
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.)

> *NOTE WELL: "Res Ipsa Loquitur" has been approved as an option for liability in medical negligence cases only for "injuries resulting from surgical instruments or other foreign objects left in a patient's body following surgery and injuries to a part of the patient's anatomy outside of the surgical field."[1] In any other instance, this instruction should be used with caution.[2]*
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> *NOTE WELL: Medical malpractice can be premised on breach of common law duties recognized in* Wall v. Stout*, 310 N.C. 184, 192, 311 S.E.2d 571, 576-77 (1984), and on breach of the statutory duty to provide health care 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 under the same or similar circumstances at the time the health care is rendered. N.C. Gen. Stat. § 90-21.12(b) specifies that in "any medical malpractice action arising out of the furnishing or failure to furnish professional services in the treatment of an emergency medical condition, . . . the claimant must prove a violation of the standards of practice set forth in subsection (a) of this section by clear and convincing evidence." Thus, for the standards of practice duty set forth in the statute, the plaintiff has the burden to prove a breach by clear and convincing evidence. The statute, however, is silent as to the common law duties to use best judgment in the treatment and care of a patient and to use reasonable care and diligence in the application of knowledge and skill to a patient's care. Consequently, based on the language of the statute, which addresses only the statutory duty, this instruction incorporates two different burdens of proof: "greater weight of the evidence" for alleged breach of common law duties; and "clear and convincing evidence" for alleged breach of statutory standards of practice.*

The *(state number)* issue reads:

"Was the plaintiff [injured] [damaged][3] by the negligence of the defendant in treating the plaintiff's emergency medical condition[4]?"

On this issue the burden of proof is on the plaintiff to prove two things: (1) that the defendant was negligent; and (2) that the negligence proximately caused [injury] [damage] to the plaintiff.

As to the first thing that the plaintiff must prove, negligence refers to a person's failure to follow a duty of conduct imposed by law. When treating an emergency medical condition, every health care provider[5] is under a duty

[to use [his] [her] best judgment in the treatment and care of the patient][6]

[to use reasonable care and diligence in the application of [his] [her] knowledge and skill to the patient's care][7] [and]

[to provide health care 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 under the same or similar circumstances at the time the health care is rendered].[8]

A health care provider's violation of [this duty] [any one or more of these duties] of care is negligence.[9]

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

NOTE WELL: 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.[10] *A similar rule applies in cases where a different treatment probably would have improved the chances of survival or recovery.*[11] *The following special instruction 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 the patient's 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*].[12]

In this case, the plaintiff contends, and the defendant denies, that the defendant was negligent. Proof of negligence can be shown in two ways. The first is by direct evidence. The second is by circumstantial evidence.

I will instruct you on the plaintiff's burden of proof on this issue, whether by direct or by circumstantial evidence.

I will first instruct you with regard to the plaintiff's burden of proof with regard to direct evidence of negligence,

(Read all contentions of negligence supported by the evidence.)

[The *(state number)* contention is that the defendant failed to use [his] [her] best judgment in the treatment and care of the patient in that *(describe specific conduct supported by the evidence)*. The plaintiff has the burden to prove this contention by the greater weight of the evidence.]

[The *(state number)* contention is that the defendant failed to use reasonable care and diligence in the application of [his] [her] knowledge and skill to the patient's care in that *(describe specific conduct supported by the evidence)*. The plaintiff has the burden to prove this contention by the greater weight of the evidence.]

[The *(state number)* contention is that the defendant failed to provide health care 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 under the same or similar circumstances at the time the health care was rendered in that *(describe specific conduct supported by the evidence)*. The plaintiff has the burden to prove this contention, by clear and convincing evidence.[13]

Clear and convincing evidence is evidence which, in its character and weight, establishes what the plaintiff seeks to prove in a clear and convincing fashion. You shall interpret and apply the words "clear" and "convincing" in accordance with their commonly understood and accepted meanings in everyday speech.]

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 has the burden to prove that the defendant's negligence was a proximate cause of the plaintiff's [injury] [damage] by the greater weight of the evidence.

I instruct you that negligence is not to be presumed from the mere fact of [injury] [damage].[14]

(Give law as to each contention of negligence included above.)[15]

[With respect to the plaintiff's *(state number)* contention, a health care provider has a duty to use [his] [her] best judgment in the treatment and care of the patient.

A violation of this duty is negligence.]

[With respect to the plaintiff's *(state number)* contention, a health care provider has a duty to use reasonable care and diligence in the application of [his] [her] knowledge and skill to the patient's care.

A violation of this duty is negligence.]

[With respect to the plaintiff's *(state number)* contention, a health care provider has a duty to provide health care 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 under the same or similar circumstances at the time the health care is rendered. In order for you to find that the defendant failed to meet this duty, the plaintiff must satisfy you first, by the greater weight of the evidence, what the standards of practice were 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 defendant (*describe health care service rendered*, e.g., "operated on the plaintiff"), and, second, by clear and convincing evidence, that the defendant did not act in accordance with those standards of practice. In determining the standards of practice applicable to this contention,[16] 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.[17]

A violation of this duty is negligence.]

I will now instruct you as to the plaintiff's burden of proof with regard to circumstantial evidence of negligence.[18]

Ordinarily, in order to recover, the plaintiff must prove some negligent act or omission on the part of the defendant, and that this act or omission proximately caused the plaintiff's [injury] [damage]. Negligence cannot be presumed or inferred from the mere fact of [injury] [damage].[19] However, in certain situations, the law permits you, but does not require you, to infer from the circumstances shown by the evidence that a negligent act or omission has occurred and that it has proximately caused [injury] [damage]. The plaintiff contends that this is a case where the circumstances are such that you should infer and find that the defendant was negligent and that this negligence

proximately caused the plaintiff's [injury] [damage]. On the other hand, the defendant denies any negligence on [his] [her] and contends that you should not infer or find that the defendant was negligent or that such negligence proximately caused the plaintiff's [injury] [damage].

In order for you to infer and find that the defendant was negligent and that *his* negligence proximately caused the plaintiff's [injury] [damage],[20] the plaintiff must prove four things:

First, by the greater weight of the evidence, the [injury] [damage] which occurred was not an inherent risk of the [operation] [surgery] [(*describe other procedure*)]. [Injury] [damage] is not an inherent risk of the [operation] [surgery] [(*name other procedure*)] if it is not common to that procedure and is not a particular hazard in that type of [operation] [surgery] [(*describe other procedure*)].[21]

Second, by the greater weight of the evidence, direct proof of the cause of the [injury] [damage] is not available to the plaintiff.

Third, by the greater weight of the evidence, the [medical care rendered to] [operation upon] [surgery upon] the plaintiff was under the exclusive control or management of the defendant.

And Fourth, [by the greater weight of the evidence, that the [injury] [damage] was of a type that would have rarely occurred if the defendant had exercised [his] [her] best judgment in the treatment and care of the plaintiff]

[by the greater weight of the evidence, that the [injury] [damage] was of a type that would have rarely occurred if the defendant had used reasonable

care and diligence in the application of [his] [her] knowledge and skill to the plaintiff's care] [or]

[by clear and convincing evidence, that the [injury] [damage] was of a type that would have rarely occurred if the defendant had provided health care 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 under the same or similar circumstances at the time the health care was provided. In order for you to find that the defendant failed to meet this duty, the plaintiff must satisfy you, by the greater weight of the evidence, what the standards of practice were 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 defendant (*describe health care service rendered*, e.g., "*operated on the plaintiff"*). In determining the standards of practice applicable to this case,[22] 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. Once you have determined the standards of practice applicable to this case, you must decide whether the plaintiff proved a breach of those standards by clear and convincing evidence.][23]

(Now, members of the jury, I have some additional instructions for you to consider in relation to the [duty] [duties] I have just described. *Select from the following, as appropriate*:[24]

(*Duty to Attend*. A health care provider is not bound to render professional services to everyone who applies. 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.[25] The failure of the health care provider to use reasonable care and judgment in determining when [his] [her] attendance may properly and safely be discontinued is negligence. Whether the health care provider has used reasonable care and judgment 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.)

(*Highest Degree of Skill Not Required*. The law does not require of a health care provider absolute accuracy, either in [his] [her] practice or in [his] [her] judgment. It does not hold the health care provider to a standard of infallibility, nor does it require the utmost degree of skill and learning known only to a few in the profession. The law only requires a health care provider to have used those standards of practice exercised by 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.)

(*Not Guarantor of Diagnosis, Analysis, Judgment or Result*. *Note Well: Use only if an issue of guarantee is raised by the evidence.*[26] A health care provider does not, ordinarily, guarantee[27] the correctness of [a diagnosis] [an analysis] [a judgment as to the nature] of a patient's condition or the success

of the (*describe health care service rendered*).[28] Absent such guarantee, a health care provider is not responsible for a mistake in [diagnosis] [analysis] [judgment] unless the health care provider has violated [the duty] [one or more of the duties] I previously described.))

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 [breached the duty to use [his] [her] best judgment in the treatment and care of the patient] [or] [breached the duty to use reasonable care and diligence in the application of [his] [her] knowledge and skill to the patient's care]] [or]
>
> [by clear and convincing evidence, that the defendant breached the duty to provide health care 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 under the same or similar circumstances at the time the health care was rendered],

and, by the greater weight of the evidence 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. *Howie v. Walsh,* 168 N.C. App. 694, 699, 609 S.E.2d 249, 252 (2005) (quoting *Grigg v. Lester,* 102 N.C. App. 332, 335, 401 S.E.2d 657, 659 (1991)).

2. *Id.*

3. In death cases, this instruction can be modified to refer to the "decedent's death."

4. N.C. Gen. Stat. § 90-21.12(b) specifies that "emergency medical condition" "is defined in 42 U.S.C. 1395dd(e)(1)," which is a provision within the federal Emergency Treatment and Active Labor Act (EMTALA). It defines an "emergency medical condition" as:

> (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-
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> > (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.

42 U.S.C. § 1395dd(e)(1)(A). *See also* N.C.P.I.–Civil 809.20 ("Existence of Emergency Medical Condition").

5. A "health care provider" is defined by N.C. Gen. Stat. § 90-21.11(1) as, "[w]ithout limitation, any of the following:"

> "[a] person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, or psychology"; "[a] hospital, a nursing home licensed under Chapter 131E . . ., or an adult care home licensed under Chapter 131D"; "[a]ny other person who is legally responsible for the negligence of" such person, hospital, nursing home or adult care home; "[a]ny other person acting at the direction or under the supervision of" any of the foregoing persons, hospital, nursing home, or adult care home; or "[a]ny paramedic, as defined in G.S. 131E-155(15a)."

N.C. Gen. Stat. § 90-21.11(1).

6. *Hunt v. Bradshaw*, 242 N.C. 517, 88 S.E.2d 762 (1955), quoted with approval in *Wall v. Stout*, 310 N.C. 184, 192-93, 311 S.E.2d 571, 576-77 (1984). In *Wall v. Stout*, Chief Justice Branch, for a unanimous court, said:

> 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 requirement, and such failure is the proximate cause of injury or damage, he is liable."

310 N.C. at 192-93, 311 S.E.2d at 576-77 (quoting *Hunt* 242 N.C. at 521, 88 S.E.2d at 765). N.C. Gen. Stat. § 90-21.12(a) codifies and refines the first duty listed in *Wall.*

7. *Wall*, 310 N.C. at 192-93, 311 S.E.2d at 576-77.

8. N.C. Gen. Stat. § 90-21.12(a).

9. *Wall*, 310 N.C. at 193, 311 S.E.2d at 577.

10. *See Katy v. Capriola*, 226 N.C. App. 470, 479-81, 742 S.E.2d 247, 254-55 (2013).

11. *See id.*; *White v. Hunsinger*, 88 N.C. App. 382, 386, 363 S.E.2d 203, 206 (1988).

12. *See Katy*, 470 N.C. App. at 479-81, 742 S.E.2d at 254-55.

13. N.C. Gen. Stat. § 90-21.19(b) specifies that in "any medical malpractice action arising out of the furnishing or failure to furnish professional services in the treatment of an emergency medical condition, . . . the claimant must prove a violation of the standards of practice set forth in subsection (a) of this section by clear and convincing evidence."

14. The application of the doctrine of *res ipsa loquitur* in medical negligence actions is "somewhat restrictive." *Schaffner v. Cumberland County Hosp. Sys.*, 77 N.C. App. 689, 691, 336 S.E.2d 116, 118 (1985). There must be proof that the injury or death would rarely occur in the absence of *medical* negligence. *Id. See also Howie,* 168 N.C. App. at 698, 609 S.E.2d at 251-52 (quoting *Diehl v. Koffer*, 140 N.C. App. 375, 378, 536 S.E.2d 359, 362 (2000)):

> 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 . . . [I]n 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.

See also Schaffner, 77 N.C. App. at 691, 336 S.E.2d at 118 (expert testimony is not invariably required in all cases). For additional *res ipsa loquitur* analysis*, see also*, *Tice v. Hall*, 310 N.C. 589, 592-94, 313 S.E.2d 565, 567 (1984). *Cf. Koury v. Follo*, 272 N.C. 366, 373, 158 S.E.2d 548, 554 (1967); *Starnes v. Taylor*, 272 N.C. 386, 391, 158 S.E.2d 339, 343 (1967); *Cameron v. Howard*, 40 N.C. App. 66, 68, 251 S.E.2d 900, 901-02 (1979); *Thompson v. Lockhart*, 34 N.C. App. 1, 7, 237 S.E.2d 259, 263 (1977).

15. This instruction must be modified to add additional elements of proof if there is a question of fact as to whether the defendant is a health care provider as defined by N.C. Gen. Stat. § 90-21.11 or whether the defendant was engaged in furnishing professional health care services to the plaintiff or plaintiff's decedent.

16. 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 has applied the principles and method reliably to the facts of the case." N.C. R. Evid. 702(a) (2011). *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). In proper cases, lay opinion testimony may be used. *See* N.C. R. Evid. 701 and *Schaffner*, 77 N.C. App. at 692, 336 S.E.2d at 118 (stating that expert testimony is not invariably required in all cases).

17*. Jackson v. Sanitarium*, 234 N.C. 222, 227, 67 S.E.2d 57, 61 (1951); *Vassey v. Burch*, 45 N.C. App. 222, 225, 262 S.E.2d 865, 867 (1980), *rev'd on other grounds,* 301 N.C. 58, 269 S.E.2d 137 (1980); *Whitehurst v. Boehm*, 41 N.C. App. 670, 675, 255 S.E.2d 761, 766 (1979). "There are many known and obvious facts in the realm of common knowledge which speak for themselves, sometimes even louder than witnesses, expert or otherwise." *Gray v. Weinstein*, 227 N.C. 463, 465, 42 S.E.2d 616, 617 (1947), quoted in *Schaffner*, 77 N.C. App. at 692, 336 S.E.2d at 118. *See also* other cases cited in *Schaffner*.

18*. See* N.C.P.I.-Civil 101.45 and *supra* note 13.

19*. See supra* note 13.

20. This instruction must be modified to add additional elements of proof if there is a question of fact as to whether the defendant is a health care provider as defined by N.C. Gen. Stat. § 90-21.11 or whether the defendant was engaged in furnishing professional health care services to the plaintiff or plaintiff's decedent.

21*. Schaffner*, 77 N.C. App. at 691, 336 S.E.2d at 118.

22. *See supra* note 15.

23*. See supra* note 12.

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

25. *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).

26. *Wall*, 310 N.C. at 196, 311 S.E.2d at 579.

27. Any such guarantees, warranties or assurances must satisfy the "statute of frauds" requirement imposed by N.C. Gen. Stat. § 90-21.13(d), which reads:

> No action may be maintained against any health care provider upon any guarantee, warranty or assurance as to the result of any medical, surgical or diagnostic procedure or treatment unless the guarantee, warranty or assurance, or some note or memorandum thereof, shall be in writing and signed by the provider or by some other person authorized to act for or on behalf of such provider.

N.C. Gen. Stat. § 90-21.13(d).

28. *Belk v. Schweizer*, 268 N.C. 50, 56, 149 S.E.2d 565, 570 (1966).