809.06 MEDICAL MALPRACTICE—CORPORATE OR ADMINISTRATIVE NEGLIGENCE BY HOSPITAL, NURSING HOME OR ADULT CARE HOME[1]

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

The *(state number)* issue reads:

"Was the plaintiff [injured] [damaged] by the defendant's negligent performance of [corporate] [administrative] duties?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things: (1) that the defendant was negligent; and (2) that such negligence was a proximate cause of the plaintiff's [injury] [damage].

As to the first thing that the plaintiff must prove, negligence refers to the failure to follow a duty of conduct imposed by law. A [hospital] [nursing home] [adult care home] is under a duty to perform its corporate or administrative functions in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances at the time of the conduct at issue.[2]

A [hospital's] [nursing home's] [adult care home's] violation of this duty of care is negligence.

In this case, the plaintiff contends, and the defendant denies, that the defendant did not perform its corporate or administrative functions related to the plaintiff's health care in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances. For you to find that the defendant failed to meet this duty, the plaintiff must satisfy you, by the greater weight of the evidence, first, what the standards of practice for such administrative or corporate duties were among similar health care providers situated in the

same or similar communities under the same or similar circumstances at the time the defendant (*describe conduct at issue*, e.g., "hired the nurse" or "monitored the plaintiff's care"), and, second, that the defendant did not act in accordance with those standards of practice. In determining the standards of practice applicable to this contention,[3] you must weigh and consider the testimony of the witnesses who purport to have knowledge of those standards of practice and not your own ideas of the standards.

As to the second thing that the plaintiff must prove, the plaintiff further contends, and the defendant denies, that the defendant's negligence was a proximate cause of the plaintiff's [injury] [damage].

The plaintiff not only has the burden of proving negligence, but also that such negligence was a proximate cause of the [injury] [damage]. Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage], and is a cause which a reasonable and prudent health care provider could have foreseen would probably produce such [injury] [damage] or some similar injurious result.

There may be more than one proximate cause of [an injury] [damage]. Therefore, the plaintiff need not prove that the defendant's negligence was the sole proximate cause of the [injury] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's negligence was a proximate cause. I instruct you that negligence is not to be presumed from the mere fact of [injury] [damage].

(Now, members of the jury, I have an additional instruction for you to consider in relation to the duty I have just described.)[4]

(*Duty to Attend.* A health care provider is not bound to render professional services to everyone who seeks care. However, when a health

care provider undertakes the care and treatment of a patient, (unless otherwise limited by contract,) the relationship cannot be terminated at the mere will of the health care provider. The relationship must continue until the treatment is no longer required, until it is dissolved by the consent of the parties or until notice is given which allows the patient a reasonable opportunity to engage the services of another health care provider.[5] The failure of the health care provider to use reasonable care and judgment in determining when the attendance may properly and safely be discontinued is negligence. Whether reasonable care and judgment has been used must be determined by comparison with the standards of practice of similar health care providers situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered.)

Finally, as to this *(state number)* issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant was negligent in any one or more of the ways contended by the plaintiff and that such negligence was a proximate cause of the plaintiff's [injury] [damage], then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

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1. As amended in 2011, N.C. Gen. Stat. §§ 90-21.11(b) and 90-21.12(a) include as medical malpractice claims those corporate or administrative negligence claims against a hospital, nursing home licensed under Chapter 131E, or adult care home licensed under Chapter 131D which: (1) allege a breach of administrative or corporate duties to the patient including, but not limited to, allegations of negligent credentialing or negligent monitoring and supervision; and (2) arise from the same facts or circumstances as a medical malpractice claim under N.C. Gen. Stat. § 90-21.11(a). Previously, those claims were treated as "ordinary negligence" claims.

2. Among the common law duties previously imposed on hospitals are: the "duty to the patient to obey the instructions of a doctor, absent the instructions being obviously

negligent or dangerous"; a "duty to make a reasonable effort to monitor and oversee the treatment prescribed and administered by doctors practicing at the hospital"; and a "duty not to institute policies which interfere with the doctor's medical judgment." *Muse v. Charter Hosp*., 117 N.C. App. 468, 474, 452 S.E.2d 589, 594 (citing *Burns v. Forsyth Cnty. Hosp*., 81 N.C. App. 556, 563, 344 S.E.2d 839, 845 (1986) and *Bost v. Riley*, 44 N.C. App. 638, 647, 262 S.E.2d 391, 396, discretionary review denied, 300 N.C. 194, 269 S.E.2d 621 (1980)), discretionary review denied, 340 N.C. 114, 455 S.E.2d 663 (1995); *Blanton v. Moses H. Cone Mem'l. Hosp*., 319 N.C. 372, 376, 354 S.E.2d 455, 458 (1987) (holding that a "hospital owes a duty of care to its patients to ascertain that a doctor is qualified to perform an operation before granting him the privilege to do so"); *id.* (noting "a duty to use reasonable care in the selection, inspection, and maintenance of equipment"); *id.* 319 N.C. at 377, 354 S.E.2d at 458 (recognizing "a duty 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.

Cases in which these duties were recognized applied an "ordinary negligence" standard of "reasonable care" in determining the issue of negligence. In claims arising on or after 1 October 2011, however, pursuant to N.C. Gen. Stat. § 90-21.11(b), whether a defendant breached any duty must be determined by comparison 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 under the same or similar circumstances at the time the health care is rendered.

3. Rule 702(a) of the North Carolina Rules of Evidence requires that before an expert can testify "in the form of an opinion, or otherwise": (1) the testimony must be "based on sufficient facts or data"; (2) the testimony must be the product of "reliable principles and methods"; and (3) the witness have "applied the principles and method reliably to the facts of the case." *See also* N.C. R. Evid. 702(b) – (f) (setting forth the specific qualifications required of an expert witness testifying on the appropriate standard of health care). Further, Rule 702(h) of the North Carolina Rules of Evidence specifies that in a medical malpractice case based on alleged breach of administrative or corporate duties to the patient, a witness "shall not give expert testimony on the appropriate standard of care…unless the person has substantial knowledge, by virtue of his training and experience, about the standard of care among…medical facilities[ ] of the same type as the…medical facility[ ] whose actions or inactions are the subject of the testimony situated in the same or similar communities at the time of the alleged act giving rise to the cause of action."

4*. NOTE WELL: In* Wall v. Stout*, the court cautions that this instruction should not be used indiscriminately or without purpose. There must be evidence or contentions in the case which justify the use of this instruction.* See Wall, *310 N.C. at 197, 311 S.E.2d at 579.*

5. *See Galloway v. Lawrence*, 266 N.C. 245, 248, 145 S.E.2d 861, 864 (1965); *Groce v. Myers*, 224 N.C. 165, 171, 29 S.E.2d 553, 557 (1944); *Childers v. Frye*, 201 N.C. 42, 45, 158 S.E. 744, 746 (1931); *Nash v. Royster*, 189 N.C. 408, 413, 127 S.E. 356, 359 (1925).