Virginia Model Jury Instructions – Civil

Release 26, April 2026

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Instruction No. 2.000 Preliminary Instructions to Jury

Members of the jury, the order of the trial of this case will be in four stages:

1. Opening statements
2. Presentation of the evidence
3. Instructions of law
4. Final argument

After the conclusion of final argument, I will instruct you concerning your deliberations. You will then go to your room, select a foreperson, deliberate, and arrive at your verdict.

Opening Statements

The plaintiff's attorney may make an opening statement outlining the plaintiff's case. Then the defendant's attorney also may make an opening statement. Neither side is required to do so.

Presentation of the Evidence

Following the opening statements, the plaintiff will introduce evidence, after which the defendant then has the right to introduce evidence (but is not required to do so). Rebuttal evidence may then be introduced if appropriate.

Instructions of Law

At the conclusion of all evidence, I will instruct you on the law which is to be applied to this case.

Final Argument

Once the evidence has been presented and you have been instructed on the law, then the attorneys may make their closing arguments. The plaintiff's attorney will argue first, the defendant's attorney may reply, and the plaintiff's attorney may close in rebuttal.

Members of the jury, your function in the trial of this case is to reach a unanimous verdict. The verdict must be based solely on the evidence and the instructions of law which you will be given after all the evidence has been presented. The law applicable to this case is given to you in these instructions and in the other instructions you will receive at the close of all evidence. It is your duty to follow all of these instructions.

No statement or ruling or remark that I may make during the course of the trial is intended to indicate my opinion as to what the facts are. It is your responsibility as members of the jury to consider the evidence and determine the facts in this case.

The evidence which you are to consider consists of testimony of witnesses, any exhibits

admitted into evidence, and any facts agreed upon between the parties and presented to you by stipulation. The admission of evidence in court is governed by rules of law. From time to time, it may be the duty of the attorneys to make objections, and it is my duty as judge to rule on those objections and decide whether or not you can consider certain evidence. You must not consider testimony or exhibits to which an objection was sustained or which has been ordered stricken. If an objection is overruled, then you may consider that evidence together with all other evidence in the case. The opening statements and closing arguments of the attorneys are intended to help you in understanding the evidence and in applying the law, but their statements are not evidence.

In your determination of what the facts are, you alone must decide the credibility of the witnesses and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case. You should not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper. You should use your common sense in considering the evidence, and you may draw reasonable inferences from that evidence; but in doing so, you should not indulge in guesswork or speculation. From consideration of these things and all the other circumstances of the case, you should determine which witnesses are more believable and weigh their testimony accordingly.

Until this case is submitted to you for your deliberations, you should not decide any issue in the case. Also, you should not discuss the case with anyone or remain within hearing of anyone who is discussing it. This includes discussing the case in person, in writing, by phone or electronic means, via text messaging, e-mail, any social networking platform such as Facebook or X (formerly known asTwitter), blogging, web site, or other means. There will be occasional recesses during the trial. During the recesses, you should not discuss the case with your fellow jurors or go to the scene or make any independent investigation or receive any information about the case from radio, television, or the newspapers. Once your deliberations begin, then you must discuss the case only in the jury room when all the members of the jury are present. You are to decide this case solely on the evidence presented in this courtroom, and not on the basis of any outside source.

If you are asked or approached in any way about your jury service or anything about this case prior to rendering a verdict, you should respond that you have been ordered by the judge not to discuss the matter, and you should report the contact to the court as soon as possible.

Do not attempt at any time before to the conclusion of the case to research any fact, issue, or law related to this case, whether by discussion with others, by research in a library or on the Internet, or by any other means or source, including dictionaries, reference books, or anything on the Internet. You must not use Internet maps, or any other program or device to search for and view any location discussed in the testimony. You must not search for any information about the case, or the law which applies to the case, or the people involved in the case, including the parties, the witnesses, the lawyers, or the judge. Your sworn duty is to decide the case solely and wholly on the evidence presented in this courtroom. You must not communicate with anyone about the case by any other means, including by telephone, text messages, email, internet chat or chat rooms,

blogs, or social web sites. I expect you will inform me if you become aware of another juror's violation of these instructions.

Just before your deliberations, you will be given final instructions about your selection of a leader, the conduct of your deliberations, and the forms for your verdict.

The faithful and proper performance by you of your duty is vital to the administration of justice. On behalf of the court and the litigants, we appreciate your giving your complete attention to the case as it is presented.

Thank you.

Instruction No. 2.020 Credibility of Witnesses

You are the judges of the facts, the credibility of the witnesses, and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case.

You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.

You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may decide which witnesses are more believable and weigh their testimony accordingly.

Instruction No. 2.030 Adverse Witness

The plaintiff called the defendant as an adverse witness. The plaintiff is bound by as much of the defendant's testimony given as an adverse witness as is clear, logical, reasonable, and uncontradicted.

The plaintiff is not bound by any of the defendant's testimony given as an adverse witness that conflicts with any of the other evidence in the case.

Instruction No. 2.040 Expert Witness

In considering the weight to be given to the testimony of an expert witness, you should consider the basis for his opinion and the manner by which he arrived at it [and the underlying facts and data upon which he relied].

Instruction No. 2.060 Party Bound by His Own Testimony

When one of the parties testifies unequivocally to facts within his own knowledge, those statements of fact and the necessary inferences from them are binding upon him. He cannot rely on other evidence in conflict with his own testimony to strengthen his case.

However, you must consider his testimony as a whole, and you must consider a statement made in one part of his testimony in the light of any explanation or clarification made elsewhere in his testimony.

Instruction No. 2.080 Unexplained Failure to Produce Important Witness

If you believe that a party, without explanation, failed to call an available witness who has knowledge of necessary and material facts, you may, but are not required to, infer that witness's testimony would have been unfavorable to the party who failed to call the witness.

Instruction No. 2.090 Jury View

The purpose of taking you to view the scene [premises] **was to clarify and explain the evidence which was introduced at trial, not to supply evidence. You must restrict your consideration to the evidence presented in court.**

Instruction No. 2.100 Circumstantial Evidence

Any fact that may be proved by direct evidence may also be proved by circumstantial evidence; that is, you may draw all reasonable conclusions from the evidence.

Instruction No. 2.130 Prior Inconsistent Statement by Witness

If you believe from the evidence that a witness [other than a party] **previously made a statement inconsistent with his testimony at this trial, the only purpose for which you may consider the statement is for its bearing on the witness's credibility. It is not evidence that what the witness previously said is true.**

Instruction No. 2.135 Prior Inconsistent Statement by Party

If you believe from the evidence that a party previously made a statement inconsistent with his testimony at this trial, you may consider that previous statement as evidence that what the party previously said was true.

Instruction No. 2.140 Prior Conviction of Felony or Crime Involving Lying, Cheating, or Stealing

During the trial, proof that a witness had been convicted of [a felony; perjury; a crime involving lying, cheating, or stealing] **was admitted. The only purpose for which that evidence may be considered by you is its bearing on the witness's credibility.**

You may not consider the conviction[s] **as proof of any other issue in this case.**

Instruction No. 2.170 Rejected and Stricken Evidence

You must not consider any matter that was rejected or stricken by the Court. It is not evidence and should be disregarded.

Instruction No. 2.180 Amount Sued for Is Not Evidence

Any amount of damages requested is not evidence in this case; you should not consider it as evidence in reaching your verdict.

Instruction No. 2.190 Peremptory Instruction

As a matter of law, the defendant was negligent [and his negligence was a proximate cause of the accident].

Instruction No. 2.200 Effect of Defendant Admitting Liability

The defendant has admitted that he is liable for any injury the plaintiff received from the accident. Therefore, the only issue that you have to decide is the amount of damages[, if any,] **the plaintiff is entitled to recover.**

An admission of liability should not influence you in any way in considering the issue of damages.

Instruction No. 2.210 Effect of Judge Striking Defense

The court has found that defendant is liable for any injury the plaintiff received from the accident. Therefore, the only issue you have to decide is the amount of damages the plaintiff is entitled to recover [if any].

The fact that the Court is submitting only the question of damages to you, and not the question of legal liability, should not influence you in any way in considering the issue of damages.

[The court has found that the defendant was negligent and that the defendant's negligence was the proximate cause of the accident, and that the defendant is liable for any injury the plaintiff received from the accident. Therefore, the only issues you have to decide are whether the plaintiff was injured as a result of the accident and, if so, the amount of damages the plaintiff is entitled to recover, [if any].

The fact that the Court is submitting only the questions of injury and damages to you, and not the questions of legal liability, negligence, or causation, should not influence you in any way in considering the issues of injury and damages.]

Instruction No. 2.220 Verdict Not to Be Based on Sympathy, Bias, Guesswork, or Speculation

You must not base your verdict in any way upon sympathy, bias, guesswork, or speculation. Your verdict must be based solely upon the evidence and instructions of the court.

Instruction No. 2.240 Verdict Against an Estate: Dead Man's Act

You cannot render a verdict against (name of individual or entity protected by the statute) **based upon the uncorroborated testimony of** (name(s) of adverse and interested party or parties).

Corroborating evidence is evidence that tends to confirm and strengthen or to show the truth or probability of the testimony of the witness who must be corroborated. Such evidence need not come from a witness; it may be furnished by physical facts or from other circumstances adequately proven.

If you find that some or all of the testimony of (name(s) of adverse and interested party or parties) **was uncorroborated, you must disregard the uncorroborated testimony.**

Instruction No. 2.250 Unanimous Verdict: "*Allen* ["*Titcomb*"] Charge"

As you have been told, your verdict must be unanimous. If you can possibly reach a verdict, it is your duty to do so. You should listen to the views and opinions of your fellow jurors with fairness and candor, and you should consider what they say. However, you must decide the case for yourself, and you should reach an agreement only if it can be done without sacrificing your individual judgment. As you deliberate, each of you, whether in the majority or the minority, should not hesitate to re-examine your own views and change your opinion if you are convinced it was wrong. None of you, as a juror, however, should give up your honest opinion as to the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

If you can reach a decision without surrendering your conscientious opinion, it is your duty to do so.

Please return to the jury room and give the matter your further consideration.

[What I am about to say does not mean that you are going to be made to agree or that you are going to continue deliberations until you arrive at a verdict.

Trials are expensive and the jury must decide the issues in the case. If you cannot decide, then we will have to get another jury to decide the issues. I see no reason why you as jurors are not as competent and able to decide the issues as any other jury.

It is your duty to make an honest and sincere attempt to reach a verdict. Of course, that must be unanimous. Jurors should be open-minded and listen to the argument of others.

Talk over the issues and evidence freely and fairly. Each juror must decide the issue for himself or herself, but only after an impartial consideration of the evidence with his or her fellow jurors.

In the course of your deliberations, a juror should not hesitate to re-examine his or her views and change his or her opinion if convinced it is erroneous.

Each juror in the minority view should reconsider such minority view in light of the opinion of the majority. And, likewise, each juror in the majority view should give equal consideration to the views of the minority.

No juror should surrender his or her conviction as to the weight of the evidence, solely because of the opinion of his or her fellow jurors or for the mere purpose of returning a verdict.

As fair-minded individuals, then, I am asking you to go back, to retire, to make another honest effort to come to a conclusion on all the issues presented in the case, keeping in mind what I said to you in this instruction.]

Thank you.

Instruction No. 3.000 Negligence: Issues and Allocation of Burdens of Proof

Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The issues in this case are:

(1) Was the defendant negligent?
(2) If the defendant was negligent, was the defendant's negligence a proximate cause of the accident?

On these issues the plaintiff has the burden of proof.

(3) Was the plaintiff negligent?
(4) If the plaintiff was negligent, was the plaintiff's negligence a proximate cause of the accident?

On these issues the defendant has the burden of proof.

(5) If the plaintiff is entitled to recover, what is the amount of the plaintiff's damages?

On this issue the plaintiff has the burden of proof.

Your decision on these issues must be governed by the instructions that follow.

Instruction No. 3.050 Finding Instruction

You shall find your verdict for the plaintiff if the plaintiff has proved by the greater weight of the evidence that:

(1) the defendant was negligent; and that
(2) the defendant's negligence was a proximate cause of the plaintiff's accident and damages.

You shall find your verdict for the defendant if:

(1) the plaintiff failed to prove either or both of the two elements above; or if
(2) you find by the greater weight of the evidence that the plaintiff was contributorily negligent and that the plaintiff's contributory negligence was a proximate cause of the accident.

Instruction No. 3.060 Finding Instruction: Multiple Defendants

You shall find your verdict for the plaintiff and against (name of first defendant) **if the plaintiff has proved by the greater weight of the evidence that:**

(1) (name of first defendant) **was negligent; and that**
(2) (name of first defendant)**'s negligence was a proximate cause of the plaintiff's accident and damages.**

You shall find your verdict for the plaintiff and against (name of second defendant) **if the plaintiff has proved by the greater weight of the evidence that:**

(1) (name of second defendant) **was negligent; and that**
(2) (name of second defendant)**'s negligence was a proximate cause of the plaintiff's accident and damages.**

You shall find your verdict for the plaintiff and against both defendants if the plaintiff has proved by the greater weight of the evidence that:

(1) both defendants were negligent; and that
(2) the negligence of both defendants was a proximate cause of the plaintiff's accident and damages.

You shall find your verdict for either or both defendants if:

(1) as to that defendant, the plaintiff has failed to prove either negligence or proximate cause; or
(2) you find by the greater weight of the evidence that the plaintiff was contributorily negligent and that the plaintiff's contributory negligence was a proximate cause of the accident.

Instruction No. 3.100 Standard of Proof: Definition of Greater Weight of the Evidence

The greater weight of all the evidence is sometimes called the preponderance of the evidence. It is that evidence which you find more persuasive, when evaluated against all of the evidence that has been admitted in the case. The testimony of one witness whom you believe can be the greater weight of the evidence.

Instruction No. 3.110 Standard of Proof: Definition of Clear and Convincing Evidence

When a party has the burden of proving an issue by clear and convincing evidence, the party must produce evidence that creates in your minds a firm belief or conviction that the party has proved the issue.

Instruction No. 4.000 Definition of Negligence

Negligence is the failure to use ordinary care. Ordinary care is the care a reasonable person would have used under the circumstances of this case.

Instruction No. 4.010 Burden of Proof

The plaintiff has the burden of proving by the greater weight of the evidence that the defendant was [negligent; grossly negligent; willfully or wantonly negligent] **and that the defendant's negligence was a proximate cause of the accident and any of the injuries to the plaintiff.**

Instruction No. 4.015 Fact of Accident Is Not Proof of Negligence

The fact that there was an accident and that the plaintiff was injured does not, of itself, entitle the plaintiff to recover.

Instruction No. 4.018 Foreseeable Consequences

The defendant is not required to have anticipated or foreseen the precise [injury; damage] **that occurred, but it is sufficient that a reasonably prudent person would have anticipated or foreseen that some** [injury; damage] **might probably result from the negligent act.**

Instruction No. 4.020 Concurring Negligence

If two or more persons are negligent, and if the negligence of each is a proximate cause of the plaintiff's injury, then each is liable to the plaintiff for his injury. This is true even if the negligence of one is greater than the negligence of the [other; others].

Instruction No. 4.025 Single, Indivisible Injury

If separate and independent acts of negligence of two [or more] [persons; defendants] are each a proximate cause of a single indivisible injury to the plaintiff, and if it is not possible to determine what portion of the injury was caused by each negligent [person; defendant], then each is liable to the plaintiff for the injury.

Instruction No. 4.030 Definition of Gross Negligence

"Gross negligence" is that degree of negligence which shows such indifference to others as constitutes an utter disregard of caution amounting to a complete neglect of the safety of [another person; another person's property]**. It is such negligence as would shock fair-minded people, although it is something less than willful recklessness.**

Instruction No. 4.040 Definition of Willful and Wanton Conduct

"Willful and wanton conduct" is acting consciously in disregard of another person's rights or acting with a reckless indifference to the consequences to another person when the defendant is aware of his conduct and is also aware, from his knowledge of existing circumstances and conditions, that his conduct would probably result in injury to another.

Instruction No. 5.000 Definition of Proximate Cause

A proximate cause of [an accident; a collision; an injury; damages; death] is a cause that, in natural and continuous sequence, produces the [accident; collision; injury; damage; death]. It is a cause without which the [accident; collision; injury; damage; death] would not have occurred.

Instruction No. 5.005 Multiple Proximate Causes

There may be more than one proximate cause of [an accident; a collision; an injury; damages; death]**. If the negligence of a defendant proximately caused injury to** (name of plaintiff/decedent) **then the negligence of that defendant is a proximate cause of** [name of plaintiff/decedent]**'s** [injury; damages; death] **even if there were other acts or omissions that caused** (name of plaintiff/decedent)**'s** [injury; damages; death]**.**

[If you find that there is a superseding cause for the plaintiff's [injury; damages; death], you shall find for the defendant(s)].

Instruction No. 5.010 Definition of Superseding Cause

A superseding cause is an independent event, not reasonably foreseeable, that completely breaks the connection between the defendant's negligent act and the plaintiff's injury. A superseding cause breaks the chain of events so that the defendant's original negligent act is not a proximate cause of the plaintiff's injury in the slightest degree.

Instruction No. 6.000 Definition of Contributory Negligence

Contributory negligence is the failure to act as a reasonable person would have acted for his own safety under the circumstances of this case.

Instruction No. 6.005 Child Under Seven Incapable of Contributory Negligence

A child under seven years of age is incapable of being contributorily negligent.

Instruction No. 6.010 Duty to Children Under Fourteen Years of Age

If you believe by the greater weight of the evidence that the defendant saw, or in the exercise of ordinary care, should have seen the plaintiff near the scene of [accident; incident**], then the defendant had a duty to consider that the child might, upon childish impulse and heedless of danger, put himself in a position of peril. It then became the duty of the defendant to use the degree of care a reasonable person would use under the circumstances of this case.**

Instruction No. 6.020 Negligence of Child of Seven Years Old or Older But Less than Fourteen

A child seven years of age or older but less than fourteen is presumed incapable of negligence. However, you may find him negligent if:

(1) It is shown by the greater weight of the evidence that the child had the capacity to understand the nature of the danger and the peril associated with his conduct, taking into consideration the child's age, intelligence, and experience; and
(2) If you further find by the greater weight of the evidence that the child's conduct did not conform to the standard of what a reasonable person of like age, intelligence, and experience would do under the circumstances for his own safety and protection.

Instruction No. 6.030 Standard of Conduct for Minor of Fourteen Years Old or Older But Less than Eighteen

The standard by which the conduct of a minor of fourteen years of age or older but less than eighteen is to be measured is that degree of care which persons of the same age, experience, intelligence, discretion, and knowledge would exercise under the circumstances of this case.

Instruction No. 6.040 Contributory Negligence: Burden of Proof

When the defendant claims contributory negligence as a defense, he has the burden of proving by the greater weight of the evidence that the plaintiff was negligent and that this negligence was a proximate cause of the plaintiff's injuries. Contributory negligence may be shown by the defendant's evidence or by the plaintiff's evidence.

Instruction No. 6.050 Contributory Negligence: Parties' Negligence Not Compared

If you find from the greater weight of the evidence that both the plaintiff and the defendant were negligent and that their negligence proximately contributed to the accident, you may not compare the negligence of the parties. Any negligence of the plaintiff which was a proximate cause of the accident will bar the plaintiff from recovering.

Instruction No. 6.055 Contributory Negligence: Availability of Defense (Willful and Wanton)

If you find from the greater weight of the evidence that the defendant engaged in willful and wanton conduct that proximately contributed to the accident, and if you further find from the greater weight of the evidence that the plaintiff engaged in conduct that proximately contributed to that same accident, but that such conduct was only [negligent; grossly negligent]**, then defendant cannot rely upon contributory negligence as a defense to plaintiff's claim.**

However, if you find from the greater weight of the evidence that the defendant engaged in willful and wanton conduct that proximately contributed to the accident, and you further find that the plaintiff engaged in willful and wanton conduct that proximately contributed to that same accident, then plaintiff's conduct bars his recovery.

Instruction No. 6.060 Contributory Negligence: Right to Assume Ordinary Care

The plaintiff has a right to assume that the defendant will [use ordinary care; obey the law] **until he realizes, or in the exercise of ordinary care should realize, that the defendant is not going to do so.**

[The defendant has a right to assume that the plaintiff will [use ordinary care; obey the law] until he realizes, or in the exercise of ordinary care should realize, that the plaintiff is not going to do so.]

Instruction No. 6.100 Definition of Assumption of the Risk

If you find by the greater weight of the evidence that the plaintiff fully understood the nature and extent of a known danger, and if he voluntarily exposed himself to it, he assumed the risk of injuring himself from that danger. The plaintiff cannot recover for injuries that proximately resulted from assuming the risk of a known danger.

Instruction No. 6.110 Assumption of the Risk: Burden of Proof

Where the defendant claims assumption of the risk as a defense, he has the burden of proving by the greater weight of the evidence that the plaintiff fully appreciated the nature and the extent of a known danger; that the plaintiff voluntarily exposed himself to it; and that the plaintiff was injured as a result of the danger assumed. Assumption of the risk may be shown by the defendant's evidence or by the plaintiff's evidence.

Instruction No. 7.000 Sudden Emergency

The [defendant; plaintiff] **contends that he was confronted with a sudden emergency. A sudden emergency is an event or a combination of circumstances that calls for immediate action without giving time for the deliberate exercise of judgment.**

If you believe from the evidence that the [defendant**;** plaintiff]**, without negligence on his part, was confronted with a sudden emergency and acted as a reasonable person would have acted under the circumstances of this case, he was not** [negligent; contributorily negligent].

Instruction No. 7.005 Medical Emergency

The [defendant; plaintiff] **contends that he was confronted with a medical emergency. A medical emergency occurs when the** [defendant; plaintiff] **is suddenly stricken by an illness that he had no reason to anticipate and which renders it impossible for him to control his** [automobile; (name of other vehicle); (name of other machine)].

If you believe from the evidence that the [defendant; plaintiff] **was confronted by a medical emergency, then he was not negligent.**

Instruction No. 7.010 Negligent Entrustment

The plaintiff contends that the defendant is liable because he permitted his vehicle to be used by an unfit driver whose negligence, as a result of the unfitness, caused the accident. An unfit driver is a person who, because of his [age; inexperience; physical condition; mental condition; drug/alcohol impairment]**, is likely to use a motor vehicle in a manner involving unreasonable risk of harm to others. Plaintiff must prove by the greater weight of the evidence that:**

(1) defendant expressly or impliedly permitted (name of driver) **to drive his vehicle; and**
(2) (name of driver) **was an unfit driver; and**
(3) defendant knew, or should have known, that (name of driver) **was an unfit driver; and**
(4) (name of driver) **was negligent as a result of the unfitness; and**
(5) (name of driver)**'s negligence was a proximate cause of plaintiff's injuries.**

Permission is express when it is given directly. Permission is implied when it is gathered from the circumstances, general language, or conduct of the parties.

Instruction No. 7.020 Rescue

The plaintiff contends that [he was not contributorily negligent; he did not assume the risk] **when he exposed himself voluntarily to danger because he was attempting to rescue** (name of person)**. A plaintiff who risks injury while attempting to rescue someone** [is not contributorily negligent; did not assume the risk] **if you believe from all the evidence:**

(1) that (name of person) **was in imminent and serious danger;**
(2) that plaintiff was injured after the rescue attempt began;
(3) that plaintiff did not create the danger; and
(4) that the plaintiff did not rashly and recklessly disregard all considerations for his own safety in attempting to rescue (name of person).

Instruction No. 7.030 Last Clear Chance: Helpless Plaintiff

Contributory negligence by the plaintiff will not bar his recovery if you find by the greater weight of the evidence that:

(1) the plaintiff negligently placed himself in a situation of peril from which he was physically unable to remove himself; and
(2) the defendant saw, or should have seen, the plaintiff and realized, or should have realized, his peril; and
(3) thereafter, the defendant could have avoided the accident by using ordinary care.

Instruction No. 7.040 Last Clear Chance: Inattentive Plaintiff

Contributory negligence by the plaintiff will not bar his recovery if you find by the greater weight of the evidence that:

(1) the plaintiff negligently placed himself in a situation of peril; and
(2) he was physically able to remove himself from the situation, but he was unaware of his peril; and
(3) the defendant actually saw the plaintiff and realized, or should have realized, his peril; and
(4) therefore, the defendant could have avoided the accident by using ordinary care.

Instruction No. 7.050 *Res Ipsa Loquitur*

Where the plaintiff has proved by the greater weight of the evidence that:

(1) an accident has occurred which normally would not have occurred if the defendant had used ordinary care; and
(2) the means or instrumentality causing the accident was under the exclusive control of the defendant; and
(3) the defendant had, or should have had, exclusive knowledge [of the way the instrumentality was used; how the accident occurred]**;**

you may, but are not required to, decide that the defendant was negligent.

Instruction No. 8.000 Definition of Employer and Employee

An employer is a person or legal entity with the power or right to control the means and methods of performance by which another person performs the employer's work.

An employee is the person who is subject to the power or right of an employer to control the means and methods of performing the work.

Instruction No. 8.010 Employer's Liability for Employee's Negligence

An employer is liable for all damages proximately caused by the negligence of its employee while acting within the scope of that person's employment.

Instruction No. 8.020 Issues and Allocation of Burden of Proof

In order to recover against (name of employer), **the plaintiff has the burden of proving by the greater weight of the evidence that** (name of employee) **was the employee of** (name of employer), **that** (name of employee) **was negligent while acting within the scope of his employment, and that this negligence proximately caused damage to the plaintiff.**

Instruction No. 8.030 Scope of Employment—Presumption and Burden of Production

If you find by the greater weight of the evidence that (name of employee) **was the employee of** (name of employer), **the defendant, you may presume that** (name of employee) **was acting within the scope of employment. Once an employer-employee relationship has been established, the burden is on the** (name of employer)**, the defendant, to present evidence that the** (name of employee) **was not acting within the scope of employment when the act was committed.**

Instruction No. 8.040 Scope of Employment

In reaching your decision whether (name of employee) **was acting within the scope of his employment, you must determine whether he was acting within the ordinary course of such business. In making that determination, you may consider any of the following: (1) whether the act was expressly or impliedly directed by the employer; (2) whether the act was in the ordinary course of business or naturally incident to the employer's business; (3) whether the act was performed, although mistakenly or ill-advisedly, with the intent to further the employer's interest; and (4) whether the act was performed from some impulse or emotion that was the natural consequence of an attempt to do the employer's business.**

Instruction No. 8.050 Scope of Employment: Multiple Motives

The employer is responsible for its employee's actions if the employee was trying to some extent to serve the employer's business even though the primary motive of the employee was to benefit himself or a third person.

Instruction No. 8.060 Scope of Employment: Intentional Acts

An employee's act may be within the scope of employment even though the act is willful or malicious.

Instruction No. 8.070 Employer's Liability for Acts of Employee's Assistant

An employer is liable for the actions of a person assisting an employee [if obtaining the assistance was within the scope of the employee's job; if the employer knowingly approved the use of assistance].

Instruction No. 8.080 Special Employer Liable for Acts of Borrowed Employee

If (name of employee) **was temporarily under the control of** (name of special employer), **then** (name of special employer) **is solely liable for injuries caused by** (name of employee) **within the scope of his employment for** (name of special employer).

Instruction No. 8.090 Definition of a Vulnerable Victim

A vulnerable victim is any person who is at a substantial disadvantage relative to an employee due to circumstances, including the person's [physical or mental] [condition or characteristics].

[The Court has already determined that the Plaintiff was a vulnerable victim.]

Instruction No. 8.095 Employer's Liability to a Vulnerable Victim

An employer is liable for the actions for the [personal injury or death by wrongful act] **of a vulnerable victim if:**

(1) its employee's conduct occurred while the employee was reasonably likely to be in contact with the vulnerable victim;
(2) such conduct proximately causes the [personal injury; death]**;**
(3) the employer failed to exercise reasonable care to [control or prevent the employee from intentionally harming the victim], **resulting in an unreasonable risk of the victim suffering** [personal injury; death]**;**
(4) the employer knew or should have known **of the ability to control the employee; and**
(5) the employer knew or should have known of the necessity and opportunity for exercising control over the employee.

Instruction No. 8.100 Definition of Independent Contractor

An independent contractor is a person who is engaged to produce a specific result but who is not subject to the control of the employer as to the way he brings about that result.

Instruction No. 8.110 Principal Not Liable for Acts of Independent Contractor

A person who hires an independent contractor is not liable for the independent contractor's actions.

Instruction No. 8.120 Definition of Business Joint Venture: Liability of Co-Venturers

When two or more persons join in a business enterprise for their mutual benefit with an understanding that they are to share in the profits or losses and that each is to have a right to control or manage, then each one is liable for any negligence of the other[s] that is committed within the scope of the enterprise.

Instruction No. 8.130 Definition of Non-Business Joint Enterprise: Liability of Participants

When two or more persons undertake an activity with a common purpose and have a right to a voice in the operation and control of the activity, then each is liable for any negligence of the other[s] **that is committed within the scope of the activity.**

Instruction No. 8.140 Joint Enterprise: Right of Control

The right to have a voice in the operation and control of the enterprise or activity must result from the circumstances, purpose, and nature of the joint undertaking, and not merely from a social act of courtesy.

Instruction No. 8.150 Definition of Partnership: Liability of Partners

When two or more persons carry on a business for profit as co-owners, they are partners. Each one is liable for any negligence of the other[s] **that is committed within the scope of the business.**

Instruction No. 9.000 General Personal Injury and Property Damage

[If you find your verdict for the plaintiff, then, in] [In] determining the damages to which he is entitled, you shall consider any of the following which you believe by the greater weight of the evidence was caused by the negligence of the defendant:

(1) any bodily injuries he sustained and their effect on his health according to their degree and probable duration;
(2) any physical pain [and mental anguish] **he suffered in the past** [and any that he may be reasonably expected to suffer in the future];
(3) any disfigurement or deformity and any associated humiliation or embarrassment he suffered in the past [and any that he may be reasonably expected to suffer in the future]**;**
(4) any inconvenience caused in the past [and any that probably will be caused in the future];
(5) any medical expenses incurred in the past [and any that may be reasonably expected to occur in the future];
(6) any earnings he lost because he was unable to work at his calling;
(7) any loss of earnings and lessening of earning capacity, or either, that he may reasonably be expected to sustain in the future;
(8) any property damage he sustained.

Your verdict shall be for such sum as will fully and fairly compensate the plaintiff for the damages sustained as a result of the defendant's negligence.

Instruction No. 9.010 Reasonable Proof

The burden is on the plaintiff to prove, by the greater weight of the evidence, each item of damage he claims and to prove that each item was caused by the defendant's negligence. He is not required to prove the exact amount of his damages, but he must show sufficient facts and circumstances to permit you to make a reasonable estimate of each item. If the plaintiff fails to do so, then he cannot recover for that item.

Instruction No. 9.015 Collateral Source Rule

The presence or absence of insurance or benefits of any type, whether liability insurance, health insurance, or employment-related benefits for either the plaintiff or the defendant, is not to be considered by you [in any way in deciding the issue of liability or, if you find your verdict for the plaintiff,] in considering the issue of damages.

The existence or lack of insurance or benefits shall not enter into your discussions or deliberations in any way in deciding the issues in this case. You shall decide this case solely on the basis of the testimony and evidence presented in the courtroom, as well as the other instructions given to you by the court.

Instruction No. 9.020 Duty to Mitigate Damages

The plaintiff has a duty to minimize his damages. If you find that the plaintiff did not act reasonably to minimize his damages and that, as a result, they increased, then he cannot recover the amount by which they increased.

Instruction No. 9.030 Aggravation of Pre-Existing Condition

If you find that the plaintiff had a condition before the accident that was aggravated as a result of the accident or that the pre-existing condition made the injury he received in the accident more severe or more difficult to treat, then, [if you find your verdict for the plaintiff,] he may recover for the aggravation and for the increased severity or difficulty of treatment, but he is not entitled to recover for the pre-existing condition.

Instruction No. 9.040 Aggravation of Injuries by Health Care Provider

If you believe by the greater weight of the evidence:

(1) that the defendant is liable for the plaintiff's injuries;
(2) that the plaintiff used reasonable care in selecting a [physician; other health care provider] to treat his injuries; and
(3) that the treating physician [or other health care provider] made the injuries worse,

then the plaintiff is entitled to damages from the defendant for the increase in his injuries caused by the [physician; other health care provider].

Instruction No. 9.050 Property Damage: Total Loss—Diminution in Value Measure of Damages

When personal property is totally damaged, the measure of damages is the difference in value of the property immediately before and immediately after the accident plus the necessary and reasonable expenses incurred by the plaintiff as a result of the damage to the property.

Instruction No. 9.060 Property Damage: Partial Loss—Cost of Repairs Measure of Damages

When personal property is partially damaged, the measure of damages is the reasonable cost of repairing the property plus the amount, if any, the property depreciated due to the damage, plus the necessary and reasonable expenses incurred by the plaintiff as a result of the damage to the property, as shown by the evidence.

Instruction No. 9.070 Property Damage: Partial but Disputed Loss—Measure of Damages

Where personal property is partially damaged, the measure of damages is the difference in value of the property immediately before and immediately after the accident plus the necessary and reasonable expenses shown by the evidence to have been incurred by the plaintiff as a result of the damage. If, however, the cost of repairing the damaged property is less than the difference in value immediately before and immediately after the damage, then the measure of damages is the reasonable cost of repair with a reasonable allowance for depreciation.

Instruction No. 9.080 General Punitive Damages

If you find that the plaintiff is entitled to be compensated for his damages, and if you further believe by the greater weight of the evidence that the defendant acted with actual malice toward the plaintiff or acted under circumstances amounting to a willful and wanton disregard of the plaintiff's rights, then you may also award punitive damages to the plaintiff to punish the defendant for his actions and to serve as an example to deter him and others from acting in a similar way.

If you award punitive damages, you must state separately in your verdict the amount you allow as compensatory damages and the amount you allow as punitive damages.

Instruction No. 9.090 Punitive Damages: Definition of Common Law Actual Malice

"Actual malice" is a sinister or corrupt motive such as hatred, personal spite, ill will, or a desire to injure the plaintiff.

Instruction No. 9.100 Damages: Death by Wrongful Act

[If you find your verdict for the plaintiff, then, in] [In] determining the damages to which he is entitled, you shall include, but are not limited to, any of the following which you believe by the greater weight of the evidence were suffered by the beneficiaries and caused by the defendant's negligence:

(1) any sorrow, mental anguish, and loss of solace suffered by the beneficiaries. Solace may include society, companionship, comfort, guidance, kindly offices, and advice of the decedent;
(2) any reasonably expected loss in income of the decedent suffered by the beneficiaries;
(3) any reasonably expected loss of services, protection, care, and assistance which the decedent provided to the beneficiaries;
(4) any expenses for the care, treatment, and hospitalization of the decedent incident to the injury resulting in his death; and
(5) reasonable funeral expenses.

If you award damages under paragraphs (1), (2), and (3) above, you may distribute these damages [among; between] (name of spouse, children, and children of any deceased child of decedent) **or** (names of surviving statutory beneficiaries).

If you award damages under (4) and (5) above, you shall specifically state the amount of damages for each.

Instruction No. 9.105 Punitive Damages: Death by Wrongful Act

[If you find your verdict for the plaintiff, and if] [If] you believe by the greater weight of the evidence that the defendant's conduct was willful or wanton or was so reckless as to evince a conscious disregard for the safety of others, then you may also award punitive damages to the plaintiff to punish the defendant for his conduct and to prevent others from acting in a similar way.

If you award punitive damages, you must state separately in your verdict the amount you allow as punitive damages, and you may distribute these damages [among; between] (names of spouse, children, and children of any deceased child of decedent) **or** (names of surviving statutory beneficiaries).

Instruction No. 9.110 Contributory Negligence of Beneficiary: Death by Wrongful Act

[If you find your verdict for the plaintiff, and if] [If] you believe by the greater weight of the evidence that (name of spouse; child; grandchild; parent; brother; sister) **failed to use ordinary care for the safety of the decedent, then** (name of spouse, etc.) **was negligent. If you further believe by the greater weight of the evidence that this negligence was a proximate cause of the decedent's death, then** (name of spouse, etc.) **cannot share in the distribution of the damages that you award.**

Even if you find that (name of spouse, etc.) **cannot share in the distribution of the damages, you may award damages to** (names of remaining beneficiaries in the class).

Instruction No. 9.120 Life Expectancy/Mortality Table

You should consider the life expectancy figure introduced as evidence along with any other evidence relating to the health, constitution, and habits of (name of plaintiff; decedent) **in determining his life expectancy.**

Instruction No. 10.000 Lookout; Control; Speed

The driver of a vehicle has a duty to use ordinary care:

(1) to keep a proper lookout;
(2) to keep his vehicle under proper control; and
(3) to operate his vehicle at a reasonable speed under the existing conditions.

If a driver fails to perform any one or more of these duties, then he is negligent.

Instruction No. 10.004 Duty of Driver Following Another Vehicle

The driver of a motor vehicle shall not follow another [vehicle; trailer; semitrailer] **more closely than is reasonable and prudent, having due regard to the speed of both vehicles and the traffic on, and conditions of, the highway at the time.**

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.005 Rear-End Collision: Finding Instruction

If (name of plaintiff)**'s vehicle was lawfully** [stopped; stopping; coming to a stop] **in its lane of travel and was struck from the rear, you may find that** (name of defendant) **was negligent unless you believe from other evidence that** (name of defendant) **was not negligent.**

Instruction No. 10.010 Right to Assume Other Driver's Ordinary Care

The driver of a vehicle has a right to assume that the driver of another vehicle will operate such other vehicle in a lawful manner until he realizes, or in the exercise of ordinary care should realize, that the other driver is not going to do so.

Instruction No. 10.020 Lookout: Scope of Duty to Keep a Proper Lookout

The duty to keep a proper lookout requires a driver to use ordinary care to look in all directions for [vehicles; persons; conditions] **that would affect his driving, to see what a reasonable person would have seen, and to react as a reasonable person would have acted to avoid a collision under the circumstances.**

Instruction No. 10.025 Lookout: Duty to Keep Windows Clear

A driver of a vehicle has a duty to use ordinary care to keep his windows clear from [substantial] obstruction so that he can keep a proper lookout.

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.030 Lookout: When Lights to Be Lighted

The driver of a vehicle has a duty to display lighted headlights and taillights [from sunset to sunrise; whenever persons or vehicles on the highway are not clearly visible at a distance of 500 feet; whenever windshield wipers are in continuous use as a result of fog, rain, sleet, or snow].

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.040 Control: Skidding

The fact that a vehicle skidded on a slippery road is not, of itself, sufficient to establish negligence on the part of the driver. If you believe by the greater weight of the evidence that the skidding was caused by failure of the defendant to act as a reasonable person would have acted under the circumstances, then the defendant was negligent. If you believe that the slippery condition of the road was the only cause of the skidding, then the defendant was not negligent.

Instruction No. 10.050 Control: Continuous Driving Over 13 Hours

A person who drives [a motor vehicle; motor vehicles] **for more than thirteen hours in any twenty-four hour period is negligent.**

Instruction No. 10.060 Control: Falling Asleep

A person who falls asleep while driving is negligent.

Instruction No. 10.070 Control: Brake Requirements

The driver of a vehicle has a duty not to drive a vehicle that has inadequate or improperly adjusted brakes.

If the driver fails to perform this duty, then he is negligent.

Instruction No. 10.080 Speed: Exceeding Posted Limit

The maximum speed limit at the time and place of the collision was (number) **miles per hour**.

If a driver was driving his vehicle faster than this limit, then he was negligent.

Instruction No. 10.090 Speed: Posted Minimum Speed

The minimum speed required at the time and place of the collision was (number) **miles per hour. The driver of a vehicle has a duty not to drive his vehicle at a speed below the posted minimum speed** [except when necessary for safe operation; except when in compliance with the law].

If a driver was driving his vehicle at less than the posted minimum speed, then he was negligent [unless it was necessary for safe operation; unless it was in compliance with the law].

Instruction No. 10.100 Speed: Driving Too Slowly

The driver of a vehicle has a duty not to drive his vehicle at such slow speed as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation [or in compliance with the law].

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.105 Speed: Table of Speed and Stopping Distances

The following has been constructed, using scientific reasoning, to provide you with an average baseline for motor vehicle stopping distances for a vehicle in good condition on a level, dry stretch of highway, free from loose material:

[Read portion of Table at Va. Code Ann. § 46.2-880, reprinted below, that is pertinent to the evidence]

These averages are not binding upon you, and if you find that the vehicle or highway conditions are different from those used in developing these average stopping distances, you may take the differences into account in your deliberations.

SPEED IN		AVERAGE STOPPING DISTANCES			TOTAL STOPPING DISTANCES: DRIVER AND	
Miles Per Hour	Feet Per Second	Automobile Brakes (In Feet)	Truck Brakes on All Wheels (In Feet)	Avg Driver Perception-Reaction Time (1.5 Seconds) (In Feet)	Automobiles (In Feet)	Trucks (In Feet)
10	14.7	5	6	22	27	28
15	22.0	11	14	33	44	47
20	29.3	19	25	44	63	69
25	36.7	30	40	55	85	96
30	44.0	43	57	66	109	123
35	51.3	58	78	77	135	155
40	58.7	76	102	88	164	190
45	66.0	96	129	99	195	228
50	73.3	119	159	110	229	269
55	80.7	144	192	121	265	313
60	88.0	171	229	132	303	361
65	95.3	201	268	143	344	411
70	102.7	233	311	154	387	465
75	110.0	268	357	165	433	522
80	117.3	305	406	176	481	582
85	124.7	344	459	187	531	646
90	132.0	386	514	198	584	712
95	139.3	430	573	209	639	782
100	146.7	476	635	220	696	855

Instruction No. 10.110 Duty to Drive on the Right

The driver of a vehicle has a duty to drive on the right half of the highway [[unless it is impracticable to drive on the right side; except when lawfully overtaking and passing another vehicle] in which event the driver may drive on the left side, providing he uses ordinary care].

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.115 Defendant in Plaintiff's Lane of Travel

The fact that the defendant's oncoming vehicle was in the plaintiff's lane of travel at the time of impact allows you to find that the defendant was negligent unless you believe from other evidence that the defendant was not negligent.

Instruction No. 10.120 Proper Lane for Slow-Moving Vehicle on Multiple-Lane Road

A driver of a vehicle proceeding at less than the normal speed of traffic, considering the time, place, and conditions, has a duty to drive in the lane nearest the right [edge; curb] **of the highway when that lane is available for travel, except when** [overtaking and passing another vehicle; preparing to make a left turn; the right lane is reserved for slow-moving traffic].

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.130 Duty to Drive on Half of the Road

The driver of a vehicle has a duty to give, as nearly as possible, one half of the main traveled portion of the highway to a driver proceeding in the opposite direction. When [the road is unmarked; the dividing lines are so faint as to be unnoticeable]**, the dividing line is the center of the highway.**

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.140 Duty to Heed Lane Markings

The driver of a vehicle has a duty to drive to the right of a [double solid line; solid line immediately to the right of a broken line] **except when** [making a left turn; in order to pass a pedestrian or a device moved by human power, including a bicycle, skateboard, or foot-scooter, provided such movement can be made safely].

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.150 Three-Lane Roads

When a highway is divided into three lanes, the driver of a vehicle has a duty not to drive in the center lane [except when overtaking and passing another vehicle; except in preparation for a left turn; unless the center lane is being used exclusively for traffic moving in his direction and is so marked].

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.160 Changing Lanes

The driver of a vehicle has a duty to drive as nearly as practicable within a single lane and not to move from that lane until he has used ordinary care to see that the movement can be made with safety.

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.170 Overtaking and Passing: Visibility

The driver of a vehicle overtaking and passing another vehicle proceeding in the same direction has a duty not to drive to the left side of the roadway unless such left side is clearly visible and free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety.

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.180 Overtaking and Passing: Clearance

The driver of a vehicle passing another vehicle proceeding in the same direction has a duty to pass at least two feet to the left of that vehicle and not to return to the right side of the highway until he can do so safely.

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.190 Stopping and Turning: Duty to Signal

Before the driver of a vehicle [turns; partly turns; changes lanes; stops; backs], **he has a duty to use ordinary care to see if such movement can be made safely, and if he makes such movement he must give a signal to any vehicle that may be affected by his intended movement.**

If a driver fails to either use ordinary care to see if such movement can be made safely or fails to give a signal to any vehicle that may be affected by his movement, then he is negligent.

Instruction No. 10.200 Turn or Stop Signal

If the driver of a vehicle may affect the operation of another's vehicle by [turning; changing lanes; stopping]**, then the driver has a duty to give a visible** [left turn signal; right turn signal; brake light] **continuously for a distance of at least** [100; 50] **feet.**

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.210 Changing Course After Signaling

If the driver of a vehicle signals a change in the course of his vehicle, then he has a duty to follow the course indicated [unless he alters the original signal. If he does, he has duty to use ordinary care to see that other [drivers; pedestrians] have seen and are aware of the change].

If a driver fails to perform [this duty; either or both of these duties]**, then he is negligent.**

Instruction No. 10.230 Right Turn: Driver's Duty

The driver of a vehicle has a duty to make a [right turn; approach for a right turn] **as close as practicable to the** [right curb; edge of the roadway].

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.240 Driver's Duty When Turning Left; Yielding Right-of-Way

The driver of a vehicle intending to turn left has a duty to yield the right-of-way to any vehicle approaching from the opposite direction that is so close as to constitute a hazard.

If a driver fails to use ordinary care to perform this duty, then he is negligent.

Instruction No. 10.250 Driver's Duty on Left Turn From a Two-Way Road

The driver of a vehicle making a left turn has a duty to:

(1) approach the intersection in that portion of the right half of the roadway nearest the centerline;
(2) enter the intersection to the right of the centerline of the road;
(3) make the turn, whenever practicable, in that portion of the intersection to the left of the center of the intersection;
(4) leave the intersection to the right of the centerline of the street he is entering.

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.260 Driver's Duty on Left Turn on Other Than Two-Way Roadways

The driver of a vehicle has a duty to approach a left turn in the extreme left-hand lane that is lawfully available to him. In making the turn, he has a duty to turn into and, as nearly as practicable, to leave the intersection in the extreme left-hand lane lawfully available to him.

If a driver fails to perform either or both of these duties, then he is negligent.

Instruction No. 10.262 Steady Red Light

The driver of a motor vehicle facing a steady red traffic light has the duty to stop and remain stopped so long as the light is red and thereafter not to proceed until it is safe to do so in the exercise of ordinary care.

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.264 Green Light

A driver facing a green light shall move in the direction of the signal, except he has a duty to yield to other vehicles and pedestrians lawfully within the intersection. In proceeding through the intersection, he has a duty to exercise ordinary care.

If a driver fails to perform either of these duties, then he is negligent.

Instruction No. 10.266 Steady Amber Light

When faced with a steady amber light, it is the duty of a driver who has not already entered an intersection, including crosswalks, to use ordinary care to stop if it is not reasonably safe to continue.

[A driver who has already entered the intersection when the signal changes to amber shall continue to move in the exercise of ordinary care until he clears the intersection.]

If a driver fails to perform [this duty; these duties], **then he is negligent.**

Instruction No. 10.268 Right Turn on Steady Red Light

A driver intending to make a right turn on a steady red light has a duty to come to a full stop, yield the right-of-way [to any pedestrian lawfully in a crosswalk; to other traffic using the intersection], and to enter the intersection cautiously.

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.270 Stop Sign: Yielding Right-of-Way

A driver facing a stop sign at an intersection has a duty to stop [at a clearly marked stop line; before entering the crosswalk on the near side of the intersection; or, in the absence of a marked crosswalk, at the point nearest the intersecting road where the driver would have a view of approaching traffic on that road]**. Before proceeding, the driver also has a duty to yield the right-of-way to any approaching vehicle from either direction.**

If a driver fails to use ordinary care to perform either or both of these duties, then he is negligent.

Instruction No. 10.280 Yield Sign at Intersection: Yielding Right-of-Way

When the driver of a vehicle approaches an intersection controlled by a yield right-of-way sign, he has a duty to slow down to a speed reasonable for the existing conditions and, if required for safety to stop [at a clearly marked stop line; before entering the crosswalk on the near side of the intersection; or, in the absence of a marked crosswalk, at the point nearest the intersecting roadway where he would have a view of approaching traffic on the intersecting road]**. Before proceeding, the driver also has a duty to yield the right-of-way to the driver of any lawfully approaching vehicle.**

If a driver fails to use ordinary care to perform either or both of these duties, then he is negligent.

Instruction No. 10.290 Uncontrolled Intersection: Yielding Right-of-Way

When two vehicles [approach; enter] **an intersection at approximately the same time, the driver of the vehicle on the left has a duty to yield the right-of-way to the driver of the vehicle on the right.**

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.295 Unlawful Speed: Forfeiture of Right-of-Way

The driver of any vehicle traveling at an unlawful speed forfeits any right-of-way he might otherwise have had. In such event, each driver is required to use ordinary care for his or her own safety.

Instruction No. 10.300 Right-of-Way: Stopping and Yielding Before Entering Highway or Crossing Sidewalk

Immediately before [entering a highway; crossing a sidewalk] **from a** [private road; driveway; alley; building]**, the driver of a vehicle has a duty to stop and use ordinary care to yield the right-of-way to any** [approaching vehicle that; pedestrian who] **is so near the** [intersection; sidewalk] **that the driver cannot safely** [enter; cross] **it.**

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.310 Right-of-Way: Traffic Circles

Vehicles already in a traffic circle have the right-of-way over vehicles entering the circle.

If the driver of a vehicle entering a traffic circle fails to yield the right-of-way, then he is negligent.

Instruction No. 10.320 Driver's Duty Not to Stop on Highway

The driver of a vehicle has a duty not to stop his vehicle in such a manner as to impede or render dangerous the use of the highway by others who are using it [unless there was [an emergency; an accident; a mechanical breakdown]].

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.330 Driver's Duty to Use Ordinary Care to Avoid Obstructing the Highway

The driver of a vehicle has a duty to use ordinary care to avoid obstructing the street or highway with his vehicle in a way that may be dangerous to others.

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.340 Driver's Duty When Stopping to Sell Merchandise

The driver of a vehicle from which merchandise is sold has a duty to use ordinary care in selecting a place to park his vehicle so that he can sell his merchandise without exposing his customers to danger.

If a driver fails to perform this duty, then he is negligent.

Instruction No. 10.350 Driver's Duty When Stopping on Highway Because of Accident

A driver whose vehicle is stopped on a roadway because he was involved in [an emergency; an accident; mechanical breakdown] **must turn on the emergency flashing lights of his vehicle, if they are in working order, and move his vehicle from the roadway to the shoulder as soon as possible.**

If a driver fails to perform either or both of these duties, then he is negligent.

Instruction No. 10.360 Certain Stopped Vehicles; Duty to Set Out Warning Devices

When [a; an] (type of commercial vehicle defined in Va. Code Ann. § 46.2-341.4) **is stopped on any roadway or on the shoulder of any highway at any time for any cause other than stops necessary to comply with traffic control devices, lawfully installed signs, or signals of law-enforcement officers, the driver must immediately activate the vehicular hazard warning signal flashers, and, as soon as possible, but in any event within ten (10) minutes of stopping, place on the roadway or shoulder three reflectorized triangular warning devices. One red reflectorized triangular warning device shall be placed in the center of the lane of traffic or shoulder occupied by the stopped vehicle and not less than 100 feet from the vehicle in the direction of traffic approaching in that lane. One red reflectorized triangular warning device shall be placed not less than 100 feet from the vehicle in the opposite direction. The third red reflectorized triangular warning device shall be placed on the traffic side of the vehicle not closer than ten (10) feet from the** [front; rear]**. The hazard warning signal flashers shall continue to flash until the red reflectorized triangular warning devices have been placed.**

If the driver of the vehicle fails to perform this duty, then he is negligent.

Instruction No. 11.000 Standard of Care: Operator Entitled to Sovereign Immunity

The driver of a (type of emergency vehicle) **has a duty not to be grossly negligent in discharging his official duties under the circumstances of this case.**

"Gross negligence" is that degree of negligence which shows such indifference to others as constitutes an utter disregard of caution amounting to a complete neglect of the safety of another [person; person's property]**. It is such negligence as would shock fair-minded people, although it is something less than willful recklessness.**

Instruction No. 11.005 Standard of Care: Operator Not Entitled to Sovereign Immunity

The driver of a (type of emergency vehicle) **has a duty to use the degree of care that a prudent man would use in discharging his official duties under the circumstances of this case.**

If the driver of a (type of emergency vehicle) **fails to use this degree of care, then he is negligent.**

Instruction No. 11.010 Speed Limits: Operator Entitled to Sovereign Immunity

The driver of a (type of emergency vehicle) **responding to an emergency call may exceed the speed limit provided he is not grossly negligent.**

Instruction No. 11.020 Certain Traffic Regulations: Operator Entitled to Sovereign Immunity

The driver of a (type of emergency vehicle) **responding to an emergency call may proceed past a [steady or flashing red signal; traffic light; stop sign; device] provided he is not grossly negligent.**

Instruction No. 11.030 Driver's Duty to Yield to Emergency Vehicle

When a (type of emergency vehicle) **approaches giving an audible signal by** [siren; exhaust whistle; air horn designed to give automatically intermittent signals] **and displaying a** [flashing; blinking; alternating; steady burning] (color as provided in Va. Code Ann. §§ 46.2-1022, 46.2-1023 or 46.2-1024) **warning light, the driver of a vehicle has a duty, as quickly as traffic and other highway conditions permit, to drive to the nearest edge of the roadway** [clear of any intersection of highways]**, and to stop and remain in that position until such emergency vehicle has passed before proceeding** [unless otherwise directed by a police or traffic officer].

If a driver fails to perform this duty, then he is negligent.

Instruction No. 11.035 Driver's Duty to Change Lanes or Reduce Speed

The driver of any motor vehicle, upon approaching a stationary vehicle that is displaying a flashing, blinking, or alternating blue, red, or amber light or other warning lights has a duty to (i) proceed with caution and, if reasonable, with due regard for safety and traffic conditions, yield the right-of-way by making a lane change into a lane not adjacent to the stationary emergency vehicle or, if changing lanes would be unreasonable or unsafe, (ii) proceed with due caution and maintain a safe speed for highway conditions.

If the driver fails to perform this duty, then he is negligent.

Instruction No. 12.000 School Bus Driver's Duty to Use Warning Device

The driver of a school bus has a duty to use a warning device when the bus is either stopped or about to stop to take on or discharge [children; elderly individuals; individuals with mental or physical disabilities]. **The warning device shall be used and in operation** [for at least 100 feet before a proposed stop on roads with lawful speed limits less than 35 miles per hour; for at least 200 feet before a proposed stop on roads with lawful speed limits of 35 miles per hour or more].

If a driver of a school bus fails to perform this duty, then he is negligent.

Instruction No. 12.010 School Bus Driver's Duty When Picking Up or Discharging Students

When discharging or picking up a child, the driver of a school bus has a duty, in addition to operating a warning device, to use ordinary care considering the experience, age, and judgment of the child.

If a driver fails to perform this duty, then he is negligent.

Instruction No. 12.030 Stopping on Highway to Pick Up or Discharge Students Permitted

A school bus may be stopped on the traveled portion of the highway, when taking on or discharging school children, at points where the bus can be clearly seen for a safe distance from both directions.

Instruction No. 12.040 Duty of a Driver Approaching School Bus That Is Stopped to Pick Up or Discharge Students

The driver of a vehicle has a duty to stop and remain stopped when approaching a school bus from any direction if the bus is stopped on any [highway; private road; school driveway] **for the purposes of** [taking on; discharging] [children; elderly individuals; individuals with mental or physical disabilities]. **The driver must remain stopped until all the** [children; elderly individuals; individuals with mental or physical disabilities] **are clear of the** [highway; private road; school driveway] **and the bus is put in motion.**

If a driver fails to perform this duty, then he is negligent.

Instruction No. 12.050 Duty of Driver Approaching School Bus Stopped for Another Reason

The driver of a vehicle approaching a stopped school bus that has stopped for a purpose other than taking on or discharging school children does not have a duty to stop. He does have a duty to use ordinary care to look out for children in the vicinity of the bus and to use ordinary care to avoid any such children.

If a driver fails to perform either of these duties, then he is negligent.

Instruction No. 12.060 Approaching Driver's Duty of Care

The presence of a school bus [taking on; preparing to take on; preparing to discharge; discharging; having discharged] **children is sufficient to put an approaching driver on notice that children may be near the bus and imposes on him a duty to exercise a degree of care in keeping with those circumstances.**

If a driver fails to perform this duty, then he is negligent.

Instruction No. 12.070 Approaching Driver Has No Duty to Stop: Divided Highway

The driver of a vehicle approaching a school bus that is stopped for the purpose of [taking on; discharging] **children on the opposite side of a divided highway that is separated by** [a physical barrier; an unpaved area] **may proceed without stopping if he uses ordinary care under the circumstances.**

Instruction No. 13.000 Passenger's Duty to Warn Driver

A passenger in a vehicle does not have a duty to be as observant as the driver. However, a passenger does have a duty to warn the driver of a danger if:

(1) the passenger observes the danger; and
(2) it is apparent to the passenger that the driver has not seen the danger; and
(3) the passenger has enough time to warn the driver of the danger; and
(4) the passenger is so situated that he can readily warn the driver of the danger.

If all of these circumstances exist, and if a passenger fails to perform this duty, then he is negligent. If any one or more of the circumstances do not exist, then the passenger is not negligent.

Instruction No. 13.010 Passenger's Duty When Getting Out of Vehicle

A passenger getting out of a motor vehicle has a duty to use ordinary care for his own safety.

If a passenger fails to perform this duty, then he is negligent.

Instruction No. 14.000 General Duties of Pedestrian

A pedestrian has a duty to use ordinary care when he is [walking on; crossing; walking along, but off of] **the** [hard surface; traveled portion] **of a highway or street:**

(1) to keep a lookout for motor vehicles;
(2) to refrain from entering or crossing [an intersection; the hard surface of a highway or street; the traveled portion of a highway or street] **in disregard of traffic approaching in such a manner that a reasonable person would not attempt to enter or cross; and**
(3) to step from his [course; intended path of travel] **into a place of safety if it reasonably appears to him that he is in danger of being struck by a motor vehicle.**

If a pedestrian fails to perform any one or more of these duties, then he is negligent.

Instruction No. 14.010 Pedestrian's Duties to Use Sidewalk or Shoulder, or Walk Along Edge of Roadway

If there is a reasonably suitable and passable sidewalk, a pedestrian has a duty to use the sidewalk.

If there is no such sidewalk, a pedestrian may walk on the [hard surface; main traveled portion] **of the roadway, but he has a duty to keep to the extreme left side or edge, except that where the shoulders of the highway or street are of sufficient width to permit, the pedestrian may walk on either shoulder.**

If a pedestrian fails to perform such duty, then he is negligent.

Instruction No. 14.020 Pedestrian's Duty Not to Step Into Highway or Street From Behind an Obstruction

A pedestrian has a duty not to step into a highway or street at any point between intersections where he would be obscured from the vision of a driver of an approaching vehicle by [another vehicle; an obstruction] [along the curb; on the side of the road]**.**

If a pedestrian fails to perform this duty, then he is negligent.

Instruction No. 14.030 Pedestrian's Right-of-Way at Marked Crosswalk, Regular Crossing, or at Intersection Where Speed Limit is Not More Than 35 m.p.h.

A pedestrian has the right-of-way when crossing a highway or street [within any clearly marked crosswalk; at any regular pedestrian crossing at the end of a block; by the most direct route at any intersection where the maximum speed limit is not more than 35 miles per hour]**.**

The pedestrian's right-of-way begins on one side of the roadway and continues until he has completed his crossing [in the crosswalk; regular pedestrian crossing; at the intersection]**.**

When a pedestrian has the right-of-way, the driver of a vehicle has a duty to [stop and remain stopped while the pedestrian is within the driver's lane or within an adjacent lane and approaching the driver's lane; change course, slow down, or come to a complete stop if necessary to permit the pedestrian to cross safely and expeditiously].

If a driver fails to perform this duty, then he is negligent.

Instruction No. 14.040 Pedestrian's Duty When Crossing Highway or Street Between Intersections

A pedestrian crossing a highway or street has a duty to cross by the most direct route and a duty to use ordinary care in crossing.

If a pedestrian fails to perform either or both of these duties, then he is negligent.

Instruction No. 14.050 Walk—Don't Walk Signals

A pedestrian has a duty not to start to cross a highway or street in the direction of a "Don't Walk" signal, and a duty, if he partially completed crossing on a "Walk" signal, to proceed to a [sidewalk; safety island] **while the "Don't Walk" signal is showing.**

If a pedestrian fails to perform either duty, then he is negligent.

Instruction No. 15.000 Driving Under the Influence of Intoxicants

A person is under the influence of intoxicants if it is apparent that he has consumed enough [alcoholic beverages; drugs; alcoholic beverages and drugs in combination] **to affect his manner, disposition, speech, muscular movement, general appearance, or behavior.**

If a person drives a motor vehicle while under the influence of intoxicants, then he is negligent.

Instruction No. 15.005 Punitive Damages: Intoxicated Driver

If you find your verdict for the plaintiff and if you further find by the greater weight of the evidence that:

Blood/Breath test

(1) when the incident causing the [injury; death] occurred, the defendant had a blood alcohol concentration of 0.15 percent or more by weight by volume (or 0.15 grams or more per 210 liters of breath); and
(2) at the time the defendant began drinking alcohol, or during the time he was drinking alcohol, he knew or should have known that his ability to operate a motor vehicle would be impaired, or when he was operating a motor vehicle he knew or should have known that his ability to operate a motor vehicle was impaired; and
(3) the defendant's intoxication was a proximate cause of the [injury; death] of the [plaintiff; name of plaintiff's decedent].

Unreasonable refusal

(1) when the incident causing injury or death occurred, the defendant was intoxicated and unreasonably refused to submit to a test of his blood alcohol content; and
(2) at the time the defendant began drinking alcohol, during the time he was drinking alcohol, or when he was operating a motor vehicle, he knew or should have known that his ability to operate a motor vehicle was impaired;
(3) the defendant's intoxication was a proximate cause of the [injury; death] of the [plaintiff; name of plaintiff's decedent].

then you may award punitive damages. If you do so, you must state separately the amount allowed as punitive damages.

Instruction No. 15.010 Contributory Negligence: Riding With Intoxicated Driver

If, at the time the plaintiff [voluntarily entered the vehicle; continued as a passenger after he had a reasonable opportunity to leave], **he knew, or should have known, that the defendant had consumed enough** [alcoholic beverages; drugs; alcoholic beverages and drugs in combination] **to impair, or to be likely to impair, his ability to drive, then the plaintiff was negligent** [unless there were circumstances that would make his conduct reasonable]**.**

Instruction No. 15.020 Assumption of the Risk: Riding With Intoxicated Driver

If, at the time the plaintiff [voluntarily entered the vehicle; continued as a passenger after he had a reasonable opportunity to leave], **he knew that the defendant had consumed enough** [alcoholic beverages; drugs; alcoholic beverages and drugs in combination] **to impair, or to be likely to impair his ability to drive, and if the plaintiff fully appreciated the nature and extent of the risk in** [entering the vehicle; continuing as a passenger after he had a reasonable opportunity to leave]**, then the plaintiff assumed the risk of any injury resulting from the defendant's intoxication** [unless there were circumstances that would make his conduct reasonable]**.**

Instruction No. 16.000 Issues

Your verdict must be based upon the facts as you find them and on the law contained in these instructions.

The issues in this case are:

(1) Was a vehicle involved in the accident whose driver was unknown?
(2) If so, was the driver of that vehicle negligent?
(3) If the driver was negligent, was his negligence a proximate cause of the accident?
(4) If the plaintiff is entitled to recover, what is the amount of his damages?

On these issues the plaintiff has the burden of proof.

Your decision on these issues must be governed by the instructions which follow.

Instruction No. 16.010 Finding Instruction

You shall find your verdict for the plaintiff if he proved by the greater weight of the evidence:

(1) that there was a vehicle involved in the accident whose driver was unknown; and
(2) that the driver of that vehicle was negligent; and
(3) that [this driver's; the defendant's] **negligence was a proximate cause of the plaintiff's accident and damages**.

You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of the elements above.

Instruction No. 17.000 Headlights: Requirements

Every motor vehicle operated on a highway shall be equipped with at least two headlights at the front of and on opposite sides of the vehicle. On low beam, headlights must be nonglaring and must reveal persons and objects at least 100 feet ahead; on high beam, they must reveal persons and objects at least 350 feet ahead.

If the driver of a vehicle fails to equip his vehicle properly, then he is negligent.

Instruction No. 17.010 Tail Lights: Requirements

Every [motor vehicle; trailer; semitrailer] **operated on a highway shall carry at the rear two red lights plainly visible in clear weather from a distance of 500 feet to the rear of the vehicle.**

If the driver of a vehicle fails to equip his vehicle properly, then he is negligent.

Instruction No. 17.020 Brake Lights: Requirements

Every [motor vehicle; trailer; semitrailer] **operated on a highway shall be equipped with at least two brake lights that automatically exhibit a red or amber light plainly visible in clear weather from a distance of 500 feet to the rear of the vehicle when the brake is applied.**

If the driver of a vehicle fails to equip his vehicle properly, then he is negligent.

Instruction No. 17.030 Horn: Requirements

Every motor vehicle operated on a highway shall be equipped with a working horn capable of being heard under normal conditions for at least 200 feet.

If the driver of a vehicle fails to equip his vehicle properly, then he is negligent.

Instruction No. 17.040 Brakes: Requirements

Every motor vehicle **operated on a highway shall be equipped with brakes in good working order capable of stopping the** motor vehicle **within** (insert applicable required stopping distance based on category of vehicle as prescribed in Va. Code Ann. § 46.2-1067) **when such vehicle is traveling at 20 miles per hour on a dry, hard, level stretch of highway free from loose material.**

If the driver of a vehicle fails to equip his vehicle properly, then he is negligent.

Instruction No. 17.050 Mirrors: Requirements

Every motor vehicle operated on the highway must be equipped with at least one outside and at least one inside mirror which reflects to the driver a view of the highway for at least 200 feet to the rear of the vehicle.

If the driver of a vehicle fails to equip his vehicle properly, then he is negligent.

Instruction No. 17.060 Windshield Wipers: Requirements

Every motor vehicle operated on a highway shall be equipped with mechanically or electrically operated windshield wipers which shall clean both the right and left sides of the windshield.

If the driver of a vehicle fails to equip his vehicle properly, then he is negligent.

Instruction No. 17.070 Flag or Light at the End of Load

Whenever the load on any vehicle extends more than four feet beyond the vehicle, a red flag measuring at least twelve inches by twelve inches shall be displayed at the end of the load. The flag must be clearly visible at all times from the rear of the load.

If the driver of a vehicle fails to equip his vehicle properly, then he is negligent.

Instruction No. 17.080 Projection of Load

No vehicle may carry a load that extends more than six inches beyond the line of the fender or body on the left or right side of the vehicle.

If a driver carries a load exceeding this limit, then he is negligent.

Instruction No. 18.000 Driver's Duty to Look and Listen

The driver of a vehicle has a duty to use ordinary care to look and listen effectively for an approaching train before crossing the tracks and a duty to stay off the tracks if he becomes aware of an approaching train.

If a driver fails to perform either or both of these duties, he is negligent.

Instruction No. 18.010 When Driver Has Duty to Look and Listen for Approaching Trains

The driver of a vehicle has a duty to look and listen for an approaching train when he knows, or by the exercise of reasonable care should know, that he is approaching a railroad crossing.

If a driver fails to perform either or both of these duties, he is negligent.

Instruction No. 18.020 Driver's Duty to Look and Listen at Crossing Even If There Is No Warning of a Train

The driver of a vehicle has a duty to use ordinary care to look and listen effectively for an approaching train before crossing the tracks even if a railroad fails to [lower the crossing gate; sound a whistle or horn or bell; give a flag signal; etc.] **as a warning that its train is approaching the crossing.**

If a driver fails to perform this duty, then he is negligent.

Instruction No. 18.030 Passenger's Duty to Look and Listen

Ordinarily the passenger in a vehicle has no duty to direct and control the driver unless it is obvious that the driver is taking no precautions for their safety. If there is no apparent danger in the manner in which the driver is operating the car the passenger is not required to interfere. However, a passenger who sees a railroad crossing ahead, or who is familiar with the crossing and is aware that it is about to be reached, has a duty to use ordinary care to look and listen effectively for an approaching train and to warn the driver of danger if:

(1) a reasonably observant person would have seen the train;
(2) it is apparent to the passenger that the driver has not seen the danger; and
(3) the passenger then has enough time to warn the driver of the danger.

If a passenger fails to perform this duty, then he is negligent.

Instruction No. 18.040 Driver's Duty While Removing Vehicle From Tracks

The driver of a vehicle has a duty to use ordinary care for his own safety when attempting to remove his stalled vehicle from the tracks.

If a driver fails to perform this duty, then he is negligent.

Instruction No. 18.050 Driver's Statutory Duty to Stop at Crossing

The driver of a vehicle has a duty to stop within fifty (50) feet but not less than fifteen (15) feet from the nearest rail of the railroad and to remain stopped until he can proceed safely. This duty shall apply [when the immediate approach of a train is indicated with a clearly visible (electrical; mechanical) signal device; when a crossing gate is lowered; when a flagman gives or continues to give a signal of the approach or passage of a train; when an approaching train signals with a (whistle; horn; bell); when an approaching (train; self-propelled machinery; automobile type vehicle traveling on a railroad track) is plainly visible and dangerously close to the crossing regardless of whether a clearly visible electric or mechanical signal device or flagman gives warning].

If a driver fails to perform this duty, then he is negligent.

Instruction No. 18.060 Duty of Driver of School Bus, Vehicle for Hire, or Vehicle Carrying Explosives or Flammables

The driver of a [school bus; motor vehicle carrying passengers for hire; vehicle carrying explosives or flammables as a cargo or part of a cargo] **has a duty at a railroad crossing:**

(1) to stop his vehicle within fifty (50) feet but not less than fifteen (15) feet from the nearest rail of the railroad;
(2) while stopped, to listen and look in both directions along the track for any indication of an approaching train;
(3) to proceed only when he can do so safely; and
(4) to cross only in such gear of the vehicle that there will be no necessity to change gears while crossing the tracks.

If a driver fails to perform one or more of these duties, then he is negligent.

Instruction No. 18.070 Driver's Duty at Crossing Barrier

The driver of a vehicle has a duty not to drive [through; around; under] **any crossing** [gate; barrier] **at a railroad crossing while it is** [closed; being opened; being closed].

If a driver fails to perform this duty, then he is negligent.

Instruction No. 18.080 Railroad's Duty to Sound Whistle, Horn, or Bell

A railroad has a duty to sharply sound a locomotive [whistle; horn] **twice when the engine is between 300 and 600 yards from a public** [highway; crossing] **and to then** [ring; sound] **the locomotive** [bell; whistle; horn] **continuously or alternately until the engine reaches the public** [highway; crossing].

If a railroad fails to perform this duty, then it is negligent.

Instruction No. 18.081 Railroad's Duty to Sound Horn

A railroad approaching a public highway rail grade crossing has a duty to sound its horn, with two long blasts, one short blast, and one long blast, beginning between 15 and 20 seconds before entering the crossing and continuing until it occupies the crossing.

If a railroad fails to perform this duty, then it is negligent [unless (the engineer in good faith began sounding the horn between 20 and 25 seconds before the crossing because he was unable to precisely estimate the time of arrival in the crossing; the train was traveling faster than 60 mph and began sounding its horn a quarter mile before the crossing; the train was stopped in close proximity to the crossing and the engineer could determine that the crossing was not obstructed and that [the crossing was equipped with automatic flashing lights and gates and the gates were fully lowered; there were no conflicting highway movements approaching the crossing])].

Instruction No. 18.090 Finding Instruction: Comparative Negligence; Railroad's Duty to Sound Warnings at Crossings

If you find by the greater weight of the evidence that:

(1) the railroad failed to sound a [whistle; horn; bell] **while approaching a crossing; and**
(2) the driver failed to exercise ordinary care in approaching the crossing; and
(3) the railroad's negligence in failing to sound a [whistle; horn; bell] **while approaching the crossing and the driver's failure to exercise ordinary care in approaching the crossing combined to cause the driver's injuries;**

then the driver may recover, but you are required to reduce his damages by the proportion that the driver's failure to exercise ordinary care proximately contributed to the accident.

Instruction No. 18.100 Railroad's Common Law Duty to Warn That Train Is Approaching Crossing

A railroad has a duty to give an adequate, reasonable, and timely warning of the approach of its train to the crossing.

If a railroad fails to perform this duty, then it is negligent.

Instruction No. 18.110 Positive and Negative Testimony

The testimony of a witness that he heard a warning signal from a train ordinarily outweighs the testimony of [a witness; witnesses] **that** [he; they] **did not hear the signal unless the** [witness; witnesses] **who did not hear the signal:**

(1) had a good opportunity to hear the signal and probably would have heard it; or
(2) his attention was drawn to the train as it approached the crossing.

Instruction No. 18.130 Railroad's Duty to Keep Reasonable Lookout

A railroad has a duty to use ordinary care to keep a lookout from the train for [vehicles; pedestrians] **approaching a crossing.**

If a railroad fails to perform this duty, then it is negligent.

Instruction No. 18.140 Railroad's Train Speed at Grade Crossing

A railroad running a [freight; passenger] **train has a duty to approach a crossing at a speed of no more than** [10 mph on an Excepted Track; (10; 15) mph on a Class 1 Track; (25; 30) mph on a Class 2 Track; (40; 60) mph on a Class 3 Track; (60; 80) mph on a Class 4 Track; (80; 90) mph on a Class 5 Track].

If a railroad fails to perform this duty, then it is negligent.

Instruction No. 18.150 Railroad's Train Speed at Grade Crossing: Ordinance

The railroad has a duty to approach the crossing at a speed of no more than (number) **miles per hour.**

If the railroad fails to perform this duty, then it is negligent.

Instruction No. 18.160 Railroad's Duty to Place and Maintain Warning Signal Boards (Crossbucks)

A railroad has a duty to place and maintain warning signals called "crossbucks" on both sides of its railroad at or near its crossings. The crossbucks must be at such heights as to be easily seen by travelers approaching from both directions of the highway, and they must bear the inscription "Railroad Crossing" in capital letters at least five inches high.

If a railroad fails to perform this duty, then it is negligent.

Instruction No. 18.170 Railroad's Duty to Place and Maintain Warning Devices at Crossings

A railroad has a duty to place and maintain warning devices with flashing lights at each crossing of a public highway. The devices must be at such height as to be easily seen by travelers and must be automatically activated by the approaching train and clearly visible to approaching travelers 200 feet from the crossing.

If a railroad fails to perform this duty, then it is negligent.

Instruction No. 18.180 Railroad's Duty to Place Warning Devices at Dangerous Crossings

A railroad has a duty to exercise ordinary care to provide such cautions or barriers as are appropriate to the nature of the crossing.

If a railroad fails to perform this duty, then it is negligent.

Instruction No. 18.190 Railroad's Duty to Remove Trees and Brush From Right-of-Way

A railroad has a duty to clear its right-of-way of any trees or brush that obstruct the view of an approaching train for one hundred feet on either side of the crossing.

If a railroad fails to perform this duty, then it is negligent.

Instruction No. 18.191 Railroad's Duty to Remove Vegetation Obstructing Sightlines

A railroad has a duty to control vegetation in its property on or immediately adjacent to the roadbed so that it does not obstruct visibility of railroad signs and signals along the right-of-way and at public crossings.

If a railroad fails to perform this duty, then it is negligent.

Instruction No. 18.192 Railroad's Duty to Clear Obstructions from Sightlines

A railroad has a duty to remove or warn about any object, whether structural or natural, that is within the railroad's right-of-way and that obstructs the clear sightlines at a crossing [of railroad signs or signals; of or from an approaching train].

If a railroad fails to perform this duty, then it is negligent.

Instruction No. 18.200 Railroad's Duty to Keep Crossings in Repair

A railroad has a duty to keep its crossings smooth and in good repair to the full width of the road, and to keep the road in good repair for two feet on either side of the outside rails so as to permit reasonable and safe travel on the highway.

If a railroad fails to perform this duty, then it is negligent.

Instruction No. 19.000 Railroad's Duty: Persons on Its Property

A railroad has a duty to use ordinary care to avoid injuring anyone who its employees knew, or should have known, was on the railroad's property and who they knew, or should have known, was in danger.

If a railroad fails to perform this duty, then it is negligent.

Instruction No. 19.010 Railroad's Duty: Identification of Object on Tracks

If an employee of a railroad sees an object on the tracks, then he has a duty to keep a lookout until he identifies the object. As soon as he knows, or should have known, that the object is a person, the railroad has a duty to use ordinary care to avoid harming him. If the person is in obvious and immediate danger, then the railroad has a duty to use all available means, consistent with the safety of those on the train, to avoid harming him.

If the railroad fails to perform one or more of these duties, then it is negligent.

Instruction No. 19.020 Railroad's Duty: Anticipated Trespassers on Tracks

A railroad has a duty to use ordinary care to look for persons whom it might reasonably expect to be using the [section of tracks; area alongside the tracks] **where the accident occurred as a walkway. If the railroad discovers, or should have discovered, a person in danger, then the railroad has a duty to use ordinary care to avoid harming him. If the person is in obvious and immediate danger, then the railroad has a duty to use all available means, consistent with the safety of those on the train, to avoid harming him.**

If the railroad fails to perform one or more of these duties, then it is negligent.

Instruction No. 20.000 Duty of Initial Carrier to Employee of Consignee

A railroad that is the initial carrier owes a duty to an employee of the company, who unloads a freight car, to use ordinary care to furnish a freight car that can be unloaded with reasonable safety.

If a railroad fails to perform this duty, then it is negligent.

Instruction No. 20.005 Duty of a Delivering Carrier to Employee of Consignee

A railroad that is the delivering carrier owes a duty to an employee of the company who unloads the freight car to use ordinary care to inspect the freight car to see if it is reasonably safe to be unloaded, and a duty to repair or give warning of any dangerous condition discoverable by the inspection.

If the railroad fails to perform either of these duties, then it is negligent.

Instruction No. 20.010 Railroad's Liability for Fires Started by Train

If you find by the greater weight of the evidence that plaintiff was damaged by a fire that was started by [a spark; coal; (name of other incendiary item)] **from defendant's** [engine; train], **then you must find for the plaintiff.**

Instruction No. 21.000 Railroad's General Duty of Care

A railroad has a duty to use ordinary care to provide its employees with a safe place in which to work and safe equipment with which to do the work. Ordinary care is the care a reasonable person would have used under the circumstances.

The railroad's duty of care is measured by what is reasonably foreseeable under like circumstances. It is not required to have anticipated or foreseen the precise [injury; damage] **that occurred, but it is sufficient that a reasonably prudent person would have anticipated or foreseen that some** [injury; damage] **might probably result from the negligent act.**

If a railroad fails to perform this duty, then it is negligent.

Instruction No. 21.001 Degree of Care Varies With Risk Level

The degree of care required by the reasonable care standard varies with the level of risk. The greater the risk of harm, the greater the required level of care.

Instruction No. 21.010 Causation

A railroad has caused or contributed to the employee's [injury; death] **if the railroad's negligence played a part—no matter how small—in bringing about the** [injury; death]**. The mere fact that** [an injury; a death] **occurred does not necessarily mean that the** [injury; death] **was caused by negligence.**

Instruction No. 21.015 Aggravation of Pre-Existing Condition

You have received evidence of (describe plaintiff's pre-existing condition).

The railroad is liable to the plaintiff only for damages you find to be caused by the railroad's negligence.

If you find that the plaintiff's pre-existing condition made him more susceptible to injury than a person in good health, the railroad is responsible for all injuries suffered by the plaintiff as a result of its negligence, even if those injuries are greater than those a person in good health would have suffered under the same circumstances.

If you find that the railroad negligently caused further injury or aggravation to the plaintiff's pre-existing condition, the plaintiff is entitled to compensation for all of his damages caused by the incident, including the further injury or aggravation. If you cannot separate the pain or disability caused by the pre-existing condition from that caused by the incident, then the railroad is liable for all of the plaintiff's injuries.

Instruction No. 21.020 Employee's Duty of Care

An employee has a duty to use ordinary care for his own safety at the time and place in question.

If an employee fails to perform this duty, then he is negligent.

Instruction No. 21.030 Contributory Negligence: Damages Diminished

If you find that the railroad and the employee were both negligent, and that the negligence of each combined to cause the employee's [injury; death]**, then the** [employee; employee's estate; employee's personal representative; employee's beneficiaries] [is; are] **entitled to recover, but you are required to diminish the damages in proportion to the amount of negligence attributable to the employee.**

To determine how much to diminish the employee's damages, you should answer the following questions.

(1) **Without taking into consideration any possible negligence by the employee, what sum of money do you find to be the total amount of the employee's damages? $_____**
(2) **What percentage of the employee's damages do you find to have been caused by the negligence of the employee? ANSWER: _____%**
(3) **What percentage of the employee's damages do you find to have been caused by the negligence of the railroad? ANSWER: _____% (Answer questions (2) and (3) in terms of percentage totaling 100%)**
(4) **The total amount of damages $_____ (from #1) x the percentage of railroad's fault _____% (from #3) = Net Verdict _____.**

Instruction No. 21.040 Violation of Federal Railroad Safety Authorization Act or Other Statute or Regulation Enacted for Safety of Employees

A railroad is liable to an employee if his [injuries were; death was] **caused in whole or in part by** (describe violation of Federal Railroad Safety Authorization Act or other statute or regulation enacted for the safety of employees)**. The violation caused or contributed to the injury if the violation played a part—no matter how small—in bringing about the employee's** [injury; death]**. The employee's negligence, if any, is not a defense to any damages caused in whole or in part by the violation of a** [statute; regulation] **enacted for the safety of employees.**

Instruction No. 21.050 Finding Instruction

The plaintiff makes two kinds of claims in this case: a [statutory; regulatory] **claim based on** (insert cite to applicable statute or regulation) **and a negligence claim. The rules of law that apply to those two claims are different; this instruction will tell you the rules to apply.**

You shall find your verdict for the plaintiff on his claim based on (insert cite to applicable statute or regulation) **if he proved by the greater weight of the evidence:**

(1) that the defendant violated a statute or regulation enacted for the safety of employees; and
(2) that the violation caused or contributed to the [injury; death] **by playing a part—no matter how small—in bringing about the** [injury; death].

If the plaintiff failed to prove either or both of the two elements above, then you shall find for the defendant on the claim based on (insert cite to applicable statute or regulation)**, but you must consider the remainder of this instruction.**

You shall find your verdict for the plaintiff on his negligence claim if he proved by the greater weight of the evidence:

(1) that the defendant was negligent; and
(2) that the negligence caused or contributed to the [injury; death] **by playing a part—no matter how small—in bringing about the** [injury; death].

If the plaintiff failed to prove either or both of the two elements above, then you shall find for the defendant on the negligence claim, but you must consider the remainder of this instruction.

If you find your verdict for the plaintiff on both the claim based on (insert cite to applicable statute or regulation) **and the negligence claim, or on the** [statutory; regulatory] **claim mentioned above alone, then you shall proceed to determine his damages according to the other instructions the court will give you. The negligence, if any, of the plaintiff does not bar him from recovering, nor does it diminish his damages.**

If you find your verdict for the plaintiff based only on the negligence claim, and if the defendant proves by the greater weight of the evidence that the plaintiff was contributorily negligent, then you shall reduce the amount of the verdict in proportion to the relative negligence of the plaintiff and defendant.

If the plaintiff fails to prove either the negligence or the statutory claim, then you shall find your verdict for the defendant.

Instruction No. 21.060 Present Value

If you find in favor of the plaintiff and make an award for any loss of earnings or expense in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that the plaintiff will have use of this money in a lump sum. You must, therefore, determine the present value or present worth of the money which you award for such future loss.

The present value of future damages is the sum of money needed now to fully compensate the plaintiff for future damages such that, if it was invested now and received a reasonably risk-free rate of interest between now and the time when the damages will be sustained, it will equal the amount of those damages at the time in the future when they will be incurred.

Instruction No. 22.000 Duty of Care Owed to Passengers Generally

The defendant is a common carrier. A common carrier has the duty to use the highest degree of practical care for the safety of its passengers. It is liable for the slightest negligence causing injury that could have been foreseen and guarded against, but it is not an insurer of the safety of its passengers.

If the defendant fails to perform this duty, then it is negligent.

Instruction No. 22.010 Duty of Care Owed to Incapacitated Passengers

If a common carrier knows, or should know, that a passenger is unable to care for his own safety, it has a duty to use care, beyond that care given to a normal passenger, to protect a passenger in his condition from the dangers incident to his surroundings and mode of travel.

If a common carrier fails to perform this duty, then it is negligent.

Instruction No. 22.020 Duty to Protect Passengers From Assault by Employees

A common carrier has a duty to protect its passengers from any unjustified assault by its employees during the passenger-carrier relationship.

If a common carrier fails to perform this duty, then it is negligent.

Instruction No. 22.030 Duty to Protect Passengers From Assault by Other Passengers or Strangers

If a common carrier knows, or by the use of proper care should know, that a [passenger; stranger] **probably will become a source of danger or menace to other passengers, it has a duty to use the highest degree of practical care and foresight to prevent any injury.**

If a common carrier fails to perform this duty, then it is negligent.

Instruction No. 22.040 Authority to Eject Disorderly Persons

A common carrier has a duty to preserve order on its conveyance; accordingly, it may use all reasonable means and necessary force to remove disorderly persons from the conveyance.

Instruction No. 22.050 Inception of Passenger-Carrier Relationship

The passenger-carrier relationship begins when a person presents himself to the carrier for transportation under such circumstances of time, place, manner, and condition that the carrier is deemed to have accepted him as a passenger.

Instruction No. 22.060 Termination of Passenger-Carrier Relationship

The passenger-carrier relationship does not end until the passenger has exited the [bus; train; taxi; ferry; elevator; (name of other similar type of conveyance)] **and has had a reasonable opportunity to reach a safe place.**

Instruction No. 23.000 Definition of Trespasser

A trespasser is one who goes upon the [lands; premises] **of another without any legal right to do so and** [without the invitation, authority, or consent of the occupant of the [lands; premises]] [intentionally fails to leave the [lands; premises] of another after being requested to do so by the occupant].

Instruction No. 23.010 Definition of Licensee

A licensee is one who enters the premises of another for his own convenience, benefit, or pleasure, with the knowledge and express or implied consent of the occupant.

Instruction No. 23.015 Definition of Bare Licensee

A bare licensee is [one who is permitted to enter the premises for his convenience, benefit, or pleasure by the passive acquiescence of the owner; a social guest].

Instruction No. 23.020 Definition of Invitee

An invitee is one who visits premises lawfully at the express or implied invitation of the occupant. An invitee is one who visits other than for a social purpose or for his own convenience.

An express invitation is one made directly or indirectly by spoken or written words to come on the premises.

An implied invitation is one made by opening the premises to others for a particular purpose.

Instruction No. 23.030 Invitee's Right to Assume Safe Condition of Premises

An invitee has the right to assume that the premises are reasonably safe for his visit. This assumption does not apply if the invitee [knows, or should have known, of the unsafe condition; uses the premises in a manner that exceeds the scope of the invitation; goes to a place on the premises where the invitee is not reasonably expected to go].

Instruction No. 23.040 Occupant's Duty to Invitee: General

An occupant of premises does not guarantee an invitee's safety, but has the duty:

(1) to use ordinary care to have the premises in a reasonably safe condition for an invitee's use consistent with the invitation unless the invitee [knows, or should have known, of the unsafe condition; uses the premises in a manner that exceeds the scope of the invitation; goes to a place on the premises where the invitee is not reasonably expected to go]**; and**
(2) to use ordinary care to warn an invitee of any unsafe condition that the occupant knows about, or that the occupant should know about by the use of ordinary care. The occupant does not have this duty if the unsafe condition would be open and obvious to an invitee who is using ordinary care for his own safety.

If an occupant fails to perform any of these duties, then the occupant is negligent.

Instruction No. 23.050 Occupant's Duty to Invitee: Remove Foreign Objects

An occupant of premises has the duty to an invitee to use ordinary care to remove a foreign substance or object from the floor if the foreign substance or object creates an unsafe condition. The occupant must do so within a reasonable time after the occupant knew, or should have known, it was there, regardless of how it got there.

If an occupant fails to perform this duty, then the occupant is negligent.

Instruction No. 23.060 Occupant's Duty to Social Guest: Activities on Premises

An occupant of premises owes a duty to a social guest on the premises to use ordinary care in his activities or conduct to avoid injury to the social guest.

If the occupant fails to perform this duty, then the occupant is negligent.

Instruction No. 23.070 Occupant's Duty to Licensee or Social Guest: Condition of Premises

An occupant of premises has a duty to a [licensee; social guest] **to use ordinary care either to make an unsafe condition safe or warn of the unsafe condition when:**

(1) the occupant knows, or should know, of an unsafe condition on his premises; and
(2) the occupant knows, or should know, that it involves an unreasonable risk of harm to a [licensee; social guest]**; and**
(3) the occupant knows, or should know, that a [licensee; social guest] **will not discover or realize the unsafe condition; and**
(4) the [licensee; social guest] **does not know, or have reason to know, of the unsafe condition and the risk involved.**

If the occupant fails to perform this duty, then the occupant is negligent.

Instruction No. 23.080 Occupant's Duty to Child: Dangerous Instrumentalities

An occupant of premises who:

(1) has a dangerous [object; instrumentality] **on the premises, the dangerous nature of which is not obvious to children;**
(2) knows, or by the use of ordinary care should know, that the premises are easily accessible to young children; and
(3) knows, or by the use of ordinary care should know, that young children are frequently on or near the premises;

has a duty to use ordinary care for the safety of those children with respect to the dangerous [object; instrumentality] [even if they are trespassers].

If the occupant fails to perform this duty, then the occupant is negligent.

Instruction No. 23.090 Occupant's Duty to Trespasser and Bare Licensee

An occupant of premises has a [duty not to willfully or intentionally cause injury to a [trespasser; bare licensee]; duty to protect a [trespasser; bare licensee] if the occupant knows, or reasonably should have known of the [trespasser's; bare licensee's] danger, and could have avoided the danger by the use of ordinary care].

If an occupant fails to perform this duty, then the occupant is negligent.

An occupant of premises has no duty to a [trespasser; bare licensee] **to keep his premises in a safe condition for the** [trespasser's; bare licensee's] **use.**

Instruction No. 23.100 Invitee Exceeding the Scope of Invitation

An invitee, while using premises in a way that exceeds the scope of the occupant's invitation to him, ceases to be an invitee and becomes a [trespasser; bare licensee].

An occupant of the premises has no duty to inspect the premises or keep the premises safe for the [trespasser's; bare licensee's] **use.**

Instruction No. 23.110 Commercial Occupant's Duty to Remove Snow and Ice After Storm

An occupant of commercial premises has a duty to an invitee to use ordinary care to remove ice or snow from [outdoor entrance walks; steps; porches; stoops; parking lots] **within a reasonable time after the** [freezing rain; snow] **stops falling.**

If an occupant fails to perform this duty, then the occupant is negligent.

Instruction No. 23.120 Occupant's Responsibility for Dangerous Substances on Premises

An occupant of premises who keeps a [dangerous; offensive] **substance on the premises has an absolute duty not to let it escape.**

If an occupant fails to perform this duty, then the occupant is negligent.

Instruction No. 23.130 Occupant's Duty to Law-Enforcement Officers, Fire Fighters and Other Designated Personnel

Where an occupant of premises:

(1) knows, or has reason to know, of a dangerous condition on his premises; and
(2) knows, or has reason to know, of the presence on his premises of a [law-enforcement officer; fire fighter; individual designated in § 8.01-226]; **and**
(3) knows, or has reason to know, that the [law-enforcement officer; fire fighter; individual designated in § 8.01-226] **is unaware of the dangerous condition;**

then an occupant has the duty to use ordinary care either to make the condition reasonably safe or to warn the [law-enforcement officer; fire fighter; individual designated in § 8.01-226] **of the dangerous condition.**

If an occupant fails to perform this duty, then the occupant is negligent.

Instruction No. 24.000 Landlord's Duty Upon Surrendering Control

A landlord who knows that a dangerous condition exists has a duty to warn the tenant about it before the tenant enters into possession. The landlord does not have this duty when the condition is open and obvious or if the tenant knew of the condition or should have discovered it by making a reasonable inspection.

If a landlord fails to perform this duty, then the landlord is negligent.

Instruction No. 24.010 Landlord's Duty to Maintain Common Areas

A landlord has a duty to a tenant to use ordinary care to keep common areas in a [reasonably safe condition; clean condition; structurally safe condition]**. Common areas are those parts of the premises over which the landlord retains control, and which may be used by all tenants.**

If a landlord fails to perform this duty, then the landlord is negligent.

Instruction No. 24.020 Landlord's Liability for Repairs Made

A landlord who undertakes to make repairs has a duty to a tenant to use reasonable care in making the repairs.

If a landlord fails to perform this duty, then the landlord is negligent.

Instruction No. 24.025 Burden of Proving Landlord's Failure to Exercise Reasonable Care in Making Repairs

Where the landlord undertakes to make repairs, the tenant has the burden of proving by the greater weight of the evidence that the landlord failed to use reasonable care in making repairs. A showing that a defect remained after repairs were made is, by itself, insufficient to satisfy this burden.

Instruction No. 24.030 Landlord's Duty to Remove Snow and Ice After Storm

A landlord has a duty to a tenant to use ordinary care to remove ice or snow from [outdoor entrance walks; steps; porches; stoops; parking lots] **under the landlord's control within a reasonable time after the** [snow; freezing rain] **stops falling.**

If a landlord fails to perform this duty, then the landlord is negligent.

Instruction No. 24.040 Tenant's Liability for Waste

A tenant may not commit waste to his landlord's premises.

Waste is the [destruction; material alteration; deterioration beyond normal wear and tear caused] **by the tenant of the landlord's premises.**

If a tenant commits waste, the tenant is liable to the landlord for damages. The damages for which a tenant is liable are [the actual reasonable cost of restoring the property to its former condition; the fair and reasonable value of the repairs necessary to restore the property to its former condition; such sum as will be sufficient to compensate the landlord for the injury to the property].

Instruction No. 24.050 Waste: Double Damages

A landlord may recover double damages from his tenant if the tenant wantonly committed waste. A tenant wantonly commits waste if:

(1) he was conscious of his conduct; and
(2) he knew from existing conditions that damage would probably result from his conduct; and
(3) he consciously and intentionally, with reckless indifference to the consequences, [did a wrongful act; omitted a known duty] **that caused injury to the landlord's premises.**

Instruction No. 25.000 Duty to Provide Accommodations

An innkeeper has a duty to provide accommodations to all persons who request them, if such accommodations are available, unless the innkeeper's refusal to do so is based on a reasonable ground.

Instruction No. 25.010 Innkeeper's Duty of Care

An innkeeper has [a duty to exercise due care and diligence in providing honest and competent employees and to take reasonable precautions to protect guests and their property; an absolute duty of care to protect guests when he knows or should know of a danger to them that might easily be [removed; remedied; cured]; a duty of utmost care and diligence to protect guests against reasonably foreseeable injury from the criminal conduct of a third party].

If an innkeeper fails to perform [this duty; these duties]**, then the innkeeper is negligent.**

Instruction No. 26.000 Definition of Nuisance

A nuisance is any [activity; use of one's property] **that** [endangers the life or health of another; interferes with the reasonable and comfortable use of the property of another; causes a material disturbance or annoyance; diminishes value].

Instruction No. 26.010 Multiple Causes of a Nuisance

If [the plaintiff; a landowner] **is damaged from a combination of nuisances originating from different sources, the burden is on [the plaintiff or landowner] to prove by the greater weight of the evidence the amount of his damage caused by** [the; each] **defendant.**

Instruction No. 26.020 Definition of Permanent Nuisance

A nuisance is permanent if, in the ordinary course of things, it will continue to produce injury.
[A nuisance becomes a permanent nuisance as of the time that it begins to produce the continuing injury.]

Instruction No. 26.030 Measure of Damages to Property: Permanent Nuisance

If a nuisance is permanent, the measure of damages to the affected property is the difference between the fair market value of the property [without; unaffected by] **the nuisance and its fair market value** [with; as affected by] **the nuisance computed at the time the nuisance was created** [commencing on (specify date)] [plus loss of use and enjoyment; plus, discomfort and inconvenience caused by the nuisance; plus physical and emotional injuries].

Instruction No. 26.040 Measure of Damages to Property: Temporary Nuisance

If a nuisance is temporary, the measure of damages is the amount that will fully and fairly compensate the landowner for the loss of use and enjoyment of his property over the period of time the nuisance was in existence [commencing on (specify date)].

Instruction No. 27.000 Definition of Trespass

A trespass is an entry without right or permission, authority or invitation, express or implied, onto property which results in interference with a person's right of possession in the property. Any physical entry upon the property constitutes such a trespass, whether the entry is a walking upon it, flooding it with water, casting objects upon it, or otherwise.

[A trespass is an intentional failure to leave property after being requested to do so by a person with a right of possession in the property.]

Instruction No. 27.010 Willful or Not Willful

A trespass is willful if it is committed [in bad faith; with intentional disregard of the rights of another; with gross negligence regarding the rights of another]**. A trespass is not willful if it is committed** [unintentionally; accidentally; inadvertently; by mistake] **under a good faith claim of right.**

Instruction No. 27.020 Presumption of Willfulness

Every trespass is presumed to be willful. If you find that there was a trespass, the burden of proof is on the defendant, based on all the evidence introduced at trial, to show that the trespass was not willful.

Instruction No. 27.040 Damages: Severance of Goods From Land

If you find by the greater weight of the evidence that the defendant removed the plaintiff's (specify goods) **from the plaintiff's land without authority, the defendant trespassed and is liable to the plaintiff in damages.**

If the defendant's act was a willful trespass, the measure of damages is the value of the (specify goods) **with any increase in their value attributable to the labor of the defendant.**

If the defendant's act was not a willful trespass, the measure of damages is the value of the (specify goods) **immediately before they were removed from the land.**

Instruction No. 28.000 Definition of “Bailment,” “Bailor” and “Bailee”

A bailment is the delivery of personal property by one person, called the “bailor,” to another, called the “bailee,” by way of loan, rental or other entrustment, for some purpose which is of benefit to one or both of them.

Instruction No. 28.010 Bailee's Duty: Mutual Benefit Bailment

If the bailment is for the mutual benefit of the bailor and the bailee, then the bailee has a duty to use ordinary care for the protection, preservation and return of the bailed property.

If the bailee fails to perform this duty, then the bailee is liable for any loss or damage to the property that is caused by such failure.

Instruction No. 28.030 Bailee's Duty: Gratuitous Bailment

If the bailment is for the benefit of the bailor alone, then the bailee has a duty to the bailor to use only slight care or diligence for the protection, preservation and return of the bailed property.

If the bailee fails to perform this duty, then the bailee is liable for any loss or damage to the property caused by such failure.

Instruction No. 28.040 Bailor's Duty: Bailment for Hire or Mutual Benefit

If the bailment is for the mutual benefit of the bailor and bailee, then the bailor has a duty to use ordinary care to see that the property bailed is reasonably fit for the purpose for which it would normally be used or for which the bailor was aware that it was intended to be used.

If the bailor fails to perform this duty, and if that failure caused the injury complained of, then the bailor is liable.

Instruction No. 28.060 Bailee's Negligence Not Imputed to Bailor

If you find that (name of bailor) **was a bailor, then** (name of bailor) **is not liable for the negligence, if any, of** (name of bailee).

Instruction No. 28.070 Issues and Allocation of Burdens of Proof: Contract

Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The issues [on the contract claim] **in this case are:**

(1) Did (name of bailor) **deliver a** (name bailed object) **to** (name of bailee) **under a bailment agreement?**
(2) Did (name of bailee) **fail to redeliver the** (name bailed object) **on demand or as agreed?**

On these issues (name of bailor) **has the burden of proof.**

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(3) Was the (name bailed object) [lost; destroyed; damaged; taken out of the bailee's possession] **without the fault of** (name of bailee)**?**

On this issue (name of bailee) **has the burden of proof.**

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(4) If (name of bailor) **is entitled to recover, what is the amount of bailor's damages?**

On this issue (name of bailor) **has the burden of proof.**

Your decision on these issues must be governed by the instructions that follow.

Instruction No. 28.071 Issues and Allocation of Burdens of Proof: Tort

Your verdict must be based on the facts as you find them, and on the law contained in all of these instructions.

The issues [on the tort claim] **in this case are:**

(1) Did (name of bailor) **deliver a** (name bailed object) **to** (name of bailee) **under a bailment agreement?**
(2) Was any damage to [loss of; destruction of] (name bailed object) **proximately caused by the negligence of** (name of bailee)**?**
(3) If (name of bailor) **is entitled to recover, what is the amount of bailor's damages?**

On these issues (name of bailor) **has the burden of proof.**

Your decision on these issues must be governed by the instructions that follow.

Instruction No. 28.080 Finding Instruction: Contract

You shall find your verdict for the bailor if the bailor proved by the greater weight of the evidence:

(1) **that bailor delivered a** (name bailed object) **to the bailee under a contract of bailment; and**
(2) **that the bailee failed to redeliver it on demand or as agreed upon.**

You shall find your verdict for the bailee:

(1) **if the bailor failed to prove either or both of the elements above** [or]
(2) **if the bailee proved by the greater weight of the evidence that the (name bailed object) was [lost; destroyed; damaged; taken out of the bailee's possession] without the fault or negligence of bailee].**

Instruction No. 28.081 Finding Instruction: Tort

You shall find your verdict for the bailor if the bailor proved by the greater weight of the evidence:

(1) **that bailor delivered a** (name bailed object) **to the bailee under a contract of bailment; and**
(2) **that the damage to** [loss of; destruction of] (name bailed object) **was proximately caused by the negligence of** bailee.

You shall find your verdict for the bailee if the bailor failed to prove either or both of the elements above.

Instruction No. 29.000 Owner's Duty: Cattle, Horses, and Other Domesticated Livestock

The owner of a [cow; horse; (name of other domesticated livestock)] **has a duty to use ordinary care to keep it from** [straying onto a public highway; breaking into an area enclosed by a lawful fence].

If the owner fails to perform this duty, then he is negligent.

Instruction No. 29.010 Owner Charged With Knowledge of Propensities of the Breed

The owner of a [breed; class; species] **of animal must take notice of the general, natural inclinations or characteristics of the** [breed; class; species] **of that animal. The owner must also take notice of the inclinations or characteristics peculiar to the animal that he knows about or should have known about. If any of those inclinations or characteristics are of a kind likely to cause injury, the owner has a duty to use ordinary care to prevent any reasonably foreseeable injury.**

If an owner fails to perform this duty, then he is negligent.

Instruction No. 29.020 Dog Owner's Duty: No Leash Ordinance

If the owner of a dog has no reason to know that his dog might cause injury to others, he may allow his dog to run free.

If the owner of a dog knows, or should know, that his dog might cause injury, he has a duty to use ordinary care to prevent injury to others.

If an owner fails to perform this duty, then he is negligent.

Instruction No. 29.030 Owner's Duty: Wild Animals

The owner or keeper of [a; an] (type of particular wild animal) **is charged with knowledge of its natural inclinations or characteristics and has a duty to use a high degree of care to keep it confined and restrained so as not to cause injury to others.**

If an owner or keeper fails to perform this duty, then he is negligent.

Instruction No. 29.040 Wild Animals: Contributory Negligence

A person who knows he is in the vicinity of [a; an] (type of particular wild animal) **is charged with knowledge of its natural inclinations or characteristics and has a duty to use ordinary care for his own safety.**

If a person fails to perform this duty, then he is negligent.

Instruction No. 30.000 Dangerous Instrumentalities and Related Activities: General Duty of Care

A person; utility [keeping explosives; possessing explosives; engaged in the production of electricity or natural gas; engaged in the distribution of electricity or natural gas; (name other similar activity involving a similarly dangerous instrumentality)] **has a duty to use a high degree of care, corresponding to the dangers involved, to prevent injury to others.**

If a person fails to perform this duty, then that person is negligent.

Instruction No. 30.010 Explosives: Strict Liability for Blasting Damage

A person who uses explosives in blasting is liable for damage that is a direct and proximate result of the blasting.

Instruction No. 30.030 Electricity and Gas: Duty to Inspect and Repair

A [person; utility; (name of other producing, transmitting, or distributing entity)] **engaged in the** [production; transmission; distribution] **of** [gas; electricity] **has a duty to make reasonable and proper inspections of** [pipes; mains; wires; appliances; (name of other equipment)] **under his control and a duty to repair promptly and effectively any leak or defect of which he knew or should have known, regardless of the cause.**

If a person fails to perform either or both of these duties, then that person is negligent.

Instruction No. 30.040 Electricity: Furnishing Current for Another's Line—Duties to Inspect and Withhold Supply

A [person; utility; (name of other producing, transmitting, or distributing entity)] **engaged in the** [production; transmission; distribution] **of electricity has no duty to inspect a line to which it supplies electrical current unless it** [owns; built; controls; has an interest in the management or operation of] **the line. But a** [person; **utility**; (name of other producing, transmitting, or distributing entity)] **does have a duty not to supply current to a line if it** [has actual knowledge of a defect in the line; knows of facts and circumstances sufficient to put it on notice that the line is defective].

If a [person; utility; (name of other producing, transmitting, or distributing entity)] **engaged in the** [production; transmission; distribution] **of electricity fails to perform either of these duties, then it is negligent.**

Instruction No. 30.045 Gas: Furnishing to Another's Pipe—Duties to Inspect and Withhold Supply

A [person; utility; (name of other producing, transmitting, or distributing entity)] **engaged in the** [production; transmission; distribution] **of gas has no duty to inspect a pipe to which it supplies gas unless it** [owns; built; controls; has an interest in the management or operation of] **the pipe. But a** [person; **utility**; (name of other producing, transmitting, or distributing entity)] **does have a duty not to supply gas to a pipe if it** [has actual knowledge of a defect in the pipe; knows of facts and circumstances sufficient to put it on notice that the pipe is defective].

If a [person; utility; (name of other producing, transmitting, or distributing entity)] **engaged in the** [production; transmission; distribution] **of gas fails to perform either of these duties, then it is negligent.**

Instruction No. 30.050 Electricity: Duty to Insulate Wires

A [person; utility; (name of other producing, transmitting, or distributing entity)] **engaged in the** [production; transmission; distribution] **of electricity has a duty to keep its transmission lines properly insulated at places where people might reasonably be expected** [to go for work, business or pleasure; to come in contact with the lines].

If a [person; utility; (name of other producing, transmitting, or distributing entity)] **engaged in the** [production; transmission; distribution] **of electricity fails to perform this duty, then it is negligent.**

Instruction No. 32.000 Municipality's Duty: Keep Streets, Sidewalks, and Bridges in Safe Condition

A city has a duty to use ordinary care to keep its [streets; sidewalks; bridges] **in a reasonably safe condition for use by the public.**

If a city fails to perform this duty, then it is negligent.

Instruction No. 32.010 Municipality's Duty: Warn of Obstruction

Normally, the public is entitled to the unobstructed use of a [street; sidewalk; bridge]**. A city may temporarily obstruct a** [street; sidewalk; bridge]**, but it has a duty to give the public an adequate warning of the obstruction.**

If a city fails to perform this duty, then it is negligent.

Instruction No. 32.020 Pedestrian or Driver Has Right to Assume Reasonably Safe Condition

A [pedestrian; driver] **has a right to assume that a** [sidewalk; street; bridge] **is in a reasonably safe condition unless he knows that it is not. He does not have to be on the lookout for dangerous conditions or obstructions.**

However, a [pedestrian; driver] **has a duty to use ordinary care for his own safety if he either knows of the dangerous condition or obstruction or if it is so open and obvious that he should see it.**

If a [pedestrian; driver] **has a duty to use ordinary care for his own safety and if he fails to perform this duty, then he is negligent.**

Instruction No. 32.030 Municipality is Not an Insurer

A city is not liable for every accident that happens on its [streets; sidewalks; bridges], **nor is it liable for every injury that is caused by a defect in its** [streets; sidewalks; bridges].

Instruction No. 32.040 Municipality's Duty: Repair or Warn Upon Notice of Defect

A city has a duty to use ordinary care to [repair; warn of] **a defect** [in; on] **a** [street; sidewalk; bridge] **within a reasonable time after it has notice of the defect. The notice may be either actual or constructive.**

A city has actual notice if any city employee who supervises the [streets; sidewalks; bridges] **or who has power to direct work on them actually knew of the defect** [in; on] **a** [street; sidewalk; bridge].

A city has constructive notice if the defect [in; on] **a** [street; sidewalk; bridge] **existed long enough that a city would have discovered it if it had used ordinary care.**

If a city has notice of a defect [in; on] **a** [street; sidewalk; bridge]**, either actual or constructive, and fails to perform this duty, then it is negligent.**

Instruction No. 32.050 Finding Instruction

You shall return your verdict for the plaintiff if he proved by the greater weight of the evidence:

(1) that the city [created; had actual or constructive notice of] **a defect** [in; on] **a** [street; sidewalk; bridge]**; and**
(2) that the city negligently failed to [repair; warn of] **the defect; and**
(3) that the city's negligence was a proximate cause of the plaintiff's accident and damage.

You shall return your verdict for the city:

(1) if the plaintiff failed to prove any or all of the three elements above; or
(2) if the city proved by the greater weight of the evidence that the plaintiff was negligent and that his or her negligence was a proximate cause of the accident.

Instruction No. 33.000 Negligent Infliction of Emotional Distress: Issues

Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The issues in this case are:

(1) Was the defendant negligent;
(2) Was the defendant's negligence a proximate cause of any [emotional distress; fright; shock] **that naturally resulted in a physical injury to the plaintiff; and**
(3) Did the plaintiff suffer damages as a result of the defendant's act?

On issue (1), the plaintiff has the burden of proof by the greater weight of the evidence. On issues (2) and (3), the plaintiff has the burden of proof by clear and convincing evidence.

Your decisions on these issues must be governed by the instructions that follow.

Instruction No. 33.100 Negligent Infliction of Emotional Distress: Finding Instruction

You shall find your verdict for the plaintiff if he proved:

(1) by the greater weight of the evidence that the defendant was negligent; and
(2) by clear and convincing evidence that the defendant's negligence was a proximate cause of [emotional distress; fright; shock] **which naturally resulted in a physical injury.**

You shall find your verdict for the defendant:

(1) if the plaintiff failed to prove either or both of the two elements above; or
(2) if you find by the greater weight of the evidence that the plaintiff was negligent and that his negligence was a proximate cause of this injury.

Instruction No. 33.200 Intentional Infliction of Emotional Distress: Issues

Your verdict must be based on the facts as you find them and on the law contained in these instructions.

The issues in this case are:

(1) **Did the defendant** [have the specific purpose of inflicting emotional distress upon the plaintiff; intend his specific conduct and know, or should have known, that his conduct would likely result in emotional distress]**;**
(2) **Was the defendant's conduct outrageous and intolerable in that it offends the generally accepted standards of decency and morality;**
(3) **Did the plaintiff suffer severe emotional distress; and**
(4) **Was the plaintiff's severe emotional distress proximately caused by the defendant's conduct?**

On these issues, the plaintiff has the burden of proof.

Your decisions on these issues must be governed by the instructions that follow.

Instruction No. 33.300 Intentional Infliction of Emotional Distress: Finding Instruction

You shall find your verdict for the plaintiff if he proved by clear and convincing evidence:

(1) **that the defendant** [had the specific purpose of inflicting emotional distress upon the plaintiff; intended his specific conduct and knew, or should have known, that his conduct would likely result in emotional distress]**; and**
(2) **that the defendant's conduct was outrageous and intolerable in that it offends generally accepted standards of decency and morality; and**
(3) **that the plaintiff suffered severe emotional distress; and**
(4) **that the plaintiff's emotional distress was proximately caused by the defendant's conduct.**

You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of the four elements above.

Instruction No. 34.000 Definition of Warranty

A warranty is a promise or guarantee by a manufacturer or seller that the product is of a certain quality or character. There are several different kinds of warranties; you will receive instructions on each type of warranty that you need to consider. The word "seller" means a person who sells or contracts to sell goods.

Instruction No. 34.010 Notice of Breach

The plaintiff must prove by the greater weight of the evidence that he gave notice to the seller of the claimed breach of warranty within a reasonable time after he discovered, or should have discovered, it. If the plaintiff fails to do so, he cannot recover.

[Notice need not be in any particular form. Notice is sufficient if it informs the seller that the buyer claims there has been a breach of warranty so that the seller and buyer may attempt to settle their differences.]

Instruction No. 34.020 Express Warranty

When a seller makes a statement, either orally or in writing, which relates to the goods and becomes a part of the basis of the bargain, he creates an express warranty that the product will conform to his statement.

Instruction No. 34.030 Express Warranty: Creation by Advertisement, Sample or Description

When a seller gives a description of the [goods; product; (name of product)]**, orally or in writing, which relates to the** [goods; product; (name of product)] **and becomes a part of the basis of the bargain, he creates an express warranty that the** [goods; product; (name of product)] **shall conform to the description.**

[When a seller provides a sample or model of the [goods; product; (name of product)] which relates to the [goods; product; (name of product)] and becomes a part of the basis of the bargain, he creates an express warranty that the [goods; product; (name of product)] shall conform to the sample or model.]

Instruction No. 34.040 Implied Warranty: Fitness for a Particular Purpose

When a seller knows, or has reason to know, that the product he is selling is to be used for a particular purpose and that the buyer is relying on the seller's skill or judgment in selecting or furnishing a product suitable for that purpose, then the seller creates an implied warranty that the product will be fit for that particular purpose.

Instruction No. 34.050 Implied Warranty: Fitness for a Particular Purpose—Reliance

In deciding whether the seller has reason to know that the buyer was relying on the seller's skill or judgment, you should consider all the facts surrounding the sale, including:

(1) whether the buyer had any control over the selection of the product;
(2) whether the buyer insisted on a particular brand or product;
(3) whether the buyer gave detailed and complete specifications for the product; and
(4) any other relevant circumstances.

Instruction No. 34.060 Implied Warranty: Merchantability

There is an implied warranty by a seller that his product will be fit for the purposes for which it is ordinarily used.

Instruction No. 34.070 Implied Warranty: Merchantability—Labeling; Without Objection in the Trade

There is an implied warranty by the seller that the product [will pass without objection in the trade under the contract description; is adequately contained, packaged, and labeled as the agreement may require; conforms to the promises or affirmations of fact made on the container or label].

Instruction No. 34.075 Breach of Warranty (Negligence) By Seller or Manufacturer

The defendant [seller; manufacturer] **has breached the implied warranty that the product is fit for the purposes for which it is ordinarily used if the plaintiff proves by a preponderance of the evidence that the product was unreasonably dangerous either for the use to which it would ordinarily be put or for some other reasonably foreseeable purpose, and that the unreasonably dangerous condition existed when the product left the defendant** [seller's; manufacturer's] **hands.**

[The defendant is negligent if the plaintiff proves by a preponderance of the evidence that the product was unreasonably dangerous either for the use to which it would ordinarily be put or for some other reasonably foreseeable purpose, and that the unreasonably dangerous condition existed when the product left the defendant [seller's; manufacturer's] hands.]

Instruction No. 34.076 Unreasonably Dangerous Product

A product is unreasonably dangerous if it is defective in design, assembly, or manufacture, or if it is unaccompanied by adequate warnings concerning its hazardous properties.

Instruction No. 34.080 Unreasonably Dangerous or Not Fit for the Purpose for Which It Is Ordinarily Used [Merchantability: Allergic Users]

Some products may be safe for use by most people and yet harmful to others. If the product contains an ingredient that is harmful to an identifiable or substantial class of users, and if the defendant [manufacturer; seller] **reasonably could foresee that danger, the product is unreasonably dangerous** [or not fit for the purpose for which it is ordinarily used] [unless the defendant gave an adequate warning of the danger].

Instruction No. 34.090 Common Law Implied Warranty: Wholesomeness of Food Products

When a person offers food or beverage for sale to the public, he warrants that the food or beverage is free of foreign substances and is fit for human consumption.

Instruction No. 34.100 Misuse or Unintended Use

A plaintiff cannot recover for breach of a warranty if he misused the product in a way not reasonably foreseeable by the defendant.

Instruction No. 34.110 Obvious Unfitness (Common Law)

When there has been an examination of the product by the buyer before purchase and the [unfitness; unwholesomeness] **of the product becomes known to the buyer or is visible or obvious, there is no implied warranty of** [fitness; wholesomeness].

Instruction No. 34.120 Obvious Unfitness: Pre-Contract (Statutory)

When the buyer [examines the product as fully as he desires; refuses to examine the product] **before purchasing the product, there is no implied warranty as to defects that the examination** [should; would] **have revealed under the circumstances.**

Instruction No. 34.130 Obvious Unfitness: Post-Contract (Statutory)

If you believe by the greater weight of the evidence that the plaintiff [discovered the product was unfit before he used it; unreasonably failed to inspect the product when an inspection would have revealed the defect]**, then the plaintiff's injury was not proximately caused by breach of the implied warranty and he cannot recover.**

Instruction No. 34.140 Manufacturer's Duty: Design and Construction

A manufacturer has a duty to use ordinary care to [design; manufacture; construct; assemble] **a product that will be reasonably safe for its intended purpose and for any other reasonably foreseeable purpose.**

If a manufacturer fails to perform this duty, then it is negligent.

Instruction No. 34.150 Manufacturer's and Seller's Duty to Warn: General

When a [manufacturer; seller] **knows, or by the use of ordinary care has a reason to know, that its product is potentially dangerous, and that this danger is not obvious or readily discoverable by the buyer, and that injury reasonably could be anticipated, the** [manufacturer; seller] **has a duty to give an adequate warning of this danger.**

In determining whether the warning given was adequate under the circumstances, you may consider:

(1) whether it could be expected to catch the attention of a reasonable person;
(2) whether it could be understood by a reasonable person; and
(3) whether it gave a reasonable indication of the nature and extent of the potential danger.

If the [manufacturer; seller] **had a duty to give a warning, and if it failed to give an adequate warning, then it was negligent.**

Instruction No. 34.155 Manufacturer's Duty to Warn: Medications

The manufacturer of a prescription drug or medication has the duty to warn the prescribing physician about the possible dangers to patients who use the drug or medication. This is to enable the physician to give an adequate warning of the dangers to the patient. If, however, a drug manufacturer warns against a particular use of the drug or medication, it need not explain exactly how improper use might affect the patient.

Instruction No. 34.170 Seller's Duty: Inspect or Test

If the seller knows, or by using ordinary care has a reason to know, that a product is likely to be dangerous or defective, he has a duty to make inspections or tests that are reasonably necessary to see that the product is safe for its intended purpose, and for any other reasonably foreseeable use.

If a seller fails to perform this duty, then he is negligent.

Instruction No. 34.180 Negligence *Per Se* (Example for Pesticide)

A manufacturer of a pesticide has a duty to see that the label does not contain a false or misleading statement about the product or its ingredients.

If the manufacturer fails to perform this duty, then it is negligent.

[A person has a duty to [use; cause to be used] a pesticide in a manner consistent with [its labeling; applicable regulations].]

[If a person fails to perform this duty, then he is negligent.]

Instruction No. 34.190 Unsafe Use of Product

If a plaintiff uses a product in a manner which he knows, or by using ordinary care should know, is unsafe, then he is negligent.

Instruction No. 34.200 Misuse or Unintended Use of Product

The plaintiff cannot recover if he misused the product in a way not reasonably foreseeable by the manufacturer.

[A buyer has a duty to use the product as it is intended to be used or in a way reasonably foreseeable by the manufacturer.

If a buyer fails to perform this duty, then he is negligent.]

Instruction No. 34.300 Motor Vehicle Warranty Enforcement Act: Manufacturer's and Dealer's Duty to Conform to Warranty

The manufacturer of a motor vehicle, and its agent or authorized dealer, has a duty to conform the vehicle to any applicable warranty by repairing or correcting any defect or condition, including those that do not affect the drivability of the vehicle, which significantly impairs the use, market value or safety of the vehicle to the consumer.

If, after a reasonable number of attempts during the period ending eighteen (18) months after the date of original delivery to the consumer of the vehicle, the manufacturer, or its agent or authorized dealer, has not conformed the vehicle to the applicable warranty, then the manufacturer has a duty either:

(1) to replace the motor vehicle with a comparable motor vehicle acceptable to the consumer; or (2) to accept return of the motor vehicle and refund to the consumer [and any lienholder as their interests may appear] **the full purchase price, including all collateral charges, and incidental damages, less a reasonable allowance for the consumer's use of the vehicle up to the date of first notice of nonconformity given to the manufacturer, its agents or authorized dealer.**

The consumer shall have the unconditional right to choose a refund rather than a replacement vehicle and to drive the vehicle until he receives either the replacement vehicle or the refund. Mileage, expenses, and reasonable loss of use necessitated by attempts to conform the vehicle to the express warranty may be recovered by the consumer.

The manufacturer, its agent or dealer shall be allowed the subtraction of a reasonable allowance for use by the consumer whether the consumer chooses a replacement vehicle or a refund.

Instruction No. 34.310 Motor Vehicle Warranty Enforcement Act: Presumption of Significant Impairment

It shall be presumed that a reasonable number of attempts have been undertaken to conform a vehicle to the warranty and that the vehicle is significantly impaired if, during the period of eighteen (18) months following the date of original delivery of the vehicle to the consumer, either:

(1) The same nonconformity has been subject to repair three (3) or more times by the manufacturer, its agent, or its authorized dealer, and the same nonconformity continues to exist; or
(2) The nonconformity is a serious safety defect and has been subject to repair one (1) or more times by the manufacturer, its agent, or its authorized dealer, and the same non-conformity continues to exist; or
(3) The vehicle is out of service due to repair for a cumulative total of thirty (30) calendar days.

Instruction No. 34.320 Motor Vehicle Warranty Enforcement Act: Definition of Warranty

Warranty means any implied warranty or any written warranty of the manufacturer. Warranty also means any affirmations of fact or promise made by the manufacturer in connection with the [sale; lease] **of a vehicle that become part of the basis of the bargain. The term "warranty" deals with the obligations of the manufacturer in relation to materials, workmanship, and fitness of a vehicle for ordinary use or reasonable intended purposes. The warranty lasts for (18) months after the new vehicle was originally delivered to the consumer.**

Instruction No. 35.000 Statewide Standard of Care for Health Care Providers

A doctor has a duty to use the degree of skill and diligence in the care and treatment of his patient that a reasonably prudent doctor in the same field of practice or specialty in Virginia would have used under the circumstances of this case. This is referred to as the standard of care.

If a doctor fails to perform this duty, then he is negligent.

Instruction No. 35.010 Statewide or Local Standard of Care for Health Care Providers

A doctor has a duty to use the degree of skill and diligence in the care and treatment of his patient that a reasonably prudent doctor in the same field of practice or specialty in Virginia would have used under the circumstances of this case. This is referred to as the standard of care.

[However, if you find that the [doctor; patient] has proved by the greater weight of the evidence that the health care services, health care facilities, and customary practices in the locality where the treatment took place make a local standard of care more appropriate than a statewide standard, then the local standard applies and a doctor has a duty to use the degree of skill and diligence in the care and treatment of his patient that a reasonably prudent doctor in the same field of practice or specialty in [the same; a similar] locality would have used under the circumstances of this case.]

If a doctor fails to perform this duty [under the standard of care you find applicable]**, then he is negligent.**

Instruction No. 35.020 Duration of Duty

A doctor who has accepted a patient for treatment has a duty to continue his services as long as they are necessary. A doctor may not abandon his patient while his services are necessary unless [he gives notice to the patient and makes arrangements for continuing treatment by another doctor; the patient is afforded a reasonable opportunity to acquire the services needed from another doctor].

If a doctor fails to perform this duty, then he is negligent.

Instruction No. 35.030 Duration of Duty: Termination of Services by Consent

A doctor who has accepted a patient for treatment may end his services with the consent or at the request of the patient.

Instruction No. 35.040 Unsuccessful Outcome Is Not Proof of Negligence

The mere fact that the plaintiff [was not cured; was injured; had a bad result] does not mean that the defendant was negligent. However, you may consider the plaintiff's outcome, along with the other evidence, in determining whether the defendant was negligent.

Instruction No. 35.050 Proof of Standard of Care: Expert Testimony

You must determine the standard of care that was required of the defendant by considering only the expert testimony on that subject.

Instruction No. 35.060 Opinion of Medical Malpractice Review Panel

The opinion of the Medical Review Panel is not binding upon you. You should consider it along with the other evidence.

Instruction No. 35.070 Treatment Without Consent

A doctor has a duty to obtain the consent of a patient before treating him. If a doctor treats without first obtaining his patient's consent, then he is liable for any injury to the patient which proximately results from the treatment, even though he exercised reasonable skill and diligence in providing the treatment.

Instruction No. 35.080 Treatment Without Informed Consent

A doctor has a duty to obtain his patient's informed consent before he treats him. Informed consent means the consent of a patient after a doctor has given the patient all information about the treatment and its risks that would be given to a patient by a reasonably prudent practitioner in the doctor's field of practice or specialty. A doctor is not required, however, to tell a patient what he already knows or what any reasonably intelligent person would know.

If a doctor fails to perform this duty, then he is negligent and is liable for any injury proximately resulting from the doctor's treatment if you believe from the evidence that the patient would have refused the treatment if the doctor had disclosed the information.

Instruction No. 35.090 Lack of Consent: Emergencies

When immediate treatment is needed to protect a person's life or health and there is no reasonable method of obtaining consent for the treatment, then a doctor may give, without the patient's consent, such treatment as would be given by a reasonably prudent doctor in the same field of practice or specialty under the circumstances of this case.

Instruction No. 35.100 Surgeon's Responsibility in Operating Room

A surgeon performing an operation is responsible for any acts of negligence by anyone in the operating room who is subject to his control, regardless of who employs or pays that person.

Instruction No. 35.110 Patient's Duty to Mitigate Damages

A patient who is injured as a result of a physician's negligence has the duty to use ordinary care to avoid loss or minimize or lessen the resulting damage.

If a patient fails to perform this duty, he may recover for the injuries caused by his physician's negligence but not for the aggravation of any injuries or increase of damages resulting from his failure to use ordinary care.

Instruction No. 35.120 Good Samaritans

A [doctor; person] **who, in good faith, gives emergency care or assistance, without compensation, to any ill or injured person** [at the scene of an accident, fire, or any life-threatening emergency; at a location for screening or stabilization of an emergency medical condition arising from an accident, fire, or any life-threatening emergency; en route to any hospital, medical clinic, or doctor's office] **is not liable for his acts or omissions while giving such care.**

Instruction No. 35.130 Duty of Hospitals

A hospital has the duty to exercise reasonable care and attention for a patient's safety as his mental and physical condition, if known, may require.

If a hospital fails to perform this duty, then it is negligent.

You must determine the degree of care that was required of the hospital by considering only the expert testimony on that subject.

Instruction No. 35.200 Duty of Architects

An architect has a duty to use reasonable care in [preparing plans for designing; supervising the construction of] **a building. Reasonable care is the care that an ordinarily skilled architect would use.**

If an architect fails to perform this duty, then he is negligent.

Instruction No. 35.300 Implied Warranty—Construction Contract

In building and construction contracts it is implied that the building shall be erected in a reasonably good and workmanlike manner in accordance with the accepted building practices in the community and when completed shall be reasonably fit for the intended purpose.

If a builder fails to perform this duty, then he is negligent.

Instruction No. 36.000 Definition of Battery

A battery is an intentional and unwanted touching of another without justification, excuse, or the consent of the other.

Instruction No. 36.010 Definition of Assault

An assault is any threatening act that is intended to put another person in reasonable fear of imminent physical injury. [Words alone are never an assault.]

Instruction No. 36.020 Self-Defense

A person who suffers, or is threatened with, an assault and battery that he did not provoke has a right to use as much force in self-defense to protect himself as is reasonably necessary.

[It is unreasonable to continue to use force if the other party withdraws from the fight in good faith and discloses a desire to terminate the fight.]

Instruction No. 36.030 Arrest: Permissible Force

An officer has the right to use reasonable force to make a lawful arrest. Use of that force is not an assault or battery. Within reasonable limits, an officer is the judge of the amount of force necessary to make a lawful arrest.

Any force used in making an unlawful arrest is an assault and battery.

Instruction No. 36.040 Arrest: Right to Resist

A person has the right to use reasonable force to resist an unlawful arrest. The use of that force is not an assault or battery.

Any force used in resisting a lawful arrest is an assault and battery.

Instruction No. 36.050 Burden of Proof: No Affirmative Defense

The burden is on the plaintiff to prove [assault; battery; assault and battery] by the greater weight of all the evidence.

The greater weight of all the evidence is sometimes called the preponderance of the evidence. It is that evidence which you find more persuasive, when evaluated against all the evidence that has been admitted in the case. The testimony of one witness whom you believe can be the greater weight of the evidence.

Instruction No. 36.060 Burden of Proof: Affirmative Defense

The burden is on the plaintiff to prove [assault; battery; assault and battery] by a preponderance of the evidence.

The burden is on the defendant to prove [self-defense; that he was making a lawful arrest] by a preponderance of the evidence.

The greater weight of all the evidence is sometimes called the preponderance of the evidence. It is that evidence which you find more persuasive, when evaluated against all the evidence that has been admitted in the case. The testimony of one witness whom you believe can be the greater weight of the evidence.

Instruction No. 36.070 Finding Instruction: Battery—No Affirmative Defenses

You shall find your verdict for the plaintiff if he proved by the greater weight of the evidence that:

(1) the defendant intentionally touched the plaintiff; and
(2) the touching was unwanted; and
(3) the touching was without justification, excuse, or the plaintiff's consent.

You shall find your verdict for the defendant if the plaintiff failed to prove one or more of the above elements.

Instruction No. 36.071 Finding Instruction: Assault—No Affirmative Defenses

You shall find your verdict for the plaintiff if he proved by the greater weight of the evidence that the defendant intentionally threatened him by some act that put him in reasonable fear of imminent physical injury. Intent may be inferred from the nature of the act and the surrounding circumstances.

You shall find your verdict for the defendant if the plaintiff failed to prove an assault.

Instruction No. 36.080 Finding Instruction: Battery—Affirmative Defenses

You shall find your verdict for the plaintiff if the plaintiff proved by the greater weight of the evidence that:

(1) the defendant intentionally touched the plaintiff; and
(2) the touching was unwanted; and
(3) the touching was without justification, excuse, or the plaintiff's consent.

You shall find your verdict for the defendant:

(1) if the plaintiff failed to prove a battery; or
(2) if the defendant proved by the greater weight of the evidence that he acted in self-defense.

Instruction No. 36.081 Finding Instruction: Assault—Affirmative Defenses

You shall find your verdict for the plaintiff if the plaintiff proved by the greater weight of the evidence that the defendant intentionally threatened him by some act that put him in reasonable fear of imminent physical injury. Intent may be inferred from the nature of the act and the surrounding circumstances.

You shall find your verdict for the defendant:

(1) if the plaintiff failed to prove an assault; or
(2) if the defendant proved by the greater weight of the evidence that he acted in self-defense.

Instruction No. 36.090 Compensatory Damages

If you find your verdict in favor of the plaintiff, then in determining the damages to which he is entitled you may consider any of the following you believe by the greater weight of the evidence was caused by the [assault; battery; assault and battery] **committed by the defendant:**

(1) all financial loss resulting from the injury the defendant caused to the plaintiff;
(2) all physical injury the plaintiff suffered;
(3) any shame, humiliation, embarrassment, or indignity the plaintiff suffered.

In awarding damages, you may also consider the insulting character of the injury to the plaintiff, the defendant's reason for injuring the plaintiff, and any other circumstances shown by the evidence which make the injury more serious.

Your verdict shall be for such sum as will fairly and fully compensate the plaintiff for the damages sustained as a result of the [assault; battery; assault and battery].

Instruction No. 37.000 Liability Issues (Public Figure/Defamatory *Per Se*)

[For use in a case involving a public-figure plaintiff, where the court has determined the statement is defamatory *per se*.]

Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The issues in this case are:

(1) Did the defendant make the following statement: (words of statement)**?**
(2) Is the statement about the plaintiff?
(3) Was the statement [heard; seen] **by someone other than the plaintiff?**
(4) Is the statement false?
(5) Did the defendant make the statement knowing it to be false or did the defendant make it so recklessly as to amount to a willful disregard for the truth, that is, with a high degree of awareness that the statement was probably false?
(6) If the plaintiff is entitled to recover, what is the amount of plaintiff's damages?

On these issues the plaintiff has the burden of proof.

Your decisions on these issues must be governed by the instructions that follow.

Instruction No. 37.010 Liability Issues (Public Figure/Not Defamatory *Per Se* or Private Figure/Substantial Danger to Plaintiff's Reputation Not Apparent)

[For use in cases involving a public-figure plaintiff, where the court has determined the statement is **NOT** defamatory *per se,* **AND** in cases where the plaintiff is a private figure and the court has determined that the statement did **NOT** make substantial danger to the plaintiff's reputation apparent.]

Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The issues in this case are:

(1) Did the defendant make the following statement: (words of statement)**?**
(2) Is the statement about the plaintiff?
(3) Was the statement [heard; seen] **by someone other than the plaintiff?**
(4) Is the statement false?
(5) Did the defendant make the statement knowing it to be false or did the defendant make it so recklessly as to amount to a willful disregard for the truth, that is, with a high degree of awareness that the statement was probably false?
(6) Did the statement tend to so harm the reputation of the plaintiff as to lower him in the estimation of the community, to deter others from associating or dealing with him, or make the plaintiff seem repulsive, infamous, or ridiculous?
(7) Was the plaintiff damaged as a result of the statement?
(8) If the plaintiff is entitled to recover, what is the amount of plaintiff's damages?

On these issues the plaintiff has the burden of proof.

Your decisions on these issues must be governed by the instructions that follow.

Instruction No. 37.020 Liability Issues (Private Plaintiff/Danger to Plaintiff's Reputation Apparent)

[For use in a case involving a private plaintiff (not a public figure), where the court has determined the statement makes substantial danger to the plaintiff's reputation apparent,]

Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The issues in this case are:

(1) Did the defendant make the following statement: (words of statement)**?**
(2) Is the statement about the plaintiff?
(3) Was the statement [heard; seen] **by someone other than the plaintiff?**
(4) Is the statement false?
(5) Did the defendant make the statement knowing it to be false or, believing it to be true, did the defendant lack reasonable grounds for such belief or act negligently in failing to ascertain the facts on which the statement was based?
(6) If the plaintiff is entitled to recover, what is the amount of plaintiff's damages?

On these issues the plaintiff has the burden of proof.

Your decisions on these issues must be governed by the instructions that follow.

Instruction No. 37.030 Insulting Words

[A statement is insulting; Words are an insult] **if people in the community usually mean and commonly accept** [it as an insult; them as insults] **and if** [it tends; they tend] **to cause violence and a breach of the peace.**

Instruction No. 37.050 Privilege

Under certain circumstances, a person has a limited privilege to make a defamatory statement about another without being liable for damages.

Under the circumstances of this case, the defendant's statement was privileged because he has an interest or duty in the subject, and he made the statement to another person with similar interest or duty. The defendant's statement is not protected, however, if he abused the privilege.

The privilege is abused when the plaintiff proves by clear and convincing evidence that:

(1) the defendant knew the statement was false or made it so recklessly as to amount to a willful disregard for the truth, that is, with a high degree of awareness that the statement was probably false; or
(2) the statement was deliberately made in such a way that it was heard by persons having no interest or duty in the subject of the statement; or
(3) the statement was unnecessarily insulting; or
(4) the language used was stronger or more violent than was necessary under the circumstances; or
(5) the statement was made because of personal spite, hatred, ill will, or desire to hurt the plaintiff, independent of the occasion on which the communication was made.

Instruction No. 37.060 Merchant: Probable Cause

If [a merchant; an agent or employee of the merchant] **had probable cause to believe that a customer had shoplifted or willfully concealed merchandise at the time he caused the customer's detention or arrest, then the merchant is not liable** [for defamatory statements; for insulting words] **made in connection with the detention or arrest.**

Instruction No. 37.090 Finding Instruction (for use with Instruction No. 37.000)

[For use in a case involving a public-figure plaintiff, where the court has determined the statement to be defamatory *per se*.]

You shall return your verdict for the plaintiff if the plaintiff has proved by the greater weight of the evidence that:

(1) defendant made the following statement: (words of statement)**; and**
(2) it was [heard; seen] **by someone other than the plaintiff; and**
(3) it was about the plaintiff; and
(4) it was false; and

if the plaintiff further proved by clear and convincing evidence

(5) that the defendant knew the statement was false or made it so recklessly as to amount to a willful disregard for the truth, that is, with a high degree of awareness that the statement was probably false. [; and
(6) that the defendant abused his privilege to make a defamatory statement, as described in Instruction No. _____ (Instruction No. 37.050)]

You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of the (number of elements) **elements above.**

Instruction No. 37.095 Finding Instruction (for use with Instruction No. 37.010)

[For use with Instruction 37.010, in cases involving a public-figure plaintiff, where the court has determined the statement is **NOT** defamatory *per se,* **AND** in cases where the plaintiff is a private figure and the court has determined that the statement did **NOT** make substantial danger to the plaintiff's reputation apparent.]

You shall return your verdict for the plaintiff if he has proved by the greater weight of the evidence that:

(1) the defendant made the following statement: (words of statement)**; and**
(2) it was about the plaintiff; and
(3) it was [heard; seen] **by someone other than the plaintiff; and**
(4) it was false; and
(5) the statement [tends to so harm the reputation of the plaintiff as to lower him in the estimation of the community or to deter others from associating or dealing with him; the statement makes the plaintiff seem repulsive, infamous, or ridiculous]**; and**
(6) the plaintiff sustained actual damage as a result of the statement, and

if the plaintiff further proved by clear and convincing evidence

(7) that the defendant knew the statement to be false or made it so recklessly as to amount to a willful disregard for the truth, that is, with a high degree of awareness that the statement was probably false. [; and
(8) that the defendant abused his privilege to make a defamatory statement, as described in Instruction No. _____ (Instruction No. 37.050)]

You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of the (number of elements) **elements above.**

Instruction No. 37.097 Finding Instruction (for use with Instruction No. 37.020)

[For use with Instruction No. 37.020, in a case involving a private plaintiff (not a public figure) where the court has determined that the statement makes substantial danger to the plaintiff's reputation apparent because it is *per se* defamation.]

You shall return your verdict for the plaintiff if he has proved by the greater weight of the evidence that:

(1) the defendant made the following statement: (words of statement)**; and**
(2) it was about the plaintiff; and
(3) it was [heard; seen] **by someone other than the plaintiff; and**
(4) it was false; and
(5) the defendant made the statement [knowing it to be false; believing it to be true but lacked reasonable grounds for such belief; acted negligently in failing to ascertain the facts on which the statement was based]. [; and

if the plaintiff further proved by clear and convincing evidence

(6) that the defendant abused his privilege to make a defamatory statement, as described in Instruction No. _____ (Instruction No. 37.050)]

You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of the (number of elements) **element above.**

Instruction No. 37.098 Finding Instruction (for use with Instruction No. 37.020)

[For use with Instruction No. 37.020 in a case involving a private plaintiff (not a public figure), where the court has determined the statement makes substantial danger to the plaintiff's reputation apparent, but it is not *per se* defamation.]

You shall return your verdict for the plaintiff if he has proved by the greater weight of the evidence that:

(1) the defendant made the following statement: (words of statement)**; and**
(2) it was about the plaintiff; and
(3) it was [heard; seen] **by someone other than the plaintiff; and**
(4) it was false; and
(5) the defendant made the statement [knowing it to be false; believing it to be true but lacking reasonable grounds for such belief; acting negligently in failing to ascertain the facts on which the statement was based]**; and**
(6) the plaintiff sustained actual damage as a result of the statement. [; and

(7) if the plaintiff further proved by clear and convincing evidence that the defendant abused his privilege to make a defamatory statement, as described in Instruction No. _____ (Instruction No. 37.050)]

You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of the (number of elements) **elements above.**

Instruction No. 37.100 Actual Damages

If you find your verdict for the plaintiff, then in determining the amount of damages to which he is entitled, you may take into consideration all of the circumstances surrounding the statement, the occasion on which it was made and the extent of its publication, the nature and character of the insult, the probable effect on those who heard the statement, and its probable and natural effect upon the plaintiff's personal feelings and upon his standing in the community and in business.

Your verdict should be for an amount that will fully and fairly compensate him for:

(1) any loss or injury to his business;
(2) any insult to him including any pain, embarrassment, humiliation, or mental suffering;
(3) any injury to his reputation; and
(4) any actual, out-of-pocket losses that were caused by the statement.

Instruction No. 37.105 Presumed Damages

[For use where the statement is defamatory *per se* and plaintiff has established liability (1) as a public figure under Instruction No. 37.090, or (2) as a private plaintiff showing negligence under Instruction No. 37.095 in a case where the statement does not involve matters of public concern.]

If you find your verdict for the plaintiff, the plaintiff is entitled to recover compensatory damages without any proof of actual or monetary injury. The statement alleged in this case is understood to mean that the [plaintiff has committed the crime of (name of crime involving moral turpitude); plaintiff would commit the crime of (name of crime involving moral turpitude); plaintiff has a contagious disease offensive to society; plaintiff is unfit to perform the duties of his employment; plaintiff lacks integrity or is dishonest in performing the duties of his employment; the effect of the words is prejudicial to the plaintiff in his work or chosen profession]**. As a result, injury to the plaintiff's personal and business reputation, humiliation, and embarrassment is presumed.**

Instruction No. 37.107 Presumed Damages (Public Concern)

[For use with a private plaintiff where the statement is defamatory *per se,* and the statement touches matters of public concern, and plaintiff has established liability under Instruction No. 37.098.]

If you find your verdict for the plaintiff, and you further find that the plaintiff proved by clear and convincing evidence that the defendant made the alleged defamatory statement knowing that it was false or made it so recklessly as to amount to a willful disregard for the truth, that is, with a high degree of awareness that the statement was probably false, the plaintiff is entitled to recover compensatory damages without any proof of actual or monetary injury. The statement alleged in this case is understood to mean that the [plaintiff has committed the crime of (name of crime involving moral turpitude); plaintiff would commit the crime of (name of crime involving moral turpitude); plaintiff has a contagious disease offensive to society; plaintiff is dishonest in performing the duties of his employment; the effect of the words is prejudicial to the plaintiff in his work or chosen profession]**. As a result, if you find that the defendant made the alleged defamatory statement knowing that it was false or with reckless disregard for its truth or falsity, injury to the plaintiff's personal and business reputation, humiliation, and embarrassment is presumed.**

Instruction No. 37.110 Punitive Damages (Defamatory *Per Se*)

[For use where the statement is found defamatory *per se*.]

Once you have found by clear and convincing evidence that a defendant made the statements knowing they were false or made them so recklessly as to amount to a willful disregard for the truth, that is, with a high degree of awareness that the statement was probably false, then you may award punitive damages to punish that defendant for such actions and to serve as an example to prevent others from making such statements in the future.

You must state separately in your verdict any amount you allow as compensatory damages, if any, and the amount you allow as punitive damages.

Instruction No. 37.111 Punitive Damages (Not Defamatory *Per Se*)

[For use where the statement is not defamatory *per se*.]

If you find that the plaintiff is entitled to recover compensatory damages, and if you further find by clear and convincing evidence that a defendant made the statements knowing the statement was false or made the statements so recklessly as to amount to a willful disregard for the truth, that is, with a high degree of awareness that the statement was probably false, then you may also award punitive damages to punish that defendant for such actions and to serve as an example to prevent others from making such statements in the future.

If you award punitive damages, you must state separately in your verdict any amount you allow as compensatory damages and the amount you allow as punitive damages.

Instruction No. 37.120 Mitigation of Damages: Actions Against Newspapers, Magazines, or Periodicals

You have heard evidence of the circumstances of publication, including the source of the information [its character as affording reasonable ground of reliance, any prior publication, or an apology or retraction made by the defendant with reasonable promptness and fairness]**. You may consider this in mitigation of compensatory or punitive damages, but you may not consider it in mitigation of any out-of-pocket losses actually incurred by the plaintiff.**

Instruction No. 37.130 Mitigation of Damages: Apology

You have heard evidence that the defendant apologized or offered to apologize to the plaintiff for the statement he made. You may consider this evidence only in mitigation of damages.

Instruction No. 38.000 Definition of False Imprisonment

False imprisonment is an intentional restriction of a person's freedom of movement without legal right.

A false imprisonment results from the intentional use of force, words, or acts which the person restrained is afraid to ignore or to which he reasonably believes he must submit.

Instruction No. 38.010 Good Faith Not a Defense

It is not a legal defense to a claim of false imprisonment that one had an honest or a reasonable belief that he was acting lawfully in restricting another's freedom. Any intentional restriction of a person's freedom that is without legal right is a false imprisonment.

Instruction No. 38.020 Lawful Arrest

A lawful arrest is a restraint of another's movement with the legal right to do so.

Instruction No. 38.030 Unnecessary Delay After Arrest

An officer who makes an arrest [with a lawful warrant; without a warrant] **has a legal duty to bring the person he arrested before a judge or magistrate** [without unnecessary delay; forthwith]**. If the officer fails to perform this duty, then he has falsely imprisoned the person he arrested even if the arrest itself was lawful.**

You may consider the circumstances that existed after the arrest and until the plaintiff was brought before the judge or magistrate in deciding whether [there was an unnecessary delay; this legal duty was complied with].

Instruction No. 38.040 Willful Concealment, Shoplifting

[A merchant; An agent of a merchant; An employee of a merchant] **who detains a person for not more than one hour is not liable for false imprisonment if he has probable cause to believe that the person has willfully** [concealed; shoplifted; stolen] **goods or merchandise.**

Instruction No. 38.045 Probable Cause

[A merchant; An agent of a merchant; An employee of a merchant] **has probable cause to believe that a person has** [concealed; shoplifted; stolen] **goods or merchandise when the circumstances would cause an ordinarily prudent person to have such a belief.**

Instruction No. 38.060 Burden of Proof: No Affirmative Defense Asserted

The burden is on the plaintiff to prove false imprisonment.

When a party has the burden of proof on an issue, he must prove that issue by the greater weight of all the evidence. This is sometimes called the preponderance of the evidence. It is that evidence which you find more persuasive. The testimony of one witness whom you believe can be the greater weight of the evidence.

Instruction No. 38.070 Burden of Proof: Affirmative Defense Asserted

The burden is on the plaintiff to prove false imprisonment.

The burden is on the defendant to prove [that he had a legal right to restrict the plaintiff's freedom of movement; that he had probable cause to believe that a person was [concealing goods; shoplifting]; that the arrest was lawful].

Instruction No. 38.080 Finding Instruction: No Affirmative Defense Asserted

You shall return your verdict for the plaintiff if he proved by the greater weight of the evidence that the defendant intentionally restricted the plaintiff's freedom of movement without legal right.

You shall return your verdict for the defendant if the plaintiff failed to prove that he was falsely imprisoned.

Instruction No. 38.090 Finding Instruction: Affirmative Defense Asserted

You shall return your verdict for the plaintiff if he proved by the greater weight of the evidence that the defendant intentionally restricted the plaintiff's freedom of movement without legal right.

You shall return your verdict for the defendant if:

(1) the plaintiff failed to prove a false arrest; or
(2) the defendant proved by the greater weight of the evidence that he had a legal right to restrain the plaintiff's freedom of movement.

Instruction No. 39.000 Definition of Actual Fraud: Intentional Misrepresentation

Actual fraud is a misrepresentation of a material fact, knowingly and intentionally made, with the intent to mislead another person, which that person relied upon with the result that he was damaged by it.

Instruction No. 39.010 Definition of Misrepresentation

A misrepresentation is any words or conduct which produce a false or misleading impression of fact in the mind of another. The misrepresentation must be made concerning an actually existing or past fact. A promise, an expression of interest, or an expectation or opinion concerning the future is not a misrepresentation.

A misrepresentation may result from silence or from the suppression of facts as well as from an affirmative representation.

Instruction No. 39.020 Definition of Material Fact

A material fact is one which influences a person to act or not to act.

Instruction No. 39.030 Definition of Reliance

Reliance is a belief that a representation is true which causes a person [to take action he would not otherwise have taken; not to take action he otherwise would have taken].

Instruction No. 39.040 Definition of Constructive Fraud

Constructive fraud is a misrepresentation of a material fact, innocently or negligently made, with the intent that a person will rely on it and which that person relied upon with the result that he was damaged by it.

Instruction No. 39.045 Duty to Take Prompt Action

If a party discovers he has been defrauded, he has a duty to take reasonably prompt action to repudiate the contract.

Instruction No. 39.050 Duty to Investigate

A person to whom a misrepresentation was made has no duty to investigate unless he had or obtained information about the representation which would cause a reasonably prudent person to investigate.

If a person has a duty to investigate a representation and fails to investigate to the extent that a reasonably prudent person would, then he is bound by all knowledge that such an investigation of that representation would have disclosed.

Instruction No. 39.060 Fact Versus Opinion

To be liable, the defendant must make a misrepresentation of past or present fact[s]**. Statements of opinion are not fraud.**

Instruction No. 39.070 Burden of Proof on Common Law Fraud: Clear and Convincing

The burden is on the party charging common law fraud to prove it by clear and convincing evidence.

Instruction No. 39.080 Factors that May Be Considered

In deciding whether fraud exists, you may take into consideration the relative knowledge of the parties, their respective motives and intentions, the closeness of their relationship, the actions of the parties, the nature and character of the transaction including the adequacy of the price, and all of the other surrounding facts and circumstances.

Instruction No. 39.090 Finding Instruction Common Law: Actual Fraud

You shall return your verdict for the plaintiff if he proved by clear and convincing evidence:

(1) That the defendant misrepresented a material fact; and
(2) That the misrepresentation was made intentionally and knowingly; and
(3) That the misrepresentation was made with the intent that the plaintiff rely upon it; and
(4) That the plaintiff relied upon it; and
(5) That the plaintiff was damaged as a result.

You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of the elements above.

Instruction No. 39.100 Finding Instruction Common Law: Constructive Fraud

You shall return your verdict for the plaintiff if he proved by clear and convincing evidence:

(1) That the defendant misrepresented a material fact; and
(2) That the misrepresentation was made innocently or negligently; and
(3) That the misrepresentation was made with the intent that the plaintiff rely upon it; and
(4) That the plaintiff relied upon it; and
(5) That the plaintiff was damaged as a result.

You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of the elements above.

Instruction No. 39.110 Finding Instruction Common Law: Actual and Constructive Fraud

You shall return your verdict for the plaintiff if he proved by clear and convincing evidence:

(1) That the defendant misrepresented a material fact; and
(2) That the misrepresentation was made intentionally and knowingly, or it was made innocently or negligently; and
(3) That the misrepresentation was made with the intent that the plaintiff rely upon it; and
(4) That the plaintiff relied upon it; and
(5) That the plaintiff was damaged as a result.

You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of the elements above.

Instruction No. 40.100 Wrongful or Tortious Interference with Contract Not Terminable at Will: Issues

Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The issues in this case are:

(1) Was there a business expectancy or a valid contractual relationship between the plaintiff and (name of third party)**; and**
(2) Did the defendant know of this business expectancy or contractual relationship; and
(3) Did the defendant intentionally cause (name of third party) **to** [breach; terminate] **the expectancy or relationship; and**
(4) Was the plaintiff damaged by the [breach; termination] **of the contract?**

On these issues, the plaintiff has the burden of proof.

The defendant has alleged that any interference with the contract was justified or privileged.

On this issue the defendant has the burden of proof.

Your decisions on these issues must be governed by the instructions that follow.

Instruction No. 40.150 Wrongful or Tortious Interference with Contract Not Terminable at Will: Finding Instruction

You shall find your verdict for the plaintiff if he proved by the greater weight of the evidence:

(1) that there was a business expectancy or a valid contractual relationship between the plaintiff and (name of third party)**; and**
(2) that the defendant knew of this business expectancy or contractual relationship; and
(3) that the defendant intentionally interfered and caused the [breach; termination] **of the expectancy or relationship; and**
(4) that the plaintiff was damaged by the [breach; termination].

You shall find your verdict for the defendant if: (1) the plaintiff failed to prove any one or more of these elements; or (2) the defendant proved by the greater weight of the evidence that the interference was justified or privileged.

Instruction No. 40.200 Wrongful or Tortious Interference With Contract Expectancy (Contract Terminable at Will); Prospective Business Relationship, or Economic Advantage; Contract: Issues

Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The issues in this case are:

(1) Was there a [contract expectancy; prospective business relationship; economic advantage; contract] **between the plaintiff and** (name of third party)**; and**
(2) Did the defendant know of this [contract expectancy; prospective business relationship; economic advantage; contract]**; and**
(3) Did the defendant use improper methods to interfere with the [contract expectancy; prospective business relationship; economic advantage; contract]**; and**
(4) Did the defendant intend to interfere with the [contract expectancy; prospective business relationship; economic advantage; contract]**; and**
(5) Was it reasonably certain that [the business relationship would have continued; the expectancy would have been realized; the economic advantage would have been realized; the contract would have continued] **in the absence of the defendant's conduct; and**
(6) Did the defendant's interference with the [contract expectancy; prospective business relationship; economic advantage; contract] **cause damage to the plaintiff?**

On these issues, the plaintiff has the burden of proof.

The defendant has alleged that any interference with the [contract expectancy; prospective business relationship; economic advantage; or contract] **was justified, privileged, or not improper.**

On these issues, the defendant has the burden of proof.

Your decisions on these issues must be governed by the instructions that follow.

Instruction No. 40.250 Wrongful or Tortious Interference With Contract Expectancy (Contract Terminable at Will); Prospective Business Relationship, or Economic Advantage; Contract: Finding Instruction

You shall find your verdict for the plaintiff if he proved by the greater weight of the evidence:

(1) that there was a [contract expectancy; prospective business relationship; economic advantage; contract] **between the plaintiff and** (name of third party)**; and**
(2) that the defendant knew of this [contract expectancy; prospective business relationship; economic advantage; contract]**; and**
(3) that the defendant used improper methods to interfere with the [contract expectancy; prospective business relationship; economic advantage; contract]**; and**
(4) that the defendant intended to interfere with the [contract expectancy; prospective business relationship; economic advantage; contract]**; and**
(5) that it was reasonably certain that [the business relationship would have continued; the expectancy would have been realized; the economic advantage would have been realized; the contract would have continued] **in the absence of the defendant's conduct; and**
(6) that the plaintiff was damaged by the disruption of the [contract expectancy; prospective business relationship; economic advantage; contract].

You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of these elements; or if you find that the defendant proved by the greater weight of the evidence that the interference was justified, privileged or not improper.

Instruction No. 40.300 Conspiracy to Harm in Trade, Business or Profession (Va. Code Ann. §§ 18.2-499 and 18.2-500): Issues

Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The issues in this case are:

(1) Did [the defendants; the defendant and at least one other person; (names of conspirators)] **act in concert, agree, associate, mutually undertake or combine together;**
(2) Did they intentionally, purposefully, and without lawful justification injure the plaintiff's [reputation; trade; business; profession]**; and**
(3) Did the plaintiff suffer damages as a result of the acts of [this defendant; these defendants; (names of conspirators)]**?**
(4) If the plaintiff is entitled to recover, what is the amount of plaintiff's damages?

On these issues, the plaintiff has the burden of proof.

Your decisions on these issues must be governed by the instructions that follow.

Instruction No. 40.350 Conspiracy to Harm in Trade, Business or Profession (Va. Code Ann. §§ 18.2-499 and 18.2-500): Finding Instruction

You shall find your verdict for the plaintiff if the plaintiff has proven by clear and convincing evidence:

(1) That [defendants; defendant and at least one other person; (names of conspirators)] **acted in concert, agreed, associated, mutually undertook or combined together;**
(2) That they intentionally, purposefully, and without lawful justification injured the plaintiff's [reputation; trade; business; profession]**; and**
(3) That plaintiff suffered damages as a result of these acts.

You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of these elements.

Instruction No. 40.400 False Advertising (Va. Code Ann. § 18.2-216): Issues

Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The issues in this case are:

(1) Did the defendant intend to sell or otherwise dispose of [merchandise; securities; service; land; lot; (name or describe other property)]**?**
(2) Did the defendant cause to be [made; published; disseminated; circulated; placed before the public] **in a** [newspaper; book; notice; pamphlet; letter; or other form of communication] **an advertisement of any sort regarding such** [merchandise; securities; service; land; lot; (name or describe other property)]**?**
(3) Did that advertisement contain a [promise; assertion; representation; statement of fact] **which was untrue, deceptive or misleading?**
(4) Did the plaintiff suffer a loss as a result of the defendant's acts?
(5) If the plaintiff is entitled to recover, what is the amount of damages?

On these issues, the plaintiff has the burden of proof.

Your decisions on these issues must be governed by the instructions that follow.

Instruction No. 40.450 False Advertising (Va. Code Ann. § 18.2-216): Finding Instruction

You shall find your verdict for the plaintiff if he proved by the greater weight of the evidence:

(1) that the defendant intended to sell or otherwise dispose of [merchandise; securities; service; land; lot; (name or described other property)]**;**
(2) that the defendant caused to be [made; published; disseminated; circulated; placed before the public] **in a** [newspaper; book notice; pamphlet; letter; or other form of communication] **an advertisement of any sort regarding such** [merchandise; securities; service; land; lot; (name or describe other property)]**;**
(3) that the advertisement contained a [promise; assertion; representation; statement of fact] **which was untrue, deceptive or misleading; and**
(4) that the plaintiff suffered a loss as a result.

You shall find your verdict for the defendant if the plaintiff failed to prove one or more of the elements above.

Instruction No. 41.000 Definition of Malicious Prosecution

Malicious prosecution is the institution of criminal proceedings by one person against another, maliciously and without probable cause, if those proceedings ended in a manner [favorable; not unfavorable] **to the person prosecuted.**

Instruction No. 41.010 Instituting Criminal Proceedings

A person institutes criminal proceedings against another by:

(1) bringing the criminal charge(s); or
(2) cooperating actively in bringing the criminal charge(s).

Instruction No. 41.020 Definition of Malice

Malice exists when the controlling motive for instituting criminal proceedings is any reason except a genuine desire to see justice done, to enforce the law, or to punish the guilty.

Malice may be inferred from a lack of probable cause.

Instruction No. 41.035 Lack of Malice

The defendant in a malicious prosecution action is not liable if he acted without malice in instituting criminal proceedings against the plaintiff. This is true even if the plaintiff was acquitted.

Instruction No. 41.040 Definition of Probable Cause

Probable cause to institute criminal proceedings against the plaintiff existed if the facts and circumstances known to the defendant and on which he acted were such that a reasonable and prudent person acting on the same facts and circumstances would have believed the plaintiff guilty of the crime of which he was suspected.

In determining whether probable cause existed, you shall consider the facts and circumstances as they appeared to the defendant at the time he instituted the criminal proceedings.

A lack of probable cause may not be inferred from malice.

Instruction No. 41.050 Probable Cause

The defendant in a malicious prosecution action is not liable if he acted with probable cause in instituting criminal proceedings against the plaintiff. This is true even if the plaintiff was acquitted and even if the defendant acted with malice.

Instruction No. 41.070 Probable Cause: Willful Concealment or Shoplifting

A [merchant; agent or employee of a merchant] **who causes the arrest or detention of any person for** [larceny; shoplifting] **is not liable to the plaintiff for malicious prosecution if he proves by the greater weight of the evidence that at the time of such person's arrest or detention, the** [merchant; agent or employee of the merchant] **had probable cause to believe that the person had committed** [willful concealment of goods or merchandise; shoplifting].

[The activation of an electronic article surveillance device as a result of a person exiting the premises or an area within the premises of a merchant where an electronic article surveillance device is located shall constitute probable cause for the detention of such person by such merchant, his agent, or employee, provided such person is detained only in a reasonable manner and only for such time as is necessary for an inquiry into the circumstances surrounding the activation of the device, and provided that clear and visible notice is posted at each exit and location within the premises where such a device is located indicating the presence of an anti-shoplifting or inventory control device.]

[An "electronic article surveillance device" means an electronic device, designed and operated for the purpose of detecting the removal from the premises, or a protected area within such premises, of specially marked or tagged merchandise.]

Instruction No. 41.080 Probable Cause: Advice of Counsel

The defendant is not liable for malicious prosecution if he instituted criminal proceedings against the plaintiff on the good faith advice of a reputable lawyer.

The defendant must prove:

(1) He sought advice of counsel with an honest purpose of being informed of the law;
(2) That he made a full, correct, and honest disclosure of all material facts known to him or that he should reasonably have known; and
(3) That he acted in good faith guided by the advice given by counsel.

A defendant who relies upon the advice of counsel as a defense has the burden of proving all three of these elements by the greater weight of the evidence.

If the defendant proves the necessary elements to establish advice of counsel as a defense, then he had probable cause for instituting the criminal proceedings even if the advice given by the attorney was wrong.

Instruction No. 41.110 Elements Stipulated or Proved as a Matter of Law

[The defendant has stipulated that he; The court has found that the defendant] instituted a criminal proceeding against the plaintiff that ended in a manner [favorable; not unfavorable] **to the plaintiff. You must still determine from the evidence and the instructions whether the criminal proceeding was instituted without probable cause and with malice.**

Instruction No. 41.130 Finding Instruction: General

You shall find your verdict for the plaintiff if he has proved by the greater weight of the evidence that:

(1) the defendant [instituted; cooperated with the institution of] **a criminal proceeding against the plaintiff; and**
(2) that criminal proceeding ended in a manner [favorable; not unfavorable] **to the plaintiff; and**
(3) the criminal proceeding was instituted by the defendant without probable cause; and
(4) the defendant acted with malice.

You shall find your verdict for the defendant if the plaintiff failed to prove one or more of the elements above.

Instruction No. 41.135 Issues and Allocation of Burdens of Proof—Where Defendant Is a Merchant

Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The issues in this case are:

(1) Did the defendant institute a criminal proceeding against the plaintiff?
(2) Did the criminal proceeding end in a manner [favorable; not unfavorable] **to the plaintiff?**
(3) Did the defendant act with malice?

On these issues, the plaintiff has the burden of proof.

(4) Was there probable cause to institute the criminal proceeding?

On this issue, the defendant has the burden of proof.

(5) If the plaintiff is entitled to recover, what is the amount of his damages?

On this issue, the plaintiff has the burden of proof.

Your decision on these issues must be governed by the instructions that follow.

Instruction No. 41.136 Finding Instruction: Where Defendant Is a Merchant

You shall find your verdict for the plaintiff if he has proved by the greater weight of the evidence that:

(1) the defendant instituted a criminal proceeding against the plaintiff; and
(2) that criminal proceeding ended in a manner [favorable; not unfavorable] **to the plaintiff; and**
(3) the defendant acted with malice.

You shall find your verdict for the defendant if:

(1) the plaintiff failed to prove one or more of the elements above; or
(2) you find by the greater weight of the evidence that the defendant had probable cause to institute the criminal proceeding.

Instruction No. 41.140 Compensatory Damages

If you find your verdict for the plaintiff, then in determining the damages to which the plaintiff is entitled, you may consider any of the following which you believe by the greater weight of the evidence was caused by the criminal proceeding instituted by the defendant:

(1) property loss;
(2) necessary expenses;
(3) insult;
(4) pain;
(5) mental suffering, anxiety or distress;
(6) harm to the plaintiff's reputation.

Your verdict shall be for such sum as will fully and fairly compensate the plaintiff for damages sustained as a result of the criminal proceeding instituted by the defendant.

Instruction No. 41.150 Punitive Damages

If you find that the plaintiff is entitled to be compensated for his damages, and if you further believe by the greater weight of the evidence that the defendant acted with actual malice in instituting the criminal proceeding against the plaintiff, then you may award punitive damages to the plaintiff to punish the defendant for his actions and to serve as an example to prevent others from acting in a similar way.

Actual malice is a sinister or corrupt motive such as hatred, personal spite, ill will, a desire to injure the plaintiff, or a conscious disregard of the rights of others. Actual malice may not be inferred from a lack of probable cause.

If you award punitive damages, you must state separately in your verdict the amount you allow as compensatory damages, if any, and the amount you allow as punitive damages.

Instruction No. 42.000 Creation of Attorney and Client Relationship

A relationship of attorney and client arises when there is an agreement between them that the attorney will act as a lawyer for the client.

Instruction No. 42.010 Attorney's Standard of Care

An attorney has a duty to use a reasonable degree of care, skill, and diligence in handling a matter entrusted to him by a client.

If an attorney fails to perform this duty, then he is negligent.

Instruction No. 42.020 Scope of Attorney's Authority

An attorney has the express authority to do everything which the client expressly authorized him to do and the implied authority to do everything necessary or incidental to the purpose for which he was retained.

Instruction No. 42.030 Attorney and Client Relationship and Third Parties: Apparent Authority

So far as third parties are concerned, an attorney and client relationship exists when the client has dealt with the third party or acquiesced in the attorney dealing with the third party in such a way as to cause a person reasonably to believe that an attorney and client relationship exists.

Instruction No. 42.040 Ratification by Client

A client ratifies [an unauthorized act of his attorney; an act that was beyond the attorney's express or implied authority at the time he did it] **if the client, after receiving full knowledge of all material facts about his attorney's act, either:**

(1) speaks or acts in such a way as to accept the attorney's act as binding him; or
(2) fails promptly to disavow the attorney's act within a reasonable time after he knows about it; or
(3) accepts the benefits of the attorney's act.

If a client ratifies an unauthorized act of his attorney, then that act is binding upon him.

Instruction No. 42.050 Dealings Between Attorney and Client

Once an attorney and client relationship exists, any [transaction; dealing] **between them that benefits the attorney is presumed to be invalid.**

To establish that the [transaction; dealing] **was valid, the burden is on the attorney to prove by clear and convincing evidence that:**

(1) he did not use any undue influence on his client; and
(2) he dealt fairly with his client in the [transaction; dealing]**; and**
(3) the client entered into the [transaction; dealing] **with a sufficient understanding of the nature and extent of his rights to allow him to understand fully the scope and effect of the** [transaction; dealing].

Instruction No. 42.060 Wrongfully Discharged Attorney Entitled to Quantum Meruit

When an attorney employed under a contingent fee contract is discharged without just cause and the client employs another attorney who obtains a recovery, the discharged attorney is entitled to a fee based upon the reasonable value of the services he rendered prior to discharge.

Instruction No. 43.000 General Agency

A broker is entitled to his commission when he produces a purchaser ready, willing and able to buy on the terms authorized by or on terms acceptable to the seller.

If a broker has done this, he is entitled to his commission even if [he did not conduct the final negotiations for the sale of the property; the seller accepted a price less than the listed price; the seller failed to complete the sale; the seller did not accept the offer; the purchaser failed to perform].

Instruction No. 43.010 Implied Brokerage Contract

A broker has an implied contract for his services if:

(1) he [found a purchaser ready, willing and able to buy; procured the sale of] **the property; and**
(2) he did so under circumstances which gave the [seller; owner] **reason to believe that he expected to be paid; and**
(3) the [seller; owner] **accepted him as his broker.**

Instruction No. 43.020 Procuring Cause: General

To earn his commission, a broker must have been the predominant, procuring cause of the sale. This means that he must have been responsible for causing a series of events which, without a break in their continuity, [produced a purchaser ready, willing and able to buy on the seller's terms; resulted in a completed sale].

If the services of a broker are the predominant procuring cause of the sale, then he is entitled to his commission even if the seller completes the sale directly with the buyer.

Instruction No. 43.030 Procuring Cause: Known Rival Brokers

When a seller employs two or more brokers and they know of each other's employment, then the broker who first produces to the seller a purchaser ready, willing and able to complete the purchase on the terms authorized by the seller or thereafter agreeable to the seller is entitled to the commission.

Instruction No. 43.040 Procuring Cause: Unknown Rival Brokers

Where a seller employs two brokers to find a purchaser for the property and they are ignorant of each other's employment, the broker whose efforts were the predominant procuring cause of the sale is entitled to the commission even though the other may have rendered services without which the result would not have been reached.

Instruction No. 43.050 Definition of Ready, Willing and Able

A purchaser is ready, willing and able to buy if he wants to buy and if, at the time he is produced to the seller, he has the ability to obtain any necessary financing at the [closing; settlement].

Instruction No. 43.060 Broker's Duty of Good Faith: Generally

A broker has a duty to deal with the seller in good faith. The broker is not entitled to a commission if he failed to disclose to the seller all facts within his knowledge that might have influenced the seller in his decision to sell.

Instruction No. 43.070 Broker's Good Faith: Adverse Interests

If someone acts as a broker for both the seller and the buyer in the same transaction without the informed written consent of both seller and buyer, then the sale may be cancelled by either seller or buyer, and the broker is not entitled to a commission.

Instruction No. 43.080 Seller Not Sole Owner

An owner who lists property with a broker is liable to him for his commission when the broker produces a purchaser ready, willing and able to buy on the terms [authorized by; acceptable to] **the seller. This is true even though the sale cannot be consummated because the owner is not the sole owner and the other co-owners of the property refuse to sign the contract.**

Instruction No. 44.000 Contractual Settlements

If one party to a dispute offers to settle the dispute and states the terms on which he will settle, and the other party accepts the terms stated, then there is a compromise settlement. You must determine from all the evidence whether the parties agreed on the terms of settlement.

(Name of proponent) **has the burden of proving by the greater weight of the evidence that there was a compromise settlement.**

[You shall return your verdict for (name of proponent) if he has proved by the greater weight of the evidence that there was a compromise settlement. You shall return your verdict for (name of contestant) if (name of proponent) has failed to prove that there was a compromise settlement.]

Instruction No. 44.010 Accord and Satisfaction —Uniform Commercial Code

Payment by (name of debtor) **through an** [instrument; check] **of an amount less than the amount claimed is in full satisfaction of the debt if** (name of debtor) **proves by the greater weight of the evidence that:**

(a) the payment is tendered in good faith as full satisfaction of the claim;
(b) the amount of the claim was [unliquidated; subject to a good faith dispute**];**
(c) the [instrument; check] **either contains or is accompanied by a written communication that states in words that are clearly noticeable that the** [instrument; check] **is made in full satisfaction of the claim; and**
(d) the payee obtained payment on the (instrument; check).

[A(n) [instrument; check] is not tendered in good faith when offered for payment of a loan if: (1) the check is for less than is due under the terms of the loan agreement; and (2) the check is tendered to [an agent; an employee; a person associated or affiliated with the creditor] who lacks knowledge of a dispute concerning the loan.]

Instruction No. 44.015 Accord and Satisfaction —Non-Uniform Commercial Code

Payment by a debtor of an amount less than the amount claimed by the creditor, when expressly accepted by the creditor in satisfaction and made pursuant to an agreement for that purpose, extinguishes the debt. This is called an accord and satisfaction.

The defendant has the burden of proving by the greater weight of the evidence that there was an accord and satisfaction.

[You shall return your verdict for the defendant if he has proved by the greater weight of the evidence that he paid the plaintiff an amount of money less than the amount owed to the plaintiff, and that the plaintiff expressly accepted this lesser amount in satisfaction pursuant to an agreement between them.

If you do not so find, then you shall return your verdict consistent with the evidence and the other instructions.]

Instruction No. 44.020 Rescission of Agreement for Fraud

A settlement arrived at by [fraud; duress; mistake] **is not binding on the parties. Such a settlement is not a defense to a lawsuit.**

Instruction No. 45.000 Issues and Burden of Proof

Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The issues in this case are:

(1) Was there a contract between the parties?
(2) If there was, did (name of defendant) breach it?

On these issues (name of plaintiff) has the burden of proof.

(3) Was the contract impossible to perform?

On this issue (name of defendant) has the burden of proof.

(4) If (name of plaintiff) is entitled to recover, what is the amount of his damage?

On this issue (name of plaintiff) has the burden of proof.

Your decisions on these issues must be governed by the instructions that follow.

Instruction No. 45.005 Issues and Allocations of Burden of Proof: Third-Party Case

There are two cases being tried by this jury.

The first case is (name of plaintiff) **against** (name of defendant)**. You should decide this case first. In this case, the issues are:**

(1) Was there a contract between (name of plaintiff) **and** (name of defendant)**?**
(2) If there was a contract, did (name of defendant) **breach the contract?**
(3) If (name of defendant) **did breach a contract, what is the amount of damages to** (name of plaintiff) **caused by the breach?**

On these issues (name of plaintiff) **has the burden of proof.**

If, in this case of (name of plaintiff) **against** (name of defendant) **you reach a verdict in favor of** (name of plaintiff) **against** (name of defendant), **then you must proceed to consider the third-party claim of** (name of defendant, third-party plaintiff) **against** (name of third-party defendant)**. In this third-party case, the issues are:**

(1) Was there a contract between (name of third-party plaintiff) **and** (name of third-party defendant) **under which** (name of third-party defendant) **has a duty to perform for** (name of third-party plaintiff) **an act or acts for** (name of plaintiff)**?**
(2) Did (name of third-party defendant) **breach such a contract?**
(3) Did any breach of such contract cause damages to (name of plaintiff) **for which you have awarded** (name of plaintiff) **a verdict against** (name of third-party plaintiff)**?**
(4) If (name of third-party defendant) **did breach a contract with** (name of third-party plaintiff), **and such breach was a cause of all or part of the damages you found** (name of plaintiff) **should recover from** (name of defendant, third-party plaintiff)**, what is the amount of such damages that** (name of defendant, third-party plaintiff) **should recover from** (name of third-party defendant)**?**

On these issues, (name of third-party plaintiff) **has the burden of proof.**

Instruction No. 45.010 Definition of Contract

A contract is an agreement, for consideration, between two or more parties. A contract arises when an offer is accepted.

Instruction No. 45.020 Offer

An offer is a proposal of the terms on which a person will enter into an agreement if that proposal is accepted by the person to whom it is made.

Instruction No. 45.030 Acceptance

Acceptance of an offer is a voluntary expression of assent to be bound by the terms of the offer.

Instruction No. 45.040 Consideration

Consideration is what is given in exchange for a promise.

Instruction No. 45.050 Specified Time for Acceptance

A person making an offer may specify a period of time within which it must be accepted. When this time period expires, the offer expires. An acceptance made after this time does not result in a contract.

Instruction No. 45.060 No Time Specified for Acceptance

When an offer does not specify any definite time for acceptance, it expires after a reasonable time. An acceptance made after this time does not result in a contract.

You must decide what a reasonable time is by considering the purpose and terms of the proposed contract, business customs, and other surrounding circumstances of which the party to whom the offer was made knows or has reason to know.

Instruction No. 45.070 Communication of Acceptance

The acceptance of an offer must be communicated to the other party by words, conduct, or any other means which would make it clear to a reasonable person in the position of the person who made the offer that his offer is being accepted.

Instruction No. 45.080 Acceptance Must Match Offer

An offer may specify the time, place or method of acceptance. The acceptance must comply with the offer in every material respect. If the acceptance is not identical to the offer in all material respects, or if a new material term is added, there is no contract.

Instruction No. 45.090 Meeting of the Minds

For a contract to exist, the minds of the parties must have met on every material term of the alleged agreement.

Instruction No. 45.100 Counteroffer

A proposal to accept an offer on terms which are different from the ones offered is both a rejection of the original offer and a counteroffer. A counteroffer is a new offer.

Instruction No. 45.110 Withdrawing an Offer

An offer may be withdrawn at any time before it is accepted. The withdrawal must be communicated to the other party before the offer is accepted. The withdrawal may be made in any way which communicates to a reasonable person that the person who made the offer no longer wants to enter into a contract. After the offer is withdrawn, an attempt at acceptance does not result in a contract.

Instruction No. 45.120 Adequacy of Consideration

Consideration for a [promise; act] **does not need to be equal in value to the** [promise; act]**. The only requirement is that consideration be of some value, however slight.**

Instruction No. 45.130 Performing Prior Legal Duty Not Consideration

[Doing; promising to do] **what one is already obligated to do is not consideration.**

Instruction No. 45.140 Past Act Not Consideration

An act done in the past cannot be consideration for a later contract.

Instruction No. 45.150 Not Suing as Consideration

If a person has a claim against another, his promise not to sue is consideration for a contract if the claim has some reasonable basis.

Instruction No. 45.160 Competence of Parties to Contract

The parties to a contract must be competent. A person is competent if he is capable of understanding the nature and the effect of the contract.

Instruction No. 45.170 Contract Must Be Complete and Reasonably Certain

A contract must be both complete and reasonably certain. It is complete if it includes all the essential terms. It is reasonably certain if all the essential terms are expressed in a clear and definite way.

Instruction No. 45.180 Mutuality of Obligation

When two parties have exchanged promises as consideration, each party must be bound to [do; refrain from doing] **something.**

Instruction No. 45.190 Intent

Interpretation of a contract is primarily a determination of what the parties intended. In determining their intent, you should first consider the words they used.

Instruction No. 45.200 Express Contract

An express contract is an agreement, either written or oral, in which the terms are stated by the parties.

Instruction No. 45.210 Implied Contract

A contract may be implied from the circumstances and the conduct of the parties.

Instruction No. 45.230 Implied Promise to Pay for Services

When a party requests another person to perform services, the law implies a promise to pay the reasonable value of those services in the absence of agreement as to price.

Instruction No. 45.300 Contract Construed as a Whole

The contract should be considered as a whole; no part of it should be ignored. The contract should be interpreted to give effect to each of its provisions. No word or phrase in a contract should be treated as meaningless if any meaning which is reasonable and consistent with other parts of the contract can be given to it.

Instruction No. 45.305 Ordinary Meaning of Words

Words used by the parties should be given their ordinary, usual, and popular meaning, unless you find that the parties clearly intended such words to have another meaning.

Instruction No. 45.310 Construction Against the Drafter

In interpreting a contract, you should resolve any doubts about the meaning of a word or phrase against the party who [prepared; supplied; inserted the language in; used the language in] **the contract.**

Instruction No. 45.320 Contract Interpretation: Ejusdem Generis

Where general words follow particular words in a listing of items or provisions in a contract, you should interpret the general terms consistently with the particular words.

Instruction No. 45.330 Practical Construction by the Parties

If you have doubt about the meaning of the terms of a contract, the conduct of the parties under the contract may furnish the proper interpretation. The parties' interpretation is entitled to great weight. However, any interpretation suggested or supported by the acts of the parties must be reasonable and not in conflict with the actual terms of the contract.

Instruction No. 45.340 Custom and Usage of Trade

The customs and usages of the trade may be shown to establish a point on which the contract is silent or unclear.

To show the existence of a custom or usage of the trade, a party must prove by the greater weight of the evidence that the custom was well established, known to the contracting parties, and generally followed in the trade at the time the contract was made. You may presume knowledge by the contracting parties where the parties are engaged in the same trade or if the custom and usage is uniform and notorious where the contract is to be performed.

Instruction No. 45.400 Material Breach of Contract

A material breach of contract occurs if a party fails to do something which he is bound to do according to the contract which is so important and central to the contract that the failure defeats an essential purpose of the contract.

Instruction No. 45.410 Waiver

A waiver occurs when a party intentionally gives up a [contractual; legal] **right which would have been beneficial to him. A waiver may be expressly stated, or it may be implied from conduct. A party cannot waive a right unless he has full knowledge of it.**

Instruction No. 45.420 Modification

A written contract may be modified or changed by a later [oral; written] **agreement. Both parties must agree to the modification. A mutual intent to modify may be either expressly stated or implied from conduct. The intent must be proved by clear and convincing evidence.**

Instruction No. 45.430 Mutual Rescission

The parties to a contract can agree to cancel their contract. If there is an agreement to cancel the contract, one party cannot recover damages from the other unless he expressly reserved that right at the time of cancellation.

Instruction No. 45.440 Preventing Performance

A party to a contract who purposefully [hinders; prevents; makes it impossible for] the other party [from; to] performing their obligations under a contract has breached the contract.

Instruction No. 45.450 Impossibility as Defense

A party is excused from their failure to perform a contract if performance became impossible after the contract was made. Where a party relies on impossibility as a defense, they must prove by the greater weight of the evidence:

(1) that performance of their obligations under the contract was rendered impossible; and
(2) that they did not cause the circumstance which made their performance impossible; and
(3) that the circumstance which rendered performance impossible was not reasonably foreseeable when the parties made the contract.

Instruction No. 45.460 Undue Influence

Undue influence occurs when one person has overcome the free will of another person and induces the other person to [do; not do] **what he otherwise would** [not have done; have done]**. If a party entered into a contract as a result of undue influence, then the contract cannot be enforced against him. Undue influence must be proven by clear and convincing evidence.**

Instruction No. 45.470 Duress

Duress is any wrongful act or threat by a person that, under the circumstances, overcomes the free will of another person and induces him to do what he otherwise would not have done. If a party entered into a contract as a result of duress, then the contract cannot be enforced against him. Duress must be proven by clear and convincing evidence.

Instruction No. 45.480 Fraud in the Inducement

A party is excused for their failure to perform a contract if the party was induced to enter into the contract by fraud. Fraud must be proven by clear and convincing evidence.

Instruction No. 45.500 Damages: Direct

If you find your verdict for the plaintiff, then he is entitled to recover as damages all of the losses he sustained [, including gains prevented,] **that are a natural and ordinary result of the breach and that he has proved by the greater weight of the evidence.**

Instruction No. 45.510 Damages: Reasonable Proof

The burden is on the plaintiff to prove by the greater weight of the evidence that he sustained [damages; each item of damage he claims]**. He is not required to prove the exact amount of his damages, but he must show sufficient facts and circumstances to permit you to make a reasonable estimate of** [them; each item]**. If the plaintiff fails to do so, then he cannot recover** [for that item]**.**

Instruction No. 45.520 Damages: Nominal

Where only a breach of contract and no actual damage has been proved, nominal damages may be recovered.

Instruction No. 45.530 Damages: Consequential

Consequential damages are damages resulting from the breach of the contract that arise from special circumstances actually foreseen or reasonably foreseeable by the parties when they made the contract. If you find your verdict in favor of the plaintiff, you may award him such damages as you believe by the greater weight of the evidence he sustained as a result of the breach.

Instruction No. 45.540 Damages: Liquidated

The parties in this case provided for the possibility of breach of contract by fixing an amount to be paid to the injured party in the event of a breach. If you find your verdict for the plaintiff, then you shall award him this fixed amount as provided in the contract.

Instruction No. 45.550 Damages: Duty to Mitigate

The plaintiff had a duty to minimize their damages. If you find that the plaintiff did not act reasonably to minimize their damages and, as a result, the damages were greater than if they had acted to minimize them, then the plaintiff cannot recover the amount by which the damages were increased. The duty to minimize damages begins when the plaintiff knew, or should have known, of the breach of the contract.

The burden is on the defendant to prove by the greater weight of the evidence that the plaintiff failed to minimize their damages and to prove by the greater weight of the evidence the amount by which they were increased as a result.

Instruction No. 45.560 Buyer's Damages: Breach of Contract to Sell Property

The measure of (name of buyer)**'s damages is the value of the property at the time the contract was breached minus the contract price.** (Name of buyer) **must prove his damages by the greater weight of the evidence.**

Instruction No. 45.570 Quantum Meruit

When a contract to pay for [services rendered; labor and materials] **has been implied, the defendant must pay the reasonable value of the** [services rendered; labor and materials supplied]**. You may consider the nature of the work and the customary rate of pay. The plaintiff must prove the reasonable value of the** [services; labor and materials] **by the greater weight of the evidence.**

Instruction No. 45.600 Finding Instruction

You shall find your verdict for the plaintiff if he has proved by the greater weight of the evidence that:

(1) there was a contract between the parties; and
(2) the defendant breached the contract.

You shall find your verdict for the defendant if:

(1) the plaintiff failed to prove [either or both; any and all] **of the elements above; or if**
(2) the defendant has proved by the greater weight of the evidence that it was impossible to perform the contract.

Instruction No. 45.610 Finding Instruction: Third-Party Case

You should first reach a verdict in the case of (name of plaintiff) **against** (name of defendant)**. You shall find your verdict for** (name of plaintiff) **if he has proved by the greater weight of the evidence that:**

(1) There was a contract between (name of plaintiff) **and** (name of defendant)**; and**
(2) (Name of defendant) **breached the contract with** (name of plaintiff)**.**

You shall find your verdict for (name of defendant) **if:**

(1) (Name of plaintiff) **failed to prove either or both of the two elements above.**

If, in the case of (name of plaintiff) **against** (name of defendant) **you find for** (name of plaintiff) **against** (name of defendant)**, then you must reach a verdict in the case of** (name of defendant, third-party plaintiff) **against** (name of third-party defendant)**. You shall find your verdict for the** (name of defendant, third-party plaintiff) **if he has proved by the greater weight of the evidence that:**

(1) (Name of third-party defendant) **breached a contract with** (name of third-party plaintiff) **under which** (name of third-party defendant) **had a duty to perform for** (name of third-party plaintiff) **an act or acts for** (name of plaintiff)**; and**
(2) (Name of third-party defendant)**'s breach of such contract was the cause of all, or part of the damages awarded to** (name of plaintiff) **against** (name of defendant, third-party plaintiff)**.**

You shall find your verdict for (name of third-party defendant) **if:**

(1) (Name of defendant, third-party plaintiff) **failed to prove either or both of the two elements above.**

If, in the case of (name of plaintiff) **against** (name of defendant), **you find for** (name of defendant)**, then you do not need to consider a verdict in the third-party claim of** (name of defendant, third-party plaintiff) **against** (name of third-party defendant)**.**

Instruction No. 46.000 Scope of Jurors' Duties

The (name of condemning authority) is empowered by law to condemn all the property described in the petition in this case. Your only duty is to determine the amount of just compensation to be paid to the property owner. You may not question the wisdom or necessity for the condemnation or the amount of property sought by the (name of condemning authority), and you may not alter the plans of the (name of condemning authority) in any way.

Instruction No. 46.010 Just Compensation: No Damage to Residue

To determine the just compensation to be paid, you must decide the fair market value of the property taken by the (name of condemning authority).

Instruction No. 46.020 Just Compensation: Damage to Residue and No Enhancement

To determine the just compensation to be paid, you must decide:

(1) the fair market value of the property taken by the (name of condemning authority); and
(2) the damage, if any, to the owner's remaining property as a result of the taking.

Instruction No. 46.030 Just Compensation: Damage to Residue and Enhancement

To determine the just compensation to be paid you must decide:

(1) the fair market value of the property taken by the (name of condemning authority); and
(2) the damage from any loss in market value, if any, to the owner's remaining property caused by the taking and public use of the property for which it was condemned, offset in whole or in part by the specific enhancement in value, if any, to the property as a result of the taking and public use.

Instruction No. 46.040 Just Compensation: Date of Determination

You must determine just compensation for the property owner as of (date).

Instruction No. 46.050 Fair Market Value

The fair market value is the price that the property would bring if it were offered for sale by one who wanted to sell, but was under no necessity, and was bought by one who wanted to buy, but was under no necessity.

In determining the fair market value of the property, you may consider everything a buyer and seller in the marketplace would reasonably consider in the purchase or sale of the specific property interests that are the subject of this proceeding.

However, you may not consider that the property owner might, for personal reasons, have been unwilling to sell at fair market value or that the (name of condemning authority) has a need for the property.

Further, in determining the fair market value of the property before the taking, you may not consider any increase or decrease in the fair market value of the property caused by the public use for which the property is being acquired, or by the likelihood that the property would be acquired for such public use other than that due to physical deterioration within the reasonable control of the owner.

Instruction No. 46.060 Fair Market Value: Use of Property, Highest and Best Use

In determining fair market value, you should consider all of the uses which might reasonably have been made of the property in light of existing conditions and circumstances. In this respect, you should consider all of the natural advantages and disadvantages of the property as well as the characteristics and needs of the surrounding community which existed at the time of the taking or which probably would exist in the near future.

You must determine fair market value based on the property's highest and best use. "Highest and best use" is the reasonably probable use of property that results in the highest value.

Instruction No. 46.070 Damage to Residue

The measure of damages to the owner's remaining property is the difference between the fair market value of the remaining property immediately before the taking and its fair market value immediately after the taking.

You may consider all present circumstances, and all circumstances reasonably expected in the near future, in determining the effect of the taking on the value of the remaining property; you may not consider remote or speculative advantages or disadvantages of the taking on the value of the remaining property.

In determining the fair market value of the property before the taking you may not consider any increase or decrease in the fair market value of the property caused by the public use for which the property is being acquired, or by the likelihood that the property would be acquired for such public use (other than that due to physical deterioration within the reasonable control of the owner).

In determining the fair market value of the remaining property after the taking, you may consider the public use for which the property is being acquired. You may not consider any general enhancement the remaining property experiences in common with surrounding properties as a result of the public use; however, you may consider any specific enhancement in value to this particular property caused by the taking and public use for which it is condemned.

Although you may consider individual items of damage to the remaining property, you cannot compute the damages to the property by adding those items. Your determination of damages to the remaining property, if any, should be based on the overall difference between the fair market value of the remaining property before and after the taking.

The owner has the burden of proving, by the greater weight of the evidence, that there is damage to the remaining property.

Instruction No. 46.080 Lost Access

"Lost access" means a change of vehicular or pedestrian access to property that is caused by a public use project for which the power of eminent domain has been exercised against the property and which results in a reduction in the value of the property. Any liability for lost access shall be made a part of any award for damage to the residue. You must ensure that any compensation awarded for lost access shall not be duplicated in the compensation otherwise awarded to the owner of the property.

Instruction No. 46.085 Lost Profits

You shall determine and specify the amount of lost profits owed to the [business; farm] owner if you find that the [business; farm] owner proved with reasonable certainty the amount of the loss and that the loss was directly and proximately caused by the taking or damaging of the property where the [business; farm] is or was located.

"Lost profits" means a loss of profits or expected profits suffered by a [business; farm] operation as a result of a taking or damaging of the property on which the [business; farm] operation is operated for a period not to exceed three years from the later of (i) the date of valuation or (ii) the date the state agency or its contractor prevents the owner from using the land or any of the owner's other property rights are taken. The [business; farm] operation claiming lost profits is entitled to compensation whether part of the property or the entire parcel of property is taken or damaged.

To award lost profits, the following conditions must be met:

1. the loss cannot be reasonably prevented by a relocation of the [business; farm] operation, or by taking steps and adopting procedures that a reasonably prudent person would take and adopt;
2. the loss will not be included in relocation assistance provided by the condemning agency;
3. compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner of the property taken or damages; and
4. the loss shall be determined in accordance with generally accepted accounting principles applied on a consistent basis.

Instruction No. 46.090 Effect of Enhancement on Damage to Residue

If you find that the (name of condemning authority)'s taking and use of the owner's property specifically enhances the value of the remaining property, then you shall consider the specific enhancement in determining the fair market value of the remaining property.

If the specific enhancement increases the fair market value of the remaining property after the taking equal to or greater than the fair market value of the property before the taking, then you cannot award any sum for damage to the remaining property.

In determining any award for lost profits, you shall also consider any specific enhancement to the remaining property resulting from the (name of condemning authority)'s taking and use of the owner's property in determining the amount of lost profits.

If the value of the specific enhancement to the remaining property is more than the damage to the remaining property, the property owner may not be charged for that difference. You cannot deduct the enhancement in value to the remaining property from the fair market value of the property which has been taken.

The (name of condemning authority) has the burden of proving, by the greater weight of the evidence, any enhancement in value to the remaining property.

Instruction No. 46.100 Damage to Residue: Formula for Determining

You may use the following formula to calculate the damage to the owner's remaining property as a result of the taking:

(1) Determine the fair market value of the entire property immediately before the taking.
(2) Determine the fair market value of the property that was taken.
(3) Subtract (2) from (1). This is the value of the remaining property without consideration of enhancement or damages.
(4) Determine the fair market value of the remaining property after the taking, considering any enhancement in value or diminution in value as a result of the taking and the use of the property taken.
(5) Subtract (4) from (3). This is the value attributed to enhancement or damages.
(6) If (5) is greater than (3), there is no damage to the remaining property.

Instruction No. 46.110 Weight of Evidence—Value

In determining your award, you should consider, but you are not bound by, the opinion testimony that has been presented, and the facts and circumstances on which those opinions were based.

In weighing the opinion testimony presented, you may consider the facts you acquired from your view of the property, but the view may not be considered by you as the only evidence in the case. Your award must bear a reasonable relationship to all of the evidence presented.

Instruction No. 46.120 Landowner's Duty to Mitigate Damages

A property owner has a duty to minimize any damages to his remaining property that will result from the use which the (name of condemning authority) intends to make of the property taken. Therefore, you may consider the reasonable expense of adjusting the remaining property to the new conditions in determining the damage to the remaining property if such expenditures will minimize damage that would otherwise occur. Such mitigation costs or expenses may only be considered as elements bearing on the difference between values before and after the taking and not as independent and distinct items of damages.

[For cases with adjustment expenses, the following may be substituted in lieu of the above paragraph:]

A property owner has a duty to minimize any damages to his remaining property that will result from the use which the [condemning authority] intends to make of the property taken. Therefore, you may consider the reasonable expense of adjusting the remaining property to the new conditions in determining the damage to the remaining property if such expenditures will minimize damage that would otherwise occur.

However, such adjustment expenses are not the measure of damages to the remaining property and cannot be recovered specifically. Nor can the sum of all adjustment expenses be the proper measure of damages. Adjustment expenses are merely a factor of evaluation. The true test of damages to the remaining property not taken is the difference in value before and immediately after the taking, less enhancement, if any, resulting from the take.

Instruction No. 46.130 “Quotient” Award Not Permitted

You may not arrive at your award by what is called the “quotient method.” That is, you may not agree to award the average of your individual opinions of value. An award made in this way is not valid.

Instruction No. 46.140 Majority Award Permitted

It is not necessary that all of you agree on the report you make. A majority of you shall arrive at your conclusion and report it to the court.

If you arrive at a majority report, those of you in the minority may submit a minority report to the court.

Instruction No. 46.150 Highway Condemnation: Definition of Limited Access Highway

The land described in the petition is being taken for a "limited access highway." A limited access highway is a highway especially designed for through traffic. Abutting landowners have no easement or right to light, air, or access just because their property abuts the limited access highway.

Instruction No. 46.180 Elements of Report—No Lost Profits Claim

Your report shall consist of two separate items:

(1) the fair market value of the property taken by the (name of condemning authority);
(2) the damage, if any, to the remaining property beyond the specific enhancement in value, if any, caused by the taking and public use of the property.

Instruction No. 46.190 Elements of Report—With Lost Profits Claim

Your report shall consist of three separate items:

(1) the fair market value of the property taken by the (name of condemning authority);
(2) the damage, if any, to the remaining property beyond the specific enhancement in value, if any, caused by the taking and public use of the property;
(3) the amount of lost profits, if any, directly and proximately caused by the taking or damaging of the property and owed to the [business or farm] owner.

Instruction No. 46.200 Just Compensation—Common Area

The common area owned by a property owner's association that is taken shall be valued on the basis of the common area's highest and best use as though it were free from restriction to sole use as a common area.

Instruction No. 46.210 Just Compensation—Reasonable Probability of Rezoning

You may consider the following factors, among others, to determine whether there is, as of the date of valuation, a reasonable probability of rezoning of the subject property in the near future:

the rezoning of nearby property, growth patterns, change of use patterns and character of neighborhood, demand within the area for certain types of land use, sales of related or similar properties at prices reflecting anticipated rezoning, physical characteristics of the subject and of nearby properties, and the age of the zoning ordinance.

You must not evaluate the property as though the rezoning is already an accomplished fact. You must evaluate the property under the restrictions of the existing zoning and give consideration to the impact upon market value of the likelihood of a change in zoning.

The burden of proving a reasonable probability of rezoning in the near future rests on the property owner.

Instruction No. 47.000 Definition of Appointed Agent or Appointed Insurance Agent

"Appointed agent" or "appointed insurance agent" means [an individual; a partnership; a corporation; a limited liability company] **licensed in this Commonwealth to sell, solicit, or negotiate contracts of insurance or annuity of the classes authorized within the scope of such license and who is appointed by a company licensed in this Commonwealth to sell, solicit, or negotiate on its behalf contracts of insurance of the classes authorized within the scope of such license and, if authorized by the company, may collect premiums on those contracts.**

Instruction No. 47.020 Agent for Insurer

An insurance agent who obtains insurance for an applicant in a company that the agent does not normally represent is, nevertheless, an agent of that company and not of the insured.

Instruction No. 47.030 Agent's Acts Bind Insurer

The acts and declarations of the agent of an insurance company, acting within the scope of his [actual; apparent] **authority, are binding on the insurance company.**

Instruction No. 47.040 Agent's Apparent Authority

Apparent authority is the authority that an insurance company has held out its agent as possessing or that it has permitted its agent to represent that he possesses.

Instruction No. 47.050 Limits on Agent's Authority Unknown to Insured

A person who has no notice or knowledge of any limitations upon the agent's authority may deal with the agent on the basis of the agent's apparent authority.

Instruction No. 47.060 Ratification of Agent's Unauthorized Acts

If an insurance company had knowledge of all material facts, and if it accepted the benefit of the act of its agent, it is bound by that act, even if it was unauthorized.

Instruction No. 47.070 Agent's Knowledge Binds Insurer

An insurance company is bound by the knowledge or notice its agent received while he was acting within his authority, even if he never communicated the information to the company[, unless the insured acted fraudulently or in bad faith; the agent had no authority to deal with the matters the notice or knowledge affected, and the insured knew or should have known this; the agent received the knowledge or notice while he was not acting as an agent, and it was not present in his mind at the time he did the act which the insured claims is binding on the company]**.**

Instruction No. 47.080 Existence of Policy: Burden of Proof

The plaintiff has the burden of proving the existence of the insurance policy by the greater weight of the evidence.

Instruction No. 47.090 Essential Elements of Insurance Contract

For a valid insurance contract to exist, the parties must have agreed on:

(1) the names of the parties to the contract;
(2) the subject of the insurance;
(3) the risks insured against;
(4) the time at which the insurance takes effect and the length of time it is to continue;
(5) the amount of the premium; and
(6) the conditions pertaining to the insurance.

Instruction No. 47.100 Oral Contracts and Binders

An oral contract to issue a temporary contract of insurance is valid and binding on the insurance company when it was made by an agent acting within the scope of his [actual; apparent] **authority.**

Instruction No. 47.110 Inception of Insurance Contract

When coverage begins under an insurance policy depends on what the parties agreed to as the starting date and not when the premiums were paid.

Instruction No. 47.120 Cancellation by Insurer: Burden of Proof

An insurance company must conform strictly to the provisions for cancellation of its policy. When an insurance company relies on cancellation of the policy as a defense to the policyholder's claim, the insurance company has the burden of proving cancellation by the greater weight of the evidence.

Instruction No. 47.125 Renewal Policy: Acceptance

The insured must accept an insurance company's offer to renew an insurance policy before the renewal becomes effective as an insurance policy. The insured may accept by an express act or by implication from a course of dealing between the insurance company and the insured. The insured must have accepted the offer to renew before the loss that gave rise to the claim occurred.

Instruction No. 47.130 Recovery Under the Policy: Burden of Proof

The burden is on the insured to prove by the greater weight of the evidence that the loss occurred while the policy was in force.

Instruction No. 47.140 Defense to Liability: Loss Not Covered

If the insurance company denies liability on the basis that the loss is excluded by the terms of the policy, it bears the burden of proof on that issue.

Instruction No. 47.150 Waiver of Provisions Benefitting the Insurer

A waiver is an intentional or voluntary abandonment of a known right. A waiver may be express or it may be inferred from acts of the party. There are two factors that must be present to find a waiver. The first is knowledge of the facts that give rise to the right. The second is the intention, based upon this knowledge, to relinquish that right.

The policyholder must prove waiver by the insurance company by the greater weight of the evidence.

Instruction No. 47.160 Estoppel to Assert Forfeiture

An insurance company, or its agent, knowing that the insured has breached a condition of the policy, may say or do something that leads the insured to believe that the policy will not be forfeited. If the insured relies in good faith on the statement(s) or action(s) of the insurance company or its agent, the insurer cannot assert a forfeiture of the policy. The burden is on the insured to prove by clear, precise, and unequivocal evidence that the company or its agent knew of the breach of a condition of the policy, that the company or its agent did or said something that led the insured to believe that the policy would not be forfeited, and that the insured in good faith relied on that conduct of the company.

Instruction No. 47.170 Issuing Policy With Knowledge of Breach

If an insurance company or its agent knew facts which would have rendered the policy invalid and the company nevertheless issued the policy, then it cannot deny liability under the policy unless the insured acted in bad faith. "Bad faith" means the insured acted either dishonestly or with the intent to defraud the insurance company.

Instruction No. 47.180 Proof of Loss or Waiver

An insured must prove by the greater weight of the evidence either that he complied with the requirements of the policy for proof of loss or that the insurance company waived compliance.

Instruction No. 47.190 Effect of Proof of Loss on Recovery at Trial

An insured cannot recover more than the amount stated in the proof of loss unless he proves by the greater weight of the evidence that the additional amounts he now claims were omitted under a misapprehension, mistake, or in ignorance of material facts that he learned after submitting the proof of loss.

Instruction No. 47.200 Notice to Insurer: Reasonable Time

The requirement in the policy that notice of the [accident; injury; loss] **be given** [immediately; at once; forthwith; as soon as practicable; as soon as possible] **means that notice must be given within a reasonable time from the date of the** [accident; injury; loss] **under all of the circumstances of the case. It does not mean that notice must be given immediately or instantaneously. If there is a reasonable explanation for the insured's delay in notifying the insurance company, the insured is not barred from a recovery because of the delay.**

The insurance company has the burden of proving by the greater weight of the evidence that notice of the [accident; injury; loss] **was not given within a reasonable time under all of the circumstances.**

Instruction No. 47.210 Untrue Statements in Application

If you find from the evidence that the insurance company has clearly proved:

(1) that the insured [made the statement; gave the answer] **in the application for the policy; and**
(2) that the [statement; answer] **was untrue when made; and**
(3) that the untruthful [statement; answer] **reasonably influenced the company's decision to issue the policy;**

then you shall find your verdict in favor of the insurance company.

Instruction No. 47.220 Answers Recorded by Agent

If an insurance company clearly proves that an answer in the application was untrue when made, then there is a presumption that the insured knew the answer was false. The burden then shifts to the insured to come forward with evidence to prove that the insured truthfully gave the answer but the answer was falsely recorded by the agent.

Instruction No. 47.500 Definition of Accidental

An injury is accidental if it takes place unexpectedly, by chance, or not according to the usual course of things.

[An accident is an event which creates an effect that is not the natural and probable consequence of means employed and is not intended, designed, or reasonably anticipated.]

Instruction No. 47.510 Accident: Insured the Aggressor

If an insured voluntarily provokes, or is the aggressor in, an encounter when he knows, or reasonably should know, that he will be in danger of bodily injury as the natural or probable consequence of his act, then his injury in the encounter is not accidental.

Instruction No. 47.515 Intentional Act

An [accident; occurrence] **does not include an intentional act by the insured.**

[An insured's intentional act is not an [accident; occurrence] if the resulting harm was reasonably anticipated or the natural and probable consequence of the intentional act.]

Instruction No. 47.520 Permanent Total Disability

A person is permanently and totally disabled if he is permanently unable to do substantially all the material acts necessary in the occupation he was engaged in at the time he was injured, and if he is permanently unable to do substantially all the material acts necessary in any other occupation for which he is qualified by his education, training, and experience.

Instruction No. 47.530 Policy Coverage: Burden of Proof

The insured has the burden of proving by the greater weight of the evidence that he was totally disabled; that the total disability occurred while the policy was in force; and that the total disability resulted from [an injury; a sickness] **that occurred while the policy was in force.**

Instruction No. 47.540 Policy Exclusions: Burden of Proof

The insurance company has the burden of proving by the greater weight of the evidence that a policy exclusion applies.

Instruction No. 47.550 Pre-Existing Condition

An insurance company cannot deny coverage for a claim under its policy because the insured had [a disease; physical impairment; physical defect] **at the time he applied for the policy unless it proves, by the greater weight of the evidence, that the insured knew, or might reasonably be expected to know, of such** [disease; physical impairment; physical defect]**.**

Instruction No. 47.700 Permissive Use Omnibus Clause

If someone drives a vehicle with the express or implied permission of the insured, then the policy covers the driver so long as he uses the vehicle for the permitted purpose. The driver had express permission if the insured directly stated that he could drive the vehicle. The driver had implied permission if there was a course of conduct between the insured and the driver from which you can fairly infer the owner's consent to the operation.

Permission, express or implied, to use a vehicle for a particular purpose may not be unreasonably exceeded.

Instruction No. 47.710 Duty to Settle

If a liability insurer has an opportunity to settle a claim against its insured for an amount within the policy limits and it refuses in bad faith to settle the claim, it is liable for the whole amount of the judgment against the insured, even if the judgment exceeds the policy limit. [If the insurer's decision not to settle the claim is made in good faith, the insurer is not liable for the amount of the judgment which exceeds the policy limits.]

A good faith decision is one that is made honestly and intelligently and is reasonable in light of the insurer's expertise in the field.

A bad faith decision is one that is made in furtherance of the insurer's own interests, with intentional disregard of the financial interest of the insured.

Instruction No. 47.810 Suicide: Burden of Proof

When death is caused by violent and external means, you should presume that the death was an accident and not suicide. The burden is on the insurance company to prove that the deceased committed suicide. This must be proved by clear and convincing evidence which excludes any reasonable theory that death resulted from natural or accidental causes or from the act of some other person.

However, the insurance company is not required to prove that the insured knew, or was capable of realizing, that his act would cause his death, that he was sane, or that he was capable of having an intention of killing himself.

Instruction No. 47.820 Accidental Death: Pre-Existing Condition

When the death of the insured was caused not only by the accident, but also by a condition which existed before the policy became effective, and which substantially contributed to cause his death, then there can be no recovery.

Instruction No. 48.000 Issues and Burden of Proof

Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The only question in this case is whether [this writing is; these writings are] **the last will of** (name of decedent)**. In deciding this question, you will have to consider these issues:**

(1) Was the writing validly executed?
(2) Did (name of decedent) **have testamentary intent when he signed it?**
(3) Did (name of decedent) **have testamentary capacity when he signed it?**

On these issues, the proponents of the will have the burden of proof by the greater weight of the evidence.

(4) Was the writing ever revoked?

On this issue, the contestants have the burden of proof by the greater weight of the evidence.

(5) Did anyone exert undue influence on (name of decedent)**?**
(6) Did anyone fraudulently bring about the execution of the writing?

On these issues, the contestants have the burden of proof by clear and convincing evidence.

Your decisions on these issues must be governed by the following instructions.

Instruction No. 48.010 Definition of a Will

A will is any writing that is validly executed in which a person states how his property is to be disposed of after he dies.

Instruction No. 48.020 Valid Execution: Non-Holographic Will

Valid execution of the will by (name of decedent) **requires that:**

(1) [(name of decedent) signed it; someone signed it for him at his direction and in his presence] **in such a way that it is clear that the writing was intended as his signature; and**
(2) [(name of decedent) signed it in the presence of two witnesses who were both there at the time that he signed; he acknowledged his will in the presence of two witnesses who were both there at the same time;] **and**
(3) the two witnesses signed the will in (name of decedent)**'s presence.**

Instruction No. 48.030 Testamentary Intent

Testamentary intent means that (name of decedent)**:**

(1) intended the writing to be an actual disposition of his property; and
(2) intended the disposition to take effect after he died.

(Name of decedent)**'s intent on either or both of these issues can be either express or implied, or both. An intent is express when it is actually stated; it is implied when it can be gathered from the circumstances.**

Instruction No. 48.040 Testamentary Capacity

Testamentary capacity means that (name of decedent) **had enough mind and intelligence at the time he signed the writing:**

(1) to understand what he was doing in making his will; and
(2) to know the nature and extent of the property he was attempting to dispose of; and
(3) to be aware of his relatives and others to whom he might naturally want to give his property; and
(4) to determine to whom he was giving his property and in what manner.

Instruction No. 48.050 Revocation

An earlier [will; codicil] **can be revoked by:**

(1) a properly executed later will of (name of decedent) **that expressly revokes an earlier** [will; codicil]**; or other writing of** (name of decedent), **executed in the manner in which a will is required to be executed, that expressly revokes an earlier** [will; codicil]**; or**
(2) [(name of decedent); (name of person acting in the decedent's presence and by his direction)] [cutting; tearing; burning; obliterating; cancelling; destroying; drawing lines through; intentionally writing over the actual words of] **the** [will; signature on the will; codicil].

Nothing is effective as a revocation unless (name of decedent) **intended it as a revocation.**

Instruction No. 48.055 Revocation Presumption

When it has been proved by the greater weight of the evidence that there was an executed will in the possession of (name of decedent) **and that it cannot be found after his death, then the law presumes that it was destroyed by** (name of decedent) **with the intention of revoking it.**

To overcome this presumption the burden is on (name of proponent) **to prove by clear and convincing evidence that** (name of decedent) **did not revoke the will.**

Instruction No. 48.060 Revival

Once a will has been revoked, it can be revived only by the proper [re-execution of the will; execution of a codicil] **with the intent to revive it.**

Instruction No. 48.070 Undue Influence

A will is invalid if it is the result of undue influence. To constitute undue influence, the conscious and deliberate choice of the person executing the writing must be destroyed. The undue influence must be of such irresistible character as to control a person's mind, and amount to coercion or duress.

Instruction No. 48.090 Finding Instruction

You shall find the writing dated (date of proponent's will) **to be the last will of** (name of decedent) **if the proponent proved by the greater weight of the evidence that:**

(1) the writing was validly executed; and
(2) (name of decedent) **had testamentary intent when he executed it;** and
(3) (name of decedent) **had testamentary capacity to make a will at the time he executed it.**

You shall find that the writing dated (date of proponent's will) **was not the last will of** (name of decedent)

(1) if the proponent failed to prove any one or more of the elements above; or
(2) if you find that the will was revoked, or
(3) if the contestant proved by clear and convincing evidence that the writing dated (date of proponent's will)**:**
(a) was the result of undue influence; or
(b) was the result of fraud.

Instruction No. 49.000 “Sexually Violent Predator”—Finding Instruction

To prove that the respondent is a sexually violent predator, the Commonwealth must prove each of the following elements by clear and convincing evidence:

(1) That the respondent has been convicted of a sexually violent offense;
(2) That the respondent has a mental abnormality or personality disorder; and
(3) That, because of the mental abnormality or personality disorder, the respondent finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts.

If you find from the evidence that the Commonwealth has proved each of these elements by clear and convincing evidence, then you shall find that the respondent is a sexually violent predator.

If the Commonwealth has failed to prove any one of these elements by clear and convincing evidence, then you must find that the respondent is not a sexually violent predator.

Instruction No. 49.100 Standard of Proof—Clear and Convincing Evidence

The Commonwealth has the burden of proving that the respondent is a sexually violent predator by clear and convincing evidence.

When a party has the burden of proving an issue by clear and convincing evidence, he must produce evidence that creates in your minds a firm belief or conviction that he has proved the issue.

Instruction No. 49.200 Definition of "Sexually Violent Offense"

You have heard evidence that the respondent was convicted of the offense of (name of offense) **in the** (name of court convicting respondent of aforementioned offense)**. I am instructing you that, as a matter of law, this offense is a sexually violent offense.**

Instruction No. 49.300 Definition of “Mental Abnormality” or “Personality Disorder”

A “mental abnormality” or “personality disorder” is a congenital or acquired condition that affects a person’s emotional or volitional capacity and renders the person so likely to commit sexually violent offenses that he constitutes a menace to the health and safety of others.

Instruction No. 49.400 Expert Opinion; Jury's Determination as to Sexually Violent Predator

Mental health experts are permitted to testify at the trial regarding their diagnoses and their opinions as to whether the respondent meets the definition of a sexually violent predator. However, such opinions shall not be dispositive of whether the respondent is a sexually violent predator; you are to make the determination of whether the respondent is a sexually violent predator based upon all the evidence.