Nursing Home Negligence Charge

COURT'S CHARGE

LADIES AND GENTLEMEN, NOW THAT YOU HAVE HEARD THE EVIDENCE, IT BECOMES MY DUTY TO GIVE YOU THE INSTRUCTIONS OF THE COURT AS TO THE LAW APPLICABLE TO THIS CASE.

ALL OF THE INSTRUCTIONS OF LAW GIVEN TO YOU BY THE COURT – THOSE GIVEN TO YOU AT THE BEGINNING OF THE TRIAL AND THESE FINAL INSTRUCTIONS – MUST GUIDE YOUR DELIBERATIONS.

THESE FINAL INSTRUCTIONS WILL COME IN THREE PARTS: (1) GENERAL INSTRUCTIONS ON YOUR DUTIES; (2) A STATEMENT OF THE RULES OF LAW THAT YOU MUST APPLY; AND (3) RULES AND GUIDELINES FOR YOUR DELIBERATIONS AND RETURN OF A VERDICT.

I. GENERAL INSTRUCTIONS

A. DUTY OF JURORS

1. JURY AS FACT FINDER. IT IS YOUR DUTY AS JURORS TO FOLLOW THE LAW AS STATED IN ALL OF THE COURT'S INSTRUCTIONS AND TO APPLY THIS

LAW TO THE FACTS AS YOU FIND THEM FROM THE EVIDENCE RECEIVED DURING TRIAL. THESE INSTRUCTIONS CONTAIN THE LAW; YOU, AND YOU ALONE, ARE THE JUDGES OF THE FACTS. YOU MUST APPLY THE FACTS AS YOU FIND THEM TO THE LAW AS THE COURT GIVES IT TO YOU.

2. NO BIAS, PREJUDICE, SYMPATHY. IT IS YOUR DUTY TO DECIDE THIS CASE BASED SOLELY ON THE EVIDENCE AND THE LAW, REGARDLESS OF PERSONAL OPINIONS, AND WITHOUT BIAS, PREJUDICE, OR SYMPATHY.

B. PREPONDERANCE OF THE EVIDENCE

1. BURDEN OF PROOF. THE BURDEN IS ON THE PLAINTIFF TO PROVE EVERY ESSENTIAL ELEMENT OF HIS CLAIM AGAINST THE DEFENDANT BY A PREPONDERANCE OF THE EVIDENCE. IF THE PROOF OFFERED BY THE PLAINTIFF FAILS TO ESTABLISH ANY ESSENTIAL ELEMENT OF THE PLAINTIFF'S CLAIM AGAINST THE DEFENDANT BY A PREPONDERANCE OF THE EVIDENCE – THAT IS, THAT THE EVIDENCE IS EVENLY DIVIDED OR PREPONDERATES IN FAVOR OF THE DEFENDANT – YOU MAY RETURN A VERDICT FOR THE DEFENDANT.

2. MEANING. TO "ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE" MEANS TO PROVE THAT SOMETHING IS MORE LIKELY SO THAN NOT SO. IN OTHER WORDS, A PREPONDERANCE OF THE EVIDENCE IN THIS CASE MEANS SUCH EVIDENCE, AS WHEN CONSIDERED AND COMPARED WITH THAT OPPOSED TO IT, HAS MORE CONVINCING FORCE AND PRODUCES IN YOUR MIND BELIEF THAT WHAT IS SOUGHT TO BE PROVED IS MORE LIKELY TRUE THAN NOT TRUE.

3. NOT "REASONABLE DOUBT". WHILE THE BURDEN IS ON THE PLAINTIFF, , TO PROVE HIS CLAIM BY A PREPONDERANCE OF THE EVIDENCE, THIS RULE DOES NOT REQUIRE PROOF BEYOND A REASONABLE DOUBT.

C. <u>SOURCES OF EVIDENCE</u>

1. GENERALLY. THE EVIDENCE IN THE CASE CONSISTS OF THE SWORN TESTIMONY OF THE WITNESSES, REGARDLESS OF WHO MAY HAVE CALLED THEM; DOCUMENTS AND OTHER THINGS RECEIVED INTO THE RECORD AS EXHIBITS, REGARDLESS OF WHO MAY HAVE PRODUCED THEM; AND THOSE MATTERS TO WHICH THE PARTIES STIPULATED.

2. NOT COUNSELS' STATEMENTS/ARGUMENTS. ALTHOUGH THE STATEMENTS AND ARGUMENTS OF COUNSEL ARE BENEFICIAL IN AIDING YOUR UNDERSTANDING OF THE ISSUES AND EVIDENCE, THEY DO NOT CONSTITUTE EVIDENCE IN THE CASE, UNLESS MADE AN ADMISSION OR STIPULATION OF FACT.

3. NOT SUSTAINED OBJECTION/STRICKEN EVIDENCE. ANY EVIDENCE TO WHICH AN OBJECTION WAS SUSTAINED BY THE COURT OR ANY EVIDENCE ORDERED STRICKEN BY THE COURT MUST BE ENTIRELY DISREGARDED. FURTHERMORE, WHEN THE COURT HAS SUSTAINED AN OBJECTION TO A QUESTION ADDRESSED TO A WITNESS, THE JURY MUST DISREGARD THAT QUESTION ENTIRELY, AND MAY DRAW NO INFERENCE FROM THE WORDING OF IT, OR SPECULATE AS TO WHAT THE WITNESS WOULD HAVE SAID IF HE HAD BEEN PERMITTED TO ANSWER SUCH QUESTION.

4. NOT COURT'S COMMENTS. NO QUESTION, OR FOR THAT MATTER, NO STATEMENT OR RULING WHICH I HAVE MADE DURING THE COURSE OF THIS TRIAL WAS INTENDED TO INDICATE MY OPINION AS TO HOW YOU SHOULD DECIDE THE CASE OR TO INFLUENCE YOU IN ANY WAY IN YOUR DETERMINATION OF THE FACTS.

5. NOT OUT-OF-COURT OCCURRENCES. ANYTHING YOU HAVE SEEN OR HEARD OUTSIDE THE COURTROOM IS NOT EVIDENCE AND MUST BE ENTIRELY DISREGARDED.

6. JUROR RECOLLECTION. IF ANY REFERENCE BY THE COURT OR BY COUNSEL TO MATTERS OF EVIDENCE DO NOT COINCIDE WITH YOUR OWN RECOLLECTION OF THE EVIDENCE, YOUR RECOLLECTION SHOULD CONTROL DURING YOUR DELIBERATIONS.

7. OBJECTIONS. IT IS THE DUTY OF THE ATTORNEY ON EACH SIDE OF A CASE TO OBJECT WHEN THE OTHER SIDE OFFERS TESTIMONY OR OTHER EVIDENCE WHICH THE ATTORNEY BELIEVES IS NOT PROPERLY ADMISSIBLE. YOU SHOULD NOT SHOW PREJUDICE AGAINST AN ATTORNEY OR HIS CLIENT BECAUSE THE ATTORNEY HAS MADE OBJECTIONS.

UPON ALLOWING THE TESTIMONY OR OTHER EVIDENCE TO BE INTRODUCED OVER THE OBJECTION OF AN ATTORNEY, THE COURT DOES NOT INDICATE ANY OPINION AS TO THE WEIGHT OR EFFECT OF SUCH EVIDENCE. AS STATED BEFORE, THE JURORS ARE THE SOLE JUDGES OF THE CREDIBILITY OF ALL WITNESSES AND THE WEIGHT AND EFFECT OF ALL EVIDENCE.

D. USE OF EVIDENCE

1. DIRECT AND CIRCUMSTANTIAL EVIDENCE. THERE ARE, GENERALLY SPEAKING, TWO TYPES OF EVIDENCE FROM WHICH YOU MAY PROPERLY FIND THE TRUTH AS TO THE FACTS OF THIS CASE. ONE IS DIRECT EVIDENCE – SUCH AS THE TESTIMONY OF ANY EYEWITNESS. THE OTHER IS INDIRECT OR CIRCUMSTANTIAL EVIDENCE – THE PROOF OF A CHAIN OF CIRCUMSTANCES POINTING TO THE EXISTENCE OR NONEXISTENCE OF CERTAIN FACTS. AS A GENERAL RULE, THE LAW MAKES NO DISTINCTION BETWEEN DIRECT AND CIRCUMSTANTIAL EVIDENCE, BUT SIMPLY REQUIRES THAT THE JURY FIND THE FACTS IN ACCORDANCE WITH THE PREPONDERANCE OF ALL THE EVIDENCE IN THE CASE, DIRECT AND CIRCUMSTANTIAL.

2. INFERENCES. IN YOUR CONSIDERATION OF THE EVIDENCE, YOU ARE NOT LIMITED TO THE BALD STATEMENTS OF THE WITNESSES. IN OTHER WORDS, YOU ARE NOT LIMITED SOLELY TO WHAT YOU SEE AND HEAR AS THE WITNESSES TESTIFIED. YOU ARE PERMITTED TO DRAW, FROM FACTS WHICH YOU FIND HAVE BEEN PROVED, SUCH REASONABLE INFERENCES THAT YOU FEEL ARE JUSTIFIED IN THE LIGHT OF YOUR COMMON EXPERIENCE. INFERENCES ARE DEDUCTIONS OR CONCLUSIONS WHICH REASON AND COMMON SENSE LEAVE THE JURY TO DRAW FROM FACTS WHICH HAVE BEEN OTHERWISE ESTABLISHED BY THE EVIDENCE IN THE CASE.

E. CREDIBILITY OF WITNESSES

1. GENERALLY. YOU, AS JURORS, ARE THE SOLE JUDGES OF THE CREDIBILITY OF THE WITNESSES AND THE WEIGHT THEIR TESTIMONY DESERVES. YOU SHOULD CAREFULLY SCRUTINIZE ALL OF THE TESTIMONY GIVEN, THE CIRCUMSTANCES UNDER WHICH EACH WITNESS HAS TESTIFIED, AND EVERY MATTER IN EVIDENCE WHICH TENDS TO SHOW WHETHER A WITNESS IS WORTHY OF BELIEF. YOU MAY CONSIDER, IF FOUND BY YOU FROM THE EVIDENCE, EACH WITNESSES':

1. GOOD MEMORY OR LACK OF MEMORY;

2. INTELLIGENCE, MOTIVE, STATE OF MIND AND DEMEANOR AND MANNER WHILE ON THE STAND;

3. ANY RELATION WHICH EACH WITNESS MAY BEAR TO EITHER SIDE OF THE CASE;

4. THE MANNER IN WHICH EACH WITNESS MIGHT BE AFFECTED BY THE VERDICT;

5. ABILITY TO OBSERVE THE MATTERS AS TO WHICH HE OR SHE HAS TESTIFIED;

6. THE OPPORTUNITY AND MEANS OR LACK OF OPPORTUNITY AND MEANS OF HAVING KNOWLEDGE OF THE MATTERS ABOUT WHICH THE WITNESS TESTIFIED;

7. THE REASONABLENESS OR UNREASONABLENESS OF THE TESTIMONY;

8. THE BIAS, PREJUDICE, HOSTILITY, OR FRIENDLINESS OF THE WITNESS TO ANY PARTY;

9. CONTRADICTORY STATEMENTS IF YOU BELIEVE THAT SUCH WERE MADE BY THE WITNESS;

10. CONTRADICTORY ACTS IF YOU BELIEVE THE WITNESS ENGAGED IN CONDUCT WHICH WAS INCONSISTENT WITH, OR CONTRADICTORY TO, HIS TESTIMONY;

11. AND WHETHER HE OR SHE IMPRESSED YOU AS HAVING AN ACCURATE RECOLLECTION OF THESE MATTERS. CONSIDER ALSO AND THE EXTENT TO WHICH, IF AT ALL, EACH WITNESS IS EITHER SUPPORTED OR CONTRADICTED BY OTHER EVIDENCE IN THE CASE.

2. INCONSISTENCIES/DISCREPANCIES. INCONSISTENCIES OR DISCREPANCIES IN THE TESTIMONY OF A WITNESS OR BETWEEN OR AMONG THE TESTIMONY OF DIFFERENT WITNESSES MAY OR MAY NOT CAUSE THE JURY TO DISCREDIT SUCH TESTIMONY. TWO OR MORE PERSONS WITNESSING AN INCIDENT OR A TRANSACTION MAY SEE OR HEAR IT DIFFERENTLY – AN INNOCENT MISRECOLLECTION, LIKE FAILURE OF RECOLLECTION, IS NOT AN UNCOMMON EXPERIENCE. SO IN WEIGHING THE EFFECT OF A DISCREPANCY, ALWAYS CONSIDER WHETHER IT PERTAINS TO A MATTER OF IMPORTANCE OR AN UNIMPORTANT DETAIL AND WHETHER THE DISCREPANCY RESULTS FROM INNOCENT ERROR OR INTENTIONAL FALSEHOOD.

3. IMPEACHMENT. A WITNESS, WHETHER OR NOT A PARTY, MAY BE DISCREDITED OR IMPEACHED BY CONTRADICTORY EVIDENCE; OR BY EVIDENCE THAT AT OTHER TIMES THE WITNESS HAS TESTIFIED OR HAS MADE STATEMENTS WHICH ARE INCONSISTENT WITH THE WITNESS' PRESENT TESTIMONY IN THIS TRIAL. IF YOU BELIEVE A WITNESS HAS BEEN IMPEACHED OR IF A WITNESS HAS BEEN SHOWN TO HAVE KNOWINGLY TESTIFIED FALSELY CONCERNING ANY

MATERIAL MATTER, YOU HAVE A RIGHT TO DISTRUST SUCH WITNESS' TESTIMONY IN ALL OTHER PARTICULARS; AND YOU MAY REJECT ALL THE TESTIMONY OF THAT WITNESS OR GIVE IT JUST SUCH CREDIBILITY AS YOU MAY THINK IT DESERVES.

4. FALSE TESTIMONY. IF YOU BELIEVE THAT ANY WITNESS IN THIS CASE TESTIFIED FALSELY, AS TO ANY MATERIAL FACT, YOU MAY, AFTER CONSIDERING AND WEIGHING THE TESTIMONY OF SUCH WITNESS, DISREGARD THE WHOLE OF THE TESTIMONY OF SUCH WITNESS OR GIVE IT OR ANY PART THEREOF, SUCH WEIGHT AND CREDIT AS YOU BELIEVE IT TO BE ENTITLED TO RECEIVE.

F. <u>EXPERT WITNESSES</u>

1. IN GENERAL. THE RULES OF EVIDENCE PROVIDE THAT IF SCIENTIFIC, TECHNICAL OR OTHER SPECIALIZED KNOWLEDGE MIGHT ASSIST THE JURY IN UNDERSTANDING THE EVIDENCE OR IN DETERMINING A FACT IN ISSUE, A WITNESS QUALIFIED AS AN EXPERT BY KNOWLEDGE, SKILL, EXPERIENCE, TRAINING OR EDUCATION MAY TESTIFY AND STATE HIS OR HER OPINION CONCERNING SUCH MATTERS.

2. CREDIBILITY. IN DETERMINING THE CREDIBILITY AND WEIGHT TO BE GIVEN TO EACH PARTIES' EXPERT, YOU MAY CONSIDER, AMONG OTHER THINGS, THE EDUCATION, TRAINING, EXPERIENCE, KNOWLEDGE AND ABILITY OF THAT WITNESS, AND THE MOTIVATION OF THE EXPERT FOR GIVING EACH OPINION.

3. WHEN UTILIZED. THE TESTIMONY OF EXPERTS IS UTILIZED WHEN THE SUBJECT MATTER OF A CASE IS SUCH THAT, WITHOUT EXPERT ASSISTANCE, INEXPERIENCED PERSONS ARE UNLIKELY TO PROVE CAPABLE OF FORMING A

CORRECT JUDGMENT. AN EXPERT WITNESS IS ONE WHO, THROUGH STUDY OR EXPERIENCE OR BOTH, HAS ACQUIRED SKILL THAT MAKES HIM BETTER QUALIFIED THAN A LAYMAN TO FORM AN OPINION ON THE SUBJECT IN QUESTION. FOR EXAMPLE, TO ENABLE YOU AS JURORS TO DETERMINE WHETHER THE DEFENDANT IS LIABLE, IT IS ORDINARILY NECESSARY TO HAVE EXPERTS TESTIFY AS TO BOTH THE APPROPRIATE STANDARD OF CARE TO WHICH THE DEFENDANT IS HELD AND TO THEIR OPINIONS AS TO WHETHER THE DEFENDANT'S CONDUCT AMOUNTED TO A DEVIATION FROM THE APPROPRIATE AND ACCEPTABLE MEDICAL STANDARD OF CARE.

4. WEIGHT OF TESTIMONY. HOWEVER, EXPERT TESTIMONY IS NO MORE CONCLUSIVE THAN THE TESTIMONY OF OTHER WITNESSES. JUST AS IN THE CASE OF NON-EXPERT WITNESSES, YOU MAY FROM ALL OF THE FOREGOING CONSIDERATIONS AND FROM ALL OTHER EVIDENCE AND CIRCUMSTANCES APPEARING IN THE TRIAL, GIVE TO THE TESTIMONY OF EACH EXPERT SUCH CREDIT AND WEIGHT AS YOU BELIEVE SUCH EVIDENCE IS ENTITLED TO RECEIVE. FURTHERMORE, AFTER WEIGHING AND CONSIDERING THE TESTIMONY AND OPINION OF AN EXPERT WITNESS, YOU MAY BELIEVE OR DISBELIEVE THE TESTIMONY AND THE OPINION OF SUCH WITNESS IN WHOLE OR IN PART.

II. THE LAW

A. PRIMA FACIE CASE

THE PLAINTIFF HAS ALLEGED THAT THE DEFENDANT COMMITTED PROFESSIONAL NEGLIGENCE. IN ORDER TO PREVAIL UPON THIS CLAIM, THE

PLAINTIFF MUST PROVE, BY A PREPONDERANCE OF THE EVIDENCE, EACH OF THE FOLLOWING THREE SEPARATE ELEMENTS:

(1) A DEVIATION FROM THE APPLICABLE STANDARD OF CARE,

(2) SUCH DEVIATION WAS A PROXIMATE CAUSE OF AN INJURY TO

, AND

(3) SUCH DEVIATION RESULTED IN DAMAGES.

B. <u>STANDARD OF CARE</u>

1. DEFINITION. THE TERM STANDARD OF CARE, AS USED IN THESE INSTRUCTIONS, MEANS THE ACCEPTABLE STANDARD OF CARE EMPLOYED BY NURSING HOMES AND ITS STAFF NATIONWIDE IN THE PRACTICE OF THEIR SPECIALTY. THE LAW OF WEST VIRGINIA DEFINES STANDARD OF CARE AS THE DEGREE OF CARE, SKILL AND LEARNING REQUIRED OR EXPECTED OF A REASONABLE, PRUDENT NURSING HOME AND ITS STAFF ACTING IN THE SAME OR SIMILAR CIRCUMSTANCE.

2. REASONABLE SKILL AND DILIGENCE. A HEALTH CARE PROVIDER IS NOT REQUIRED TO EXERCISE THE HIGHEST DEGREE OF SKILL AND DILIGENCE POSSIBLE IN THE TREATMENT OF A RESIDENT, BUT IS REQUIRED TO POSSESS AND EXERCISE THAT DEGREE OF LEARNING, SKILL, DILIGENCE AND CARE ORDINARILY USED AND POSSESSED BY A HEALTH CARE PROVIDER IN GOOD STANDING IN THE PROFESSION OR CLASS TO WHICH THEY BELONG, ACTING IN THE SAME OR SIMILAR CIRCUMSTANCES IN 1999, WITH REGARD BEING GIVEN TO THE STATE OF MEDICAL AND NURSING SCIENCE AT THAT TIME.

3. EXPERT TESTIMONY. A DEVIATION FROM A MEDICAL STANDARD MUST BE ESTABLISHED THROUGH EXPERT TESTIMONY. IN OTHER WORDS, TO FIND PROFESSIONAL NEGLIGENCE OR MALPRACTICE ON THE PART OF THE DEFENDANT, YOU MUST FIND THAT THE EXPERT TESTIMONY HAS DEMONSTRATED A DEPARTURE BY THE DEFENDANT FROM AN ACCEPTABLE STANDARD OF CARE. EXPERT MEDICAL OPINIONS MUST BE TESTIFIED TO WITH A REASONABLE DEGREE OF MEDICAL PROBABILITY. ANY EVIDENCE OF A BREACH OF STANDARD CARE NOT SUPPORTED BY EXPERT TESTIMONY SHOULD NOT BE CONSIDERED BY THE JURY.

4. NO PRESUMPTION GENERALLY. YOU MAY NOT PRESUME THAT THERE WAS A VIOLATION OF THE STANDARD OF CARE MERELY BECAUSE A LAWSUIT WAS BROUGHT OR BECAUSE THE PLAINTIFF ALLEGES THAT THE INJURY AND DEATH OF WAS THE RESULT OF THE TREATMENT SHE RECEIVED FROM THE DEFENDANT. THE LAW RECOGNIZES THAT INCIDENTS MAY HAPPEN AND INJURY AND DEATH MAY RESULT THEREFROM WITHOUT NEGLIGENCE ON THE PART OF ANY PARTY.

5. NO PRESUMPTION BECAUSE OF BAD RESULT. A HEALTH CARE PROVIDER IS NOT A GUARANTOR OF FAVORABLE RESULTS. THUS, BAD OR UNEXPECTED RESULTS OR COMPLICATIONS ARE NOT PROOF OF NEGLIGENCE ON THE PART OF THE HEALTH CARE PROVIDER. THE OCCURRENCE OF A BAD RESULT DOES NOT NECESSARILY MEAN THAT THE CARE AND THE TREATMENT AFFORDED TO THE PATIENT WAS NEGLIGENT. NEGLIGENCE CANNOT BE INFERRED SOLELY FROM THE INJURY AND DEATH OF .

C. **PROXIMATE CAUSE**

1. MEANING. THE GENERALLY ACCEPTED DEFINITION OF "PROXIMATE CAUSE" OF AN INJURY IS THAT CAUSE WHICH NECESSARILY SETS IN OPERATION THE FACTORS THAT ACCOMPLISH THE INJURY, REASONABLY FORESEEABLE BY AN ORDINARILY PRUDENT PERSON AS THE NATURAL AND PROBABLE CONSEQUENCE OF HIS OR HER ACT OR FAILURE TO ACT, AND WHICH IN NATURAL CONTINUOUS SEQUENCE, UNBROKEN BY AN INTERVENING CAUSE, PRODUCES THE INJURY, AND WITHOUT WHICH IT WOULD NOT HAVE OCCURRED. A PROXIMATE CAUSE OF AN INJURY IS A CAUSE THAT DIRECTLY CONTRIBUTES TO THE INCIDENT AND WITHOUT WHICH SUCH INJURY WOULD NOT HAVE RESULTED. IT IS IMPORTANT TO REMEMBER THAT AN INJURY MAY HAVE MORE THAN ONE PROXIMATE CAUSE.

2. BURDEN OF PROOF. IT FOLLOWS THEN, THAT TO RECOVER FROM THE DEFENDANT, THE PLAINTIFF MUST PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THAT THE NEGLIGENCE OF THE DEFENDANT PROXIMATELY CAUSED THE INJURY TO AND DEATH OF . IF, FROM A PREPONDERANCE OF THE EVIDENCE, YOU FIND THAT THE DEFENDANT'S TREATMENT OF WAS NOT A PROXIMATE CAUSE OF INJURY TO AND DEATH OF HER, THEN YOU MUST FIND IN FAVOR OF THE DEFENDANT.

IN ORDER TO PREVAIL IN THIS CASE, THE PLAINTIFF NEED ONLY PROVE THAT THE DEFENDANT WAS NEGLIGENT AND THE NEGLIGENT ACTS OR OMISSIONS INCREASED THE RISK OF HARM TO AND THAT THE INCREASED RISK OF HARM WAS A SUBSTANTIAL FACTOR IN HER DEATH.

3. OTHER POSSIBLE CAUSES OF DEATH. THE PLAINTIFF DOES NOT HAVE THE BURDEN TO EXCLUDE EVERY OTHER POSSIBLE CAUSE OF 'S DEATH. IT IS ENOUGH IF THE EVIDENCE SHOWS FACTS AND CONDITIONS FROM WHICH YOU, THE JURY, MAY REASONABLY INFER THE NEGLIGENCE OF THE DEFENDANT, AND THAT SUCH NEGLIGENCE WAS A PROXIMATE CAUSE OR SUBSTANTIAL CONTRIBUTING FACTOR IN CAUSING 'S DEATH.

D. <u>DAMAGES</u>

1. BURDEN. IF YOU FIND BY A PREPONDERANCE OF THE EVIDENCE PRESENTED TO YOU IN THIS CASE THAT THE PLAINTIFF IS ENTITLED TO RECEIVE AN AWARD FOR DAMAGES WITH RESPECT TO ANY OF HIS CLAIMS, IT IS NEVERTHELESS THE PLAINTIFF'S BURDEN TO ESTABLISH THE NATURE AND EXTENT OF EACH AND ALL CLAIMED INJURIES AND DAMAGES BY A PREPONDERANCE OF THE EVIDENCE. IF THE EVIDENCE AS TO ANY OF THE PLAINTIFF'S ALLEGED INJURIES OR DAMAGES, IF ANY, OR THE NATURE AND EXTENT THEREOF, IS EVENLY BALANCED OR PREPONDERATES IN FAVOR OF THE DEFENDANT, THEN THE PLAINTIFF IS NOT ENTITLED TO RECOVER AS TO THOSE ALLEGED INJURIES OR DAMAGES.

2. COMPENSATORY DAMAGES. IN THE EVENT THAT YOUR VERDICT IS FOR THE PLAINTIFF, THEN YOU MUST FIRST CONSIDER THE ISSUE OF COMPENSATORY DAMAGES.

GENERAL DAMAGES INCLUDE PERSONAL HUMILIATION, EMOTIONAL DISTRESS, MENTAL ANGUISH, LOSS OF SELF-ESTEEM, EMBARRASSMENT,

INCONVENIENCE OR LOSS OF ENJOYMENT OF LIFE. LOSS OF ENJOYMENT OF LIFE MEANS THE EXTENT TO WHICH A PERSON'S INJURY HAS AFFECTED HIS OR HER ABILITY TO PERFORM AND ENJOY THE ORDINARY FUNCTIONS OF LIFE.

YOU SHOULD AWARD THE PLAINTIFF ONLY SUCH A SUM OF COMPENSATORY DAMAGES AS WILL REASONABLY AND FAIRLY COMPENSATE THE PLAINTIFF FOR THE INJURIES THAT HE HAS PROVEN BY A PREPONDERANCE OF THE EVIDENCE TO HAVE ACTUALLY SUFFERED.

YOU SHALL NOT AWARD COMPENSATORY DAMAGES BASED ON SYMPATHY OR GUESSWORK. YOUR ASSESSMENT OF COMPENSATORY DAMAGES MUST BE REASONABLE AND BASED ONLY UPON THAT EVIDENCE WHICH IS PRESENTED AT TRIAL.

3. REASONABLE DEGREE OF MEDICAL PROBABILITY. FOR THE PLAINTIFF TO ESTABLISH A CAUSAL LINK BETWEEN THE DEATH OF AND THE ALLEGED NEGLIGENCE OF THE DEFENDANT, HE MUST PROVE, WITHIN A REASONABLE DEGREE OF MEDICAL PROBABILITY, THAT THE DAMAGES WERE CAUSED BY ACTS OR OMISSIONS OF THE DEFENDANT. IF YOU SHOULD FIND THAT THE PLAINTIFF FAILED TO ESTABLISH, THROUGH COMPETENT MEDICAL TESTIMONY, THAT 'S DEATH WAS, WITHIN A REASONABLE DEGREE OF MEDICAL PROBABILITY, RELATED TO THE ACTS OR OMISSIONS OF THE DEFENDANT, THEN YOU MAY NOT AWARD ANY DAMAGES.

4. ONE RECOVERY. THERE CAN ONLY BE ONE RECOVERY OF DAMAGES FOR ONE INJURY. THEREFORE, YOU ARE INSTRUCTED NOT TO AWARD THE PLAINTIFF DAMAGES MULTIPLE TIMES FOR A SINGLE LOSS.

5. SPECULATIVE DAMAGES. DAMAGES CANNOT BE AWARDED FOR AN INJURY WHERE THE EVIDENCE IS SPECULATIVE, CONJECTURAL OR UNCERTAIN AS TO THE AMOUNT OF DAMAGES. THEREFORE, IF YOU FIND THAT THE PLAINTIFF'S PROOF IS BASED MERELY ON SPECULATION, CONJECTURE OR THAT THE EVIDENCE IS UNCLEAR AS TO THE AMOUNT OF DAMAGES, IF ANY, SUFFERED BY THE PLAINTIFF, YOU NEED NOT AWARD THE PLAINTIFF DAMAGES IN THIS CASE.

HOWEVER, IT IS THE UNCERTAINTY AS TO THE FACT OF DAMAGES, AND NOT AS TO THE AMOUNT OF DAMAGES, THAT IS TO BE CONSIDERED. WHERE IT IS CERTAIN THAT DAMAGES RESULTED, MERE UNCERTAINTY AS TO THE AMOUNT DOES NOT JUSTIFY THE JURY IN REFUSING RECOVERY. A MERE DIFFICULTY IN ASSESSMENT OF DAMAGES IS NOT SUFFICIENT REASON FOR REFUSING THEM WHERE THE RIGHT TO DAMAGES HAS BEEN PROVEN.

6. LIFE EXPECTANCY. ACCORDING TO THE MORTALITY TABLES, THE AVERAGE LIFE EXPECTANCY OF A WOMAN AGED 57 IS 26.6 YEARS MORE. IN OTHER WORDS, SHOULD HAVE ATTAINED THE AGE OF 83.6 YEARS. THIS FACT IS NOW IN EVIDENCE TO BE CONSIDERED BY YOU IN FIXING DAMAGES IF YOU FIND THAT THE PLAINTIFF IS ENTITLED TO A VERDICT. HOWEVER, THIS ONE FACTOR OF EVIDENCE IS NOT, BY LAW, CONTROLLING, BUT IT SHOULD BE

CONSIDERED IN CONNECTION WITH ALL OTHER EVIDENCE IN THE CASE BEARING ON THE SAME QUESTION.

7. PUNITIVE DAMAGES. IN ADDITION TO AWARDING COMPENSATORY DAMAGES, YOU MAY IN A PROPER CASE AWARD ADDITIONAL DAMAGES KNOWN AS PUNITIVE DAMAGES AS PUNISHMENT FOR THE WILLFULNESS, WANTONNESS OR MALICIOUSNESS OF THE DEFENDANT'S' WRONGFUL ACTS.

PUNITIVE DAMAGES ARE SOMETHING IN ADDITION TO FULL COMPENSATION NOT GIVEN AS THE PLAINTIFF'S DUE, BUT GIVEN RATHER WITH A VIEW TO THE ENORMITY OF THE OFFENSE TO PUNISH THE DEFENDANT AND THUS MAKE AN EXAMPLE OF THE DEFENDANT SO THAT BOTH HE AND OTHERS MAY BE DETERRED FROM COMMITTING SIMILAR OFFENSES.

THE LAW AWARDS COMPENSATORY DAMAGES WHEN AN UNLAWFUL ACT IS DONE WITHOUT INTENT TO DO WRONG , WHERE THERE IS NO MALICE OR WHERE THE OFFENSE IS NOT OPPRESSIVELY OR RECKLESSLY COMMITTED. PUNITIVE DAMAGES ARE AWARDED WHERE THE WRONGFUL ACT IS DONE WITH A BAD MOTIVE OR IN A MANNER SO WANTON OR RECKLESS AS TO MANIFEST A WILLFUL DISREGARD OF THE RIGHTS OF OTHERS.

IF, THEREFORE, YOU FIND FROM THE EVIDENCE THAT THE DEFENDANT ACTED WITH WILLFULNESS, WANTONNESS OR MALICIOUSNESS OR IN A MANNER SO WANTON OR RECKLESS AS TO MANIFEST A WILLFUL DISREGARD TO THE RIGHTS OF , THEN PUNITIVE DAMAGES MAY BE AWARDED IN SUCH SUMS AS YOU THINK PROPER IN VIEW OF ALL CIRCUMSTANCES OF THE CASE. FOR THE

PLAINTIFF TO RECOVER PUNITIVE DAMAGES, ACTUAL MALICE NEED NOT BE SHOWN IF, FROM THE EVIDENCE, YOU BELIEVE THAT THE WRONGFUL ACTS OF THE DEFENDANT WERE COMMITTED UNDER SUCH CIRCUMSTANCES AS TO SHOW A WILLFUL DISREGARD OF 'S RIGHTS, FOR IN SUCH CASES THE LAW INFERS MALICE.

8. FACTORS TO CONSIDER IN DETERMINING PUNITIVE DAMAGES. IN DETERMINING THE AMOUNT OF PUNITIVE DAMAGES, IF ANY, THAT SHOULD BE AWARDED UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, YOU SHOULD TAKE INTO CONSIDERATION THE FOLLOWING FACTORS:

(a) PUNITIVE DAMAGES SHOULD BEAR A REASONABLE RELATIONSHIP TO THE HARM THAT IS LIKELY TO OCCUR FROM THE DEFENDANT'S CONDUCT, AS WELL AS THE HARM THAT ACTUALLY HAS OCCURRED. IF THE DEFENDANT'S ACTIONS CAUSED OR WOULD LIKELY CAUSE A SLIGHT HARM IN A SIMILAR SITUATION, THE DAMAGES SHOULD BE RELATIVELY SMALL. IF THE HARM IS GRIEVOUS, THE DAMAGES SHOULD BE GREATER;

(b) THE JURY MAY CONSIDER THE REPREHENSIBILITY OF THE DEFENDANT'S CONDUCT. THE JURY SHOULD TAKE INTO ACCOUNT HOW LONG THE DEFENDANT CONTINUED ITS ACTIONS, WHETHER IT WAS AWARE THAT ITS ACTIONS WERE CAUSING OR WERE LIKELY TO CAUSE HARM, WHETHER IT

ATTEMPTED TO CONCEAL OR COVER UP ITS ACTIONS OR THE HARM CAUSED BY THEM, WHETHER/HOW OFTEN THE DEFENDANT ENGAGED IN SIMILAR CONDUCT IN THE PAST, AND WHETHER THE DEFENDANT MADE REASONABLE EFFORTS TO MAKE AMENDS BY OFFERING A FAIR AND PROMPT SETTLEMENT FOR THE ACTUAL HARM CAUSED ONCE ITS LIABILITY BECAME CLEAR;

(c) IF THE DEFENDANT PROFITED FROM ITS WRONGFUL CONDUCT, THE PUNITIVE DAMAGES SHOULD REMOVE THE PROFIT AND SHOULD BE IN EXCESS OF THE PROFIT, SO THAT AWARD DISCOURAGES FUTURE BAD ACTS BY THE DEFENDANT;

(d) AS A MATTER OF FUNDAMENTAL FAIRNESS, PUNITIVE DAMAGES SHOULD BE IN REASONABLE RELATIONSHIP TO COMPENSATORY DAMAGES; AND

(e) THE FINANCIAL POSITION OF THE DEFENDANT IS RELEVANT.

9. BENEFICIARIES. IF YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT THE PLAINTIFF IS ENTITLED TO RECOVER AGAINST THE DEFENDANT THEN IT WILL BECOME YOUR DUTY TO DETERMINE THE AMOUNT OF DAMAGES THAT THE BENEFICIARIES OF SUSTAINED, AND WILL CONTINUE TO SUSTAIN IN THE FUTURE. 'S BENEFICIARIES INCLUDE THE FOLLOWING: HER CHILDREN, . , , AND ; AND HER MOTHER, . IN DETERMINING THE

AMOUNT OF THEIR DAMAGES, YOU SHALL TAKE INTO CONSIDERATION THE FOLLOWING THREE (3) ELEMENTS:

(a) THE SORROW, MENTAL ANGUISH AND SOLACE SUFFERED BY THEM DUE TO 'S WRONGFUL DEATH;

(b) THE LOSS OF COMPANIONSHIP, COMFORT AND GUIDANCE THAT WOULD HAVE PROVIDED TO THEM;

(c) THE LOSS OF SERVICES, PROTECTION, CARE AND ASSISTANCE THAT WOULD HAVE PROVIDED TO THEM;

(d) THE REASONABLE MEDICAL EXPENSES INCURRED FOR THE TREATMENT OF ; AND

(e) THE REASONABLE FUNERAL AND BURIAL EXPENSES INCURRED AS A RESULT OF 'S DEATH.

10. 'S RELATIONSHIP WITH BENEFICIARIES. YOU MAY CONSIDER THE BENEFICIARIES' RELATIONSHIP WITH WHEN CONSIDERING WHAT DAMAGES, IF ANY, YOU CHOOSE TO AWARD THE PLAINTIFF.

11. INSTRUCTIONS ON DAMAGES. THE FACT THAT THE COURT HAS INSTRUCTED YOU RELATIVE TO THE DAMAGES MUST NOT BE CONSIDERED BY YOU AS AN INDICATION THAT THE COURT HAS AN OPINION AS TO WHETHER THE DEFENDANT IS LIABLE FOR DAMAGES TO THE PLAINTIFF.

III. CLOSING INSTRUCTIONS

(1) FOREPERSON. UPON RETIRING TO THE JURY ROOM, YOU WILL SELECT ONE OF YOUR NUMBER TO ACT AS A FOREPERSON. THE FOREPERSON WILL PRESIDE OVER YOUR DELIBERATIONS, AND WILL BE YOUR SPOKESPERSON HERE IN COURT.

(2) UNANIMITY. YOUR VERDICT MUST REPRESENT THE CONSIDERED JUDGMENT OF EACH JUROR. TO RETURN A VERDICT, EACH JUROR MUST AGREE. YOUR VERDICT MUST BE UNANIMOUS.

(3) DELIBERATION PROCESS. IT IS YOUR DUTY AS JURORS TO CONSULT WITH ONE ANOTHER AND TO DELIBERATE WITH A VIEW TO REACHING AN AGREEMENT, IF YOU CAN DO SO WITHOUT VIOLENCE TO INDIVIDUAL JUDGMENT. YOU MUST EACH DECIDE THE CASE FOR YOURSELF, BUT ONLY AFTER AN IMPARTIAL CONSIDERATION OF THE EVIDENCE IN THE CASE WITH YOUR FELLOW JURORS. IN THE COURSE OF YOUR DELIBERATIONS, DO NOT HESITATE TO REEXAMINE YOUR OWN VIEWS AND CHANGE YOUR OPINION IF CONVINCED IT IS ERRONEOUS. BUT DO NOT SURRENDER YOUR HONEST CONVICTION AS TO THE WEIGHT OR EFFECT OF EVIDENCE SOLELY BECAUSE OF THE OPINION OF YOUR FELLOW JURORS OR FOR THE MERE PURPOSE OF RETURNING A VERDICT. REMEMBER AT ALL TIMES THAT YOU ARE NOT PARTISANS. YOU ARE JUDGES -- JUDGES OF THE FACTS. YOUR SOLE INTEREST IS TO SEEK THE TRUTH FROM THE EVIDENCE IN THE CASE.

(4) VERDICT FORM. THE COURT HAS PREPARED A VERDICT FORM FOR YOUR CONVENIENCE. YOU WILL TAKE THIS VERDICT FORM TO THE JURY ROOM. WHEN YOU HAVE REACHED UNANIMOUS AGREEMENT AS TO YOUR VERDICT, YOU WILL

HAVE YOUR FOREPERSON FILL IN, DATE, AND SIGN THE FORM THAT ACCURATELY SETS FORTH YOUR UNANIMOUS VERDICT; AND THEN RETURN WITH YOUR VERDICT TO THE COURTROOM.