No. COA25-693 17th District

NORTH CAROLINA COURT OF APPEALS

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ESTATE OF HENRY WYER, by and Through the Administrators of the Estate Of BENITA WYER and LAMONT WYER, Plaintiff, v. ALAMANCE REGIONAL MEDICAL CENTER, INC. d/b/a CONE HEALTH ALAMANCE REGIONAL MEDICAL CENTER, Defendants.	From Alamance County No. 20 CVS 002215-000

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PLAINTIFF-APPELLANTS REPLY BRIEF

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Plaintiff,	)
v.	)From Alamance County)No. 20 CVS 002215-000
ALAMANCE REGIONAL MEDICAL CENTER, INC. d/b/a CONE HEALTH ALAMANCE REGIONAL MEDICAL CENTER,	)
Defendants.	)

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PLAINTIFF-APPELLANTS REPLY BRIEF

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INTRODUCTION AND SUMMARY OF REPLY

Defendant-Appellee's Brief offers no valid basis for affirming the trial court's grant of summary judgment. Instead, it mischaracterizes the evidentiary record, improperly construes disputed facts in its own favor, and seeks to absolve itself of liability for a grave medical error—placing a do-not-resuscitate ("DNR") order in Mr. Wyer's chart without legal authority and contrary to his expressed wishes. That act, undisputed in occurrence, created a false medical directive that directly resulted in the denial of life-saving treatment.

Appellee urges the Court to find, as a matter of law, that this error had no causal impact because Mr. Wyer was in hospice care. But this argument collapses under scrutiny. The undisputed record reflects that Mr. Wyer had a full code status and never waived his right to resuscitation. Hospice status is not a license to unilaterally impose a DNR. Whether CPR might have altered the outcome is not a question of speculation—it is a question of proximate cause for a jury to decide, especially where the hospital's own negligence made that determination impossible.

Appellee's attempt to distinguish or dismiss the application of res ipsa loquitur is similarly unavailing. The wrongful placement of a DNR is the very type of error that does not ordinarily occur in the absence of negligence, and the instrumentality—Mr. Wyer's chart—was solely under the hospital's control. Whether through direct negligence or failure to adhere to institutional protocols, the Defendant's own systems allowed a wrongful code status to remain in place, leading to the failure to administer CPR.

This Court should reverse summary judgment and remand the case for trial, where a jury—not the court—must resolve disputed issues of breach, causation, and damages.

ARGUMENT

I. Appellee's Argument That Causation Is Too Speculative Ignores the Evidentiary Gap Created by Its Own Conduct

Defendant-Appellee argues that summary judgment was proper because Plaintiff cannot prove that CPR would have saved Mr. Wyer's life. This misstates both the record and the applicable law. The hospital's negligence in placing an unauthorized DNR

order directly caused the failure to initiate resuscitation efforts. The causal uncertainty now cited by Appellee is not a result of inadequate evidence from Plaintiff—it is a consequence of Defendant's own conduct, which deprived Mr. Wyer of any chance at CPR and deprived the factfinder of the ability to assess its efficacy.

Appellee relies on the affidavits of medical professionals who speculate that CPR likely would not have succeeded. But that question—whether CPR would have saved Mr. Wyer—presents a genuine issue of material fact. Moreover, the Defendant is not entitled to summary judgment merely because it claims the outcome was inevitable. Proximate cause in North Carolina requires only that a negligent act be a substantial factor in producing the injury and that the result was a reasonably foreseeable consequence. See *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 233–34, 311 S.E.2d 559, 564 (1984).

The record contains ample evidence that the DNR was not authorized, that Mr. Wyer had consistently expressed a desire for life-sustaining measures, and that the presence of the DNR led directly to the decision not to administer CPR. Defendant-Appellee's

own witnesses admitted that hospital staff followed the DNR directive in not initiating resuscitation. Whether CPR would have succeeded is not determinative on summary judgment—it is a factual issue for the jury to consider in light of all the circumstances, including the hospital's error.

Importantly, courts do not reward a defendant for creating the very uncertainty they later claim defeats causation. As the North Carolina Supreme Court has recognized, proximate cause may be found even where the injury results from a chain of events involving discretion or judgment. The hospital's error eliminated the possibility of assessing whether CPR would have worked—it cannot now use that evidentiary gap, of its own making, to escape liability.

Accordingly, Plaintiff has presented sufficient evidence to raise a jury question as to whether the Defendant's actions were a proximate cause of Mr. Wyer's death. Summary judgment on causation grounds should be reversed.

II. Appellee misconstrues the Res Ipsa Loquitur Doctrine and Its Application to This Case.

Defendant-Appellee contends that the doctrine of *res ipsa loquitur* is inapplicable because the placement of the DNR order has been explained and because the doctrine only applies when the cause of injury is unknown. This is a misstatement of North Carolina law and ignores the nature of the dispute in this case.

First, the presence of a notation in the medical record indicating that Mr. Wyer agreed to a DNR order does not eliminate the applicability of *res ipsa*. Plaintiff has consistently argued—and supported with both testimony and circumstantial evidence—that Mr. Wyer never gave such authorization, and that the DNR was entered in error. This creates a disputed issue of material fact, not a reason to bypass *res ipsa*. Where, as here, a patient's rights are significantly affected by a hospital directive allegedly issued without consent, the fact that a record entry exists does not resolve the question of whether negligence occurred in placing or maintaining that entry.

Second, North Carolina law permits the application of *res ipsa loquitur* even when the injury-producing mechanism is known. In *Robinson v. Duke University Health System, Inc.*, 229 N.C. App. 215, 747 S.E.2d 321 (2013), the Court of Appeals allowed *res ipsa* to proceed in a case where a feeding tube was dislodged, despite knowing the nature of the event. The Court reaffirmed that *res ipsa* is appropriate where the injury would not ordinarily occur in the absence of negligence, and the instrumentality was under the exclusive control of the defendant. Id. at 223.

Here, the unexplained presence of a DNR order—allegedly without the consent of the patient or any authorized decisionmaker—meets both prongs of that test. The entry of a DNR, contrary to a patient's previously expressed wishes and without a documented request by a healthcare power of attorney or legal guardian, is not a common or acceptable occurrence in hospital practice. Moreover, the hospital maintained sole control over the electronic health record system in which the order was entered and on which staff relied during Mr. Wyer's code event.

While Defendant points to notations in the chart suggesting DNR status, Plaintiff has presented sufficient contrary evidence—including statements from family members, prior records of full-code status, and the timing of the hospice enrollment—to support an inference that the DNR order was wrongfully placed or maintained. The conflicting accounts about consent underscore why summary judgment was improper and why *res ipsa loquitur* provides a permissible theory for the jury to evaluate.

Ultimately, the existence of an entry in the chart does not immunize the hospital from scrutiny under *res ipsa*. The question is whether a jury could reasonably infer negligence from the fact that such a serious and harmful directive was entered, followed, and never corrected—despite the patient's consistent preference for resuscitation. Under North Carolina law, the answer is yes.

III. Hospice Enrollment Does Not Relieve Defendant of Its Duty to Obtain Proper Authorization Before Issuing a DNR Order

Defendant-Appellee argues that Mr. Wyer's enrollment in hospice care supports its position that no duty was breached,

implying that the entry of a DNR order was consistent with his care plan. This reasoning is both factually and legally flawed.

a. Hospice Enrollment Does Not Equate to a DNR Order

North Carolina law is clear that hospice services, while often provided near the end of life, do not automatically override a patient's rights regarding life-sustaining treatment. A patient receiving hospice care retains the right to accept or refuse resuscitative efforts, and medical providers remain bound by informed consent requirements and established procedures for issuing DNR orders. The North Carolina Medical Board explicitly recognizes that a DNR order must be based on a physician's assessment and properly documented consent, regardless of hospice status. See *N.C. Med. Bd., Position Statement: "Do Not Resuscitate" Orders (rev. 2014).*

Defendant's brief fails to identify any evidence that Mr. Wyer was under palliative sedation, had declined CPR, or lacked capacity at the time the DNR was entered. Nor does it offer proof that any

legally authorized representative consented to such a directive. The assertion that hospice care implies consent to a DNR order is unsupported by law and inconsistent with accepted medical and ethical practice.

b. The Duty of Care Remains in Effect Regardless of Prognosis

Appellee further suggests that because Mr. Wyer's condition was terminal, no breach occurred even if the DNR was entered without proper authorization. This argument dangerously conflates prognosis with autonomy. Regardless of life expectancy, the hospital had a continuing duty to respect Mr. Wyer's expressed wishes and ensure that any changes to his code status were properly authorized. This duty was especially critical given that a DNR order can have life-ending consequences.

Hospice enrollment may guide the overall goals of care, but it does not absolve the hospital of the responsibility to verify consent before implementing a no-resuscitation directive. Whether Mr. Wyer was actively dying is not dispositive; what matters is that he remained a competent adult with the right to make his own medical

decisions—or, if incapacitated, that his legally designated surrogate did so.

c. Summary Judgment Was Improper Given the Disputed Authorization

Appellee relies on notations in the chart suggesting that Mr. Wyer consented to DNR status, but Plaintiff has presented contrary evidence—including family testimony and Mr. Wyer's prior full-code documentation—that casts serious doubt on the legitimacy of the DNR order. This factual dispute alone precludes summary judgment. A jury must determine whether the DNR was properly authorized, and if not, whether its use breached the applicable standard of care.

IV. The Weight and Credibility of Appellee's Expert Affidavits Is a Jury Question, Not a Basis for Summary Judgment

Defendant-Appellee relies heavily on the affidavits of its retained experts to argue that (1) the standard of care was not breached, and (2) CPR would not have changed Mr. Wyer's outcome. However, these affidavits—submitted without discovery, depositions, or cross-examination—do not entitle Appellee to

summary judgment. The credibility and weight of expert testimony are classic jury questions.

a. Disputed Factual Premises Undermine the Affidavit Conclusions

The defense expert opinions rest on factual assumptions that are sharply contested: namely, that the DNR order was properly authorized, that Mr. Wyer's condition rendered CPR futile, and that hospital staff acted appropriately in withholding resuscitation. But these assumptions are contradicted by:

- Documentation showing Mr. Wyer was full code upon admission.
- Statements from family members who were present and opposed any DNR.
- The absence of any signed MOST, DNR, or documented surrogate consent, directing DNR.

Even in the absence of a competing expert, these factual disputes are material. If a jury disbelieves the foundational facts assumed by Appellee's experts, it may likewise reject their conclusions. See *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 234, 311 S.E.2d 559, 564

(1984) (even when there is no conflict in evidence, if conflicting inferences may be drawn, summary judgment is improper).

b. **Summary Judgment Is Not a Mechanism to Pre-Judge Factual Disputes or Credibility**

North Carolina courts consistently hold that a plaintiff is not required to overcome expert opinion with expert testimony at the summary judgment stage, particularly where material facts are in dispute. See *Turner v. Duke Univ.*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989) ("It is not the role of the trial court to weigh the evidence or determine the truth of the matter but to determine only whether a genuine issue exists for trial.").

Here, Plaintiff's claims are rooted not in technical medical misjudgment, but in administrative failures—including placing a DNR in the chart without lawful consent or documentation. These are factual determinations within the jury's understanding, and do not require expert rebuttal to survive summary judgment.

c. The Hospital Cannot Shield Itself from Liability By Creating an Evidentiary Gap

By entering an unauthorized DNR and then withholding CPR, the hospital created the very evidentiary void it now argues is fatal to Plaintiff's case. While Plaintiff may lack expert testimony on whether CPR would have succeeded, this absence is the direct result of the hospital's actions, not a failure of Plaintiff's diligence.

As this Court has recognized, a defendant cannot benefit from uncertainty it creates through its own wrongdoing. The hospital made it impossible to know whether resuscitation might have worked, and a jury should decide whether that deprivation constitutes actionable negligence.

CONCLUSION

Defendant-Appellee's brief fails to resolve the core disputes of fact that remain at the heart of this case: whether the DNR order was properly authorized, whether CPR was wrongfully withheld, and whether that deprivation contributed to Mr. Wyer's death.

These are not issues suited for summary judgment. The trial court erred in weighing affidavits over live testimony, discounting sworn statements from family members, and ignoring the evidentiary gap caused by the hospital's own actions.

This case is not about second-guessing complex medical decisions—it is about a basic procedural and ethical failure: placing a do-not-resuscitate order in a patient's chart without his or his surrogate's consent. Whether or not CPR would have ultimately saved Mr. Wyer's life, a jury must decide whether he was unlawfully deprived of the chance to try.

Plaintiff respectfully requests that this Court reverse the trial court's grant of summary judgment and remand the case for trial.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Plaintiff certifies that the foregoing brief, which was prepared using a 14-point proportionally spaced font with serifs, is less than 3750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, and this certificate of compliance, as reported by the word-processing software.

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CERTIFICATE OF SERVICE

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I hereby certify that a copy of the foregoing PLAINTIFF APPELLANT'S REPLY BRIEF was served upon all counsel of record, by electronic and first class mail addressed to:

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