

No. COA25-693

No. _____

17th District

NORTH CAROLINA COURT OF APPEALS

ESTATE OF HENRY WYER, by and)
Through the Administrators of the Estate)
Of BENITA WYER and LAMONT WYER,)

Plaintiff,)

v.)

From Alamance County

No. 20 CVS 2215

ALAMANCE REGIONAL MEDICAL)
CENTER, INC. d/b/a CONE HEALTH)
ALAMANCE REGIONAL MEDICAL)
CENTER,)

Defendants.)

RECORD ON APPEAL

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STATEMENT OF ORGANIZATION OF TRIAL COURT

Pursuant to Rule 9(b) of the North Carolina Rules of Appellate procedure, the Plaintiffs: The Estate of Henry Wyer, Benita Wyer, and Lamont Wyer, are appealing a judgment granting the Defendant's Motion for Summary Judgment rendered during the January 27, 2025 session of the Alamance County Superior Court Division, by the Honorable R. Stuart Albright. Plaintiff filed and served written notice of appeal on February 11, 2025. The Order granting summary judgment was filed on January 30, 2025.

The record on appeal was filed in the Court of Appeals on July 10, 2025 and docketed on _____ 2025.

STATEMENT OF JURISDICTION

This action was commenced by the filing of a complaint and issuance of summons on December 17, 2020. The parties acknowledge that the trial court had personal and subject-matter jurisdiction.

STATE OF NORTH CAROLINA



20 CVS 2215

ALAMANCE

County

In The General Court Of Justice
☐ District ☒ Superior Court Division

Name Of Plaintiff

Estate of Henry Wyer C/O Kya J Johnson

Address

701 E Market Street

City, State, Zip

Greensboro, NC 27401

VERSUS

Name Of Defendant(s)

Alamance Regional Medical Center d/b/a Cone Health Alamance
Regional Medical Center

Date Original Summons Issued

Date(s) Subsequent Summons(es) Issued

CIVIL SUMMONS

☐ ALIAS AND PLURIES SUMMONS (ASSESS FEE)

G.S. 1A-1, Rules 3 and 4

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1

Alamance Regional Medical Center d/b/a Cone Health Alamance
Regional Medical Center by serving Registered Agent Cheryl Koob
1200 N Elm Street
Greensboro, NC 27401

Name And Address Of Defendant 2



IMPORTANT! You have been sued! These papers are legal documents, DO NOT throw these papers out!
 You have to respond within 30 days. You may want to talk with a lawyer about your case as soon as possible, and, if needed, speak with someone who reads English and can translate these papers!

¡IMPORTANTE! ¡Se ha enablado un proceso civil en su contra! Estos papeles son documentos legales.
¡NO TIRE estos papeles!

Tiene que contestar a más tardar en 30 días. ¡Puede querer consultar con un abogado lo antes posible acerca de su caso y, de ser necesario, hablar con algulen que lea inglés y que pueda traducir estos documentos!

A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and
2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (if none, Address Of Plaintiff)

Kya J Johnson

Kenneth M. Johnson, P.A.

701 E Market Street

Greensboro, NC 27401

336

272-8273

Date Issued

12-17-20

Time

10:50

☒ AM ☐ PM

Signature

Kathy Calver

☒ Deputy CSC☐ Assistant CSC☐ Clerk Of Superior Court☐ ENDORSEMENT (ASSESS FEE)

This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.

Date Of Endorsement

Time

☐ AM ☐ PM

Signature

☐ Deputy CSC☐ Assistant CSC☐ Clerk Of Superior Court

NOTE TO PARTIES: Many counties have **MANDATORY ARBITRATION** programs in which most cases where the amount in controversy is \$25,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and, if so, what procedure is to be followed.

(Over)

NORTH CAROLINA

ALAMANCE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 2215

FILED
2021 MAR -2 AM 11:43
ALAMANCE COUNTY C.S.C.

Estate of Henry Wyer by and)
Through Administrators of The)
Estate, Benita Wyer and Lamont)
Wyer,)

Plaintiff,)

vs.)

) AFFIDAVIT OF SERVICE OF PROCESS

Alamance Regional Medical Center)
d/b/a Cone Health Alamance)
Regional Medical Center)
Defendants.)

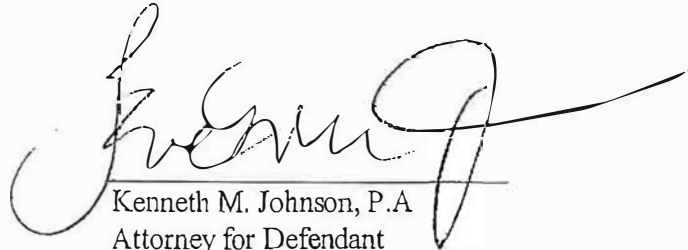
The undersigned certifies that:

(1) A copy of the Summons and Complaint was deposited in the United States Post Office for mailing by certified mail, return receipt requested.

(2) It was mailed to the defendant, Alamance Regional Medical Center d/b/a Cone Health Alamance Regional Medical Center by serving Registered Agent, Cheryl Koob at 1200 N Elm Street, Greensboro, North Carolina 27401.

(3) Process was in fact received on the 29th day of December 2020 as evidence by the US Postal Service return receipt from the USPS.

This the 26th day of February 2021.



Kenneth M. Johnson, P.A
Attorney for Defendant
P. O. Box 21247
Greensboro, NC 27420
(336) 272-8273

NORTH CAROLINA
GUILFORD COUNTY

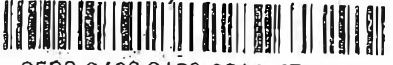
Sworn and subscribed before
me this the 26th day of February 2021.

April Y Miller
Notary Public

April Y Miller
Printed Name
My Commission Expires 7-6-24

APRIL Y. MILLER
NOTARY PUBLIC
Guilford County
North Carolina
My Commission Expires 7-6-24

APRIL Y. MILLER
NOTARY PUBLIC
Guilford County
North Carolina
My Commission Expires

SENDER - COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
☒ Complete Items 1, 2, and 3. ☒ Print your name and address on the reverse so that we can return the card to you. ☒ Attach this card to the back of the mailpiece, or on the front if space permits. 1. Article Addressed to: <u>Alamance Regional Medical Center</u> <u>Wake Cone Health Alamance</u> <u>Regional Medical Center by seeing</u> <u>Agent Cheryl Koob</u> <u>1200 N. Elm Street</u> <u>Greensboro, NC 27401</u>  9590 9402 6132 0209 7767 66 2. Article Number (Transfer from service label) <u>7020 2450 0001 7290 5430</u>		A. Signature ☒ <u>[Signature]</u> ☐ Agent ☐ Addressee B. Received by (Printed Name) <u>Bonnie S</u> C. Date of Delivery <u>DEC 20 2020</u> D. Is delivery address different from Item 1? ☐ Yes If YES, enter delivery address below: ☐ No	
3. Service Type ☒ Adult Signature ☐ Adult Signature Restricted Delivery ☒ Certified Mail® ☐ Certified Mail Restricted Delivery ☐ Collect on Delivery ☐ Collect on Delivery Restricted Delivery ☐ Insured Mail ☐ Insured Mail Restricted Delivery (over \$500)		☐ Priority Mail Express® ☐ Registered Mail™ ☐ Registered Mail Restricted Delivery ☒ Return Receipt for Merchandise ☐ Signature Confirmation™ ☐ Signature Confirmation Restricted Delivery	

PS Form 3811, July 2015 PSN 7530-02-000-9053

Domestic Return Receipt

[FAQs >](#)[Track Another Package +](#)**Tracking Number:** 70202450000172905880[Remove X](#)

Your item was picked up at a postal facility at 8:22 am on December 29, 2020 in GREENSBORO, NC 27401.

Delivered

December 29, 2020 at 8:22 am
Delivered, Individual Picked Up at Postal Facility
GREENSBORO, NC 27401

[Feedback](#)

Text & Email Updates



Tracking History



December 29, 2020, 8:22 am

Delivered, Individual Picked Up at Postal Facility
GREENSBORO, NC 27401

Your item was picked up at a postal facility at 8:22 am on December 29, 2020 in GREENSBORO, NC 27401.

December 28, 2020, 8:32 am

Available for Pickup
GREENSBORO, NC 27401

December 28, 2020, 8:29 am

Arrived at Post Office

GREENSBORO, NC 27401

December 27, 2020

In Transit to Next Facility

December 24, 2020, 9:57 pm

Departed USPS Regional Facility

GREENSBORO NC DISTRIBUTION CENTER

December 23, 2020, 10:33 pm

Arrived at USPS Regional Facility

GREENSBORO NC DISTRIBUTION CENTER

Product Information

See Less ^

Feedback

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Go to our FAQs section to find answers to your tracking questions.

FAQs

PLEADINGS

ALAMANCE COUNTY
NORTH CAROLINA

FILED IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

2020 DEC 17 A 10:49 20-CVS-2215

ESTATE OF HENRY WYER, ALAMANCE CO., C.S.C.

By and through the Administrators of
The Estate, BENITA WYER and

LAMONT WYER,

Plaintiffs,

vs

ALAMANCE REGIONAL MEDICAL
CENTER, INC. d/b/a CONE HEALTH
ALAMANCE REGIONAL MEDICAL
CENTER,

Defendants.

COMPLAINT

NOW COMES, the Plaintiff, by his attorneys, The Law Offices of Kenneth M. Johnson,
and complaining of the Defendants, states as follows:

1. Henry Wyer, plaintiff's intestate late of Alamance County, North Carolina, died on June 18, 2018.
2. The plaintiff, Benita Wyer, is the daughter of Henry Wyer, and was duly appointed administrator by the Clerk of Superior Court of Alamance County, North Carolina, has qualified and is acting as such administrator in the institution of this action which action is instituted within two years from the death of the plaintiff's intestate.
3. The plaintiff, Lamont Wyer, is the son of Henry Wyer, and was duly appointed administrator by the Clerk of Superior Court of Alamance County, North Carolina, has qualified and is acting as such administrator in the institution of this action which action is instituted within two years from the death of the plaintiff's intestate.

4. Defendant Alamance Regional Medical Center, Incorporated is a corporation under the laws of the State of North Carolina, is doing business in North Carolina with its principal place of business in Alamance County, North Carolina. Defendant's registered agent is Cheryl Koob, whose address is 1200 N. Elm Street, Greensboro, NC 27401.
5. On or about June 18, 2018, plaintiff was lawfully on said premises as a patient.
6. On or about May 11, 2018, plaintiffs discussed a "Do Not Resuscitate" or "Full Code" prior to the plaintiff's performed surgery at defendant's facility. A "Medical Orders" form was signed and notarized indicating "Full Code/Perform CPR" by plaintiffs.
7. On or about June 14, 2018 another discussion was had between plaintiffs and staff at defendant's facility regarding a "Do Not Resuscitate" or "Full Code/CPR" prior to the plaintiff's readmission. There was not another "Medical Orders" form signed by plaintiff.
8. On or about June 18, 2018, defendant Alamance Regional Medical Center, individually and/or by and through its agents, servants and/or employees maintained the aforementioned paperwork and had a duty to perform as signed and requested in the paperwork, including proceeding with a "Full Code" should circumstances require it, if that was requested as signed by include the plaintiff herein.

COUNT I: NEGLIGENCE

9. At all relevant times, defendant was a fully accredited medical care facility under the laws and the regulations of the State of North Carolina. It represented to the general public and to Plaintiff that it owned and operated a medical care facility with a

professional staff, medical personnel and equipment to render skilled and adequate service.

10. At the aforesaid time and place, the defendant, as the maintainer of the aforementioned paperwork, either individually or by and through its agents, servants and/or employees acted with less than reasonable care and was then and there guilty of one or more of the following careless and negligent acts or omissions:

- a. Improperly directed a Do Not Resuscitate be carried out for Plaintiff without adequate signed paperwork directing such performance be done.
- b. Was otherwise careless and negligent in the carrying out of erroneous instructions.

11. As a direct and proximate result of the aforementioned negligence and conduct of the defendant, the plaintiff did not receive the requested care and treatment which resulted in his death. But for these negligent acts, the plaintiff Henry Wyer would have lived.

12. As a direct and proximate result of the aforesaid careless and negligent acts, the Plaintiffs Benita Wyer and Lamont Wyer, then and there suffered great pain and anguish, both in mind and body and will in the future continue to suffer. The Plaintiff Henry Wyer suffered death and became liable for large sums of money for medical care and services.

COUNT II: BREACH OF CONTRACT

13. The allegations set forth in paragraphs 1 through 12 are realleged and incorporated by reference as if fully set forth.

14. Plaintiffs Henry Wyer, and Benita Wyer, and defendant entered into a contract on or about May 11, 2018. This was a signed written agreement. The agreement was that should the plaintiff Henry Wyer require resuscitation that defendants were to perform CPR. The defendant failed to comply with the written agreement when plaintiff Henry Wyer did require resuscitation on or about June 18, 2018 and defendant did not resuscitate.

15. Plaintiff Henry Wyer died on June 18, 2018.

WHEREFORE, Plaintiff demands:

1. Trial by jury,
2. Judgment against the defendants, jointly and severally, for damages in an amount in excess of \$10,000, with interest as allowed by law,
3. Costs, and
4. Such other and further relief which the Court may deem just and proper.

This the 17th day of December, 2020.


Kya Johnson, Esq.
Attorney for Plaintiff
NC State Bar#: 33444

OF COUNSEL:

Kenneth M. Johnson, P.A.
701 East Market Street
PO Box 21247
Greensboro, NC 27420
(336) 272-8273 Office
(336) 285-8579 Facsimile

THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

2021 MAR -4 PM 2: 52 20 CVS 2215

ALABAMA COUNTY, C.S.C.

Plaintiff,

V.

Defendants.

**MOTION TO DISMISS AND
ANSWER OF ALAMANCE
REGIONAL MEDICAL CENTER, INC.**

MOTION TO DISMISS AND FIRST DEFENSE

SECOND DEFENSE

4. Denied, except it is admitted that Alamance Regional Medical Center, Inc. is an entity organized and existing under the laws of the State of North Carolina, with its principal place of business in Alamance County, North Carolina.

5. Denied, except it is admitted that on or about June 18, 2018, Henry Wyer was a patient at Alamance Regional Medical Center.

6. Denied for lack of information and belief.

7. Denied, except it is admitted that on or about June 14, 2018, a Do Not Resuscitate Order was signed and entered in the medical record of Henry Wyer at Alamance Regional Medical Center.

8. Denied, except it is admitted that as of June 18, 2018, the medical record of Henry Wyer at Alamance Regional Medical Center contained a Do Not Resuscitate Order effective June 14, 2018.

COUNT I – NEGLIGENCE

9. Denied, except it is admitted that Alamance Regional Medical Center was a fully accredited hospital under the laws and regulations of the State of North Carolina as of 2018.

10. Denied, including each and every subparagraph thereof.

11. Denied.

12. Denied.

COUNT II – BREACH OF CONTACT

13. The defendant Alamance Regional Medical Center, Inc. hereby incorporates by reference its responses to the allegations contained in Paragraphs 1 through 12 of plaintiff's Complaint.

14. Denied, except it is admitted that on or about June 14, 2018, a Do Not Resuscitate Order was signed and entered in the medical record of Henry Wyer at Alamance Regional Medical Center.

15. Admitted.

THIRD DEFENSE

The healthcare services provided to Henry Wyer by defendant conformed in all respects to the applicable standards of care and this defendant was in no way negligent as alleged in the Complaint. Further, the care provided to Henry Wyer was based upon the exercise of best judgment and upon the use of reasonable care and diligence in the application of skill and knowledge by the defendant.

FOURTH DEFENSE

The medical record of Henry Wyer from Alamance Regional Medical Center contains a Do Not Resuscitate Order which was signed by his attending healthcare provider and was entered into the patient's medical record on or about June 14, 2018 ("DNR Order"). According to the terms of the DNR Order, there was no expiration date for the order. The medical record of Mr. Wyer does not contain any subsequent or further order rescinding the DNR Order, which order remained in full force and effect on June 18, 2018. The care provided to Mr. Wyer after entry of the DNR Order was consistent with that order.

FIFTH DEFENSE

Pursuant to N.C.G.S. § 90-21.17(d), the defendant is not subject to civil liability for acting in good faith reliance on the DNR Order.

SIXTH DEFENSE

To the extent the Complaint purports to state claims by Benita Wyer individually, the defendant Alamance Regional Medical Center, Inc. hereby moves to dismiss any claims alleged by Benita Wyer individually since she was not a patient at Alamance Regional Medical Center, Inc. at the times alleged in the Complaint and since Benita Wyer had no contract with defendant. Further, the medical records of Henry Wyer reflect that Benita Wyer agreed with the DNR Order entered on June 14, 2018, regarding the medical care or treatment to be provided to Henry Wyer thereafter.

WHEREFORE, the defendant Alamance Regional Medical Center, Inc. prays for relief as follows:

1. That plaintiff have and recover nothing of this defendant;
2. That all costs be taxed to plaintiff;
3. For trial by jury on all issues of fact contained herein; and
4. For such other and further relief as the court may deem just and proper.

This the 15 day of March, 2021.



J. DENNIS BAILEY

Attorney for Defendant

Alamance Regional Medical Center, Inc.

OF COUNSEL:

WALDREP WALL BABCOCK & BAILEY PLLC

1076 W. Fourth Street

Winston-Salem, NC 27101

Phone: 336/722-6300

Fax: 336/722-1993

CERTIFICATE OF SERVICE

This to certify that the undersigned has this date served this pleading in the above-entitled action upon all other parties to this cause by:

- () Hand-delivering a copy hereof to the attorney(s); or
- (✓) Depositing a copy hereof in a first class postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Post Office, properly addressed to the attorney(s) for said parties.

This the 15 day of March, 2021.


J. DENNIS BAILEY

ADDRESSEE(S):

Ms. Kya Johnson
Kenneth M. Johnson, P.A.
Post Office Box 21247
Greensboro, NC 27420-1247

IN THE GENERAL COURT OF JUSTICE

2021 SEP -2 P 12:50

OR COURT DIVISION
20 CVS 2215

1) B.P

[illegible]

ORDER

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THIS MATTER CAME ON FOR HEARING BEFORE THE UNDERSIGNED during the August 30, 2021, Civil Session of Alamance County Superior Court upon defendant Alamance Regional Medical Center, Inc. d/b/a Cone Health Alamance Regional Medical Center's Motion to Dismiss plaintiff's complaint; and it appearing to the Court, after reviewing the court file and hearing arguments of counsel, that good cause exists to grant defendant's motion. The Court notes that at the hearing plaintiff's counsel tendered copies of certain exhibits (Exhibit A: MOST Order and Exhibit B: DNR Order which have been placed in the court file) as referenced in the complaint for review by the Court, which exhibits were reviewed under the standards applicable to the motion to dismiss, without converting the motion to summary judgment under Rule 56.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that defendant Alamance Regional Medical Center, Inc. d/b/a Cone Health Alamance Regional Medical Center's Motion to Dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to comply with Rule 9(j) be, and the same hereby is, GRANTED. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff's complaint is dismissed with prejudice.

This the 2nd day of September, 2021.



KEVIN M. BRIDGES
SUPERIOR COURT JUDGE

NORTH CAROLINA
ALAMANCE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 2215

ESTATE OF HENRY WYER, by and
through the Administrators of The Estate
of BENITA WYER and LAMONT WYER,

Plaintiff,

v.

ALAMANCE REGIONAL MEDICAL
CENTER, INC. d/b/a CONE HEALTH
ALAMANCE REGIONAL MEDICAL
CENTER

Defendants.

**RULE 58
CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this date served a file-stamped copy of the attached Order filed on September 2, 2021, in the above-entitled action upon all other parties to this cause by:

- () By emailing a copy hereof to the email address below; and/or
- (X) Depositing a copy hereof in a first-class postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Post Office, properly addressed to the parties listed below.



J. DENNIS BAILEY
Attorney for Defendant
WALDREP WALL BABCOCK & BAILEY PLLC
370 Knollwood Street, Suite 600
Winston-Salem, NC 27103
Phone: 336/722-6300

ADDRESSEE:

Ms. Kya Johnson
Kenneth M. Johnson, P.A.
Post Office Box 21247
Greensboro, NC 27420-1247

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-940

No. COA22-320

Filed 29 December 2022

Alamance County, No. 20 CVS 2215

ESTATE OF HENRY WYER, by and through the Administrators of the Estate,
BENITA WYER and LAMONT WYER, Plaintiffs,

v.

ALAMANCE REGIONAL MEDICAL CENTER, INC. d/b/a CONE HEALTH
ALAMANCE REGIONAL MEDICAL CENTER, Defendants.

Appeal by Plaintiffs from order entered 2 September 2021 by Judge Kevin M.
Bridges in Alamance County Superior Court. Heard in the Court of Appeals 6
September 2022.

Kenneth M. Johnson, Attorney, P.A., by Kya Johnson, for plaintiffs-appellants.

Waldrep Wall Babcock & Bailey PLLC, by J. Dennis Bailey, for defendant-appellee.

MURPHY, Judge.

¶ 1 A complaint that alleges a decedent previously executed a form requiring resuscitation efforts but died after the medical provider unilaterally entered and subsequently followed an unauthorized Do Not Resuscitate Order alleges facts establishing negligence under the common law doctrine of res ipsa loquitur. On these

alleged facts, a medical malpractice action was not subject to the heightened pleading requirement of expert certification under Rule 9(j) of the Rules of Civil Procedure, and the trial court improperly dismissed the action for failure to include that certification. However, the trial court did not err in dismissing a second claim for breach of contract based on the same facts where that claim was, in effect, a medical malpractice action.

BACKGROUND

¶ 2 The Record on Appeal in this case does not disclose much. What is alleged is that on 11 May 2018, Decedent Henry Wyer, along with his daughter and co-administrator of his estate, Plaintiff Benita Wyer,¹ met with Defendant Alamance Regional Medical Center, Inc. d/b/a Cone Health Alamance Regional Medical Center and signed a form titled *Medical Orders for Scope of Treatment* (“MOST form”) prior to Decedent’s scheduled surgery. Decedent and his daughter indicated on the MOST form Decedent’s wishes for Defendant to attempt resuscitation and provide the “[f]ull [s]cope of [t]reatment,” including transfer, in the event Decedent were to stop breathing or lose his pulse. Although it appears from the pleadings that Decedent underwent surgery at Defendant Hospital, the pleadings do not reveal the scope of the surgery, how it went, or Decedent’s prognosis following the surgery.

¹ Also joined as a plaintiff is Decedent’s son and co-administrator of his estate, Lamont Wyer.

¶ 3 Plaintiff's complaint alleges Decedent was readmitted to Defendant Hospital on 14 June 2018 and that no additional MOST form was signed at that time. It is unclear why Decedent was readmitted. Although another MOST form was not signed upon the June readmittance, the complaint alleged Plaintiff had "another discussion" with Defendant's staff upon the June readmittance regarding a Do Not Resuscitate order ("DNR"). Although a different MOST form was not signed after that discussion, Defendant's staff signed and entered a DNR in Decedent's medical record effective 14 June 2018. Plaintiff alleges the May MOST form requiring a full scope of treatment in the event of an emergency was still in effect at all times.

¶ 4 Four days after his readmission, on 18 June 2018, Decedent went into a cardiopulmonary episode while in Defendant's care and died that day when Defendant's staff abided by the terms of the 14 June DNR, not performing CPR or otherwise attempting to resuscitate Decedent.

¶ 5 On 17 December 2020, Decedent's Estate filed a complaint in Alamance County Superior Court asserting claims for (I) negligence in improperly entering and subsequently following the June DNR Order and (II) breach of contract in entering the DNR Order without Plaintiff's consent and in violation of the binding May MOST form.

¶ 6 On 4 March 2021, Defendant filed a *Motion to Dismiss and Answer* admitting its entry of the DNR Order, alleging it conformed with applicable standards of care

in entering the form, and additionally alleging that the DNR Order superseded the agreement the parties previously reached in the MOST form. Defendant answered further that Decedent's medical records "reflect that [Plaintiff] agreed with the DNR Order entered on [14 June 2018], regarding the medical care or treatment to be provided to [Decedent] thereafter."

7 The trial court granted Defendant's Rule 12(b)(6) motion to dismiss and dismissed both counts of Plaintiff's complaint for failing to assert that an expert reviewed Decedent's medical care and was willing to assert it fell below the applicable standard of care in accordance with Rule 9(j) of the North Carolina Rules of Civil Procedure. The trial court noted in its order "that at the hearing [Plaintiff's] counsel tendered copies of certain exhibits . . . as referenced in the complaint for review by the Court, which exhibits were reviewed under the standard applicable to the motion to dismiss, without converting the motion to summary judgment under Rule 56." Plaintiff filed timely notice of appeal.

ANALYSIS

8 "On a motion to dismiss for failure to state a claim upon which relief can be granted, all allegations of fact are taken as true but conclusions of law are not." *Jackson v. Bumgardner*, 318 N.C. 172, 174-75 (1986) (citations omitted). A complaint is properly dismissed under Rule 12(b)(6)

when one of the following three conditions is satisfied: (1)

when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint on its face reveals the absence of facts sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim.

Id. at 175.

9 “On appeal of a 12(b)(6) motion to dismiss, this Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court’s ruling on the motion to dismiss was correct.” *Wheless v. Maria Parham Med. Ctr., Inc.*, 237 N.C. App. 584, 589 (2014), *appeal dismissed, disc. rev. denied*, 368 N.C. 247 (2015). “In conducting our analysis, we also consider any exhibits attached to the complaint because a copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.” *Krawiec v. Manly*, 370 N.C. 602, 606 (2018).

10 A “plaintiff’s compliance with [N.C.G.S.] § 1A-1, Rule 9(j) requirements” likewise “presents a question of law to be decided by a court, not a jury. A question of law is reviewable by this Court *de novo*.” *Smith v. Axelbank*, 222 N.C. App. 555, 558 (2012).

A. Count I – Negligence

11 Plaintiff first contends the trial court erred in dismissing the negligence count of its complaint for failure to provide the expert certification required under Rule 9(j) of the North Carolina Rules of Civil Procedure. We agree and reverse the trial court’s

Rule 12(b)(6) dismissal of Count I.

¶ 12 Claims involving medical negligence are governed by Chapter 90 of the North Carolina General Statutes. For any medical malpractice action, Article 1B outlines a statutory negligence framework particularly defined to the practice of medicine.

¶ 13 A negligence claim is a medical malpractice action subject to Article 1B if it asserts either of the following:

a. A civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.

b. A civil action against a hospital . . . for damages for personal injury or death, when the civil action (i) alleges 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 (ii) arises from the same facts or circumstances as a claim under sub-subdivision a. of this subdivision.

N.C.G.S. § 90-21.11(2) (2021).

¶ 14 N.C.G.S. § 90-21.12 then defines actionable medical negligence as care that “was not 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” N.C.G.S. § 90-21.12(a) (2021). This includes “action or inaction” by the healthcare provider that likewise “was not 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” *Id.*

¶ 15 Since it will often be the case that expert testimony is needed to opine on the applicable medical standard of care in any given case, the North Carolina General Assembly began subjecting medical malpractice actions to heightened pleading requirements under Rule 9 of the North Carolina Rules of Civil Procedure beginning in 1995, generally requiring an allegation certifying an expert witness had reviewed the claim before filing to survive dismissal. *See* N.C.G.S. § 1A-1, Rule 9(j) (2021); *see also* *Thigpen v. Ngo*, 355 N.C. 198, 203 (2002) (“The General Assembly added subsection (j) of Rule 9 in 1995 pursuant to chapter 309 of House Bill 730, entitled, ‘An Act to Prevent Frivolous Medical Malpractice Actions by Requiring that Expert Witnesses in Medical Malpractice Cases Have Appropriate Qualifications to Testify on the Standard of Care at Issue and to Require Expert Witness Review as a Condition of Filing a Medical Malpractice Action.’”); *see generally* N.C.G.S. § 90-21.12 (2021). Rule 9(j) provides that “a complaint alleging medical malpractice shall be dismissed unless a plaintiff asserts in her complaint that her medical care has been reviewed by a person who is willing to testify that the medical care did not comply with the applicable standard of care[.]” *Smith*, 222 N.C. App. at 558; *see* N.C.G.S. § 1A-1, Rule 9(j).

¶ 16 However, because there also are often cases where proof of negligence or

causation in a medical malpractice action is lacking, Rule 9(j) alternatively requires that “a plaintiff must allege facts establishing negligence under the doctrine of *res ipsa loquitur*.” *Smith*, 222 N.C. App. at 558 (citing N.C.G.S. § 1A-1, Rule 9(j)(3)). The *res ipsa loquitur* doctrine

permits negligence to be inferred from the physical cause of an accident, without the aid of circumstances pointing to the responsible human cause. Where this rule applies, evidence of the physical cause or causes of the accident is sufficient to carry the case to the jury on the bare question of negligence.

Diehl v. Koffer, 140 N.C. App. 375, 377 (2000) (quoting *Harris v. Mangum*, 183 N.C. 235, 237 (1922)). The doctrine is invoked 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.” *Smith*, 222 N.C. App. at 559 (marks omitted); *Robinson v. Duke Univ. Health Sys.*, 229 N.C. App. 215, 225 (2013), *disc. rev. denied*, 367 N.C. 328 (2014); see also *Alston v. Granville Health Sys.*, 221 N.C. App. 416, 419, *disc. rev. denied*, 366 N.C. 247 (2012). “[T]he plaintiff must, in part, allege facts from which a layperson could infer negligence by the defendant based on common knowledge and ordinary human experience.” *Robinson v. Halifax Reg’l Med. Ctr.*, 271 N.C. App. 61, 70 (2020). Where “[t]he fact of the casualty and the attendant circumstances [] themselves furnish all the proof that the injured person is able to offer or that it is necessary to

offer[,]" *Mitchell v. Saunders*, 219 N.C. 178, 183 (1941) (citation omitted), "the facts or circumstances accompanying an injury by their very nature raise a presumption of negligence on the part of the defendant." *Smith*, 222 N.C. App. at 559 (marks omitted).

The doctrine is grounded in the superior logic of ordinary human experience; and it permits a jury, on the basis of experience or common knowledge, to infer negligence from the mere occurrence of the accident itself. However, application of the doctrine based on common knowledge is allowed only when the occurrence clearly speaks for itself.

Diehl, 140 N.C. App. at 378 (marks and emphases omitted).

¶ 17 "If the facts of the case justify . . . application of the doctrine of *res ipsa loquitur*, the nature of the occurrence and the inference to be drawn supply the requisite degree of proof to carry the case to the jury without direct proof of negligence" and, thus, the need for expert review and certification. *Tice v. Hall*, 310 N.C. 589, 593 (1984). "Uniformly, in this and other courts, *res ipsa loquitur* has been applied to instances where foreign bodies, such as sponges, towels, needles, glass, etc., are introduced into the patient's body during surgical operations and left there." *Id.* at 592 (citation omitted). We have also applied the doctrine where there were "injuries to a part of the patient's anatomy outside of the surgical field." *Robinson*, 229 N.C. App. at 225. Nonetheless, our Courts have emphasized that "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.” *Id.* at 227.

¶ 18

Plaintiff argues it was not required to specifically plead the Rule 9(j) expert certification here in that it alleged facts implicating the doctrine of *res ipsa loquitur* thereby allowing the negligence claim to be presented to a jury pursuant to Rule 9(j)(3). Specifically, Plaintiff contends that “[h]ow the MOST form was replaced by the DNR form is not directly clear.” We agree the doctrine of *res ipsa loquitur* applies here as to how the DNR Order came to be created and placed in Decedent’s file, thus negating the need for certification of expert review.

¶ 19

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.

¶ 20 Plaintiff 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 Plaintiff was not required to include the expert certification required under Rule 9(j) in order to survive a Rule 12(b)(6) motion. We reverse the dismissal of Count I of Plaintiff's complaint for negligence.

B. Count II – Breach of Contract

¶ 21 Plaintiff also challenges the trial court's dismissal of Count II for breach of contract. This claim is based on the same facts supporting Plaintiff's negligence claim; namely, Defendant's non-performance under the 11 May 2018 MOST form and subsequent entry of the unauthorized June DNR Order. The trial court dismissed Plaintiff's breach of contract claim pursuant to Rule 12(b)(6) for failure to provide the certification required by Rule 9(j). We conclude the trial court did not err in dismissing Count II of the complaint.

¶ 22 “[I]n the context of a health care provider's unauthorized disclosure of a patient's confidences, claims of medical malpractice, invasion of privacy, breach of implied contract and breach of fiduciary duty/confidentiality should all be treated as claims for medical malpractice.” *Jones v. Asheville Radiological Group*, 129 N.C. App. 449, 456 (1998), *remanded on other grounds*, 350 N.C. 654 (1999). “Moreover, . . . North Carolina does not recognize breach of contract as a legal theory under which

one can recover for negligent malpractice.” *Lackey v. Bressler*, 86 N.C. App. 486, 491 (1987); *see also Wheeless*, 237 N.C. App. at 590 (noting “unfair and deceptive acts committed by medical professionals are not included within the prohibition of N.C.G.S. § 75-1.1(a).”); *but see Bennett v. Hospice & Palliative Care Ctr. of Alamance-Caswell*, 246 N.C. App. 191, 196 (2016) (holding the trial court erred in dismissing the plaintiff’s breach of contract action where the claim, involving post-mortem handling of the decedent’s body and services, did not “involve[] the provision of medical care under [N.C.G.S.] § 90-21.11” as to invoke the heightened pleading requirements of Rule 9(j)).

¶ 23 The above authorities dictate Plaintiff cannot recover under a breach of contract theory for what is, in reality, an action for medical malpractice. The trial court did not err in dismissing Count II of Plaintiff’s complaint.

CONCLUSION

¶ 24 Count I of Plaintiff’s Complaint for medical negligence alleges facts implicating the common law doctrine of *res ipsa loquitur*; thus, the malpractice claim did not require the heightened pleading requirement of expert certification and review pursuant to Rule 9(j). The trial court therefore erred in dismissing Count I of Plaintiff’s complaint under Rule 12(b)(6), and we vacate its order granting Defendant’s motion to dismiss with respect to that count and remand for further proceedings consistent with this opinion. Count II of Plaintiff’s complaint, however,

was properly dismissed as it states a claim for medical malpractice, not breach of contract.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges DILLON and INMAN concur.

Report per Rule 30(e).

STATEMENT REGARDING TRANSCRIPT

Per Rules 7(b) and 9(c) of the North Carolina Rules of Appellate Procedure, the transcript of the entire proceedings in this case, taken by Kimberly K. Berens on January 27, 2025 consisting of 45 pages, numbered 1-45, bound in one volume, will be electronically filed by Kimberly Berens promptly once the docket number is assigned to this appeal.

Motions and Memoranda

NORTH CAROLINA
ALAMANCE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 2215

ESTATE OF HENRY WYER, by and
through the Administrators of The Estate
of BENITA WYER and LAMONT WYER,

Plaintiff,

v.

ALAMANCE REGIONAL MEDICAL
CENTER, INC. d/b/a CONE HEALTH
ALAMANCE REGIONAL MEDICAL
CENTER

Defendant.

**DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT**

Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, the Defendant Alamance Regional Medical Center, Inc. d/b/a Alamance Regional Medical Center (hereinafter “Defendant” or “ARMC”), hereby moves the Court for entry of an order granting summary judgment on the grounds that there are no genuine issues of material fact and the Defendant is entitled to judgment as a matter of law on Plaintiff’s claims since, among other things, there is no evidence of negligence by Defendant or that any such negligence proximately caused injury or damage to Plaintiff.

In support of this motion, Defendant relies upon the following affidavits with attachments, which will be filed contemporaneously with the Motion for Summary Judgment:

- Affidavit of Randall E. Schisler, Jr., MD
- Affidavit of James Robinson Harper, Jr., MD
- Affidavit of Gretchen Haralson, RHIT

Also in support of this motion, the Defendant relies upon the pleadings and the following documents, which will be filed before the hearing on Defendant's motion:

- Deposition of Benita Wyer
- Deposition of Megan Mason, NP
- Deposition of LaToya Lowery, RN

WHEREFORE, the Defendant respectfully requests that the Court enter an order granting this motion for summary judgment dismissing this action with prejudice, and for such other and further relief as the Court may deem just and proper.

This the 30th day of December, 2024.



J. DENNIS BAILEY
PEYTON M. PAWLIK
Attorneys for Defendant

OF COUNSEL:

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CERTIFICATE OF SERVICE

This to certify that the undersigned has this date served this pleading in the above-entitled action upon all other parties to this cause by:

- (X) Electronic mail (e-mail) transmission to the attorney(s) for said parties at the address(es) listed below; or
- () Depositing a copy hereof in a first class postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Post Office, properly addressed to the attorney(s) for said parties.

This the 30th day of December, 2024.



J. DENNIS BAILEY

ADDRESSEE(S):

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NORTH CAROLINA
ALAMANCE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 2215

ESTATE OF HENRY WYER, by and
through the Administrators of The Estate
of BENITA WYER and LAMONT WYER,

Plaintiff,

v.

ALAMANCE REGIONAL MEDICAL
CENTER, INC. d/b/a CONE HEALTH
ALAMANCE REGIONAL MEDICAL
CENTER

Defendant.

**DEFENDANT'S MEMORANDUM
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

Defendant Alamance Regional Medical Center, Inc. d/b/a Alamance Regional Medical Center (hereinafter "Defendant" or "ARMC") submits the following Memorandum of Law in Support of its Motion for Summary Judgment and requests that the Court enter an Order granting summary judgment in favor of Defendant and dismissing all claims asserted by Plaintiff.

I. INTRODUCTION

On June 13, 2018, Mr. Henry Wyer was admitted to ARMC for treatment of various health problems. During this hospital admission, a Do Not Resuscitate ("DNR") Order was entered in his medical record on June 14, 2018, after a palliative care consult. Then, 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, she found that Mr. Wyer's hands were already cold. The medical staff did not attempt to resuscitate Mr. Wyer in compliance with the DNR Order, and he died on June 18, 2018.

Plaintiff 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 signed on May 11, 2018, requesting that resuscitation be attempted in the event of cardiopulmonary arrest. In the Complaint, Plaintiff alleged that Defendant 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.” (Complaint ¶ 10) Plaintiff also included a breach of contract claim based upon the MOST form that was signed on May 11, 2018. (*Id.* at ¶ 14)

Defendant filed a Motion to Dismiss the 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. The Trial Court granted defendant’s motion by Order entered on September 2, 2021. Plaintiff filed a notice of appeal to the Court of Appeals. 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 of Appeals 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 Plaintiff was 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 of Appeals noted: “According to the complaint, the origin of the DNR form is unknown to Plaintiff; 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. Defendant now files this Motion for Summary Judgment as supported by the pleadings, discovery, depositions, and affidavits from two experts: Dr. Randall Schisler (Palliative Care) and Dr. James Harper (Cardiologist). For the reasons stated below, Defendant submits that there are no genuine issues of material fact, and that it is entitled to judgment as a matter of law.

II. STANDARD OF REVIEW

Under Rule 56 of the North Carolina Rules of Civil Procedure, a party moving for summary judgment must establish the lack of any triable issue of fact. The motion may be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Yount v. Lowe*, 288 N.C. 90, 94, 215 S.E. 2d 563, 566 (1975). 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.* Summary judgment is proper in two types of cases: (1) those where a claim or defense is utterly baseless in fact; and (2) those where only a question of law on the indisputable facts is in controversy and it can be appropriately decided without a full trial. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E. 2d 823, 829 (1971).

A movant is entitled to summary judgment if it can either: (1) show the nonexistence of an essential element of the plaintiff's claim; or (2) show that the plaintiff cannot produce evidence on an essential element of its claim. *Roumillat v. Simplistic Enters.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (internal citations omitted), *abrogated by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998). Once a movant meets this burden, the claim can only survive if the plaintiff can

"produce a forecast of evidence demonstrating that [it] will be able to make out at least a prima facie case at trial." *Id.* at 63, 414 S.E.2d at 342 (internal citation omitted). In order to meet this burden, the plaintiff may not rest upon the mere allegations or denials of its pleading but must set forth "specific facts showing that there is a genuine issue for trial." N.C. R. Civ. P. 56(e).

III. STATEMENT OF FACTS

Prior to June 2018, Mr. Henry Wyer was a 75-year-old (DOB 7/7/1942) man with chronic health problems. Earlier that year, he had moved from Durham to Elon to live with his daughter, Benita, because he got sick. (Deposition of Benita Wyer, May 7, 2024, page 28) 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. (*Id.* at 29-34) He was hospitalized at Duke Hospital in March 2018 (*Id.* at 35) where they recommended transfer to a skilled nursing facility after discharge; instead, Benita decided to take him to her home so she could care for him. (*Id.* at 37) In April 2018, he went back to Duke Hospital for evaluation after a possible stroke. (*Id.* at 39) In May 2018, he was seen by his physician at Duke for reports of falling frequently at home. (*Id.* at 43) He was then admitted to Peak Resources in Alamance for 18 days (*Id.*), after which he returned to Benita's home.

The MOST form was signed on May 11, 2018. (Copy attached as Exhibit A.) Benita said this form was obtained from a doctor's office on Roxboro Road in Durham (Benita Depo. at 47); however, she did not know the name of the physician who was seeing her father or who signed the form. (*Id.*) A plain reading of the MOST form shows that the form has not been completed as the

name and phone number of the person who signed the form are not printed in the space provided. As of May 11, 2018, this form indicated that CPR was to be attempted in the event the “[p]atient has no pulse and is not breathing.” (Ex. A) 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. (*Id.* at 50) Notably, even after Mr. Wyer’s passing, Benita still had the original MOST form in her possession. (*Id.* at 53)

In June 2018, Mr. Wyer received home health care from Liberty Home Health. (*Id.* at 61) On June 5, 2018, Liberty contacted Duke to get a hospice referral for the patient. (*Id.* at 62) By that time, he had experienced a series of health problems leading to repeated hospitalizations in March, twice in April, and May. (*Id.* at 63) In June 2018, he again required admission to the hospital. (*Id.*)

Mr. Wyer was admitted to ARMC on June 13, 2018. Upon admission, the admitting physician initiated a family meeting to discuss the plan of care. (*Id.* at 67) He noted the patient had “a very poor prognosis long term” and requested a palliative care consult for Mr. Wyer due to his overall decline. (MR at p. 73)¹

On June 14, 2018, Megan Mason, NP, a palliative care nurse practitioner, went to see Mr. Wyer. (MR at p. 52) As noted in the medical records, NP Mason conducted a complete history and examination of the patient. Benita was also present, and, at her deposition, she confirmed most of the details in NP Mason’s note. (Benita Depo. at 73-81) Based on the consult meeting and discussions with the patient, NP Mason entered a DNR Order for Mr. Wyer effective June 14, 2018. (Copy attached as Exhibit B.) The Order was entered in the medical record on June 14,

¹ A complete copy of the records from ARMC for Mr. Wyer’s June 13, 2018, admission, is submitted with the Affidavit of Gretchen Haralson, RHIT, records custodian, filed contemporaneously herewith. Citation to specific pages of those records will be referenced in this memorandum as “MR at p. ____.”

2018, at 12:45 pm (MR at p. 180), where it remained unchanged throughout the remainder of the hospital admission. The DNR Order was noted by other providers who were also seeing Mr. Wyer (MR at pp. 82, 91), and by Hospice services. (MR at p. 86)

Mr. Wyer remained hospitalized until June 18, 2018, when, according to medical records, there was a change in his condition. The patient's heart monitor showed asystole (MR at p. 115), which reflected that his heart had completely stopped beating. When the nurse entered the room, she observed that Mr. Wyer had no breath sounds, no heart rate, and no blood pressure. (*Id.*) She also noticed that his hands were cold. (*Id.*) Based on the DNR Order, CPR was not performed, and the patient was pronounced dead. Benita was not present at the hospital when these events occurred, but a nurse called to report her father's passing, at which point she went to ARMC. (Benita Depo. at 95) No autopsy was performed.

IV. ARGUMENT

A. The doctrine of *res ipsa loquitur* does not apply at this stage of the case.

As noted by the Court of Appeals in this case, 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 (2012) (marks omitted); *Robinson v. Duke Univ. Health Sys.*, 229 N.C. App. 215, 225 (2013), *disc. rev. denied*, 367 N.C. 328 (2014); *see also Alston v. Granville Health Sys.*, 221 N.C. App. 416, 419, *disc. rev. denied*, 366 N.C. 247 (2012)). In ruling upon Defendant's Rule 12(b)(6) motion, the Court of Appeals held that “the doctrine of *res ipsa loquitur* applies here as to how the DNR Order came to be created and placed in Decedent's file, thus negating the need for certification of expert review.” *Id.* at ¶ 18. The decision by the Court of Appeals was reached

upon review of the order granting the motion to dismiss under Rule 12(b)(6), where the court must take the allegations of the complaint as true. *Jackson v. Bumgardner*, 318 N.C. 172, 174-75 (1986) (citations omitted). The determination that *res ipsa loquitur* applied was based solely on review of the complaint, prior to discovery regarding whether the facts supported those allegations.

As pertinent to the summary judgment motion presently under consideration, the Court of Appeals 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.

Defendant contends that the evidence developed in discovery shows "how [Mr. Wyer's] status was changed to DNR on 14 June" and rebuts the allegations of negligence and application of *res ipsa loquitur* in this case. The "origin of the DNR form" is not unknown. It is undisputed that NP Mason saw Mr. Wyer and his daughter on June 14, 2018, (Benita deposition p. 73) and that NP Mason entered the DNR Order in the record immediately after that visit. (MR at p. 180) Benita admitted that when she met with NP Mason on June 14, 2018 they discussed the DNR. (Benita depo. at 79) NP Mason documented that the patient and his daughter agreed to the DNR Order (MR at p. 53), although Benita now denies that she agreed to the DNR. At deposition, NP

Mason testified that her note was an accurate account of what was discussed that day. (Deposition of Megan Mason, NP, August 16, 2024, page 34-35)

In N.C.G.S. § 90-21.17, North Carolina provides a statutory procedure whereby a patient may decide to elect or decline cardiopulmonary resuscitation when the need occurs. The statute 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 wherein he agreed with the plan for DNR. (MR at p. 49) The DNR Order signed by NP Mason (MR at p. 180) is the type of order recognized by this statute. See Affidavit of Randall E. Schisler, Jr., MD, ¶ 7 (“In my opinion the DNR Order dated June 14, 2018 ... was properly completed and constituted a valid order under applicable rules and ARMC policy.”)

Despite the notes and records created on June 14, 2018, Benita now claims that she did not agree to the DNR Order for her father. (Benita Depo. at 80) 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. (MR at p. 49) Thus, the DNR Order was entered with proper consent and agreement *from the patient*. Any possible objection to the DNR Order *by Benita* is not dispositive or even relevant since there is no evidence that she had authority to make this decision for her father at that time. 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. Thus, any Health Care Power of Attorney naming Benita would be ineffective as of the time the decision was made by the patient and the DNR Order was written on June 14, 2018. Since *res ipsa loquitur* does not apply here, Plaintiff is required to prove negligence.

B. There is no evidence of a breach of standard of care by Defendant.

“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 noted here 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, Plaintiff has failed to make such a showing. Review of the discovery and evidence in this case shows that Plaintiff cannot establish the elements of a viable malpractice claim. Accordingly, summary judgment should be granted for Defendant.

In this case, Plaintiff designated one expert witness: Latoya Lowery, RN. Ms. Lowery said she was contacted to explain the difference between a DNR and a MOST form. (Deposition of Latoya Lowery, RN, November 19, 2024, page 8) As a nurse, Ms. Lowery conceded that she was not qualified to opine regarding the standard of care applicable to Megan Mason, NP, who entered the DNR Order in this case. (*Id.* at 14) Lowery stated 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. (*Id.*) She further stated that she identified no violations of care by any nurse (*Id.* at 13- 14), and she did not contend that ARMC as a facility or institution did anything inappropriate in Mr. Wyer's care. (*Id.* at 15) She mentioned that generally a healthcare facility should follow its policy when there is a MOST form and a DNR Order (*Id.* at 16); however, as of her deposition, she did not even know what the ARMC policy stated or if there were any violations of that policy in Mr. Wyer's case. (*Id.* at 19) Thus, Plaintiff is 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 Plaintiff fails to establish an essential element of the negligence claim. *Roumillat*, 331 N.C. at 63, 414 S.E.2d at 342.

At her deposition, Ms. Lowery agreed that the MOST form for Mr. Wyer was incomplete because it did not contain the name or phone number of the provider who signed it. (Lowery Depo. at 44-46) On the other hand, Ms. Lowery stated the DNR Order entered by NP Mason was properly completed (*Id.* at 55), and she had no information that there was anything improper about the DNR Order. (*Id.* at 68) In the Complaint, Plaintiff alleged that Defendant was negligent by "Improperly direct[ing] a Do Not Resuscitate be carried out for Plaintiff without adequate signed paperwork" directing such performance be done. (Complaint, ¶ 10) However, Ms. Lowery noted that, unlike the MOST form which must be signed by the patient or an authorized representative, the DNR Order does not have to be signed by a patient or family member in order to be valid. (*Id.* at 57) Thus, Plaintiff's own expert disproves the assertion of negligence in the Complaint. In any event, Ms. Lowery agreed that, even if the MOST form had been completed properly, it could be changed, revoked, or overruled later by a valid DNR. (*Id.* at 46)

In addition to Plaintiff's failure to present expert testimony in support of the claims asserted, Defendant has submitted the affidavit of Dr. Randall Schisler, an expert in palliative

medicine, to rebut any possible claims of negligence. According to his affidavit, Dr. Schisler stated that he is familiar with the standard of care for providers at ARMC, like NP Mason, who were treating Mr. Wyer. (Schisler Affidavit, ¶ 3) He expressed the opinion that Defendant complied with the applicable standards, used best judgment, and exercised reasonable care in caring for Mr. Wyer in June 2018. (*Id.* at ¶ 4) He further stated that:

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

Dr. Schisler felt that ARMC staff acted properly in the decision to follow the DNR Order and not to attempt CPR or resuscitation of this patient. (*Id.* at ¶ 8) As shown by this affidavit, Defendant has submitted evidence to establish that no negligence occurred in the care of Mr. Wyer and thus Defendant's motion for summary judgment should be granted.

C. There is no evidence to establish causation.

Finally, there is no evidence showing that any possible error or omission by Defendant caused Mr. Wyer's death. 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 the 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. Capricola*, 226 N.C. App. 470, 479, 742 SE2d 247, 254 (2013). In the absence of such evidence, summary judgment should be granted for the defendant. See, *Hawkins v. Emergency Med. Physicians of Craven Cty., PLLC*, 240 N.C. App. 337, 347, 770 S.E.2d 159, 166 (2015) (Summary judgment affirmed where the plaintiff failed to establish proximate causation since the plaintiff's expert witnesses were unable to testify that the plaintiff "would not have or *probably* would not have died had [the defendant] not administered the dose of Lovenox to [the plaintiff] in the ED."); and *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 this action, Plaintiff's expert, Ms. Lowery, testified that she had no opinion as to why Mr. Wyer died. (Lowery Depo. at 60) 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. (*Id.* at 61-62) She also did not contend that the nurses or staff should have ignored the DNR Order. (*Id.*) Thus, Plaintiff's expert does not attempt to offer any opinion that would establish that Mr. Wyer's death resulted from improper care by Defendant (though she did not even identify anything improper about the care provided to the patient). Plaintiff thus has no causation evidence to show that Defendant's negligence caused injury. In addition, 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. (*Id.* at 64) 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, Plaintiff is unable to establish the essential element of causation and summary judgment should be granted.

In addition to the lack of evidence from Plaintiff, ARMC has 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. (Harper Affidavit, ¶ 5) He said it is unlikely that Mr. Wyer would have survived his arrest. (*Id.*) 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. (*Id.* at ¶ 9) Thus, Plaintiff has failed to establish an essential element of the negligence claim and summary judgment should be granted. *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.

V. CONCLUSION

As stated above, Plaintiff has failed and is unable to present evidence to establish that Defendant violated applicable standards of practice or that any such violation was the proximate cause of injury to Mr. Wyer. Further, Defendant has presented affidavits from experts who affirmatively express the opinions that Defendant did not violate applicable standards of practice and that it was unlikely that Mr. Wyer would have survived even if CPR had been performed. For these reasons, Defendant's motion for summary judgment should be granted and this action should be dismissed.

This the 30th day of December, 2024.



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NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

20 CVS 2215-000

ALAMANCE COUNTY

ESTATE OF HENRY WYER, by and through)
the Administrators of The Estate of BENITA WYER)
and LAMONT WYER,)

Plaintiff,)

v.)

ALAMANCE REGIONAL MEDICAL CENTER, INC.)
d/b/a CONE HEALTH ALAMANCE REGIONAL)
MEDICAL CENTER,)

Defendants.)

MEMORANDUM OF LAW IN OPPOSITION OF DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

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Plaintiffs submit the following Memorandum in opposition of Defendant's Motion for Summary Judgment:

INTRODUCTION

Defendants have failed to meet their burden under Rule 56 of the North Carolina Rules of Civil Procedure, because there remains several issues of material facts that are supported by evidence in the record. A valid claim exists for medical malpractice, and this matter should proceed to a jury for a decision.

FACTS SUPPORTED BY EVIDENCE IN THE RECORD

The decedent, Henry Wyer was admitted for treatment for several reasons throughout 2018. (Deposition of Benita Wyer pgs. 61-68) He had several health issues and would often times request his daughter to speak on his behalf due to her occupation as a certified nurses assistant. (Deposition of Benita Wyer pg. 8) (Exhibit 1, Affidavit of Benita Wyer) Henry Wyer completed a form that had as its title "Choose Your Health Care Agent" on April 5, 2018. He identified his daughter to serve as his health care agent in case he was too sick to make decisions himself. He further indicated in this document that "his life is worth living no matter how sick I am". He wanted "all life support treatments that his doctor thinks would help", to be performed. There were only two exceptions he noted to this request. The first was, he did not want dialysis, and the other was he did not want to stay on life support machines. All other treatments, including CPR, were options Mr. Wyer indicated he wanted performed, should the situation arise. (Deposition of Benita Wyer, Exhibit 3, pg.7)

A month later, at a primary care doctor's visit on May 11, 2018, Mr. Wyer, along with his daughter, again discussed end of life plan of care. This included his wishes regarding, but not limited to, whether he wanted life-saving procedures to occur. He authorized his daughter to sign a Medical Orders for Scope of Treatment (MOST) form. The form indicated that the Plaintiff wanted "CPR to be attempted if the patient had no pulse and is not breathing and the full scope of treatment if the patient has a pulse and/or is breathing. (Deposition of Benita Wyer, Exhibit 2) By this time, Mr. Wyer had been diagnosed with Coronary Artery Disease, Hyperlipidemia, Hypokalemia, Lung Mass, Pulmonary Embolism, UTI and a stroke. (ARMC Certified Medical Records, pgs. 1-2)

Mr. Wyer presented to Alamance Regional Medical Center a month after this MOST form was signed, and only two months after the first form was signed, on June 13, 2018. The diagnosis at the time of admission was vomiting, small bowel obstruction, constipation, and acute cystitis, with hematuria, slurred speech, cough, and shortness of breath. (ARMC Certified Medical Records, page. 7) That same day, at approximately 1:37PM, Dr. Sona Patel spent approximately 55 minutes with Henry Wyer, and Benita Wyer, his daughter, discussing his condition. Dr. Patel requested a surgery consultation done regarding the severe constipation, he indicated there was failure to thrive and suggested palliative care be consulted. Dr. Patel informed Benita Wyer and Henry Wyer that the patient overall had a very poor prognosis. He stated that both the patient and the daughter understood. Dr. Patel discussed code status with both Mr. Wyer and Ms. Wyer, and Mr. Wyer wanted to be a Full Code. (Exhibit 5, Medical Record Evidence, pg. 44) There was acknowledgment in the medical record of a pre-existing MOST form. (ARMC Certified Medical Records, pgs. 91,100)

Less than 24 hours later, on June 14, 2018, Megan Mason, Nurse Practitioner, also spoke with Henry Wyer and his daughter. She again, discussed Mr. Wyer's condition, and prognosis. She states it is industry standard to get the wishes from the patient and advocate for those wishes in his chart. (Deposition of Megan Mason, pgs. 17-18)

Ms. Mason discussed the recommendation of DNR/DNI orders considering Mr. Wyer's age, frailty, and co-morbidities. Ms. Wyer, with Henry Wyer agreeing, responded to Ms. Mason by saying, "if he had a chance of surviving, I would want this for him." Consistent with the paperwork previously completed by Mr. Wyer, indicating his life preserving wishes, and consistent with his expressed desire for a Full Code with Dr. Patel less than 24 hours earlier, this statement indicated Mr. Wyer desired a Full Code. (ARMC Certified Medical Records, pg. 53) Ms. Wyer further shared with Ms. Mason, the signed MOST form. She did so to share, while she understood Ms. Mason's position, Mr. Wyer's status is to remain a Full Code. (Deposition of Benita Wyer, pg. 105) Despite this, Megan Mason testified that she entered a DNR order into Mr. Wyer's chart that day and wrote "[Ms. Wyer] agrees with DNR/DNI and allowing him to die a natural death." (ARMC Certified Medical Records, pg.53)

The early afternoon of June 18, 2018, Henry Wyer called Benita Wyer to let her know that he was ready to be discharged. Ms. Wyer spoke with him as well as a hospital physician asking when Ms. Wyer would be able to pick him up. She indicated she would pick him up after her then, pregnant daughter had delivered her grandchild at another hospital. (Deposition of Benita Wyer, pg. 95) Ms. Wyer received a phone call that Mr. Wyer had expired before she was able to pick him up. The medical record indicates the patient was "noted to have asystole." He had a DO NOT RESCUSCITATE status therefore he did not undergo CPR." The medical record also indicates Ms. Wyer returned to the hospital stating she and her father never wanted to be a

Do Not Resuscitate. (ARMC Certified Medical Records, pg. 66) She again showed the signed MOST form at a meeting that occurred the day after he passed. (Deposition of Benita Wyer, pg. 105)

ARGUMENT IN SUPPORT OF OPPOSITION FOR SUMMARY JUDGMENT:

Defendants have not met their burden in supporting a motion for Summary Judgment. Rule 56 of the NC Rules of Civil Procedure allows a defending party to move for a summary judgment in his favor. Summary Judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. (*Robinson v. Duke University Health Systems*, 747 S.E. 2d 321 (2013)) The trial court must consider the evidence in the light most favorable to the non-moving party. (*Robinson* quoting *Crocker v. Roethling* 363. NC 140. 628 (2009)) The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. (*Robinson*)

Whether Mr. Wyer agreed to having a DNR order placed into his medical file is a material fact. The Defendant's entire argument is based on this material fact. The validity of this fact is highly disputed, and its invalidity is supported by evidence in the record.

I. The doctrine of *res ipsa loquitur* still applies at this stage.

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 the defendant. (*Bowlin v. Duke University* 108 N.C. App. 145, 149, 423, S.E.2d 320, 322 (1992)) The doctrine of *res ipsa loquitur* in its distinctive sense permits negligence to be

inferred from the physical cause of an [injury], without the aid of circumstances pointing to the responsible human cause. Where this rule applies, evidence of the physical cause or causes of the injury is sufficient to carry the case to the jury on the bare question of negligence. (Diehl v. Koffer 168 N.C. App. 694, 698, 609 S.E. 2d 359, 362 (2000)) For the doctrine 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, NC App. 730 S.E. 2d 840, 843 (2012)) In order for the doctrine to apply, an average juror must be able to infer, through his common knowledge and experience and without the assistance of expert testimony, whether negligence occurred. (Diehl, Id.)

Plaintiff's allegations are he and his family never agreed to having a DNR Order placed in his chart. Despite this, a DNR order was placed in his chart, and CPR was not performed when he coded. CPR was not performed because the hospital staff and physicians were following the order that was erroneously placed in his chart. Supporting evidence of the allegation that Mr. Wyer never agreed to having a DNR placed in his chart includes separate paperwork signed by both the deceased plaintiff and his purported Healthcare POA. These forms were the MOST Form and the "Choose your own Health Care Agent" form. Both forms, included as exhibits in the record, indicate the Plaintiff wanted to be a Full Code. Supporting evidence of this allegation also includes the medical record, included as Exhibit X, where, less than 24 hours prior to meeting with Megan Mason, Mr. Wyer desired a Full Code. Further, the deposition testimony of Benita Wyer supports the fact that Mr. Wyer and family never agreed to a DNR being placed in his folder. A layperson understands that if a person wants CPR performed on them should something medically occur, the exact opposite shouldn't be placed in their chart.

Defendants argue that *res ipsa loquitur* no longer applies in this matter because there is evidence in the record of exactly how the DNR order became a part of the record. Specifically, they argue “the evidence developed in discovery shows “how [Mr. Wyer’s] status was changed to DNR on 14 June... that NP Mason documented that the patient and his daughter agreed to the DNR... and that she testified her note was an accurate account of what was discussed that day.” Defendants rely on this evidence to argue that the doctrine of *res ipsa loquitur* is no longer applicable.

“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, “ where evidence constituting direct proof of the cause of injury is presented, the doctrine of *res ipsa loquitur* is not applicable.” However, “a proffer of evidence of the cause of an injury should not be conflated with the injurious condition itself.” (*Robinson Id.*)

The plaintiff in *Robinson* contended the defendants were negligent because her colon was attached to her vagina after a botched colectomy surgery causing feces to come through her vagina. An expert opinion in the record opined that the surgical error occurred by inserting a stapler through the vagina instead of the rectum. Defendants in *Robinson*, argued that *res ipsa* no longer applied because there is direct proof of the plaintiff’s injury offered in the record. The court found that “defendant’s argument conflates proffered evidence of the cause of [the injury] with the injurious condition itself. Conflicting testimony [in the record], as to how the colon became attached at a minimum created a question of material fact for a jury to the precise cause of the injurious condition.” The “proffer of testimony opining as to the particular human cause of Robinson’s injurious condition does not preclude the application of the *res ipsa doctrine*, where

the negligence may be inferred from the physical cause of Robinson's injury- the direct attachment of her small intestine to her vagina." (*Robinson. Id*)

In the present case, Defendants have proffered evidence that Megan Mason states she placed the DNR order in the chart because the family agreed to it. There is additional proffered evidence as indicated above, that the family never agreed to the DNR order. The injury itself here, is the DNR order being placed in the record by Megan Mason. The cause of Megan Mason placing it in the record is a material fact, and is highly disputed. The defendants contend it was done because the family agreed to it. Plaintiffs contend the family never agreed.

This conflicting testimony as to how and/or why the DNR was enclosed in the record of Mr. Wyer, at minimum, creates a question of material fact for a jury. Like the *Robinson* case, negligence in the present case may be inferred from the fact a DNR order was placed in the chart when it never should have been, because it wasn't agreed to by the patient or his family.

II. There is evidence that supports a claim for medical malpractice.

In order to maintain an action for medical malpractice, a plaintiff must offer evidence to establish (1) the applicable standard of care (2) breach of that standard (3) proximate causation and (4) damages. (*Atkins v. Mortenson* 183 N.C. App. 625, 630, 644, S.E. 2d 625, 629, 652 S.E. 2d 255 (2007))

To meet their burden of proving the applicable standard of care, plaintiffs must satisfy the requirements of N.C. Gen.Stat. § 90-21.12 (2011), which provides:

“[I]n any medical malpractice action as defined in G.S. 90-21.11(2)(a), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the care of such health care provider *was not 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 of the alleged act giving rise to the cause of action[.]”

Id. § 90-21.12(a) (emphasis added).

Plaintiffs must establish the relevant standard of care through expert testimony. When plaintiffs have introduced evidence from an expert stating that the defendant doctor did not meet the accepted medical standard, [t]he evidence forecast by the plaintiffs establishes a genuine issue of material fact as to whether the defendant doctor breached the applicable standard of care and thereby proximately caused the plaintiffs' injuries. This issue is ordinarily a question for the jury, and in such case, it is error for the trial court to enter summary judgment for the defendant. (Robinson)

Megan Mason, offered as the nurse practitioner, stated that the standard of care includes speaking with the family to obtain their assessment as to their desire for end of life orders including MOST and DNR, and it is their responsibility to document and carry out their desires in the record. (Mason Deposition) Plaintiff's expert witness, testified that it is industry standard to place a DNR in the record if the patient agrees to it. Affidavits submitted by Defendants address the validity of the MOST forms but rely on the written record of Megan Mason to assume she carried out the wishes of the family. They do not address the community standard of actually carrying out the wishes.

Information provided by defendants in their discovery list their own standards for a DNR. It starts with discussing with the patients their desires in end of life care. (Exhibit Defendant responses) The expert for the Plaintiff indicated plainly that a DNR cannot be entered into the

record without the patient consenting to it. Defendant's whole entire argument relies on the assumption that there is not an error in the medical record, a material fact that is clearly disputed with evidence.

Expert testimony is not required ... to establish the standard of care, failure to comply with the standard of care, or proximate cause, in situations where a jury, based on its common knowledge and experience, is able to decide those issues. The application of this "common knowledge" exception to the requirement of expert testimony in medical malpractice cases has been reserved for those situations in which a physician's conduct is so grossly negligent *or the treatment is of such a nature that the common knowledge of laypersons is sufficient to find* the standard of care required, a *departure therefrom*, or proximate causation. (Bailey v. Jones, 112 N.C. App. 380, 387, 435 S.E. 2d 787, 792 (1993).)

A layperson knows that if a patient never agreed to having CPR withheld from them in a medical setting, something that potentially saves their life, then it shouldn't be added to their chart that they did agree to it. There is evidence that the Defendants breached their duty of care when they placed the DNR order in the file. The Plaintiff died when there was no CPR performed on him. This was as a direct result of the DNR Order being placed in the medical record. That information is in evidence in the medical record. The affidavits, offered by the Defendants, indicating the length of time Plaintiff may have lived, or whether he could have lived at all, is an opinion and not definitive. This may subsequently reflect upon the amount of damages to be awarded, but does not change the evidence that damages were incurred by the Plaintiff. The amount of damages to be awarded is an issue for a jury to decide, and should not be decided in a Motion for Summary Judgment.

CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment should be denied. This claim should not be dismissed pursuant to Rule 56 of the North Carolina Rules of Civil Procedure because there is at least one material fact in this case that remains highly disputed and there is evidence in the record, when looked in the light most favorable to the Plaintiff, supporting those disputed facts. Specifically, it still complies with rule 9(j)(3) because there are facts that supports negligence under the existing common-law doctrine of *res ipsa loquitur*. These facts are supported by the record.

This the 21st day of January, 2025.

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Kya Johnson
Attorney for the Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MEMORANDUM OF LAW IN OPPOSITION OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT were served upon all parties of record, by first class mail addressed to:

J. Dennis Bailey
Waldrep Wall
370 Knollwood Street
Suite 600
Winston-Salem, NC 27103
dbailey@waldrepwall.com

This the 21 day of January, 2025.



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NORTH CAROLINA
ALAMANCE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 2215

ESTATE OF HENRY WYER, by and
through the Administrators of The Estate
of BENITA WYER and LAMONT WYER,

Plaintiff,

v.

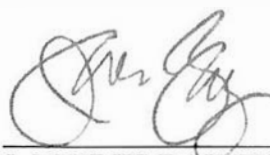
ALAMANCE REGIONAL MEDICAL
CENTER, INC. d/b/a CONE HEALTH
ALAMANCE REGIONAL MEDICAL
CENTER

Defendants.

NOTICE OF HEARING

PLEASE TAKE NOTICE that defendant Alamance Regional Medical Center, Inc. d/b/a Cone Health Alamance Regional Medical Center will bring its Motion for Summary Judgment on for hearing on Monday, January 27, 2025 at 10:00 a.m. in Alamance County Superior Court or at such other time and place as determined by the Court.

This the 15th day of January, 2025.



J. DENNIS BAILEY
Attorney for Defendant

OF COUNSEL:

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Judgment and Order

FILED
DATE: January 30, 2025
TIME: 12:28:28 PM
ALAMANCE
CLERK OF SUPERIOR COURT

NORTH CAROLINA

BY: C. Durham

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 2215

ALAMANCE COUNTY

ESTATE OF HENRY WYER, by and
through the Administrators of The Estate
of BENITA WYER and LAMONT WYER,

Plaintiff,

v.

ALAMANCE REGIONAL MEDICAL
CENTER, INC. d/b/a CONE HEALTH
ALAMANCE REGIONAL MEDICAL
CENTER

Defendants.

ORDER

THIS MATTER CAME ON FOR HEARING BEEFORE THE UNDERSIGNED during the January 27, 2025, Civil Session of Alamance County Superior Court upon Defendant's Motion for Summary Judgment; and it appearing to the Court after reviewing the pleadings, discovery, depositions, and affidavits submitted by the parties and after hearing arguments of counsel that there are no genuine issues of material fact and that Defendant is entitled to judgment as a matter of law;

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendant's Motion for Summary Judgment be, and the same hereby is, GRANTED. IT IS FURTHER ORDERED that Plaintiff's Complaint is hereby dismissed with prejudice.

This the 29th day of January, 2025.



R. STUART ALBRIGHT
Superior Court Judge Presiding

NORTH CAROLINA
ALAMANCE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 2215

ESTATE OF HENRY WYER, by and
through the Administrators of The Estate
of BENITA WYER and LAMONT WYER,

Plaintiff,

v.

ALAMANCE REGIONAL MEDICAL
CENTER, INC. d/b/a CONE HEALTH
ALAMANCE REGIONAL MEDICAL
CENTER

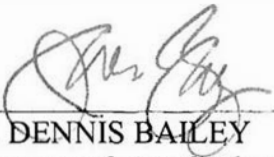
Defendants.

**RULE 58
CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this date served a file-stamped copy of the attached Order filed on January 30, 2025 in the above-entitled action upon all other parties to this cause by electronic mail to the attorney for said parties at the email addresses listed below:

Kya Johnson
Kenneth M. Johnson, P.A.
Post Office Box 21247
Greensboro, NC 27420-1247
kyajjohnsonlaw@gmail.com

This the 3rd day of February, 2025.



J. DENNIS BAILEY
Attorney for Defendant

OF COUNSEL:

WALDREP WALL BABCOCK & BAILEY PLLC
370 Knollwood Street, Suite 600
Winston-Salem, NC 27103
Phone: 336/722-6300
Fax: 336/722-1993

PT

Notice of Appeal and Orders

STATE OF NORTH CAROLINA
ALAMANCE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20CVS002215-000

ESTATE OF HENRY WYER, by
and through the Administrators of
The Estate, BENITA WYER and
LAMONT WYER

Plaintiff,

v.

ALAMANCE REGIONAL
MEDICAL CENTER, INC. d/b/a
CONE HEALTH ALAMANCE
REGIONAL MEDICAL
CENTER,
Defendants.

NOTICE OF APPEAL

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Plaintiff Estate of Henry Wyer, by and through the Administrators of the Estate, Benita Wyer and Lamont Wyer hereby give notice of appeal to the Court of Appeals of North Carolina from the Summary Judgment Order of Judge R. Stuart Albright, entered on January 30, 2025, in the Superior Court of Alamance County, which dismissed Plaintiff's action.

This the 14 day of February, 2025.

KENNETH M. JOHNSON, P.A.



Kya Johnson
Attorney for Plaintiff-Appellant
701 East Market Street
Greensboro, NC 27401
(336) 272-8273
State Bar No. 33444
kyajjohnsonlaw@gmail.com

STATE OF NORTH CAROLINA
ALAMANCE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20CVS002215-000

ESTATE OF HENRY WYER, by and
through the Administrators of The Estate,
BENITA WYER and LAMONT WYER
Plaintiff,

v.

ALAMANCE REGIONAL MEDICAL
CENTER, INC. d/b/a CONE HEALTH
ALAMANCE REGIONAL MEDICAL
CENTER, Defendants.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFF'S NOTICE OF APPEAL were served upon all counsel of record, by electronic mail addressed to:

J. Dennis Bailey
WALDREP WALL BABCOCK AND BAILEY
370 Knollwood Street
Suite 600
Winston-Salem, NC 27103
dbailey@waldrepwall.com

This the 11th day of February, 2025.



KYA JOHNSON
Attorney for Plaintiff

OF COUNSEL:

KENNETH M. JOHNSON, P.A.
701 East Market Street
PO Box 21247
Greensboro, NC 27420
(336) 272-8273 Office
(336) 285-8579 Facsimile

STATE OF NORTH CAROLINA
COUNTY OF ALAMANCE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20CVS002215-000

ESTATE OF HENRY WYER, by and
through the Administrators of The Estate
BENITA WYER and LAMONT WYER,

Plaintiff,

v.

ALAMANCE REGIONAL MEDICAL
CENTER, INC. d/b/a CONE HEALTH
ALAMANCE REGIONAL MEDICAL
CENTER,

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing APPEALLATE DIVISION TRANSCRIPT CONTRACT were served upon all counsel of record and the transcriptionist, by electronic mail addressed to:

J. Dennis Bailey
WALDREP WALL BABCOCK &
BAILEY, PLLC
370 Knollwood Street, Suite 600
Winston-Salem, NC 27103

dbailey@waldrepwall.com

Kimberly K. Berens
Official Court Reporter
212 W. Elm Street
Graham, NC 27253
kimberly.k.berens@nccourts.org

This the 19th day of February, 2025.



KYA JOHNSON
Attorney for Plaintiff

OF COUNSEL:

KENNETH M. JOHNSON, P.A.
701 East Market Street
PO Box 21247
Greensboro, NC 27420
(336) 272-8273 Office
(336) 285-8579 Facsimile

STATE OF NORTH CAROLINA
ALAMANCE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

NO.: 20CVS002215-000

ESTATE OF HENRY WYER

Plaintiff(s).

v.

ALAMANCE REGIONAL MEDICAL CEN.

Defendant(s).

**Appellate Division
Transcript Documentation**

(N.C. R. App. P. 7)

Part 1. Transcripts for the Appeal

The undersigned party has ordered a transcript of the trial tribunal proceedings identified below for this appeal. *(Please list transcripts ordered both before and after notice of appeal.)*

Date	Location (County and Courtroom)	Judge Presiding	Description
01/27/2025	Alamance County Historic Ctrm	Hon. R. Stuart Albright	Summary Judgement Motion Hearing
☐ Additional proceedings are identified on page(s) _____.			

STATE OF NORTH CAROLINA
COUNTY OF ALAMANCE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

ESTATE OF HENRY WYER, by and
through the Administrators of The Estate
BENITA WYER and LAMONT WYER,

Plaintiff,

v.

ALAMANCE REGIONAL MEDICAL
CENTER, INC. d/b/a CONE HEALTH
ALAMANCE REGIONAL MEDICAL
CENTER,

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFF'S APPELLATE DIVISION
TRANSCRIPT DOCUMENTATION were served upon all counsel of record, by electronic mail
addressed to:

J. Dennis Bailey
Waldrep Wall Babcock & Bailey, PLLC
370 Knollwood Street, Suite 600
Winston-Salem, NC 27103
dbailey@waldrepwall.com

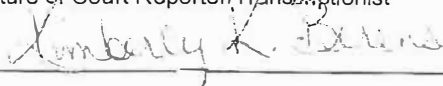
Kimberly K. Berens
Official Court Reporter
212 W. Elm Street
Graham, NC 27253

This the 17 day of February, 2025.


KYA JOHNSON
Attorney for Plaintiff

OF COUNSEL:

KENNETH M. JOHNSON, P.A.
701 East Market Street
PO Box 21247
Greensboro, NC 27420
(336) 272-8273 Office
(336) 285-8579 Facsimile

STATE OF NORTH CAROLINA ALAMANCE _____ County		File No. 20 CVS 00215-000	
		Additional File No.(s)	
		In the General Court of Justice ☐ District ☒ Superior Court Division	
Name of Plaintiff ("STATE OF NORTH CAROLINA" if a criminal case) THE ESTATE OF HENRY WYER		CERTIFICATE OF TRANSCRIPT DELIVERY	
VERSUS			
Name of Defendant ALAMANCE REGIONAL MEDICAL CENTER			
Codefendant(s) If Tried Jointly			
The undersigned hereby certifies that the transcript of proceedings in the above-captioned action was delivered as herein described.			
Description of Transcript(s) Delivered			
Date(s) of Trial/Hearing(s) 01/27/2025	Date Transcript(s) Ordered/Requested 2/11/2025	Transcript Ordered/Requested by Kya Johnson	
Date Transcript(s) Delivered 5/12/2025	Number of Volumes Delivered 1	Total Number of Pages Delivered 45	
Parties to Whom Transcript(s) Delivered			
For the (specify) Plaintiff (Name and Address) Kya Johnson Telephone No. E-mail Address kyajohnsonlaw@gmail.com	For the (specify) Defendant (Name and Address) Dennis Bailey Telephone No. E-mail Address dbailey@waldrepwall.com	For the (specify) (Name and Address) Telephone No. E-mail Address	
For the (specify) (Name and Address) Telephone No. E-mail Address	For the (specify) (Name and Address) Telephone No. E-mail Address	For the (specify) (Name and Address) Telephone No. E-mail Address	
Date 5/12/2025	Name of Court Reporter/Transcriptionist (printed) Kimberly K. Berens	Signature of Court Reporter/Transcriptionist 	

PROPOSED ISSUES ON APPEAL

The following are issues Plaintiff brings for appeal in front of the North Carolina Court of Appeals:

- I. Did the trial court err in granting summary judgment to the defendants by concluding that the doctrine of *res ipsa loquitur* does not apply in this medical malpractice action, despite evidence that the injury was of a kind that ordinarily does not occur in the absence of negligence and was in the exclusive control of the defendants?
- II. Did the trial court err in granting summary judgment to the defendants by finding there was no genuine issue of material fact as to whether defendants breached the applicable standard of care?
- III. Did the trial court err in concluding there was no genuine issue of material fact as to whether the defendants' acts or omissions were the proximate cause of plaintiff's injuries?
- IV. Did the trial court improperly weigh evidence or make credibility determinations in granting summary judgment for the defendants in violation of Rule 56 of the North Carolina Rules of Civil Procedure?
- V. Did the trial court err in granting summary judgment where the plaintiff submitted expert or circumstantial evidence sufficient to support a

reasonable inference of negligence and causation, warranting resolution
by a jury?

STATEMENT REGARDING EXHIBITS

Pursuant to Rule 9(d) of the North Carolina Rules of Appellate Procedures, the exhibits and a description of the exhibits attached are as follows:

- A. Medical Orders for Scope of Treatment (MOST) Form- This form is signed by plaintiff Benita Wyer serving as Health Care Power of Attorney for plaintiff Henry Wyer, and indicates plaintiff wants medical personnel to attempt cardiopulmonary resuscitation (CPR) if patient is in cardiopulmonary arrest.
- B. Do Not Resuscitate Order- This order was signed and placed in the medical record of plaintiff Henry Wyer by Megan Mason, NP, who was providing care to Mr. Wyer during his June 2018 admission to Alamance Regional Medical Center. The DNR Order provides in the event of cardiac and/or pulmonary arrest, efforts of cardiopulmonary resuscitation (CPR) SHOULD NOT be initiated.
- C. Affidavits of Randall E. Schisler, Jr. MD- Medical Opinion regarding validity of the MOST Form and DNR Order (without attached filed Exhibits: the MOST and DNR Order. Already included as Record Exhibits A and B and pursuant to Rule 9(b)2)
- D. Affidavit of James Robinson Harper, Jr. MD- Medical Opinion regarding viability of Henry Wyer (without attached filed Exhibits: the MOST and DNR

Order. Already included as Record Exhibits A and B and pursuant to Rule 9(b)(2)

- E. Affidavit of Gretchen Haralson, RHIT- records custodian for Cone Health/Alamance Regional Medical Center, Inc. who confirmed a true and accurate copy of all medical records of Henry Wyer were submitted to the court. Included with this Record are referenced excerpts of the medical records.
- F. Deposition of Megan Mason-the Alamance Regional employee, Nurse Practitioner who evaluated Henry Wyer and completed medical records regarding end of life decisions. Relevant excerpts referenced in the Motion and Memoranda are included in the Record.
- G. Deposition of Benita Wyer- Plaintiff and Health Care Power of Attorney for Henry Wyer- deposition exhibits-relevant excerpts referenced in the Motion and Memoranda are included in the Record.
- H. Affidavit of Disputed Facts-Verified by Benita Wyer
- I. Deposition of Latoya Lowery, RN- Medical Opinion Expert regarding the MOST form and DNR protocols- Relevant Excerpts referenced in Motion and Memoranda are included in the Record.
- J. Discovery Responses of Alamance Regional Medical Center, Inc., referenced in Motions and Memoranda- policies of Alamance Regional Medical Center regarding the MOST forms, DNR and end of life.

STATEMENT REGARDING RULE 11(c) SUPPLEMENT

This statement is made pursuant to Rule 11(c) of the North Carolina Rules of Appellate Procedure and states that a supplement compiled pursuant to this rule is being filed separately. A complete copy of the medical records listed as an exhibit to the Affidavit of Gretchen Haralson. In accordance with Rules 9(a) and 11(c) of the North Carolina Rules of Appellate Procedure, a "Rule 11(c) Supplement to the Printed Record on Appeal," consisting of 350 pages, numbered 229-580, is being filed contemporaneously herewith. The Rule 11(c) Supplement will be referenced as "(R S p____)".

STIPULATION SETTLING RECORD ON APPEAL

1. The proposed record on appeal was timely served on June 5, 2025. The certificate showing service of the proposed record is included in the settled record.
2. Defendant's objections were served on June 24, 2025. The parties came to an agreement as to which documents would be included in the printed record. Because no party moved for judicial settlement, the Record on Appeal was deemed settled on July 9, 2025.
3. All captions, signatures, headings of papers, certificates of service, and documents filed with the trial court that are not necessary for an understanding of the appeal may be omitted from the record, except as required by Rule 9 of the North Carolina Rules of Appellate Procedure.
4. The parties have undergone a reasonable search for duplicative or substantially similar documents in the record and in the Rule 9(d)(2) documentary exhibits.
5. The parties stipulate that the following documents constitute the agreed-upon Record on Appeal to be filed with the Clerk of the Court of Appeals:
 - a. This printed Record on Appeal, consisting of pages 1 through 89
 - b. The trial transcript described in the Statement of Transcript Option, (R p 34) which will be submitted by the court reporter upon receipt of a docket number for the appeal;

- c. Rule 9(d)(1) documentary exhibits consisting of 137 pages, consecutively numbered and cited as “Rec. Ex. A” through “Rec. Ex. J”; and
- d. The Rule 11(c) “Supplemental Record on Appeal” identified in stipulation 2, consisting of pages 227 through 575.

This the 9th day of July, 2025.

For the Plaintiff-Appellant:

A handwritten signature in black ink, appearing to read 'Kya Johnson', is written over a horizontal line.

Kya Johnson

NC Bar No.: 33444

KENNETH M. JOHNSON, P.A.

701 East Market Street

PO Box 21247

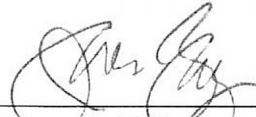
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For the Defendant-Appellee:



J. Dennis Bailey
NC Bar No: 12847
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No. _____

17th District

NORTH CAROLINA COURT OF APPEALS

ESTATE OF HENRY WYER, by and)
Through the Administrators of the Estate)
Of BENITA WYER and LAMONT WYER,)

Plaintiff,)

v.)

From Alamance County

No. 20 CVS 2215

ALAMANCE REGIONAL MEDICAL)
CENTER, INC. d/b/a CONE HEALTH)
ALAMANCE REGIONAL MEDICAL)
CENTER,)

Defendants.)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing STIPULATED RECORD ON APPEAL was served upon all counsel of record, by electronic mail addressed to:

J. Dennis Bailey
NC Bar No: 12847
WALDREP WALL
370 Knollwood Street
Suite 600
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722-1993 Facsimile
dbailey@waldrepwall.com

This the 10th day of July, 2025.



KYA JOHNSON
Attorney for Plaintiff

OF COUNSEL:

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