No. COA25-693 SEVENTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
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ESTATE OF HENRY WYER, by and through the Administrators of The Estate of BENITA WYER and LAMONT WYER, Plaintiffs-Appellants, v. ALAMANCE REGIONAL MEDICAL CENTER, INC. d/b/a CONE HEALTH ALAMANCE REGIONAL MEDICAL CENTER, Defendant-Appellee.	)	From Alamance County No. 20CVS002215-000

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DEFENDANT-APPELLEE'S BRIEF

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INTRODUCTION

On June 13, 2018, Mr. Henry Wyer was admitted to Alamance Regional Medical Center ("ARMC") for treatment of various health problems. During this hospital admission, a palliative care consult was conducted to discuss end of life plans and thereafter a Do Not Resuscitate ("DNR") Order was entered in his medical record on June 14, 2018. (R p 94) A few days later, on June 18, 2018, Mr. Wyer suffered an event that left him with no pulse, no blood pressure, and no respirations. When the nurse entered the room to check on Mr. Wyer at that time, she found that he was not

responsive, and his hands were already cold. In compliance with the DNR Order, the medical staff did not attempt to resuscitate Mr. Wyer, and he died on June 18, 2018.

Plaintiffs filed this action alleging that Mr. Wyer should have been resuscitated based on a form labeled "Medical Orders for Scope of Treatment" ("MOST") which was previously signed on May 11, 2018, requesting that resuscitation be attempted in the event of cardiopulmonary arrest. (R p 91-92) In their Complaint, Plaintiffs alleged that Defendant ARMC was negligent by "[i]mproperly direct[ing] a Do Not Resuscitate be carried out for Plaintiff without adequate signed paperwork" and was otherwise negligent in "carrying out erroneous instructions." (R p 11) Plaintiffs also included a breach of contract claim based upon the MOST form that was signed on May 11, 2018. (R p 12)

On September 2, 2021, the trial court entered an Order dismissing Plaintiffs' Complaint for failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure since there was no certification of review by an expert and under Rule 12(b)(6) since the breach of contract claim was not proper. By decision entered on December 29, 2022, the Court of Appeals reversed the dismissal of the negligence claim and affirmed dismissal of the breach of contract claim. *Est. of Wyer by & through Wyer v. Alamance Reg'l Med. Ctr., Inc.*, 2022-NCCOA-940, 287 N.C. App. 395, 881 S.E.2d 759 (unpublished). The Court held that the motion to dismiss the negligence claim was improperly granted because the Complaint "alleged facts which, taken as true, invoke the doctrine of *res ipsa loquitur* as to the cause of the unauthorized June DNR Order in Decedent's file, and thus Plaintiffs were not

required to include the expert certification required under Rule 9(j) in order to survive a Rule 12(b)(6) motion." *Id.* at ¶ 20. Specifically, the Court noted: "According to the complaint, the origin of the DNR form is unknown to Plaintiffs; thus, *res ipsa loquitur* permits the inference of negligence." *Id.* at ¶ 19.

After the appellate decision, this matter returned to the trial court where the parties conducted discovery and expert discovery, including discovery regarding the origin of the DNR Order. On December 30, 2024, Defendant ARMC filed a Motion for Summary Judgment supported by the pleadings, discovery, depositions, and affidavits from two experts: Dr. Randall Schisler (Palliative Care) and Dr. James Harper (Cardiologist). On January 30, 2025, the Honorable R. Stuart Albright, Superior Court Judge for Alamance County, conducted a hearing and entered an order granting Defendant's Motion for Summary Judgment. Plaintiffs filed a Notice of Appeal on February 11, 2025.

ISSUES PRESENTED

I. Whether the trial court erred in holding that the doctrine of *res ipsa loquitur* is inapplicable to the facts of this case where the mechanism of alleged injury is known.

II. Whether the trial court erred in granting summary judgment in favor of Defendant ARMC where Plaintiffs offered no expert evidence of a violation of the standard of care by Defendant and no evidence of causation.

STATEMENT OF FACTS

Prior to June 2018, Mr. Wyer was a 75-year-old (DOB: 07/07/1942) man with chronic health problems. Earlier that year, he had moved from Durham to Elon to live with his daughter, Benita Wyer, because he was sick. (R p 170) Benita acknowledged that, as reflected in his medical records, Mr. Wyer suffered from Paget's disease, had neck surgery after a work injury with continued pain, had paralysis in his legs, used a cane and walker, required a home health aide, had failure to thrive with weight loss and poor appetite, had a urinary infection requiring placement of an indwelling catheter, and had an enlarged prostate with possible malignancy. (R p 170-172) He was hospitalized at Duke Hospital in March 2018 (R p 172) where they recommended transfer to a skilled nursing facility after discharge. Instead, Benita decided to take him to her home where she could care for him. (R p 172) In April 2018, Mr. Wyer went back to Duke Hospital for evaluation after a possible stroke. (R p 173) In May 2018, he was seen by his physician at Duke for reports of falling frequently at home. (R p 174) He was then admitted to Peak Resources in Alamance for 18 days (R p 174), after which he returned to Benita's home.

The MOST form referenced in the complaint was signed on May 11, 2018. (R p 91-92) This form indicated that CPR was to be attempted in the event the "[p]atient has no pulse and is not breathing." (R p 91) Benita said this form was obtained from a doctor's office on Roxboro Road in Durham (R p 175); however, she did not know the name of the physician who was seeing her father or who signed the form. (R p 175)

A simple review of the MOST form shows that it was not fully completed, as the name and phone number of the physician who signed the form are not printed in the space provided. The form was signed by Benita as the Health Care Power of Attorney for Mr. Wyer, even though she said her father did not execute any document making that appointment.[1] (R p 176)

In June 2018, Mr. Wyer received home health care from Liberty Home Health. (R p 177) On June 5, 2018, Liberty contacted Duke to get a hospice referral for the patient due to his poor condition. (R p 178) By that time, he had experienced a series of health problems leading to repeated hospitalizations in March, twice in April, and May. (R p 178) In June 2018, he again required admission to the hospital. (R p 178) Mr. Wyer was admitted to ARMC on June 13, 2018. At that time, a family meeting was held to discuss the plan of care. (R p 179) The admitting physician noted the patient had "a very poor prognosis long term" and requested a palliative care consult due to his overall decline. (R p 300)

The next day, on June 14, 2018, Megan Mason, NP, a palliative care nurse practitioner, went to see Mr. Wyer. (R p 279) As noted in the medical records, NP Mason conducted a complete history and examination of the patient. (*Id.*) Benita was also present, and, at her deposition, she confirmed most of the details in NP Mason's note. (R p 180-182) Based on the consultation and discussions with the patient, NP Mason entered a DNR Order for Mr. Wyer effective June 14, 2018. (R p 94) The

[1] Even if there was a Health Care Power of Attorney, it is not clear that Benita was authorized to sign the MOST form for Mr. Wyer since there is no physician statement that he was unable to make his own healthcare decisions at that time. *See infra* p 11-12.

Order was entered in the medical record on June 14, 2018, at 12:45 pm (R p 407), where it remained unchanged throughout the remainder of the hospital admission. The DNR Order was noted by other providers who also saw Mr. Wyer (R p 309, 318), and by Hospice services. (R p 313)

Mr. Wyer remained hospitalized until June 18, 2018, when, according to the medical records, there was a change in his condition. The patient's heart monitor showed asystole (R p 342), indicating that his heart had completely stopped beating. When a nurse entered the room to check on Mr. Wyer, she observed that he had no breath sounds, no heart rate, and no blood pressure. (R p 342) She also noticed that his hands were cold. (R p 342) Based on the DNR Order, CPR was not performed, and the patient was pronounced dead. No autopsy was requested or performed.

STANDARD OF REVIEW

The standard of review of the trial court's order granting summary judgment is *de novo*, *Ussery v. Branch Banking and Tr. Co.*, 368 N.C. 325, 334-35, 777 S.E.2d 272, 278 (2015), and is reviewed in the light most favorable to plaintiffs. *Parkes v. Hermann*, 376 N.C. 320, 321, 852 S.E.2d 322, 323 (2020). When a party makes a motion for summary judgment, the adverse party must respond with affidavits that "set forth specific facts showing that there is a genuine issue for trial." N.C.G.S. § 1A-1, Rule 56(e). If the adverse party does not respond with evidence of a genuine issue for trial, summary judgment is appropriate. *Id.* "If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE DOCTRINE OF *RES IPSA LOQUITUR* IS INAPPLICABLE IN THIS CASE.

A. THE DOCTRINE OF *RES IPSA LOQUITUR* DOES NOT APPLY IN THIS CASE BECAUSE THE MECHANISM OF ALLEGED INJURY IS KNOWN.

In the prior appeal from the Order granting Defendant's Rule 12(b)(6) motion in this case, this Court noted that the doctrine of *res ipsa loquitur* may apply "where 'no proof of the cause of an injury is available, the instrument involved in the injury is in the exclusive control of the defendant, and the injury is of a type that would not normally occur in the absence of negligence.'" *Est. of Wyer*, 2022-NCCOA-940 at ¶ 16 (citing *Smith v. Axelbank*, 222 N.C. App. 555, 559, 730 S.E.2d 840, 843 (2012) (marks omitted); *Robinson v. Duke Univ. Health Sys.*, 229 N.C. App. 215, 225, 747 S.E.2d 321, 329 (2013) *disc. rev. denied*, 367 N.C. 328, 755 S.E.2d 618 (2014); *see also Alston v. Granville Health Sys.*, 221 N.C. App. 416, 727 S.E.2d 877 *disc. rev. dismissed*, 366 N.C. 247, 731 S.E.2d 421 (2012)). As pertinent to the summary judgment ruling presently under review, the Court further stated:

> The relevant inquiry is how Decedent's status was changed to DNR on 14 June, contrary to the MOST form completed a month earlier. To support a claim for medical malpractice, Plaintiff must put forth evidence establishing Defendant breached the applicable medical standards of care in entering the subsequent unconsented DNR order into his file. See, e.g., N.C.G.S. § 90-21.17 (2021); see also *Tice*, 310 N.C. at 594 ("Defendant's evidence that he complied with the statutory standard does not remove the case from the jury's determination."). According to the complaint, the origin of the DNR form is unknown to Plaintiff; thus *res ipsa loquitur* permits the inference of negligence. *See Alston*, 221 N.C. App. at 419 ("Our Court has held that the *res ipsa*

> *loquitur* doctrine is only applicable where there is no direct proof of the cause of the injury available to the plaintiff."). Defendant may raise defenses to rebut the allegation of negligence or application of the *res ipsa loquitur* doctrine beyond its Rule 12(b)(6) motion.
>
> *Est. of Wyer*, 2022-NCCOA-940 at ¶19.

As noted above, Defendant challenges the application of *res ipsa loquitur* on the facts discovered regarding the status change to DNR. In *Alston*, cited above, the decedent was injured when she fell off an operating table on which she had been lying, unconscious, awaiting surgery. 221 N.C. App. at 419, 727 S.E.2d at 880. The plaintiff filed suit asserting a claim based on *res ipsa loquitor*, "alleging that it was unknown how the decedent fell and that the injury would not have occurred in the absence of negligence." *Gause v. New Hanover Reg'l Med. Ctr.*, 251 N.C. App. 413, 419-20, 795 S.E.2d 411, 416 (2016). However, it was determined through discovery that "the decedent fell because medical personnel had failed to secure her in restraints." *Id.* The Court of Appeals affirmed summary judgment dismissing the complaint since "the plaintiff could not state a claim for *res ipsa loquitor* because the cause of the decedent's fall was no longer unknown." *Id.*

Likewise in this case, the evidence developed during discovery shows "how [Mr. Wyer's] status was changed to DNR on 14 June" and thus rebuts the allegations of negligence and defeats the application of *res ipsa loquitur*. Plaintiffs-Appellants can no longer argue that "the origin of the DNR form is unknown." It is undisputed that NP Mason saw Mr. Wyer on June 14, 2018, (R p 280) and, based upon that encounter, NP Mason entered the DNR Order in the record immediately thereafter. (R p 407)

NP Mason testified that she entered the DNR Order with the express consent of the patient (R p 166), and there is no evidence to the contrary.

Plaintiffs-Appellants now refer to *Robinson v. Duke University Health Systems, Inc.* for the contention that application of *res ipsa loquitur* is not precluded in every case where the act that caused the injury is known. 229 N.C. App. 215, 47 S.E.2d 321 (2013). However, in *Robinson*, the Court of Appeals held that application of *res ipsa loquitur* was appropriate in that case because negligence could be inferred from the act that caused the plaintiff's injury, "the direct attachment of her small intestine to her vagina" during bowel surgery, since that was not likely to occur in the absence of negligence. *Id.* at 215, 47 S.E.2d at 333.

In the present case, the act which Plaintiffs-Appellants allege caused the decedent's injury was the entry of a DNR form into his medical record. This is not an act that is unlikely to occur in the absence of negligence. On the contrary, the entry of a DNR form into a patient's medical record is an act that most often occurs in the absence of negligence. Although Plaintiffs-Appellants argue that the DNR order was entered without authorization, as noted above, no credible evidence has been offered to support that contention. Thus, the facts of this case are easily distinguished from those of *Robinson* and the doctrine of *res ipsa loquitur* is inapplicable here.

B. MR. WYER CONSENTED TO THE DNR ORDER AND IT WAS APPROPRIATELY PLACED IN HIS MEDICAL RECORD.

In N.C.G.S. § 90-21.17, North Carolina provides a statutory procedure whereby a patient may decide to decline cardiopulmonary resuscitation to avoid loss of dignity and unnecessary pain and suffering. Under this statute, a physician may issue a

portable Do Not Resuscitate ("DNR") or a Medical Order for Scope of Treatment ("MOST") with the consent of the patient. N.C.G.S. § 90-21.17 (b). The statute also recognizes that a health care provider may "issu[e] a written order, other than a portable DNR order or MOST not to resuscitate a patient in the event of cardiac or respiratory arrest, or to use, withhold, or withdraw additional medical interventions as provided in the MOST, in accordance with acceptable medical practice and the facility's policies." N.C.G.S. § 90-21.17 (e).

On June 14, 2018, NP Mason met with Mr. Wyer to discuss his status and plan for care, at which time he agreed with the plan for entry of a DNR Order. (R p 280) NP Mason documented that both Mr. Wyer and his daughter, Benita, agreed to the DNR Order. (R p 280) The DNR Order signed by NP Mason (R p 299) is the type of order recognized by N.C.G.S. § 90-21.17. *See* Affidavit of Randall E. Schisler, Jr., MD ("In my opinion the DNR Order dated June 14, 2018 … was properly completed and constituted a valid order under applicable rules and ARMC policy.") (R p 96, ¶ 7)

Benita admitted that when she met with NP Mason on June 14, 2018, they discussed the DNR Order. (R p 182) However, despite the notes and records created on June 14, 2018, and her own testimony and that of NP Mason (R p 166), Benita now claims that she did not agree to the DNR Order for her father. (R p 182) It first should be noted that there is no evidence in this case to controvert the statement in NP Mason's note that *Mr. Wyer* was in agreement with the plan to enter the DNR Order. (R p 53) Thus, the DNR Order was entered with proper consent and agreement from the patient. Plaintiffs-Appellants contend that the existence of a MOST form, which

is dated May 11, 2018, is evidence that Mr. Wyer did not want a DNR in June 2018. However, the MOST form was not executed properly, and even if it had been, it is an undisputed fact that a MOST form can be changed, revoked, or overruled later by a valid DNR. (R p 212)

Additionally, any possible objection to the DNR Order by Benita is not relevant since there is no evidence that she had authority to make this decision for Mr. Wyer. Even if Benita held a Health Care Power of Attorney, which is not clear, any such power would not be effective unless the attending physicians "determine in writing that the principal lacks sufficient understanding or capacity to make or communicate decisions relating to the health care of the principal." N.C.G.S. § 32A-20(a). There is nothing in the record to show that Mr. Wyer lacked understanding or capacity to make his own healthcare decisions as of June 14, 2018, and there is certainly no determination "in writing" by his attending physicians to that effect. In fact, Plaintiffs-Appellants acknowledge that Mr. Wyer was "cognitively competent" at the time of his admission to ARMC on June 13, 2018. (Appellants' Br., p. 11) Thus, any Health Care Power of Attorney naming Benita would not be effective as of the time the patient agreed to the DNR Order as entered on June 14, 2018. Plaintiffs-Appellants have offered no evidence to support the contention that Mr. Wyer did not consent to entry of the DNR Order. On the contrary, the contemporaneously prepared medical records and the testimony of NP Mason establish that Mr. Wyer did agree to the DNR Order. Thus, Plaintiffs-Appellants' assertion that an "unauthorized DNR order" was entered into Mr. Wyer's medical record is not supported by the evidence.

For summary judgment purposes, an issue is "material" if the facts alleged would constitute or irrevocably establish any material element of a claim or defense. *Bernick v. Jurden*, 306 N.C. 435, 440, 293 S.E. 2d 405, 409 (1982) (internal citation omitted). An issue is "genuine" if it may be maintained by substantial evidence. *Id.* Benita's alleged disapproval of the DNR Order does not create a "genuine issue of material fact" for the jury, because, as noted above, it is an undisputed fact in this case that Mr. Wyer was competent to make his own healthcare decisions. Therefore, the fact that Benita states that she did not consent to entry of the DNR Order is immaterial, as it was Mr. Wyer's decision to make.

II. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BECAUSE PLAINTIFFS OFFERED NO EXPERT EVIDENCE TO SUPPORT THEIR CLAIMS OF NEGLIGENCE.

A. PLAINTIFFS OFFERED NO EXPERT EVIDENCE THAT DEFENDANT ARMC BREACHED THE APPLICABLE STANDARD OF CARE.

"In a medical malpractice action, a plaintiff has the burden of showing (1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff." *Purvis v. Moses Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 477, 624 S.E.2d 380, 383 (2006) (internal quotation marks and citation omitted). Indeed, the Court of Appeals previously noted in this case that "Plaintiff must put forth evidence establishing Defendant breached the applicable medical standards of care in entering the subsequent unconsented DNR order into

his file" in order to prove the claim of medical malpractice. *Est. of Wyer*, 2022-NCCOA-940 at ¶19. As noted below, Plaintiffs failed to make such a showing. Review of the discovery and evidence in this case shows that Plaintiffs-Appellants cannot establish the elements of a viable malpractice claim. Accordingly, the trial court was correct in granting summary judgment for Defendant ARMC.

Plaintiffs designated one expert witness in this case: Latoya Lowery, RN. Ms. Lowery said she was contacted by Plaintiffs to explain the difference between a DNR and a MOST form. (R p 206) As a nurse, Ms. Lowery conceded that she was not qualified to opine on the standard of care applicable to Nurse Practitioner Mason, who entered the DNR Order in this case. (R p 208) Ms. Lowery acknowledged she was not expressing opinions about care by the physician or the nurse practitioner because those were beyond the scope of her knowledge and practice as a nurse. (R p 208) She further stated that she identified no violations of care by any nurse (R p 207-208), and that she did not contend ARMC as a facility or institution did anything inappropriate in Mr. Wyer's care. (R p 208) Although she mentioned generally that a healthcare facility should follow its own policy when there is a MOST form and a DNR Order (R p 208), as of her deposition, she did not even know what the ARMC policy stated or if there were any possible violations of that policy in Mr. Wyer's case. (R p 209) Thus, Plaintiffs-Appellants are unable to show that ARMC or any providers involved in the care of Mr. Wyer in June 2018 violated applicable standards of practice. Summary judgment is appropriate when a plaintiff fails to establish an

essential element of the negligence claim. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342.

Further, Plaintiffs' own expert disproved the assertion of negligence in their Complaint. Plaintiffs alleged that Defendant ARMC was negligent by "Improperly direct[ing] a Do Not Resuscitate be carried out for Plaintiff without adequate signed paperwork" directing such performance. (R p 11) However, Ms. Lowery stated the DNR Order entered by NP Mason was properly completed (R p 212), and she had no information that there was anything improper about the DNR Order. (R p 215) She also noted that, unlike the MOST form which must be signed by the patient or an authorized representative, a DNR Order does not have to be signed by a patient or family member to be valid. (R p 212)

As Plaintiffs-Appellants correctly note, the key question in this case is whether ARMC, through NP Mason, breached the standard of care and "negligently overrode the patient's and his agent's express wishes." (Appellants' Br., p. 11-12) However, in a medical malpractice action, the plaintiff must demonstrate that the treatment administered by the defendant provider was in negligent violation of the accepted standard of medical care through the testimony of a qualified expert. *Tripp v. Pate*, 49 N.C. App. 329, 332, 271 S.E.2d 407, 409 (1980); *Assaad v. Thomas*, 87 N.C. App. 276, 360 S.E.2d 503 (1987). As detailed above, Plaintiffs' sole expert witness did not testify that Defendant breached the standard of care.

In contrast to Plaintiffs' failure to present expert testimony in support of the claims they asserted, Defendant ARMC submitted the affidavit of Dr. Randall

Schisler, an expert in palliative medicine, to rebut any possible claims of negligence. In his affidavit, Dr. Schisler stated that he is familiar with the standard of care for providers at ARMC, who treated Mr. Wyer. (R p 96, ¶ 3) He expressed the opinion that Defendant, including NP Mason, complied with the applicable standards, used best judgment, and exercised reasonable care in treating Mr. Wyer in June 2018. (R p 96, ¶ 4) He further stated that:

- The MOST form was not properly completed for several reasons and thus was not valid. (R p 96, ¶ 5)
- A MOST form could be modified, revoked, or superseded by a later DNR Order. (R p 96, ¶ 6)
- The DNR Order written by NP Mason was properly completed and constituted a valid order. (R p 96, ¶ 7)

Dr. Schisler felt that the ARMC staff acted properly in the decision to follow the DNR Order and not to attempt CPR or resuscitation of this patient. (R p 96, ¶ 8)

Because Defendant ARMC submitted the affidavit of Dr. Schisler in support of its summary judgment argument that no negligence occurred in the care of Mr. Wyer, Plaintiffs were "required to come forward with a forecast of evidence showing the existence of a genuine issue of material fact" with respect to Defendant's argument pursuant to Rule 56(e). *Rorrer v. Cooke*, 313 N.C. 338, 350, 329 S.E.2d 355, 363 (1985); N.C.G.S. § 1A-1, Rule 56(e). Plaintiffs were required to forecast such evidence through sworn affidavits of their own. *Rorrer*, 313 N.C. at 360, S.E.2d at 369. Plaintiffs submitted one affidavit in response to Defendant's Motion for Summary Judgment: an "Affidavit of Disputed Facts" executed by Benita Wyer. (R p 195) However this affidavit fails to "forecast any evidence" that Defendant breached the

standard of care. *Rorrer*, 313 N.C. at 357, S.E.2d at 367. Furthermore, Benita's affidavit is legally insufficient to create a genuine issue of material fact on the standard of care because she is not a qualified medical expert. *Tripp*, 49 N.C. App. at 332, 271 S.E.2d at 409. Thus, Plaintiffs did not come forward with any competent expert evidence to support their claim that Defendant ARMC was negligent and thus summary judgment was properly entered against them. *Rorrer*, N.C. at 359, S.E.2d at 368.

B. PLAINTIFFS OFFERED NO EVIDENCE OF CAUSATION.

Plaintiffs also failed to offer any evidence showing that a possible error or omission by Defendant caused Mr. Wyer's death. Even if the doctrine of *res ipsa loquitur* applies, in order to successfully make a medical malpractice claim a plaintiff must be able to show, without the assistance of expert medical testimony, that the injury complained of was due to a negligent act by the defendant(s) and that the injury would not have occurred in the absence of that negligent act. *Wright v. WakeMed*, 238 N.C. App. 603, 607, 767 S.E.2d 408, 411 (2014). In *Wright*, the plaintiff claimed injury after she ingested the wrong combination of medications due to an alleged error by the defendant hospital on plaintiff's "Admission Medication Orders" during transfer from the hospital's surgical unit to the rehab unit. *Id.* at 604, 767 S.E.2d at 410. Plaintiff filed a complaint seeking recovery of damages for personal injury and alleging that she was entitled to prevail on a *res ipsa loquitur* theory. *Id.* The Court of Appeals held that the plaintiff's claim failed under the doctrine of *res ipsa loquitur* because she could not demonstrate without expert testimony that the

injury she claimed was the result of the specific negligent act she alleged. *Id.* at 609, 767 S.E.2d at 413. Specifically, the Court held that "although the inaccurate copying of a medication list might be understood as a negligent act" without expert testimony, the plaintiff was also required to prove that the inaccurate copying of the medication list and her ingestion of the wrong combination of medications caused her injury, which she could not do without the assistance of expert testimony. *Id.*

Similarly, here, even if the Court were to determine that the placement of an unauthorized DNR order in a patient's medical record "might be understood as a negligent act", in order to proceed a on a theory of *res ipsa loquitur*, plaintiffs must also be able to show that the injury would not have occurred in the absence of that negligent act without the assistance of expert testimony, which they cannot do. Plaintiffs would need expert testimony to make a showing that, if the DNR Order were not in his record and if CPR had been performed, more likely than not, to a reasonable degree of medical certainty, the patient would have been revived and would have survived. Because plaintiffs offered no such expert testimony, their claim for negligence based on the doctrine of *res ipsa loquitur* fails even if it applies. *Id. See also Smith v. Axelbank*, 222 N.C. App. at 560, 730 S.E.2d at 843 (holding that plaintiff did not "sufficiently allege facts establishing negligence under the doctrine of *res ipsa loquitur*" because expert testimony was required for the jury to determine whether her injury was caused by the medication prescribed by the defendant physician.); and *Gibson v. Ussery*, 196 N.C. App. 140, 143, 675 S.E.2d 666, 668 (2009) (holding that "a valid negligence-based claim for the recovery of damages …also requires proof that

the negligent act on which the plaintiff's claim rests resulted in the injury for which the plaintiff seeks redress.")

Testimony from a qualified and competent expert "is required to establish proximate causation of the injury in medical malpractice actions." *Cousart v. Charlotte-Mecklenburg Hosp. Authority*, 209 N.C. App. 299, 303, 704 S.E.2d 540, 543 (2011). "Plaintiffs must be able to make a prima facie case of medical negligence at trial, which includes articulating proximate cause with specific facts couched in terms of probabilities." *Id.* at 303-04, 704 S.E.2d at 543. Further, "[t]he connection or causation between the negligence and [the injury] must be probable, not merely a remote possibility." *White v. Hunsinger*, 88 N.C. App. 382, 387, 363 S.E.2d 203, 206 (1988). It is not enough for a plaintiff to show that the patient's chances of survival would have improved without the alleged deviation in care. Rather, the plaintiff must prove it is probable that a different outcome would have occurred if the proper treatment had been rendered. *Katy v. Capriola*, 226 N.C. App. 470, 479, 742 S.E.2d 247, 254 (2013). In the absence of such evidence, summary judgment should be granted for the defendant. *See Cousart*, 209 N.C. App. at 309-10, 704 S.E.2d at 547 (summary judgment for the defendant affirmed where "no proximate cause evidence submitted by [the plaintiff] was sufficiently reliable to be considered competent").

In *Hawkins v. Emergency Med. Physicians of Craven Cnty., PLLC*, 240 N.C. App. 337, 346, 770 S.E.2d 159, 165 (2015), the plaintiff claimed that administration of the medication Lovenox was a cause of the decedent's death. However, the Court of Appeals found that none of plaintiff's experts opined that Lovenox was "a

reasonably probable cause" of the decedent's death. The Court held that the plaintiff "failed to show that she presented a genuine issue of material fact on the issue of causation" and thus summary judgment in favor of the defendants was proper. *Id.* at 348, 770 S.E.2d at 166.

In the present case, Plaintiffs' sole expert witness, Ms. Lowery, testified that she had no opinion as to why Mr. Wyer died. (R p 213) Even though she had no opinion as to why his heart stopped, she said she did not contend that any improper care led to his arrest or events leading to a need for resuscitation. (R p 213-214) She also did not contend that the nurses or staff should have ignored the DNR Order. (R p 213-214) Thus, Plaintiffs' expert did not attempt to offer any opinion that would establish that Mr. Wyer's death was caused by or resulted from improper care by Defendant (though she did not even identify anything improper about the care provided to the patient). Thus, Plaintiffs-Appellants have offered no causation evidence to show that negligence by ARMC caused any injury. Additionally, Ms. Lowery testified that she did not know if Mr. Wyer could have been resuscitated or if he would have survived if CPR had been performed. (R p 214) *See White v. Hunsinger*, 88 N.C. App. at 387, 363 S.E.2d at 206 (causation "must be probable, not merely a remote possibility"). Again, based on the evidence in the record, Plaintiffs-Appellants are unable to establish the essential element of causation and therefore summary judgment was properly granted. *Hawkins*, 240 N.C. App. at 348, 770 S.E.2d at 166.

While Plaintiffs offered no causation evidence, Defendant ARMC submitted opinions from its experts on the causation issue. Dr. Harper is a cardiologist who expressed the opinion that CPR would not have revived or resuscitated Mr. Wyer even if it had been attempted on June 18, 2018. (R p 104, ¶ 5) He said it is unlikely that Mr. Wyer would have survived his arrest. (R p 104, ¶ 5) Similarly, Dr. Schisler, an internist and palliative care expert, said in his opinion, to a reasonable degree of medical certainty, based upon peer-reviewed studies published in the medical literature regarding survival after CPR, that Mr. Wyer probably would not have been resuscitated and that he probably would not have survived to be discharged from that hospital admission. (R p 97, ¶ 9) This evidence is unrefuted.

Defendant ARMC offered two affidavits in support of its summary judgment argument on causation. Thus, as with the standard of care, Plaintiffs were required to present evidence in the form of affidavits to forecast a genuine issue of material fact with respect to causation. *Rorrer*, 313 N.C. at 360, 329 S.E.2d at 369. Benita's "Affidavit of Disputed Facts" is completely silent on the issue of causation. Even if it spoke to causation, Benita's affidavit is legally insufficient to create a genuine issue of material fact on causation because she is not a qualified medical expert. *McGill v. French*, 333 N.C. 209, 217, 424 S.E.2d 108, 113 (1993). Plaintiffs did not come forward with any competent expert evidence to support their claim that any negligence by Defendant ARMC was a proximate cause of Mr. Wyer's injury, and thus summary judgment was properly entered against them. *Rorrer*, N.C. at 359, S.E.2d at 368.

Plaintiffs-Appellants argue that ARMC caused an "evidentiary gap" and thus there is no way to determine whether CPR might have succeeded. (Appellants' Br., p. 13). This argument misconstrues the standard. It is the plaintiff's burden to prove it is *probable* that a different outcome would have occurred if the proper treatment had been rendered. *Katy*, 226 N.C. App. at 479, 742 S.E.2d at 254 (emphasis added). Moreover, "The general rule in medical malpractice cases is that the plaintiff must establish proof of a causal connection between the negligence of the physician and the injury complained of by the testimony of medical experts." *McGill*, 333 N.C. at 217, 424 S.E.2d at 113; *see also Young v. Hickory Business Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000) ("[O]nly an expert can give competent opinion evidence as to the cause of the injury" in medical malpractice cases).

Mr. Wyer had asystole and no breath sounds, heart rate, or blood pressure when he was found. (R p 342) Plaintiffs have the burden of proving that if CPR had been attempted, Mr. Wyer would have, more likely than not and to a reasonable degree of medical certainty, been revived and survived. *Katy*, N.C. App. at 479, S.E.2d at 254. Whether CPR would be likely to revive a patient who had asystole is not something a jury can determine without the assistance of expert testimony. *Tripp*, 49 N.C. App at 336-337; 271 S.E.2d at 412. Plaintiffs in this case offered no evidence, from an expert or otherwise, to suggest that CPR might have worked had it been attempted. Thus, Plaintiffs failed to present a genuine issue of material fact on the issue of causation and summary judgment in favor of Defendant ARMC was

appropriate. *Hawkins*, 240 N.C. App. at 348, 770 S.E.2d at 166; *Purvis*, 175 N.C. App. at 477, 624 S.E.2d at 383; *Cousart*, 209 N.C. App. at 303-04, 704 S.E.2d at 543.

CONCLUSION

For the foregoing reasons, Defendant-Appellee respectfully requests that this Court affirm the trial court's order granting Defendant ARMC's Motion for Summary Judgment and dismissing the claims of Plaintiffs-Appellants with prejudice.

This the 6th day of October, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rulle 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Defendants-Appellees certifies that the foregoing brief, which was prepared using a 12-point proportionally spaced font with serifs, is less than 8,750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificate of service, this certificate of compliance, and appendixes) as reported by the word-processing software.

/s/ J. Dennis Bailey
J. DENNIS BAILEY

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2025, a copy of the foregoing Motion for Extension of Time was filed electronically with the Court of Appeals pursuant to Rule 26(a) of the North Carolina Rules of Appellate Procedure and has been served electronically upon all counsel as follows:

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