424 S.E.2d at 115. The Court held that a patient's failure to keep his appointments and failure to report symptoms constituted sufficient evidence of negligence for a jury to find these actions were the proximate cause of his injuries. *Id.*

Cobo v. Raba, 347 N.C. 541, 546, 495 S.E.2d 362, 366 (1998)

Contributory negligence, as its name implies, is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains. . . . Contributory negligence by the plaintiff can exist only as a co-ordinate or counterpart of negligence by the defendant as alleged in the complaint. *Jackson v. McBride*, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967). "Contributory negligence occurs either before or at the time of the wrongful act or omission of the defendant." *Miller v. Miller*, 273 N.C. 228, 239, 160 S.E.2d 65, 74 (1968). "[I]n order for a contributory negligence issue to be presented to the jury, the defendant must show that plaintiff's injuries were proximately caused by his own negligence." *Cobo,* 347 N.C. at 545, 495 S.E.2d at 365.
…

See McGill, 333 N.C. at 220-21, 424 S.E.2d at 114-15 (holding the issue of contributory negligence was for the jury where the plaintiff contributed to his worsening systems by failing to follow his physician's instructions, denying the physician the opportunity to treat the plaintiff).

See Katy v. Capriola, 226 N.C. App. 470, 742 S.E.2d 247 (2013) (holding the issue of contributory negligence was for the jury where the plaintiff failed to seek medical attention as her condition deteriorated).

See Andrews v. Carr, 135 N.C. App. 463, 521 S.E.2d 269 (1999) (holding that even if the plaintiff's post-surgery conduct contributed to his injuries, his conduct could not constitute contributory negligence as it occurred subsequent to the negligent medical care).

See *Powell v. Shull*, 58 N.C. App. 68, 293 S.E.2d 259 (1982) (holding the plaintiff's failure to keep follow-up appointments with the defendant physician did not amount to contributory negligence as the plaintiff's actions could not have decreased or lessened the injury caused by the physician's negligence).

Justus v. Rosner, 254 N.C. App. 55, 73-75, 802 S.E.2d 142, 153-55 (2017)

Note: Did the actions of the plaintiff constitute contributory negligence or did it justify a jury determination on the issue of mitigation? [810.24 PERSONAL INJURY DAMAGES – DEFENSE OF MITIGATION.]

10. Use of additional instructions: (duty to attend, highest degree of skill not required, and not guarantor of diagnosis, analysis, judgment or result)

A. Not guarantor of diagnosis, analysis, judgment or result

[A]n instruction to the effect that a physician is "not an insurer of results" should not be given when no issue concerning a guarantee has been raised. The proposition explained by this instruction interjected unnecessary considerations that were not germane to determination of the issues in this case. *Wall v. Stout,* 310 N.C. 184, 197, 311 S.E.2d 571, 579 (1984). (See N.C.G.S. §90-21.13(d) in which any guarantee, warranty or assurance is required to be in writing. That section of N.C.G.S. §90-21.13(d) is set out completely in endnote 17 in N.C.P.I.-Civ. 809.00 and N.C.P.I.-Civ. 809.00A.

B. Duty to attend

If the facts do not require a particular instruction, the court should not give it. Merely because a particular instruction is generally given in a particular type of case and is included in the standard PJI instruction and comes from a leading case does not require it in every case of that genre. The Court's instruction on the law is, rather, to be molded by the applicable facts. *Spadaccini v. Dolan*, 63 A.D. 2d 110, 119, 407 N.Y.S. 2d 840, 845 (N.Y. App. Div. 1978).

You are directed to the introductory comments to the North Carolina Pattern Jury Instructions which state that "[t]hese instructions do not eliminate the need to individually tailor each charge to the given factual situation and to comply with Rule

51(a) of the North Carolina Rules of Civil Procedure." *Wall v. Stout*, 310 N.C. 184, 197, 311 S.E.2d 571, 579 (1984).

C. Infallibility or Highest Degree of Skill Not Required

The plaintiff in *Patton v. Charlotte-Mecklenburg Hosp. Auth.,* 254 N.C. App. 852, 803 S.E.2d 666 (2017) argued that the infallibility instruction contradicted other language in the instructions, misled and confused the jury and was an incorrect statement of North Carolina law. The appellate court ruled that our Court recently decided this issue, albeit in an unpublished decision. *Wilson v. Ashley Women's Ctr., P.A.*, 253 N.C. App. 409, 798 S.E.2d 815, 2017 WL 1650129 (unpublished) (N.C. Ct. App. 2017). We find *Wilson* persuasive and conclude the trial court properly instructed the jury. Accordingly, we hold this assignment of error is without merit.

In *Wilson v. Ashley Women's Ctr., P.A.*, 253 N.C. App. 409, 798 S.E.2d 815 (2017), plaintiffs argued that the pattern jury instruction [809.00] failed to take into account the three duties owed by defendants, that it contradicts other language in the instructions given by the trial court, and that it misinforms and misleads the jury as to the law. Plaintiffs rely on the Supreme Court's description of a physician's duty in *Hunt v. Bradshaw*, 242 N.C. 517, 88 S.E.2d 762 (1955), in support of their argument. *Hunt* provided as follows, in pertinent part: A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient. *Id.* at 521, 88 S.E.2d at 765.

We first note that "[t]his Court has recognized that the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions." *Caudill v. Smith*, 117 N.C. App. 64, 70, 450 S.E.2d 8, 13 (1994). "Jury instructions in accord with a previously approved pattern jury instruction provide the jury with an understandable explanation of the law." *Carrington v. Emory*, 179 N.C. App. 827, 829, 635 S.E.2d 532, 534 (2006). Viewing the jury instruction as a whole and in context, we observe that prior to giving the challenged jury instruction, the trial court instructed the jury regarding the three duties referenced in *Hunt*:

As to the first thing the plaintiff must prove, negligence refers to a person's failure to follow a duty of conduct imposed by law. Every healthcare provider is under a duty to use their best judgment in the treatment and care of their patients, to use reasonable care and diligence in the application of their knowledge and skill to their patient's care, and to provide health care in accordance with the standards of practice among members of the same healthcare profession with similar training and experience situated in the same or similar communities at the time the health care is rendered. A healthcare provider's violation of any one or more of these duties of care is negligence.

Significantly, subsequent to the decision in *Hunt*, our Supreme Court stated in *Wall v. Stout*, 310 N.C. 184, 311 S.E.2d 571 (1984), that the *Hunt* standard was "completely unitary in nature, combining in *one test* the exercise of 'best judgment, 'reasonable care and diligence' *and* compliance with the 'standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities.'" *Id.* at 193, 311 S.E.2d at 577 (emphasis in original). Based on the foregoing, we see no basis for concluding that the trial court erred in giving this pattern instruction.

11. Bifurcation

N.C. Gen. Stat. § 1A-1, Rule 42

(1) …

(2) Upon motion of any party in an action that includes a claim commenced under Article 1G of Chapter 90 of the General Statutes involving a managed care entity as defined in G.S. 90-21.50, the court shall order separate discovery and a separate trial of any claim, cross-claim, counterclaim, or third-party claim against a physician or other medical provider.

(3) Upon motion of any party in an action in tort wherein the plaintiff seeks damages exceeding one hundred fifty thousand dollars ($150,000), the court shall order separate trials for the issue of liability and the issue of damages, unless the court for good cause shown orders a single trial. Evidence relating solely to compensatory damages shall not be admissible until the trier of fact has determined that the defendant is liable. The same trier of fact that tries the issues relating to liability shall try the issues relating to damages.

If separate trials for the issue of liability and for the issue of damages are not ordered, it is advised to reduce such order in writing to show the "good cause."

"RES IPSA LOQUITUR"

809.03 MEDICAL NEGLIGENCE - INDIRECT EVIDENCE OF NEGLIGENCE ONLY. ("RES IPSA LOQUITUR").

(Use for claims arising before 1 October 2011.)

809.03A MEDICAL MALPRACTICE—INDIRECT EVIDENCE OF NEGLIGENCE ONLY. ("RES IPSA LOQUITUR").

(Use for claims arising on or after 1 October 2011.)

809.05 MEDICAL NEGLIGENCE - BOTH DIRECT AND INDIRECT EVIDENCE OF NEGLIGENCE.

(Use for claims arising before 1 October 2011.)

809.05A MEDICAL MALPRACTICE—BOTH DIRECT AND INDIRECT EVIDENCE OF NEGLIGENCE.

(Use for claims arising on or after 1 October 2011. For claims arising before 1 October 2011, use N.C.P.I.—Civil 809.05.)

N.C.P.I.-Civil 809.03 requires the plaintiff to prove four things, by the greater weight of the evidence, before the jury can infer and find that the defendant was negligent and that that negligence proximately caused the plaintiff's injury:

(1) the injury which occurred was not an inherent risk of the procedure;

(2) direct proof of the cause of the injury is not available to the plaintiff;

(3) the medical care rendered or the surgery performed upon the plaintiff was under the exclusive control or management of the defendant; and

(4) the injury was of a type that would not have occurred if the defendant had (A) exercised his best judgment in the treatment and care of the plaintiff; (B) used reasonable care and diligence in the application of the defendant's knowledge and skill to the plaintiff's care; and (C) provided health care in accordance with the standards of practice

(a) among members of the same health care profession

(b) with similar training and experience

(c) situated in the same or similar communities

(d) at the time the health care service was provided.

[Numbers and letters added for clarity]

Note: N.C.P.I.-Civil 809.03A requires the same as above, but (4)(C) reads: (a) among members of the same health care profession (b) with similar training and experience (c) situated in the same or similar communities (d) *under the same or similar circumstances* (e) at the time the health care service was provided.

The phrase "under the same or similar circumstances" is also contained in the 800.03A paragraph captioned "*Highest Degree of Skill Not Required.*"

Note: Our appellate courts encourage the trial courts to remain vigilant and cautious about providing *res ipsa loquitur* as an option for liability in medical malpractice cases other than in those cases where it has been expressly approved. *See, e.g.*, *Grigg v. Lester*, 102 N.C. App. 332, 335, 401 S.E.2d 657, 659 (approving the use of the doctrine for "injuries resulting from surgical instruments or other foreign objects left in the body following surgery and injuries to a part of the patient's anatomy outside of the surgical field"). *Howie v. Walsh*, 168 N.C. App. 694, 699, 609 S.E.2d 249, 252 (2005).

Note: However, any limitation of the application of *res ipsa loquitur* to only these two types of medical malpractice cases is not supported by the plain language of our case law. Although in *Hayes v. Peters*, 184 N.C. App. 285, 287-88, 645 S.E.2d 846, 848 (2007), the court cautioned the trial courts in applying *res ipsa loquitur* in medical malpractice actions involving injuries other than those two categories, *Hayes* does not hold that these two types of cases are the only ones in which *res ipsa loquitur* can apply.

Our Supreme Court has long held that "where proper inferences may be drawn by ordinary men from proved facts which give rise to *res ipsa loquitur* …, there should be no reasonable argument against the availability of the doctrine in medical and surgical cases involving negligence[.]" *Mitchell v. Saunders*, 219 N.C. 178, 182, 13 S.E.2d 242, 245 (1941). If a case does not involve either a foreign object left in the body following surgery or an injury to an area far away from and completely unrelated to the zone of surgery, the argument that *res ipsa loquitur* cannot apply is without merit. *Robinson v. Duke Univ. Health Sys.*, 229 N.C. App. 215, 227-28, 747 S.E.2d 321, 331 (2013).

Note: *Query:* Outside of a case where the injuries resulted from surgical instruments or other foreign objects left in the body following surgery and injuries to a part of the patient's anatomy outside of the surgical field: If the plaintiff has to prove that the injury was of a type that would not have occurred if the defendant had provided health care in accordance with the standards of practice, how is that done unless an expert testifies what the standards of practice were at the time the health care service was provided?

[See *Robinson v. Duke Univ. Health Sys.,* 229 N.C. App. 215, 747 S.E.2d 321 (2013).]

It is well established that [b]ecause questions regarding the standard of care for health care professionals ordinarily require highly specialized knowledge, the plaintiff must establish the relevant standard of care through expert testimony. Further, the standard of care must be established by other practitioners in the particular field of practice of the defendant health care provider or by other expert witnesses equally familiar and competent to testify as to that limited field of practice.

Although it is not necessary for the witness testifying as to the standard of care to have actually practiced in the same community as the defendant, the witness must demonstrate that he is familiar with the standard of care in the community where the injury occurred, or the standard of care of similar communities. *Smith v. Whitmer,* 159 N.C. App. 192, 195-96, 582 S.E.2d 669, 671-72 (2003); *Peter v. Vullo*, 234 N.C. App. 150, 154-55, 758 S.E.2d 431, 435 (2014).

Res ipsa loquitur is a doctrine addressed to those situations where the facts or circumstances accompanying an injury by their very nature raise a presumption of negligence on the part of defendant. It is applicable when (1) no proof of the cause

of an injury is available, (2) the instrument involved in the injury is in the exclusive control of defendant, and (3) the injury is of a type that would not normally occur in the absence of negligence. (*Numbers added). Howie v. Walsh*, 168 N.C. App. 694, 698, 609 S.E.2d 249, 251 (2005).

Trial courts are encouraged to remain vigilant and cautious about providing *res ipsa loquitur* as an option for liability in medical malpractice cases other than in those cases where it has been expressly approved. In *Grigg v. Lester*, 102 N.C. App. 332, 335, 401 S.E.2d 657, 659 (1991), the court approved the use of the doctrine for "injuries resulting from surgical instruments or other foreign objects left in the body following surgery and injuries to a part of the patient's anatomy outside of the surgical field".

This circumspect application is founded on two principles that "render[] the average juror unfit to determine whether [a] plaintiff's injury would rarely occur in the absence of negligence[:]" (1) most medical treatment involves inherent risks despite adherence to the appropriate standard of care and (2) "the scientific and technical nature of medical treatment[.]" *Schaffner v. Cumberland Cty. Hosp. Sys., Inc.*, 77 N.C. App. 689, 692, 336 S.E.2d 116, 118 (1985). These principles contend with the basic foundation of the doctrine, which "is grounded in the superior logic of ordinary human experience [and] permits a jury, on the basis of experience or common knowledge, to infer negligence from the mere occurrence of the accident itself." *Diehl v. Koffer*, 140 N.C. App. 375, 378, 536 S.E.2d 359, 362 (2000). "Therefore, in order for the doctrine to apply, not only must plaintiff have shown that [the] injury resulted from defendant's [negligent act], but plaintiff must [be] able to show - without the assistance of expert testimony - that the injury was of a type not typically occurring in absence of some negligence by defendant." *Id.*

As a result of the fact that the doctrine of *res ipsa loquitur* only applies in the absence of direct proof of the cause of the plaintiff's injury, a plaintiff is not entitled to rely on it in the event that there is direct evidence of the reason that the plaintiff sustained the injury for which he or she seeks relief. *Robinson v. Duke University Health Systems, Inc.*, 229 N.C. App. 215, 226, 747 S.E.2d 321, 330 (2013), *disc. review denied*, 367 N.C. 328, 755 S.E.2d 618 (2014). *Wright v. WakeMed*, 238 N.C. App. 603, 606, 767 S.E.2d 408, 411 (2014).

In order for the doctrine of *res ipsa loquitur* "to apply in a medical malpractice claim, a plaintiff must allege facts from which a layperson could infer negligence by the defendant based on common knowledge and ordinary human experience." *Smith v. Axelbank*, 222 N.C. App. 555, 559, 730 S.E.2d 840, 843 (2012). "Our Courts have consistently found that *res ipsa loquitur* is inappropriate in the usual medical malpractice case, where the question of injury and the facts in evidence are peculiarly in the province of expert opinion." *Robinson*, 229 N.C. App. at 224, 747 S.E.2d at 329. Nevertheless, where proper inferences may be drawn by ordinary men from approved facts which give rise to *res ipsa loquitur* without infringing this principle, there should be no reasonable argument against the availability of the doctrine in medical and surgical cases involving negligence, just as in other negligence cases,

where the thing which caused the injury does not happen in the ordinary course of things, where proper care is exercised. *Mitchell v. Saunders*, 219 N.C. 178, 182, 13 S.E.2d 242, 245 (1941).

Wright v. WakeMed, 238 N.C. App. 603, 606-07, 767 S.E.2d 408, 411-12 (2014).

Note: If there is a question of fact about whether (1) the defendant is a health care provider, (2) whether the defendant was engaged in furnishing professional health care services, (3) whether the defendant had a duty to attend or (4) whether the defendant had guaranteed a result, the instructions will have to be modified.

N.C.P.I. Civil-809.05 and **N.C.P.I. Civil-809.05A** should be used with caution. If there is direct evidence of negligence then *res ipsa loquitur* would not be available to the plaintiff. However, there may be a unique fact situation or multiple acts of negligence that could permit the usage of these instructions.

Because "the *res ipsa loquitur* doctrine is only applicable where 'there is no direct proof of the cause of the injury available to the plaintiff[,]'" *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 352, 666 S.E.2d 127, 135 (2008) (quoting *Parks v. Perry*, 68 N.C. App. 202, 207, 314 S.E.2d 287, 290 (1987), "where evidence constituting direct proof of the cause of injury is presented, 'the doctrine of *res ipsa loquitur* [is] not applicable.'" *Alston v. Granville Health Sys.*, 221 N.C. App. 416, 420, 727 S.E.2d 877, 878 (2012) (quoting *Yorke*, 192 N.C. App. at 353, 666 S.E.2d at 136). In addition, when evaluating whether the injury is of a type that does not ordinarily occur in the absence of negligence, our Court has applied a twofold test in medical malpractice cases: "(1) the injurious result must rarely occur standing alone and (2) the result must not be an inherent risk of the operation." *Parks*, 68 N.C. App. at 206, 314 S.E.2d at 290. *Robinson v. Duke Univ. Health Sys.*, 229 N.C. App. 215, 226, 747 S.E.2d 321, 330 (2013).

Corporate or Administrative Negligence

809.06 MEDICAL MALPRACTICE - CORPORATE OR ADMINISTRATIVE NEGLIGENCE BY HOSPITAL, NURSING HOME OR ADULT CARE HOME.

(Use for claims arising on or after 1 October 2011.)

N.C. Gen. Stat. § 90-21.11(2)b reclassifies civil actions against a hospital, a nursing home (licensed under N.C.G.S. Chapter 131E) and an adult care home (licensed under N.C.G.S. Chapter 131D) as a medical malpractice action for damages for personal injury or death when the civil action: (i) alleges a breach of administrative or corporate duties to the patient and (ii) arises from the same facts or circumstances as a claim under sub-subdivision a.

Note: N.C. Gen. Stat. § 90-21.11(2)b lists negligent credentialing and negligent monitoring and supervision as examples of a breach of administrative or corporate duties to the patient. These examples are not exclusive.

Note: Claims arising before October 1, 2011 were treated as "ordinary negligence" claims.

Note: Under N.C. Gen. Stat. § 90-21.12(a), in actions against a hospital, a nursing home and an adult care home, the plaintiff must prove by the greater weight of the evidence that the "action or inaction" of the health care provider was not in accordance with the standards of practice

(1) among similar health care providers
(2) situated in the same or similar communities
(3) under the same or similar circumstances
(4) at the time of the alleged act giving rise to the cause of action.

Note: (1) N.C. Gen. Stat. § 90-21.11(2)(a) does not include "with similar training and experience" when determining the standards of practice for similar hospitals, nursing homes or adult care homes.

(2) N.C. Gen. Stat. § 90-21.11(2)(a) refers to "action or inaction" of hospitals, nursing home or adult care homes which are not in accordance with the standards of practice as opposed to the "care" other health care providers that are not in accordance with the standards of practice.

(3) Standards of practice are set among "similar" health care providers, not members of the "same" health care profession.

Note: Be advised that the "similar training and experience" language is included in several areas of the 809.06 Medical Malpractice-Corporate or Administrative Negligence pattern. Also the word "same" is included when it should be "similar." The civil subcommittee has not addressed these issues.

Note: N.C. Gen. Stat. § 1A-1, R. 9(j) provides that: Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless…

Query: Hospitals, nursing homes and adult care home causes of actions are defined as a health care provider in G.S. 90-21.11(2)b. Does that mean those causes of action are not subject to 9(j) rules?

However, see *Estate of Savino v. Charlotte-Mecklenburg Hosp. Auth.*, 375 N.C. 288, 296-97, 847 S.E.2d 677, 683-84 (2020). "[T]he legislature did not "intend[] to create a new cause of action by the 2011 amendment, but rather **intended to re-classify** administrative negligence claims against a hospital as a medical malpractice action **so that they must meet the pleading requirements of a medical malpractice action rather than under a general negligence theory**." *Estate of*

Savino v. Charlotte-Mecklenburg Hosp. Auth., 375 N.C. 288, 296-97, 847 S.E.2d 677, 683-84 (2020).

Query: Is the Supreme Court requiring compliance with 9(j) pleading requirements for causes of action against hospitals, nursing homes and adult care homes even though Rule 9(j) N.C. Gen. Stat. §90-21.11(2)a seems to exclude them from that requirement?

N.C. Gen. Stat. § 90-21.11(2)b lists negligent credentialing and negligent monitoring and supervision as examples of a breach of administrative or corporate duties to the patient. Previously, common law duties to the patient previously imposed on hospitals under an ordinary negligence standard of reasonable care are set out in endnote 2 of PJI Civil-809.06. They are:

(1) To obey the instructions of a doctor, absent the instructions being obviously negligent or dangerous;

(2) To make a reasonable effort to monitor and oversee the treatment prescribed and administered by doctors practicing at the hospital;

(3) To not institute policies which interfere with the doctor's medical judgment;

(4) To ascertain that a doctor is qualified to perform an operation before granting him the privilege to do so;

(5) To use reasonable care in the selection, inspection, and maintenance of equipment;

(6) To monitor on an ongoing basis the performance of physicians on its staff.

It may be proper to instruct the jury as to the existence of such duties, if applicable.

Note: For causes of action arising after October 1, 2011, these actions listed above may also be negligent if there is expert testimony that these actions are not in accordance with the standards of practice.

Note: Violation of a hospital's policy is not necessarily a violation of the applicable standard of care, because the hospital's rules and policies may reflect a standard that is above or below what is generally considered by experts to be the relevant standard. *O'Mara v. Wake Forest Univ. Health Scis.*, 184 N.C. App. 428, 439, 646 S.E.2d 400, 406 (2007).

Note: **N.C. Gen. Stat. § 90-21.18** provides that "[a] medical director of a licensed nursing home shall not be named a defendant in an action pursuant to this Article except under any of the following circumstances:

(1) Where allegations involve a patient under the direct care of the medical director.

(2) Where allegations involve willful or intentional misconduct, recklessness, or gross negligence in connection with the failure to supervise, or other acts performed or failed to be performed, by the medical director in a supervisory or consulting role."

DEFENSE OF LIMITATION BY NOTICE OR SPECIAL AGREEMENT

809.07 MEDICAL NEGLIGENCE - DEFENSE OF LIMITATION BY NOTICE OR SPECIAL AGREEMENT.

A health care provider may, in advance, limit the extent and scope of his employment by notice or special agreement. (A health care provider may agree to perform health care services without undertaking or making himself responsible for the subsequent care and treatment of the patient.) A health care provider who limits the extent and scope of his employment has the legal responsibility only for the health care services rendered within the limitations of that employment. However, any health care services he does render must be in accordance with the standards of practice exercised by members of the same health care profession with similar training and experience situated in the same or similar communities at the time the health care service is rendered.

The health care services rendered must be in accordance with the standards of practice exercised by

(a) members of the same health care profession

(b) with similar training and experience

(c) situated in the same or similar communities

(d) at the time the health care is rendered.

Note: For causes of action arising after October 1, 2011, the pattern instruction needs to add ***under the same or similar circumstances.***

Note: This instruction does not address the issue where the health care provider goes beyond the limited scope of his engagement. See N.C.P.I-Civil 809.45.

Emergency Medical Condition

N.C.G.S. §90-21.12(b)

(5 instructions)

809.20 MEDICAL MALPRACTICE - EXISTENCE OF EMERGENCY MEDICAL CONDITION.

(Use for claims arising on or after 1 October 2011.)

809.22 MEDICAL MALPRACTICE—EMERGENCY MEDICAL CONDITION— DIRECT EVIDENCE OF NEGLIGENCE ONLY.

(Use for claims arising on or after 1 October 2011. For claims arising before 1 October 2011, use N.C.P.I.—Civil 809.00.)

809.24 MEDICAL MALPRACTICE—EMERGENCY MEDICAL CONDITION -INDIRECT EVIDENCE OF NEGLIGENCE ONLY ("RES IPSA LOQUITUR").

(Use for claims arising on or after 1 October 2011. For claims arising before 1 October 2011, use N.C.P.I.—Civil 809.03.)

809.26 MEDICAL MALPRACTICE—EMERGENCY MEDICAL CONDITION—BOTH DIRECT AND INDIRECT EVIDENCE OF NEGLIGENCE.

(Use for claims arising on or after 1 October 2011. For claims arising before 1 October 2011, use N.C.P.I.—Civil 809.05.)

809.28 MEDICAL MALPRACTICE - EMERGENCY MEDICAL CONDITION - CORPORATE OR ADMINISTRATIVE NEGLIGENCE BY HOSPITAL, NURSING HOME OR ADULT CARE HOME.

(Use for claims arising on or after 1 October 2011.)

The term, "emergency medical condition" is derived from 42 U.S.C. § 1395dd(e)(1)(A) (Emergency Treatment and Active Labor Act "EMTALA") and *Diaz v. Div. of Soc. Serv*., 360 N.C. 384, 387–90, 628 S.E.2d 1, 3–5 (2006).

42 U.S.C.§ 1395dd. Examination and treatment for emergency medical conditions and women in labor [Effective until January 1, 2023]:

(e) Definitions. In this section:

(1) The term "emergency medical condition" means—

(A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—

(i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,
(ii) serious impairment to bodily functions, or
(iii) serious dysfunction of any bodily organ or part; or

(B) with respect to a pregnant woman who is having contractions—
(i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or

(ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.

Note:

- Based upon *Lexis Advance,* this federal statute expires on January 1, 2023. It is unknown what the expiration of this federal statute will mean to N.C. law. It is also unknown what an amendment to this statute would mean to N.C. law*.*
- There is no language that limits its application to the emergency room or the health care providers that work in the emergency room. Location does not control.
- The committee decided that the defendant has the burden of proving by the greater weight of the evidence that the plaintiff was in an emergency medical condition.
- A decision has to be made as to how and when this issue will be presented to the jury. This could be the first issue the jury has to decide if there is not a stipulation or a directed verdict as to this finding. This issue could be bifurcated from the rest of the issues. The mechanics as to how this issue gets resolved has not been determined.
- When there is a finding that the plaintiff was in an emergency medical condition, the plaintiff must prove a violation of the standards of practice by **clear and convincing evidence**. However, the common law duties, (1) use best judgment in the treatment and care of the patient and (2) use reasonable care and diligence in the application of his/her knowledge and skill in the patient's care, have to be proven by the greater weight of the evidence.
- The argument can be made that at some point in almost every medical procedure every patient, even if the plaintiff did not present in an emergency medical condition, would without immediate medical attention could reasonably be expected to fall within the definition of being in an emergency medical condition.
- Can a defendant by his own negligence create an emergency medical condition that triggers the higher burden of proof?
- In "Good Samaritan" cases, does the gross negligence have to proven by clear and convincing evidence?
- What are the definitions of (1) acute symptoms; (2) sufficient severity; (3) serious jeopardy; (4) serious impairment to bodily functions; and (5) serious dysfunction of any bodily organ or part? Do you apply its ordinary, legal or medical meanings or definitions?

Query: Assuming a bifurcated trial ordered pursuant to Rule 42 of the North Carolina Rules of Civil Procedure, if the defendant introduces evidence to support a finding that the plaintiff was in an emergency condition, does that open the door to further evidence offered by the plaintiff regarding pain and other acute symptoms that places the health of the plaintiff in serious jeopardy? That evidence, contrary to the trial court's order of bifurcation, could be relevant on the issue of damages before the issue of liability has been determined. An initial limited instruction might be necessary.

Relationship between Emergency Medical Condition (N.C.P.I. Civil 809.20) and the Sudden Emergency Doctrine (N.C.P.I. Civil 102.15):

Sudden emergency doctrine is not available in a medical malpractice case.

"The doctrine of sudden emergency creates a less stringent standard of care for one who, through no fault of his own, is suddenly and unexpectedly confronted with imminent danger to himself or others." *Marshall v. Williams*, 153 N.C. App. 128, 131, 574 S.E.2d 1, 3 (2002); *Wiggins v. E. Carolina Health-Chowan, Inc.*, 234 N.C. App. 759, 764, 760 S.E.2d 323, 327 (2014).

"In North Carolina, the sudden emergency doctrine has been applied only to ordinary negligence claims, mostly those arising out of motor vehicle collisions, and has never been utilized in a medical negligence case." (Citations omitted). "Even in cases where the facts giving rise to suit could presumably be categorized as sudden medical emergencies, the general standard of care for healthcare professionals has been sufficient to assess liability." *Wiggins,* 234 N.C. App. at 766-67, 760 S.E.2d at 328.

"The application of the healthcare professional standard of care to a wide range of factual scenarios is not accidental. Our Supreme Court has described the standard for medical professionals as *"completely unitary in nature*, combining in one test the exercise of 'best judgment,' 'reasonable care and diligence' and compliance with the 'standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities.'" *Wall v. Stout*, 310 N.C. 184, 193, 311 S.E.2d 571, 577 (1984) (holding that the passage of section 90-21.12 did not abrogate the duties of healthcare professionals created at common law). Part of the standard developed at common law is to examine a healthcare professional's conduct in light of the factual circumstances of the case." *Wiggins,* 234 N.C. App. at 767, 760 S.E.2d at 328-29.

"Thus, the standard of care for healthcare professionals, both at common law and as enunciated in section 90-21.12, is designed to accommodate the factual exigencies of any given case, including those that may be characterized as medical emergencies. Therefore, we hold that the sudden emergency doctrine is unnecessary and inapplicable in such cases, and the trial court's instruction on the sudden emergency doctrine here was "likely, in light of the entire charge, to mislead the jury.'" *Hammel v. USF Dugan, Inc.*, 178 N.C. App. 344, 347, 631 S.E.2d 174, 178 (2006).

Sudden emergency doctrine requires the jury to assess defendant's actions in light of what a reasonable and prudent *person* would do when faced with the same emergency. "Healthcare professionals are held to a higher standard of care than laypersons." These duties are incompatible. "[B]ecause the practice of medicine involves a specialized knowledge beyond that of the average person, the applicable standard of care in a medical malpractice action must be established through expert

testimony." *Leatherwood v. Ehlinger,* 151 N.C. App. 15, 20, 564 S.E.2d 883, 886 (2002); *Wiggins*, 234 N.C. App. at 768, 760 S.E.2d at 329.

Informed Consent

809.45 Medical Negligence—Informed Consent—Actual and Constructive.

N.C. Gen. Stat. § 90-21.13 (not amended)

Note: To meet the statutory standard of N.C.G.S. §90-21.13, the health care provider must provide to his patient such information about the treatments or procedures and their inherent hazards and risks as is customarily provided by other members of the same health care profession with similar training and experience situated in the same or similar communities, *see* G.S. 90-21.13(a)(1), *and* provide information which would permit a reasonable person to "have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments," *see* G.S. 90-21.13(a)(2).

The provider may not be held liable, however, if a reasonable person, under the surrounding circumstances, would have undergone the treatment or procedure had he or she been advised in accordance with G.S. 90-21.13(a)(1) and (2). G.S. 90-21.13(a)(3). *Nelson v. Patrick*, 73 N.C. App. 1, 11, 326 S.E.2d 45, 51-52 (1985).

There is no requirement that all three subdivisions of N.C. Gen. Stat. § 90-21.13 be complied with. N.C.G.S. § 90-21.13(a) is in the disjunctive and does not require the health care provider to establish compliance with all three subsections; it is sufficient if the provider can demonstrate that no genuine issue of fact exists under subsections (1) and (2). *Foard v. Jarman,* 326 N.C. 24, 30, 387 S.E.2d 162, 166 (1990).

Note: In actions based upon a health care provider's failure to obtain informed consent, this Court has concluded G.S. § 90-21.13(a)(1) requires the use of expert medical testimony by the party seeking to establish the standard of care. *Nelson v. Patrick*, 58 N.C. App. 546, 549, 293 S.E.2d 829, 831 (1982), *appeal upon remand*, 73 N.C. App. 1, 326 S.E.2d 45 (1985); *Clark v. Perry*, 114 N.C. App. 297, 305, 442 S.E.2d 57, 61 (1994). Thus, an expert must testify as to what information concerning the particular treatments or procedures, their inherent hazards and risks, is customarily provided by other members of the same health care profession, with similar training and experience, situated in the same or similar communities. *Nelson,* 73 N.C. App. at 11, 326 S.E.2d at 51-52.

Note: To comply with N.C.G.S. § 90-21.13, the health care provider must provide the patient with sufficient information about the proposed treatment and its attendant risks to conform to the customary practice of members of the same profession with similar training and experience situated in the same or similar communities. In

addition, the health care provider must impart enough information to permit a reasonable person to gain a "general understanding" of both the treatment or procedure and the "usual and most frequent risks and hazards" associated with the treatment. "The provider may not be held liable, however, if a reasonable person, under the surrounding circumstances, would have undergone the treatment or procedure had he or she been advised in accordance with G.S. 90-21.13(a)(1) and (2). G.S. 90-21.13(a)(3)." *Foard v. Jarman*, 326 N.C. 24, 26-27, 387 S.E.2d 162, 164-65 (1990).

Handa v. Munn, 182 N.C. App. 515, 519-20, 642 S.E.2d 540, 542-43 (2007).

Rather than requiring physicians to inform patients in every instance that a procedure is experimental in nature, N.C.G.S. § 90-21.13 directs a physician to indicate the status of a procedure and risks involved therein in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities, G.S. § 90-21.13(a)(1), and in such a manner that a reasonable person would under the circumstances derive from the information a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities, G.S. § 90-21.13(a)(2). *Osburn v. Danek Med., Inc.*, 135 N.C. App. 234, 239, 520 S.E.2d 88, 92 (1999).

Note: N.C. Gen. Stat. § 90-21.13(b) provides that a consent which is evidenced in writing and which meets the foregoing standards, and which is signed by the patient or other authorized person, shall be presumed to be a valid consent. This presumption, however, may be subject to rebuttal only upon proof that such consent was obtained by fraud, deception or misrepresentation of a material fact. A consent that meets the foregoing standards, that is, given by a patient, or other authorized person, who under all the surrounding circumstances has capacity to make and communicate health care decisions, is a valid consent.

See Hauser v. Brookview Women's Ctr., PLLC, 274 N.C. App. 510, 851 S.E.2d 691 (2020) (unpublished) which discusses N.C. Gen. Stat. § 90-21.13(b). That statutory provision establishes a presumption that a written consent, that is signed by the patient or other authorized person and "meets the foregoing standards," is a valid consent. Accordingly, to determine whether the instruction was supported by evidence, we must determine whether the Consent Form "meets the foregoing standards" referenced in N.C. Gen. Stat. § 90-21.13(b) and set forth in N.C. Gen. Stat. § 90-21.13(a).

The word "misrepresentation" refers only to intentional misrepresentation, and not to encompass innocent or negligent misrepresentation. *Liborio v. King*, 150

N.C. App. 531, 564 S.E.2d 272, (2002).

The General Assembly chose not to give the signed consent form conclusive weight. The form thus constitutes only some evidence of valid consent, and summary judgment may not be granted solely thereon when the adequacy of the underlying representations is disputed. *Estrada v. Jaques*, 70 N.C. App. 627, 645, 321 S.E.2d 240, 251 (1984), limited, *Osburn v. Danek Med., Inc.*, 135 N.C. App. 234, 520 S.E.2d 88, (1999).

Note: N.C.G.S. § 90-21.13(c) lists individuals who, in the order indicated, are authorized to consent to medical treatment on behalf of a patient who is comatose or otherwise lacks capacity to make or communicate health care decisions.

Note: Also, if none of the persons listed under subsection (c) of this section is reasonably available, then the patient's attending physician, in the attending physician's discretion, may provide health care treatment without the consent of the patient or other person authorized to consent for the patient if there is confirmation by a physician other than the patient's attending physician of the patient's condition and the necessity for treatment; provided, however, that confirmation of the patient's condition and the necessity for treatment are not required if the delay in obtaining the confirmation would endanger the life or seriously worsen the condition of the patient. N.C. Gen. Stat. § 90-21.13(c)(1).

Respondeat Superior

809.65 MEDICAL NEGLIGENCE - HEALTH CARE PROVIDER'S LIABILITY FOR ACTS OF NON-EMPLOYEE AGENTS - RESPONDEAT SUPERIOR.
(Use for claims arising before 1 October 2011.)

809.65A MEDICAL MALPRACTICE—HEALTH CARE PROVIDER'S LIABILITY FOR ACTS OF NON-EMPLOYEE AGENTS—RESPONDEAT SUPERIOR.
(Use for claims arising on or after 1 October 2011.

809.66 MEDICAL NEGLIGENCE—HEALTH CARE PROVIDER'S LIABILITY FOR ACTS OF NON-EMPLOYEE AGENTS—RESPONDEAT SUPERIOR—APPARENT AGENCY.

809.75 MEDICAL NEGLIGENCE—INSTITUTIONAL HEALTH CARE PROVIDER'S LIABILITY FOR SELECTION OF ATTENDING PHYSICIAN.
(Use for claims arising before 1 October 2011. For claims arising on or after 1 October 2011, use either N.C.P.I.—Civil 809.00A or N.C.P.I.—Civil 809.06.)

809.80 MEDICAL NEGLIGENCE - INSTITUTIONAL HEALTH CARE PROVIDER'S LIABILITY FOR AGENTS; EXISTENCE OF AGENCY

"…[U]nder the doctrine of *respondeat superior*, a hospital is liable for the negligence of a physician or surgeon acting as its agent. There will generally be no vicarious liability on an employer for the negligent acts of an independent contractor." *Hylton v. Koontz*, 138 N.C. App. 629, 635, 532 S.E.2d 252, 257 (2000), *disc. review denied*, 353 N.C. 373, 546 S.E.2d 603 (2001). This Court has established that "the vital test in determining whether an agency relationship exists is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details." *Hylton*, 138 N.C. App. at 636, 532 S.E.2d at 257. Specifically, "'the principal must have the right to control *both the means and the details of the process* by which the agent is to accomplish his task in order for an agency relationship to exist.'" *Wyatt v. Walt Disney World Co.*, 151 N.C. App. 158, 166, 565 S.E.2d 705, 710 (2002). *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 299, 628 S.E.2d 851, 857 (2006)

When, however, a hospital does hold itself out as providing services, we believe the approach of the Restatement (Second) of Torts § 429 is consistent with our prior decisions considering apparent agency. We are also persuaded by the weight of authority from other jurisdictions. Under this approach, a plaintiff must prove that (1) the hospital has held itself out as providing medical services, (2) the plaintiff looked to the hospital rather than the individual medical provider to perform those services, and (3) the patient accepted those services in the reasonable belief that the services were being rendered by the hospital or by its employees. A hospital may avoid liability by providing meaningful notice to a patient that care is being provided by an independent contractor. *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 307, 628 S.E.2d 851, 862 (2006).

Under the doctrine of *respondeat superior,* a hospital is liable for the negligence of a physician or surgeon acting as its agent. There will generally be no vicarious liability on an employer for the negligent acts of an independent contractor. Unless there is but one inference that can be drawn from the facts, whether an agency relationship exists is a question of fact for the jury. If only one inference can be drawn from the facts then it is a question of law for the trial court. *Hylton v. Koontz,* 138 N.C. App. 629, 635, 532 S.E.2d 252, 257 (2000).

"[A]pparent agency would be applicable to hold the hospital liable for the acts of an independent contractor if the hospital held itself out as providing services and care." *Diggs v. Novant Health, Inc.,* 177 N.C. App. 290, 305, 628 S.E.2d 851, 861 (2006). Under this approach, a plaintiff must prove that (1) the hospital has held itself out as providing medical services, (2) the plaintiff looked to the hospital rather than the individual medical provider to perform those services, and (3) the patient accepted those services in the reasonable belief that the services were being rendered by the hospital or by its employees. A hospital may avoid liability by providing meaningful notice to a patient that care is being provided by an independent contractor. *Diggs, 177 N.C. App. at* 307, 628 S.E.2d at 862.

Evidence that a physician has privileges at a hospital is not sufficient, standing alone, to make the physician an agent of the hospital. *Peter v. Vullo*, 234 N.C. App. 150, 159-60, 758 S.E.2d 431, 438 (2014).

MEDICAL MALPRACTICE - DAMAGES

809.100 MEDICAL MALPRACTICE - DAMAGES - PERSONAL INJURY GENERALLY.

(Use for claims filed on or after 1 October 2011. For claims filed before 1 October 2011, use N.C.P.I.-Civil 810.00 et seq.)

See N.C.R.Civ.P. Rule 42(b)(3) Bifurcation of issues

Economic Damages:

809.114 MEDICAL MALPRACTICE PERSONAL INJURY DAMAGES - PERMANENT INJURY - ECONOMIC DAMAGES.

(Use for medical malpractice cases filed on or after 1 October 2011. For all other cases, use N.C.P.I.-Civil 810.14.)

- Medical expenses
- Loss of earnings
- Permanent injury for medical expenses
- Permanent injury for loss of earnings

Use N.C.G.S. § 8-46 Mortality Tables

Non- economic Damages (N.C.G.S. §90-21.19(c)(2)):

809.115 MEDICAL MALPRACTICE PERSONAL INJURY DAMAGES - PERMANENT INJURY - NON-ECONOMIC DAMAGES.

(Use for medical malpractice cases filed on or after 1 October 2011. For all other cases, use N.C.P.I.-Civil 810.14.)

When this instruction is given, you also should give N.C.P.I.-Civil 810.16 ("Future Worth in Present Value").

Use N.C.G.S. § 8-46 Mortality Tables

- Pain and suffering
- Scars and disfigurement
- Partial loss of use of part of the body
- Loss of use of part of the body
- Loss of part of the body
- Loss of consortium
- Permanent injury for (pain and suffering)(scars and disfigurement)(loss of use of part of the body)(loss of consortium)

Note: N.C.G.S. §90-21.19(a): Amount of noneconomic damages against all defendants cannot exceed $500,000 (adjusted every 3 years beginning in 2014). The jury is not to be advised as to this cap.

809.199 Sets out a sample verdict form for damages distinguishing economic and non-economic damages in both personal injury cases and wrongful death cases.

(Use for claims filed after October 1, 2011.)

809.160 MEDICAL MALPRACTICE - DAMAGES - NO LIMIT ON NON-ECONOMIC DAMAGES.

(Use for medical malpractice claims filed on or after 1 October 2011.)

N.C.G.S. §90-21.19(b):

Notwithstanding N.C.G.S. §90-21.19(a), there shall be no limit on the amount of noneconomic damages for which judgment may be entered against a defendant if the trier of fact finds **both** of the following:

(1) The plaintiff suffered disfigurement, loss of use of part of the body, permanent injury or death.

(2) The defendant's acts or failures, which are the proximate cause of the plaintiff's injuries, were committed in reckless disregard of the rights of others, grossly negligent, fraudulent, intentional or with malice.

Note: Subsection (1) talks about disfigurement, loss of use of part of the body, permanent injury or death, however, the definition of "noneconomic damages" set out in N.C.G.S. §90-21.19(c)(2) refers to damages for pain, suffering, emotional distress, loss of consortium, inconvenience, and any other "nonpecuniary compensation damages." [Does not include punitive damages.]

A. Statutes and rules governing proof of medical expenses (hospital, doctor, drug and other expenses):

N.C.G.S. §8C-1-414: Evidence offered to prove past medical expenses shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of the source of payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied. This rule does not impose upon any party an affirmative duty to seek a reduction in billed charges to which the party is not contractually entitled.

Effective October 1, 2011

N.C.G.S. §8-58.1:

(a) Whenever an issue of hospital, medical, dental, pharmaceutical, or funeral charges arises in any civil proceeding, the injured party or his guardian, administrator, or executor is competent to give evidence regarding the amount paid or required to be paid in full satisfaction of such charges, provided that records or copies of such charges showing the amount paid or required to be paid in full satisfaction of such charges accompany such testimony.

(b) The testimony of a person pursuant to subsection (a) of this section establishes a rebuttable presumption of the reasonableness of the amount paid or required to be paid in full satisfaction of the charges. However, in the event that the provider of hospital, medical, dental, pharmaceutical, or funeral services gives sworn testimony that the charge for that provider's service either was satisfied by payment of an amount less than the amount charged, or can be satisfied by payment of an amount less than the amount charged, then with respect to that provider's charge only, the presumption of the reasonableness of the amount charged is rebutted and a rebuttable presumption is established that the lesser satisfaction amount is the reasonable amount of the charges for the testifying provider's services. For the purposes of this subsection, the word "provider" shall include the agent or employee of a provider of hospital, medical, dental, pharmaceutical, or funeral services, or a person with responsibility to pay a provider of hospital, medical, dental, pharmaceutical, or funeral services on behalf of an injured party.

(c) The fact that a provider charged for services provided to the injured person establishes a permissive presumption that the services provided were reasonably necessary but no presumption is established that the services provided were necessary because of injuries caused by the acts or omissions of an alleged tortfeasor.

Note: G.S. 8-58.1 creates a mandatory presumption of reasonableness for a plaintiff's medical expenses if the medical expenses are an issue and evidence is presented showing the total charges. *Griffis v. Lazarovich*, 161 N.C. App. 434, 588 S.E.2d 918, (2003).

When plaintiff proffers the evidence required by this section, the fact-finder must find that the total amount of the alleged medical charges is reasonable, unless defendant carries its burden of going forward by rebutting the presumed fact of reasonableness. *Jacobsen v. McMillan*, 124 N.C. App. 128, 476 S.E.2d 368, (1996).

Where the injured party testified as to her injuries and treatment and introduced her medical bills, and the tortfeasor failed to introduce any evidence to rebut the presumption that the charges in the medical bills were reasonable, the reasonableness of the charges was conclusively established. *McCurry v. Painter*, 146 N.C. App. 547, 553 S.E.2d 698, (2001).

B. Four instructions regarding introduction of medical expenses:

810.04A Personal Injury Damages - Medical Expenses - Stipulation.

Use for claims arising on or after 1 October 2011 when there is a **stipulation as to both the reasonableness of the amount of expenses and the causal nexus of the expenses** to the conduct at issue**.**

(For claims arising before 1 October 2011, use N.C.P.I.-Civil 810.04.)

810.04B Personal Injury Damages - Medical Expenses - Stipulation as to Amount Paid or Necessary to be Paid, But Not Nexus to Conduct.

Use for claims arising on or after 1 October 2011 when there is a **stipulation as to the reasonableness of the amount of expenses but not the causal nexus of the expenses** to the conduct at issue.

(For claims arising before 1 October 2011, use N.C.P.I.-Civil 810.04.)

810.04C Personal Injury Damages - Medical Expenses - No Stipulation, No Rebuttal Evidence.

Use for claims arising on or after 1 October 2011 when the plaintiff has offered **evidence of the amount paid or necessary to be paid, and the defendant has not offered rebuttal evidence**.

(For claims arising before 1 October 2011, use N.C.P.I.-Civil 810.04.)

810.04D Personal Injury Damages - Medical Expenses - No Stipulation, Rebuttal Evidence Offered.

Use for claims arising on or after 1 October 2011 when the plaintiff has offered **evidence of the amount paid or necessary to be paid, and the defendant has offered rebuttal testimony by the provider of the medical services.**

(For claims arising before 1 October 2011, use N.C.P.I.-Civil 810.04.)

C. Personal injury damages instruction mandates:

Personal injury final mandate (regular): N.C.P.I.-Civil 809.120

Personal injury final mandate (per diem): N.C.P.I.-Civil 809.122

Wrongful Death Damages

See N.C. Gen. Stat. § 1A-1, Rule 42: Bifurcation of issues

809.142 MEDICAL MALPRACTICE - DAMAGES - WRONGFUL DEATH GENERALLY.

Use for claims **filed** on or after 1 October 2011.

(For claims filed before 1 October 2011, use N.C.P.I.-Civil 810.42 et seq.)

Note: If there is no stipulation as to the decedent's next-of-kin or determined as a matter of law, then a separate issue must be submitted to the jury. (No pattern instruction available).

N.C.P.I.-Civil 809.142 Lists economic and non-economic damages

Economic:

809.150 MEDICAL MALPRACTICE WRONGFUL DEATH DAMAGES - PRESENT MONETARY VALUE OF DECEASED TO NEXT-OF-KIN - ECONOMIC DAMAGES.

(Use for claims **filed** on or after 1 October 2011.)

A. Statutes and rules governing proof of economic damages (net income, hospital, doctor, drug funeral and other expenses):

N.C.G.S. §28A-18-2(b) Economic damages

(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death

- 810.04A Personal Injury Damages - Medical Expenses - Stipulation.
- 810.04B Personal Injury Damages - Medical Expenses - Stipulation as to Amount Paid or Necessary to be Paid, But Not Nexus to Conduct.
- 810.04C Personal Injury Damages - Medical Expenses - No Stipulation, No Rebuttal Evidence.
- 810.04D Personal Injury Damages - Medical Expenses - No Stipulation, Rebuttal Evidence Offered.

N.C.G.S.§8C-1-414: Evidence offered to prove past medical expenses shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of the source of payment, **and** evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied. This rule does not impose upon any party an affirmative duty to seek a reduction in billed charges to which the party is not contractually entitled.

(2) Reasonable funeral expenses (After October 1, 2011)

- 810.48A WRONGFUL DEATH Damages - FUNERAL Expenses - Stipulation.

- 810.48B Wrongful Death Damages - FUNERAL Expenses - Stipulation as to Amount Paid or Necessary to be Paid, But Not Nexus to Conduct.
- 810.48C WRONGFUL DEATH Damages - FUNERAL Expenses - No Stipulation, No Rebuttal Evidence.
- 810.48D WRONGFUL DEATH Injury Damages - FUNERAL Expenses - No Stipulation, Rebuttal Evidence Offered.

(3) Present monetary value of deceased to next-of-kin from the deceased net income

(4) *Issue:* Services where there is evidence of market value of those services

Note: To determine the net income that the deceased would have earned during the remainder of his life, you must subtract from the deceased's reasonably expected income the amount he would have spent on himself or for other purposes which would not have benefited his next-of-kin. The amount he would have earned depends upon his prospects in life, health, character, ability, industry and the ability to earn money and the business in which he was employed. It also depends upon his life expectancy-that is, the length of time he could reasonably have been expected to live but for the negligence of the defendant. This expectancy is affected by his health, his constitution and his habits.

Note: Consideration must also be given the life expectancy of the next-of-kin to determine if next-of-kin's life expectancy is less than that of the deceased at time of death.

Non-economic:

809.151 MEDICAL MALPRACTICE WRONGFUL DEATH DAMAGES - PRESENT MONETARY VALUE OF DECEASED TO NEXT-OF-KIN - NON-ECONOMIC DAMAGES.

(Use for claims **filed** on or after 1 October 2011.)

B. Statutes and rules governing proof of noneconomic damages:

N.C.G.S. §90-21.19(c)(2) Noneconomic damages. — Damages to compensate for pain, suffering, emotional distress, loss of consortium, inconvenience, and any other nonpecuniary compensatory damage. "Noneconomic damages" does not include punitive damages as defined in N.C.G.S.§1D-5.

Also the present monetary value to the deceased's next of kin from his/her:

(1) Society
(2) Companionship
(3) Comfort
(4) Guidance
(5) Kindly offices
(6) Advice
(7) Protection

(8) Care or assistance
(9) Services for which do not have a market value

N.C.G.S. §90-21.19(a) Limitations on Non-economic Damages.
Judgment shall not be entered against any defendant for noneconomic damages in excess of five hundred thousand dollars ($500,000) for all claims brought by all parties arising out of the same professional services.

Note: The court will not instruct the jury as to the monetary limitations on non-economic damages. The attorneys and witnesses are also prohibited from informing the jury as to the limitations.

809.160 MEDICAL MALPRACTICE - DAMAGES - NO LIMIT ON NON-ECONOMIC DAMAGES.

(Use for medical malpractice claims filed on or after 1 October 2011.)

N.C.G.S. §90-21.19(b) Notwithstanding subsection (a) of this section, there shall be no limit on the amount of noneconomic damages for which judgment may be entered against a defendant if the trier of fact finds **both** of the following:

(1) The plaintiff suffered disfigurement, loss of use of part of the body, permanent injury or death.

(2) The defendant's acts or failures, which are the proximate cause of the plaintiff's injuries, were committed in reckless disregard of the rights of others, grossly negligent, fraudulent, intentional or with malice.

C. Wrongful death damages instruction mandates:

Wrongful death final mandate (regular): N.C.P.I.-Civil 809.154

Wrongful death final mandate (per diem): N.C.P.I.-Civil 809.156