

809.65A MEDICAL MALPRACTICE—HEALTH CARE PROVIDER'S LIABILITY
FOR ACTS OF NON-EMPLOYEE AGENTS—*RESPONDEAT SUPERIOR*.¹

*(Use for claims arising on or after 1 October 2011. For claims arising before
1 October 2011, use N.C.P.I.-Civil 809.65.)*²

The *(state number)* issue reads:

"Was *(name nurse, attendant, other person)* the agent of the defendant
at the time the *(describe health care service)* was performed?"³

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, that *(name
nurse, attendant, other person)* was the defendant's agent at the time the
(describe health care service) was performed.

Ordinarily, a health care provider⁴ is not liable for the negligence of
[nurses] [attendants] [*(name other persons)*] who are not the health care
provider's employees. However, where, in the preparation and performance
of [a medical treatment] [an operation] [*(describe other procedure)*] the
health care provider has full control and supervision of the [nurse] [attendant]
[*(name other person)*], such person becomes an agent and the health care
provider is liable for any negligence of that agent which proximately causes
the [injury] [damage]. The [nurse] [attendant] [*(name other person)*] is the
agent of the health care provider only if, at the time the *(describe health care
service)* was performed, the health care provider possesses the power to
control directly and supervise the [nurse] [attendant] [*(name other person)*]
while performing the *(state health care service)*. The [nurse] [attendant]
[*(name other person)*] will be considered an agent of the health care provider
if the health care provider possesses this power of supervising the manner of

acting whether or not the power is exercised. (The duties of the health care provider with respect to such supervision and control over such agents are substantially the same as those respecting the other phases of the treatment of the patient generally; that is, in supervising agents, the health care provider is bound

[to exercise [his] [her] best judgment in the treatment and care of [his] [her] patient]⁵

[NOTE WELL: This duty does not apply in cases in which the jury has before it only a corporate or administrative medical malpractice claim, pursuant to N.C. Gen. Stat. § 90-21.12(a) (N.C.P.I.—Civil 809.06).]

[to use reasonable care and diligence in the application of [his] [her] knowledge and skill to [his] [her] patient's care]⁶

[NOTE WELL: This duty does not apply in cases involving only a corporate or administrative medical malpractice claim. See prior NOTE WELL.]

[and]

[to follow the standards of practice among health care providers with similar training and experience situated in the same or similar communities under the same or similar circumstances⁷ at the time the health care service was rendered].⁸)

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 (*name nurse, attendant, other person*) was the agent of the defendant at the time

the (*state health care service*) was performed, 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.

1. See *Lewis v. Barnhill*, 267 N.C. 457, 465, 148 S.E.2d 536, 543 (1966); *Davis v. Wilson*, 265 N.C. 139, 145, 143 S.E.2d 107, 111 (1965); *Jackson v. Joyner*, 236 N.C. 259, 261, 72 S.E.2d 589, 591 (1952); *Nash v. Royster*, 189 N.C. 408, 411, 127 S.E. 356, 360 (1925).

2. *NOTE WELL: The instruction previously labeled as N.C.P.I.-Civil 809.65A "Medical Malpractice-Health Care Provider's Liability For Acts of Non-Employee Agents-Respondeat Superior-Apparent Agency" has been revised and renumbered as N.C.P.I.-Civil 809.66.*

3. For claims alleging direct negligence against a hospital, nursing home or adult care home for breach of administrative or corporate duties, including negligent monitoring, supervision, hiring, or credentialing, use N.C.P.I.-Civil 809.06, or if the claim arises out of the treatment of an emergency medical condition, N.C.P.I.-Civil 809.28.

4. “Health care provider” is defined by N.C. Gen. Stat. § 90-21.11. In particular, it should be noted that the term “health care provider” specifically includes “[a]ny other person who is legally responsible for the negligence of a person described by [N.C. Gen. Stat. § 90-21.11(1)(a)],” which includes nurses and anyone “rendering assistance to a physician,” or “[a]ny other person acting at the direction or under the supervision of [any of the foregoing persons]” N.C. Gen. Stat. § 90-21.11(1). Note that, although a paramedic is defined as a health care provider by N.C. Gen. Stat. § 90-21.11, 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.

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

6. *Id.*

7. *NOTE WELL: If the malpractice alleged is based on lack of informed consent, delete the phrase "under the same or similar circumstances." Informed consent claims are governed by N.C. Gen. Stat. § 90-21.13, which does not include that language.*

8. N.C. Gen. Stat. § 90-21.12.

