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**TENNESSEE PATTERN  
JURY INSTRUCTIONS**

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**TENNESSEE PATTERN JURY INSTRUCTION  
- CIVIL -**

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## Chapter 1 – GENERAL INSTRUCTIONS

### T.P.I. —CIVIL 1.01 Before Voir Dire

You have been summoned as prospective jurors in a civil case involving [an automobile collision that occurred on or about \_\_\_\_\_ at \_\_\_\_\_ ] [a claim of medical negligence] [a claim involving \_\_\_\_\_] [an incident that occurred on \_\_\_\_\_ ]. The parties involved are: \_\_\_\_\_ . Their attorneys are: \_\_\_\_\_ .

[Two separate cases are being tried together. In one case, the plaintiff(s), \_\_\_\_\_ has/have filed a lawsuit against defendant(s). In the other case, plaintiff(s), \_\_\_\_\_, has/have filed a lawsuit against the defendant(s), \_\_\_\_\_

Since these cases are being tried together, whenever I refer to “plaintiff” or “defendant,” I am referring to each party who is a plaintiff or a defendant in one of these cases.]

You will be asked questions [by the Court and] by the attorneys. Although some of the questions may seem to be personal, they are intended to find out if you have any knowledge of this particular case, if you have any opinion that you cannot put aside or if you have had any experience in life that might cause you to identify yourself with one party or another. Jurors must be as free as humanly possible from bias, prejudice, or sympathy and must not be influenced by preconceived ideas about the facts or the law. The parties are entitled to jurors who approach this case with open minds until a verdict is reached.

Each party has a right to request that a certain number of prospective jurors be excused. If you are excused you should not consider it a reflection on you in any way.

### T.P.I. —CIVIL 1.02 After Voir Dire and Before Trial

Before the trial begins, I am going to give you some instructions to help you understand how the case will proceed, what your duties will be, and how you should conduct yourselves during the trial.

When I have completed these instructions, the attorneys will make their opening statements. These statements will be brief outlines of what the attorneys expect the evidence to be.

After the opening statements, you will hear the evidence. The evidence generally consists of the numbered exhibits and the testimony of witnesses. The plaintiff will present evidence first. The defendant then will be given the opportunity to present evidence. Normally, the plaintiff will present all of the plaintiff’s evidence before the other party[ies] presents any evidence. Exceptions are sometimes made, however, usually to accommodate a witness.

The witnesses will testify in response to questions from the attorneys. Witnesses are first asked questions by the party who calls the witness to testify and then others are permitted to cross-examine

the witnesses. Although evidence is presented by asking questions, the questions themselves are not evidence. An insinuation contained in a question is not evidence. You should consider a question only as it gives meaning to a witness's answer.

[[Evidence may be presented by deposition. A deposition is testimony taken under oath before the trial and preserved in writing [or on videotape]. [In Tennessee, a doctor of medicine often gives testimony by deposition]. You are to consider deposition testimony as if the witness appeared in court.]]

During the trial, objections may be made to evidence or trial procedures. I may sustain objections to questions asked without permitting a witness to answer, or I may instruct you to disregard an answer that has been given. In deciding this case, you may not draw any inference from an unanswered question, and you may not consider testimony that you are instructed to disregard.

Any arguments about objections or motions are usually required to be made by the attorneys out of the hearing of the jury. Information may be excluded because it is not legally admissible. Excluded information cannot be considered in reaching your decision. A ruling that is made on an objection or motion will be based solely upon the law. You must not infer from a ruling that I hold any view or opinion for or against any party in this lawsuit.

When all of the evidence has been presented to you, the attorneys will make their closing arguments. The attorneys will point out to you what they contend the evidence has shown, what inferences you should draw from the evidence, and what conclusions you should reach as your verdict. The plaintiff will make the first argument and will be followed by the defendant. The plaintiff may then respond to the defendant's argument.

Unless you are otherwise instructed, statements made by the attorneys are not evidence. Those statements are made only to help you understand the evidence and apply the law to the evidence in the case. You should ignore any statement that is not supported by the evidence.

After the arguments are made, I will instruct you on the rules of law that apply to the case. It is your function as jurors to determine what the facts are and to apply the rules of law that I give you to the facts that you have found. You will determine the facts from all the evidence. You are the sole and exclusive judges of the facts. On the other hand, you are required to accept the rules of law that I give you whether you agree with them or not.

As the sole judges of the facts, you must determine which of the witnesses' testimony you accept, what weight you attach to it, and what inferences you will draw from it. The law does not, however, require you to accept all of the evidence. In deciding what evidence you will accept, you must make your own evaluation of the testimony given by each of the witnesses and determine the weight you will give to that testimony. You must decide which witnesses you believe and how important you think their testimony is. You are not required to accept or reject everything a witness says. You are free to believe all, none, or part of any person's testimony.

In deciding which testimony you believe, you should rely on your own common sense and everyday experience. There is no fixed set of rules to use in deciding whether you believe a witness, but it may help you to think about the following questions:

1. Was the witness able to see, hear or be aware of the things about which the witness testified?
2. How well was the witness able to recall and describe those things?
3. How long was the witness watching or listening?
4. Was the witness distracted in any way?
5. Did the witness have a good memory?
6. How did the witness look and act while testifying?
7. Was the witness making an honest effort to tell the truth, or did the witness evade questions?
8. Did the witness have any interest in the outcome of the case?
9. Did the witness have any motive, bias, or prejudice that would influence the witness's testimony?
10. How reasonable was the witness's testimony when you consider all of the evidence in the case?
11. Was the testimony contradicted by what the witness has said or done at another time, by the testimony of other witnesses, or by other evidence?

[In appropriate cases the trial judge may want to give a summary of the applicable law.]

There are several rules concerning your conduct during the trial and during recesses that you should keep in mind.

First, do not conduct your own private investigation into this case, although you may be tempted to do so. For example do not visit the scene of an incident, read any textbooks or articles concerning any issue in this case, or consult any other source of information. If you were to do that, you would be getting information that is not evidence. You must decide this case only on the evidence and law presented to you during the trial. Any juror who receives any information about this case other than that presented at the trial must notify the Court immediately.

Second, do not discuss the case either among yourselves or with anyone else during the trial. You must keep an open mind until you have heard all of the evidence, the attorneys' closing arguments and my final instructions concerning the law. Any discussions before the conclusion of the case would be premature and improper.

Third, do not permit any other person to discuss the case in your presence. If anyone does attempt to do so, report this fact to the Court immediately without discussing the incident with any of the other jurors.

Fourth, do not speak to any of the attorneys, parties or witnesses in this case, even for the limited purpose of saying good morning. They are also instructed not to talk to you. In no other way can all the parties feel assured of your absolute impartiality.

**T.P.I. —CIVIL 1.03 Use of Juror Notes**

You are permitted to take notes during the trial. You may take notes only of verbal testimony from witnesses, including witnesses presented by deposition or videotape. You may not take notes during the opening statements or closing arguments or take notes of objections made to the evidence. You may not take notes during breaks or recesses. Notes may be made only in open Court while witnesses are testifying.

Your notes should not contain personal reactions or comments, but rather should be limited to a brief, factual summary of testimony you think is important. Please do not let your note-taking distract you and cause you to miss what the witness said or how the witness said it. Remember that some testimony may not appear to be important to you at the time. That same testimony, however, may become important later in the trial.

Your notes are not evidence. You should not view your notes as authoritative records or consider them as a transcript of the testimony. Your notes may be incomplete or contain errors and are not an exact account of what was said by a witness.

**T.P.I.—CIVIL 1.04 Corporation Not To Be Prejudiced**

The fact that a corporation is a party must not influence you in your deliberations or in your verdict. Corporations and persons are equal in the eyes of the law. Both are entitled to the same fair and impartial treatment and to justice by the same legal standards.

**T.P.I. —CIVIL 1.05 Insurance and Insurance Companies**

[There is no evidence before you that any party has or does not have insurance. Whether or not insurance exists has no bearing upon any issue in this case. You may not discuss insurance or speculate about insurance, based on your general knowledge.]

[Or]

[Evidence of insurance has been admitted for the limited purpose of \_\_\_\_\_.  
You may consider evidence of insurance only for this limited purpose.]

There are sound reasons for this rule. A party is no more or less likely to be negligent because a party does or does not have insurance. Injuries and damages, if any, are not increased or decreased because a party does or does not have insurance.

**T.P.I. – CIVIL 1.06 – Juror Questions**

Ladies and gentleman, you will hear testimony from various witnesses during the trial. If you would like to ask a witness a question, write the question on a blank piece of paper, fold the paper,

then hand it to the bailiff who will give it to me. Please do not put your name on the question. The purpose of a question should be to clarify evidence not to explore theories of your own, nor to attempt to discredit the witness.

You are only allowed to ask a question of a witness while that witness is on the witness stand. Once a witness leaves the witness stand, you will not be allowed to ask that witness any further questions.

I will review the question and allow the attorneys to review the question. Please do not hesitate to write any question which you feel is necessary or appropriate, but please do not be offended if I do not ask your question or if I vary the wording of the question before it is asked of the witness. One of my functions as presiding judge is to make sure that all evidence admitted is legally admissible under the rules of evidence and procedure under Tennessee law. If I do not ask all or part of a question, you must not draw any inference from my decision.

The attorneys have the primary responsibility for asking questions, and each of them will be attempting to place before you all the evidence needed to assist you in reach a proper verdict.

## **Chapter 2 - EVIDENCE**

### **A. GENERAL RULES**

#### **T.P.I.—CIVIL 2.01 Evidence**

You are to decide this case only from the evidence which was presented at this trial. The evidence consists of:

1. The sworn testimony of the witnesses who have testified, both in person and by deposition;
2. The exhibits that were received and marked as evidence; and
3. Any facts to which all the lawyers have agreed or stipulated.
4. [Any other matters that I have instructed you to consider as evidence.]

#### **T.P.I.—CIVIL 2.02 Direct and Circumstantial Evidence**

There are two kinds of evidence; direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of a witness about what the witness personally observed.

Circumstantial evidence is indirect evidence that gives you clues about what happened. Circumstantial evidence is proof of a fact, or a group of facts, that cause you to conclude that another fact exists. It is for you to decide whether a fact has been proved by circumstantial evidence. If you base your decision upon circumstantial evidence, you must be convinced that the conclusion you reach is more probable than any other explanation.

[For example, if a witness testified that the witness saw it raining outside, that would be direct evidence that it was raining. If a witness testified that the witness saw someone enter a room wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.]

You are to consider both direct and circumstantial evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give any evidence.

In making your decision, you must consider all the evidence in light of reason, experience and common sense.

### **T.P.I.—CIVIL 2.03 Weighing Conflicting Testimony**

Although you must consider all of the evidence, you are not required to accept all of the evidence as true or accurate.

You should not decide an issue by the simple process of counting the number of witnesses who have testified on each side. You must consider all of the evidence in your case. You may decide that the testimony of fewer witnesses on one side is more convincing than the testimony of more witnesses on the other side.

### **T.P.I.—CIVIL 2.04 Absence of Witness or Evidence**

Under certain circumstances you may consider the absence of evidence or a witness. You may conclude that the [evidence] [testimony] of the witness would be adverse to that party who failed to offer it only if you find all of the following elements:

1. That it was within the power of a party to [offer evidence] [produce a witness] on an issue in this case, but that party has failed to [offer the evidence] [to produce the witness]; and
2. The [evidence] [witness] was uniquely under the control of the party and could have been produced by the exercise of reasonable diligence; and
3. [The [evidence] [witness] was not equally available to an adverse party] [or] [the witness was likely to be biased against an adverse party because of a relationship to the party who would be expected to produce the witness]; and
4. The [evidence] [witnesses' testimony] would not be merely cumulative; and
5. A reasonable person under the same or similar circumstances would have [offered the evidence] [produced the witness] if the [evidence] [testimony] would be favorable; and
6. No reasonable excuse for the failure has been shown.

You must find all of these elements before you can conclude that the [evidence] [testimony of a witness] would be adverse to a party.

### **T.P.I.—CIVIL 2.05 Limited Admission of Evidence—Parties or Purpose**

[If evidence was admitted but limited to one or more parties, you must not consider it as to any other party.]

[Whenever evidence was admitted for a limited purpose, you must not consider it for any other purpose.]

Your attention was called to these matters when the evidence was admitted.

### **T.P.I.—CIVIL 2.06 Deposition of Testimony**

Certain testimony has been presented by deposition. A deposition is testimony taken under oath before the trial and preserved in writing [or on videotape]. You are to consider that testimony as if it had been given in Court.

### **T.P.I.—CIVIL 2.07 Interrogatories**

During the course of the trial you may have heard reference made to the word “interrogatory.” An interrogatory is a written question that must be answered under oath in writing. You are to consider interrogatories and their answers as if the questions had been asked and answered in Court.

### **T.P.I.—CIVIL 2.08 Requests for Admissions**

The [plaintiff] [defendant] has introduced into evidence certain “requests for admissions.” If these facts were admitted or not answered, you are to consider the facts to be true, since the other party had the opportunity to deny the admission request but did not do so.

### **T.P.I.—CIVIL 2.09 Stipulations**

A stipulation is an agreement. The parties have stipulated that certain matters of fact are true. They are bound by this agreement, and in your consideration of the evidence you are to treat these facts as proved.

[The parties have stipulated that if \_\_\_\_\_ were called as a witness, [he] [she] would testify as stipulated. You are to regard this stipulated testimony as if it had been given in open court by any other witness.]

**T.P.I. —CIVIL 2.10 Failure of Party to Testify to Conversations With Deceased or Incompetent Person**

[Name of deceased or incompetent person] cannot be here to testify. The law does not permit the [defendant] [plaintiff] [or] [any other person who has an interest] to testify about transactions with the person who is now [deceased] [incompetent]. Therefore, you should not consider as favorable or unfavorable that [name or status of defendant, plaintiff, or any other interested person] did not testify concerning such transactions with [name of deceased or incompetent person].

**B. EVALUATION OF EVIDENCE**

**T.P.I.—CIVIL 2.20 Credibility of Witness**

You are the sole and exclusive judges of the credibility or believability of the witnesses who have testified in this case. You must decide which witnesses you believe and how important you think their testimony is. You are not required to accept or reject everything a witness says. You are free to believe all, none, or part of any person's testimony.

In deciding which testimony you believe, you should rely on your own common sense and everyday experience. There is no fixed set of rules to use in deciding whether you believe a witness, but it may help you to think about the following questions:

Was the witness able to see, hear, or be aware of the things about which the witness testified?

How well was the witness able to recall and describe those things?

How long was the witness watching or listening?

Was the witness distracted in any way?

Did the witness have a good memory?

How did the witness look and act while testifying?

Was the witness making an honest effort to tell the truth, or did the witness evade questions?

Did the witness have any interest in the outcome of the case?

Did the witness have any motive, bias or prejudice that would influence the witness's testimony?

How reasonable was the witness' testimony when you consider all of the evidence in this case?

Was the witness' testimony contradicted by what that witness has said or done at another time, by the testimony of other witnesses, or by other evidence?

[Has there been evidence regarding the witness's intelligence, respectability, or reputation for truthfulness?]

[Has the witness's testimony been influenced by any promises, threats, or suggestions?]

[Did the witness admit that any part of the witness's testimony was not true?]

### **T.P.I.—CIVIL 2.21 Discrepancies in Testimony**

There may be discrepancies or differences within a witness' testimony or between the testimony of different witnesses. This does not necessarily mean that a witness should be disbelieved. Sometimes when two people observe an event they will see or hear it differently. Sometimes a witness may have an innocent lapse of memory. Witnesses may testify honestly, but simply may be wrong about what they thought they saw or remembered. You should consider whether a discrepancy relates to an important fact or only to an unimportant detail.

### **T.P.I.—CIVIL 2.22 Witness Willfully False**

You may conclude that a witness deliberately lied about a fact that is important to your decision in the case. If so, you may reject everything that witness said. On the other hand, if you decide that the witness lied about some things but told the truth about others, you may accept the part you decide is true and you may reject the rest.

### **T.P.I.—CIVIL 2.23 Admissions Implied From Silence**

Sometimes silence may be an admission. Under certain circumstances you may conclude that a party admitted or agreed with something that was said in that party's presence. Such evidence should be received with caution.

For you to draw the conclusion that a party adopted another's statement or believed it to be true, you must find all of the following elements:

1. That the party heard and understood the statement; and
2. That there was a reasonable opportunity to reply; and
3. That the party was in such physical and mental condition that the party reasonably could be expected to reply; and
4. That the statement was made under such circumstances that it would normally call for an answer; and
5. That the party failed to respond or made an evasive response to the statement.

You must find all of these elements before you can consider the party's silence or evasive answer to be an admission.

**T.P.I.—CIVIL 2.24 Privileges**

*No instruction recommended.*

**T.P.I.—CIVIL 2.25 Physical Laws, Facts**

You should consider all of the surrounding circumstances at the time of the event or occurrence when weighing the testimony of a witness. A statement of fact should be disregarded if you find the statement is inherently impossible or contrary to universally recognized physical laws or well established physical facts.

**T.P.I. —CIVIL 2.26 Evidence of Settlement**

You may consider evidence that a witness who was also involved in this incident [collision] has compromised and settled the witness' claim only for the purpose of deciding whether or not that witness has any interest or bias in this case. You may not consider any settlement as an admission of liability for any loss or damage.

**C. EXPERT TESTIMONY**

**T.P.I. —CIVIL 2.30 Expert Testimony--Determination of Weight**

Usually witnesses are not permitted to testify as to opinions or conclusions. However, a witness who has scientific, technical, or other specialized knowledge, skill, experience, training, or education may be permitted to give testimony in the form of an opinion. Those witnesses are often referred to as "expert witnesses."

You should determine the weight that should be given to each expert's opinion [and resolve conflicts in the testimony of different expert witnesses]. You should consider:

1. The education, qualifications, and experience of the witness[es]; and
2. The credibility of the witness[es]; and
3. The facts relied upon by the witness[es] to support the opinion; and
4. The reasoning used by witness[es] to arrive at the opinion.

You should consider each expert opinion and give it the weight, if any, that you think it deserves. You are not required to accept the opinion of any expert.

**T.P.I.—CIVIL 2.31 Hypothetical Question**

An expert witness was asked to assume that certain facts were true and to give an opinion based upon that assumption. This is called a hypothetical question. You must determine if any fact assumed by the witness has not been established by the evidence and the effect of that omission, if any, upon the value of the opinion.

**T.P.I.—CIVIL 2.32 Computer Animation**

You have been shown a computer-animated visualization. This visualization is intended by the party presenting it to help you understand the testimony [and opinion] of the witness by illustrating that testimony visually. Like the testimony of the witness, it may be accepted or rejected in whole or in part.

It is for you to decide what, if any, weight you will give to the testimony of any witness. If you find that the animation does not fairly and accurately depict the event that it is intended to portray or if it does not fairly or accurately illustrate the testimony of the witness, then you should disregard it.

**T.P.I. —CIVIL 2.33 Computer Simulation**

You have been shown a computer-animated simulation which has been received as opinion evidence. This simulation should be considered the same as other expert opinion testimony and it may be accepted or rejected in whole or part.

It is for you to decide what, if any, weight you will give to any evidence. If you find that the simulation does not fairly and accurately depict the event that it is intended to portray or if the underlying data or process is not accurate or is not trustworthy, then you should disregard it.

**D. BURDEN OF PROOF**

**T.P.I. —CIVIL 2.40 Burden of Proof – Preponderance of Evidence**

In this action, the plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues: \_\_\_\_\_

\_\_\_\_\_.

The defendant has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues: \_\_\_\_\_

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The term “preponderance of the evidence” means that amount of evidence that causes you to conclude that an allegation is probably true. To prove an allegation by a preponderance of the evidence, a party must convince you that the allegation is more likely true than not true.

If the evidence on a particular issue is equally balanced, that issue has not been proven by a preponderance of the evidence and the party having the burden of proving that issue has failed.

You must consider all the evidence on each issue.

### **T.P.I.—CIVIL 2.41 Admitted Fault**

The defendant has admitted liability for the plaintiff’s injuries that were legally caused by the defendant’s conduct.

The plaintiff has the burden of proving these remaining issues:

1. Did the plaintiff receive an injury that was caused by the [incident] [accident] in this case; and
2. What amount of damages would compensate the plaintiff for the injury, if any, that the plaintiff received. [and]
3. [That percentage of fault, if any, is chargeable to the plaintiff? When deciding this issue, you should not reduce any damages that you award by any percentage of fault that you find.]

The admission of liability should not prejudice you for or against the defendant in fixing the amount of damages, if any.

### **T.P.I. —CIVIL 2.42 Burden of Proof—Clear and Convincing Evidence**

Clear and convincing evidence is a different and higher standard than preponderance of the evidence. To prove an issue by clear and convincing evidence, the party having that burden of proof must show that the proposed conclusion is highly probable and that there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.

## **Chapter 3 – NEGLIGENCE, FAULT AND LEGAL CAUSE**

### **A. INTRODUCTION**

#### **T.P.I. —CIVIL Introduction—Comparative Fault Suggested Outline**

1. Identification of those who can be at fault and explanation of “preponderance of evidence.”
2. Definition of fault.
3. Definition of negligence.
4. Negligence per se (if applicable).
5. Common law duties.
6. Legal cause.
7. *Eaton v. McLain* factors (if applicable).
8. Impact of finding of comparative fault.
9. Conclusion.

### **B. RIGHT TO RECOVER**

#### **T.P.I. —CIVIL 3.01 Determination of Whether Plaintiff Entitled to Recover a Verdict (*No Issue of Comparative Fault*)**

A plaintiff is entitled to recover compensation for an injury that was legally caused by the negligent conduct of a defendant. In this case, the plaintiff has the burden of proving:

1. That the defendant was negligent; and
2. That the negligence was a legal cause of injury to the plaintiff.

### **C. STANDARD OF CARE**

#### **T.P.I.—CIVIL 3.05 Definition of Negligence**

Negligence is the failure to use ordinary or reasonable care. It is either doing something that a reasonably careful person would not do, or the failure to do something that a reasonably careful person would do, under all of the circumstances in this case.

A person may assume that every other person will use reasonable care, unless a reasonably careful person has cause for thinking otherwise.

### **T.P.I.—CIVIL 3.06 Right to Assume Other’s Normal Faculties**

In the absence of reasonable cause for thinking otherwise, a person who is using ordinary care has a right to assume that other persons are ordinarily intelligent and possess normal sight and hearing.

### **T.P.I.—CIVIL 3.07 Standard of Care Imposed on Minors** *(Not Drivers of Motor Vehicles)*

[The law presumes that a minor between the ages of seven and fourteen is not capable of negligent conduct, but you may determine that the evidence has overcome that presumption and find the minor capable of negligence.]

[The law presumes that a minor between the ages of fourteen and eighteen is capable of negligent conduct, but you may determine that the evidence has overcome that presumption and find the minor not capable of negligence.]

The negligence of a minor, if any, must be determined in light of the minor’s age, experience, training, education, maturity and other factors that would influence the minor’s judgment. A minor will not be held to the standard of care imposed on adults. A minor will not be held to the standard of care imposed on adults. A minor is chargeable with such care as a reasonably careful person of similar age, capacity, knowledge, and experience would be expected to use.

### **T.P.I. 3—CIVIL 3.08 Sudden Emergency**

A person who is faced with a sudden or unexpected emergency that calls for immediate action is not expected to use the same accuracy of judgment as a person acting under normal circumstances who has time to think and reflect before acting. A person faced with a sudden emergency is required to act as a reasonably careful person placed in a similar position. A sudden emergency will not excuse the actions of a person whose own negligence created the emergency.

If you find there was a sudden emergency that was not caused by any fault of the person whose actions you are judging, you must consider this factor in determining and comparing fault.

### **T.P.I.—CIVIL 3.09 Negligence *Per se***

A person who violates a status or ordinance is negligent. However, a person violating a statute or ordinance is not at fault unless you also find that the violation was a legal cause of the injury or damage for which the claim has been made.

## **D. LEGAL CAUSE**

### **T.P.I.—CIVIL 3.20 Definition of Legal Cause**

A legal cause of any injury is a cause which, in natural and continuous sequence, produces an injury, and without which the injury would not have occurred.

### **T.P.I.—CIVIL 3.21 When Precise Cause Cannot Be Identified**

If the plaintiff establishes by a preponderance of evidence all of the following facts, then [you will find that] each defendant is responsible for the plaintiff's injury. In order to find the defendant responsible, the plaintiff must prove:

1. That each of the defendants was negligent, and
2. That the negligent act of one of the defendants was the legal cause of the plaintiff's injury, and
3. That the injury was such that it could only result from the negligent act of one of the defendants, and
4. That from the circumstances of the accident the plaintiff cannot reasonably establish which defendant's negligence was the legal cause of the injury.

Under such circumstances, however, a defendant is not responsible if that defendant establishes by a preponderance of evidence all of the facts necessary to prove that defendant's negligence was not a legal cause of the plaintiff's injury.

### **T.P.I.—CIVIL 3.22 Superseding Cause**

A cause of an injury is not a legal cause when there is a superseding cause. For a cause to be a superseding cause, all of the following elements must be present:

1. The harmful effects of the superseding cause must have occurred after the original negligence;
2. The superseding cause must not have been brought about by the original negligence;
3. The superseding cause must actively work to bring about a result which would have not have followed from the original negligence; and

4. The superseding cause must not have been reasonably foreseeable by the original negligent party.

## **A. FAULT**

### **T.P.I.—CIVIL 3.30 Willful or Wanton Misconduct**

Willful or wanton misconduct is intentional wrongful conduct, done either with knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results. It does not require an intent to injure or harm the plaintiff individually. It may be considered by you in determining the amount of fault you will assign to a party.

### **T.P.I.—CIVIL 3.31 Gross Negligence**

Gross negligence is a negligent act done with utter lack of concern for the safety of others, or an act done with such reckless disregard for the rights of others that a conscious indifference to the consequences can be implied.

### **T.P.I.—CIVIL 3.32 Suit for Injury to a Minor as Affected by Fault of Parent**

In a lawsuit brought by a minor plaintiff to recover damages for injuries, the percentage of fault, if any, of a parent of the minor may not be assigned to the minor.

### **T.P.I.—CIVIL 3.33 Suit for Injury to a Minor—Parent’s Special Damages**

This lawsuit involves two separate claims: a claim by (minor) for injuries; and a claim by the parent(s) for medical expenses incurred [and for loss of earnings of the minor until the minor reaches legal age].

If you find the defendant at fault and you do not find fault on the part of the (minor) you will assess damages, if any, under the instructions I will give you. If you find fault on the part of (minor) and you find fault on the part of the defendant, you will proceed to compare the fault of the parties.

[As to the parent’s claim for damages, if you find the defendant at fault and do not find any fault on the part of the parents of the minor, you will assess the damages, if any, under the instructions given. If, however, you find fault on the part of the parents and you also find fault on the part of the defendant, you will proceed to compare the fault of the parties.]

### **T.P.I.—CIVIL 3.34 Direction Against Imputation of Driver’s Fault to Plaintiff Rider**

A plaintiff passenger is not responsible for any act or omission of the driver of the car in which the passenger is riding. A passenger is not at fault unless you find the passenger’s own negligence is a legal cause of the plaintiff passenger’s injury.

## **F. COMPARATIVE FAULT**

### **T.P.I.—CIVIL 3.50 Comparative Fault, Theory and Effect**

In deciding this case you must determine the fault, if any, on each of the parties. If you find more than one of the parties at fault, you will then compare the fault of the parties. To do this, you will need to know the definition of fault.

A party is at fault if you find that the party was negligent and that the negligence was a legal cause of the injury or damages for which a claim is made.

Fault has two parts: negligence and legal cause. Negligence is the failure to use reasonable care. It is either doing something that a reasonably careful person would not do, or the failure to do something that a reasonably careful person would do, under circumstances similar to those shown by the evidence. A person may assume that every other person will use reasonable care unless the circumstances indicate the contrary to a reasonably careful person.

[Judge may insert specific claims of common law duties.]

[A person who fails to follow the law of [city] [state] [county] is negligent. The law requires that [state or accurately summarize the applicable statute(s), regulation(s), or ordinance(s)]. Failure to follow this [these] statute[s], regulation[s], ordinance[s]] is negligence.

The second part of fault is legal cause. A legal cause of any injury is a cause which, in natural and continuous sequence, produces an injury, and without which the injury would not have occurred. A single injury can be caused by the negligent acts or omissions of one or more persons.

If you find that a party was negligent and that the negligence was a legal cause of the injury or damages for which a claim was made, you have found that party to be at fault. The plaintiff has the burden to prove the defendant’s fault. If the plaintiff fails to do so, you should find no fault on the part of the defendant. Likewise, the defendant has the burden to prove the plaintiff’s fault. If the defendant fails to do so, you should find no fault on the part of the plaintiff. If you find more than one person to be at fault, you must then determine the percentage of fault chargeable to each of them.

You must also determine the total amount of damages sustained by any party claiming damages. You must do so without reducing those damages by any percentage of fault you may have charged to that party. I will instruct you on the law of damages in a few minutes.

It is my responsibility under the law to reduce the amount of damages you assess against any party by the percentage of fault, if any, that you assign to that party. [A spouse's claim for loss of services and consortium is also reduced by any fault assigned to the injured spouse.]

A party claiming damages will be entitled to damages if that party's fault is less than 50% of the total fault in the case. A party claiming damages who is 50% or more at fault, however, is not entitled to recover any damages whatsoever.

### **T.P.I.—CIVIL 3.51 Comparative Fault, Basis of Comparison**

You have been instructed that if you find more than one party at fault, you must apportion the fault of each party.

In making the apportionment of percentage of fault, you should keep in mind that the percentage of fault chargeable to a [party] [person] is not to be measured solely by the number of particulars in which a [party] [person] is found to have been at fault.

[Nor does the fact that both parties are claiming the same act of negligence against each other necessarily mean that both must be equally at fault.]

You should weigh the respective contributions of the [parties] [persons], considering the conduct of each as a whole, determine whether one made a larger contribution than the other(s), and if so, to what extent it exceeds that of the other(s).

### **T.P.I.—CIVIL 3.52 Additional Factors for Comparing Fault**

The percentage of fault assigned to any person depends upon all of the circumstances of the case. The conduct of each person may make that person more or less at fault, depending upon all of the circumstances. In order to assist you in making this decision, you may consider the following factor(s) and you may also consider any other factors that you find to be important under the facts and circumstances. But the determination of fault on the part of any person and the determination of the relative percentages of fault, if any, are matters for you alone to decide.

- [1. Whose conduct more directly caused the injury to the plaintiff;]
- [2. How reasonable was the person's conduct in confronting a risk, for example, did the person know of the risk or should the person have known of it;]
- [3. Did the person fail to reasonably use an existing opportunity to avoid an injury to another;]

- [4. Was there a sudden emergency requiring a hasty decision;]
- [5. What was the significance of what the person was attempting to accomplish by the conduct [such as an attempt to save another's life].]

**T.P.I.—CIVIL 3.53 Where Claim Is Made Against One not Joined as a Party**

In this case, \_\_\_\_\_ claims that (name of non-party) was at fault and has the burden of proving (their, his, her) fault.

[Even though [he/she has] [they have] not appeared or offered evidence], it is necessary that you determine whether (name of non-party ) was at fault and determine the percentage of fault, if any, chargeable to [him/her] [them].

**T.P.I.—CIVIL 3.54 Wrongful Death**

Any fault of (decedent) must be assigned to the plaintiff.

Therefore, when comparing the fault of the parties, you shall assign to the plaintiff any fault you assign to (decedent).

**T.P.I.—CIVIL 3.55 Comparative Fault Principal-Agent Directed Imputation**

It has been established that (agent) was the agent of (principal).

Therefore, (agent) and (principal) should be considered as one in assigning fault.

**T.P.I.—CIVIL 3.56 Respondeat Superior (Separate Allegation of Fault against Employer)**

As (employee)'s employer, (employer) is responsible for (employee)'s negligence. In addition, you may also attribute fault directly against (employer) if you find that (employer) was at fault separate and apart from the fault of (employee).

**T.P.I.—CIVIL 3.57 Principal and Agent Sued Disputed Agency**

The plaintiff claims that the defendant \_\_\_\_\_ was the principal and the defendant \_\_\_\_\_ was an agent of the principal.

If you determine that the defendant (agent) [was the agent of the defendant (principal) [and] [was acting within the scope of the agent's [authority] [employment] at the time of the [event(s)] [accident],] and if you find the defendant (agent) [should be held responsible] [is at fault], then the plaintiff can recover damages against both defendants as if one.

However, if you determine that defendant (agent) [should be held responsible] [is at fault] but [was not then the agent of defendant (principal) [or] [was not acting within the scope of the agent's (authority) (employment)] at the time of the [event(s)] [incident], then the plaintiff cannot recover damages against the principal.

If you find that defendant (agent) [should not be held responsible] [is not at fault], then the plaintiff cannot recover damages against either defendant.

### **T.P.I.—CIVIL 3.58 Explanation of Verdict**

The percentage figure for each party may range from zero (0) to one hundred (100) percent. When the percentages of fault of all parties [being compared] are added together, the total must equal [0% or] 100%. The total percentage cannot be more or less than [0% or] 100%.

The parties to whom you may assign fault are:

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Your next obligation is to determine the full amount of damages, if any, sustained by the following parties without considering the question of fault:

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### **T.P.I.—CIVIL 3.59 Jury Verdict Form**

We, the jury, unanimously answer the questions submitted by the Court as follows:

1. Do you find the defendant to be at fault? (The plaintiff has the burden of proof.)

Yes \_\_\_\_\_

NO \_\_\_\_\_

If your answer is "no," stop here, sign the verdict form and return to the Court. If you answer "yes," proceed to Question 2.

2. Do you find the plaintiff to be at fault? (The defendant has the burden of proof.)

Yes \_\_\_\_\_ NO \_\_\_\_\_

If your answer is "no," you have found defendant 100% at fault and therefore you should skip question 3 and proceed to question 4. If your answer is "yes," proceed to question 3.

3. If you have found both parties to be at fault, considering all the fault at One Hundred Percent (100%), what percentage of fault do you attribute to each of the parties?

Plaintiff	_____	% (0-100%)
Defendant	_____	% (0-100%)
Total	<u>100%</u>	

If you find the plaintiff to be 50% or more at fault, stop here, sign this form and return to Court. A plaintiff 50% or more at fault is not entitled to recover damages. If you find that plaintiff is less than 50% at fault, proceed to question 4.

4. Decide the total amount of damages sustained by the Plaintiff. Do not reduce those damages by any percentage of fault you may have assigned to plaintiff. It is the responsibility of the judge, after you return your verdict, to reduce the damages you award, if any, by the percentage of fault you assign to plaintiff. What amount of damages, if any do you find were sustained by (plaintiff)?

(Burden of proof is on the plaintiff).

TOTAL DAMAGES \$ \_\_\_\_\_

Presiding Juror \_\_\_\_\_

Date \_\_\_\_\_

**T.P.I.—CIVIL 3.60 Comparative Fault Verdict Form—No Counterclaim**

We, the jury, unanimously answer the questions submitted by the Court as follows:

1. Considering all of the fault at 100%, what percentage of the total fault is chargeable to each of the following persons?

\_\_\_\_\_ % (0-100%)

\_\_\_\_\_ % (0-100%)

\_\_\_\_\_ % (0-100%)

Total [0% or 100%]

2. Without considering the percentage of fault found in Question 1, what total amount of damages, if any, do you find were sustained by the following parties:

\_\_\_\_\_ \$ \_\_\_\_\_  
\_\_\_\_\_ \$ \_\_\_\_\_

\_\_\_\_\_  
DATE

\_\_\_\_\_  
PRESIDING JUROR

**T.P.I.—CIVIL 3.61 Comparative Fault Verdict Form—Two Plaintiff Passengers Counter Claims Between Two Drivers**

We, the Jury, unanimously answer the questions submitted by the Court as follows:

1. Considering all of the fault that produced injury to (name of passenger 1) at 100%, what percentage of the total fault do you attribute to each of the following parties?

In answering this question, do not consider the fault, if any, of (name of passenger 2).

\_\_\_\_\_ (name of passenger 1) \_\_\_\_\_% (0-100%)

\_\_\_\_\_ (name of defendant 1) \_\_\_\_\_% (0-100%)

\_\_\_\_\_ (name of defendant 2) \_\_\_\_\_% (0-100%)

TOTAL [0% or 100%]

2. Considering all of the fault that produced the injury to (name of passenger 2) at 100%, what percentage of the total fault do you attribute to each of the following parties?

\_\_\_\_\_ (name of passenger 2) \_\_\_\_\_% (0-100%)

\_\_\_\_\_ (name of defendant 1) \_\_\_\_\_% (0-100%)

\_\_\_\_\_ (name of defendant 2) \_\_\_\_\_% (0-100%)

TOTAL [0% or 100%]

3. Considering all of the fault at 100%, what percentage of the total fault is attributable to each of the drivers?

In answering this question, do not consider the fault, if any, of either of the passengers.

\_\_\_\_\_ (name of passenger 1 or 2) \_\_\_\_\_% (0-100%)

\_\_\_\_\_ (name of driver 1) \_\_\_\_\_% (0-100%)

\_\_\_\_\_ (name of driver 2) \_\_\_\_\_% (0-100%)

TOTAL [0% or 100%]

4. Without considering any of the percentages of fault you found above, what total amount of damages do you find was sustained by each of the following parties:

\_\_\_\_\_ (name of passenger 1) \$ \_\_\_\_\_

\_\_\_\_\_ (name of passenger 2) \$ \_\_\_\_\_

\_\_\_\_\_ (name of driver 1) \$ \_\_\_\_\_

\_\_\_\_\_ (name of driver 2) \$ \_\_\_\_\_

\_\_\_\_\_  
DATE

\_\_\_\_\_  
PRESIDING JUROR

**T.P.I.—CIVIL 3.62 Comparative Fault Verdict Form—(Multiple Defendant Case Where Each Defendant Asserts the Other Defendant or Non-party Is at Fault and That the Plaintiff Is Also at Fault)**

We, the Jury, unanimously answer the questions submitted by the Court as follows:

1. Do you find the defendant \_\_\_\_\_ to be at fault? Answer yes or no \_\_\_\_\_. (May be proved by plaintiff or defendant \_\_\_\_\_). If your answer is no, put an "O" in the space provided in Question 5 for this defendant.

2. Do you find the defendant \_\_\_\_\_ to be at fault? Answer yes or no \_\_\_\_\_. (May be proved by plaintiff or defendant \_\_\_\_\_). If your answer is no, put an "O" in the space provided in Question 5 for this defendant.
3. [Do you find \_\_\_\_\_ who is not a party in this lawsuit to be at fault? Answer yes or no \_\_\_\_\_. (May be proved by plaintiff or defendant \_\_\_\_\_) If your answer is no, put an "O" in the space provided in Question 5 for defendant.
4. Do you find the plaintiff \_\_\_\_\_ to be at fault? Answer yes or no \_\_\_\_\_. (The defendants have the burden of proof.) Proceed to Question 5. If your answer is no, put an "O" in the space designated for plaintiff's percentage of fault.
5. If you found any party or non-party to be at fault, considering all the fault at One Hundred Percent (100%), what percentage of fault do you attribute to each of the parties?

_____ (plaintiff)	(0-100%) _____ %
_____ (defendant)	(0-100%) _____ %
_____ (defendant)	(0-100%) _____ %
_____ (non-party)	(0-100%) _____ %

TOTAL \_\_\_\_\_ (100%)

6. Decide the total amount of damages sustained by the Plaintiff. Do not reduce those damages by any percentage of fault you may have assigned to plaintiff. It is the responsibility of the Judge, after you return your verdict, to reduce the damages you award, if any, by the percentage of fault you assign to the plaintiff. What amount of damages, if any, do you find were sustained by plaintiff.

TOTAL DAMAGES \$ \_\_\_\_\_

Presiding Juror \_\_\_\_\_

Date \_\_\_\_\_

**T.P.I.—CIVIL 3.63 Considering Employer's Conduct—Products Liability Cases**

You may assess fault against one or more of the following parties: [\_\_\_\_\_]. You may not assess fault against the employer. The law provides that plaintiff may not sue the employer in this type of case and the defendants cannot ask that fault be assigned to the employer.

You may, however, consider the evidence you have seen and heard about the employer's conduct in determining whether the defendant's conduct was a cause of the plaintiff's (injury) (death). Conduct of an employer that contributes to cause an injury does not prohibit you from assessing fault against a defendant unless the employer's conduct was the sole cause of the plaintiff's injuries. If you find the defendant at fault you may not consider the employer's conduct to determine the degree of fault of the defendant.

## **Chapter 4 - TORT LAW—SPECIAL DOCTRINES**

### **A. RES IPSA LOQUITUR**

#### **T.P.I.—CIVIL 4.01 Res Ipsa Loquitur**

In this case, plaintiff contends you should infer from the occurrence that defendant was negligent and the defendant's negligence caused the occurrence. In order to draw this inference, you must find:

1. That the device [activity] does not ordinarily cause such an occurrence unless it has been carelessly [constructed] [inspected] [used]; and
2. That defendant was in exclusive control or management of the device [activity] at the time of the occurrence.

If you find these elements exist you may infer defendant was negligent unless you decide there is sufficient evidence to overcome that inference. The defendant may overcome the inference of negligence by showing that defendant did use due care or that the occurrence was brought about by a cause other than the defendant's negligence.

### **B. INTOXICATION**

#### **T.P.I.—CIVIL 4.10 Definition**

A person is intoxicated when that person's physical and mental abilities are impaired as a result of [drinking an alcoholic beverage] [or] [the use of any drug]. The impairment must be to the extent that the person is unable to act with ordinary or reasonable care, as would a sober person under the same or similar circumstances.

#### **T.P.I.—CIVIL 4.11 Intoxication as Negligence**

An intoxicated person is held to the same standard of reasonable care as a sober person. Intoxication is not an excuse for the failure to act as a reasonably careful person.

In determining whether or not a person was negligent, you should consider whether or not that person was intoxicated at the time of the occurrence together with all other evidence.

[A person who has become voluntarily intoxicated is required to use the same care as that of a sober person.]

## **C. ASSUMPTION OF THE RISK**

### **T.P.I.—CIVIL 4.15 Express Assumption of the Risk**

Express assumption of the risk occurs when a person knowingly, willingly and expressly consents to be exposed to a dangerous condition or activity. A person who expressly assumes a risk cannot recover for a resulting injury.

The defendant must prove by a preponderance of the evidence that, prior to the time of the injury, the plaintiff agreed to accept the particular risk of harm that caused the injury. The agreement to accept the risk may be by release, waiver, or other words excusing responsibility.

If you find that the plaintiff has agreed to assume the risk of harm arising from the defendant's negligent conduct, you will return a verdict for the defendant.

## **D. DANGEROUS ACTIVITY**

### **T.P.I. —CIVIL 4.20 Care Required When One Must Work in a Dangerous Activity**

In determining the degree of care required of a person who must work in a dangerous occupation or activity, you should consider the following:

1. Whether the occupation or activity involves unusual risks of injury;
2. Whether the occupation or activity requires the person to take risks that a reasonable person would avoid; and
3. Whether and to what extent the requirements of the occupation or activity limit the care that a person can take for safety.

### **T.P.I.—CIVIL 4.21 High Duty of Care in Dangerous Activity**

Because of the great danger involved in (Describe activity) a reasonably careful person will use extreme caution in that activity.

### **T.P.I.—CIVIL 4.22 Duty when Engaged in Electrical Activity**

The handling of electricity is a dangerous activity. Anyone who works with or is in the business of transmitting electricity is required to use the highest degree of care.

When suppliers of electricity have used the high degree of care required of them, the acts of a person who needlessly and heedlessly comes in contact with electricity may be found to be the legal cause of any resulting injury.

## **E. VOLUNTEERS**

### **T.P.I. 3—CIVIL 4.30 Volunteers**

There is no automatic duty to help a person in danger. If someone having no special duty voluntarily undertakes to aid another person, there is no responsibility for resulting damages unless the aid is rendered in such a manner that it would be considered gross negligence. Negligence is a failure to use ordinary care. Gross negligence includes not only the failure to exercise ordinary care, but also a conscious disregard for the rights and safety of others or a callous indifference to the consequences of one's actions or failure to act.

### **T.P.I.—CIVIL 4.31 Duty to Render Aid**

Ordinarily, a person does not have a duty to aid another unless some special relationship between the parties creates a duty to render aid. The duty to render aid created by a special relationship is a duty to use reasonable care under the circumstances.

[A common carrier is required to take reasonable affirmative steps to aid a passenger in peril.] [An innkeeper is required to take affirmative steps to aid guests in peril.] [The relationship between persons on property open to the public and the possessor of that property justifies creation of a duty to render aid.] [A social guest-host relationship creates a duty to render aid.] [In the case of sick persons who are social guests, the person under the duty is not required to give aid to one whom that person has no reason to believe to be ill.]

## **F. EMOTIONAL DISTRESS**

### **T.P.I.—CIVIL 4.35 Intentional Infliction of Emotional Distress**

Absent a physical injury, the law does not permit the recovery of damages for emotional distress unless the emotional distress is severe. A plaintiff is entitled to recover damages for severe emotional distress:

1. Actually and proximately caused by the extreme and outrageous conduct of another; and
2. Done either with the specific intent to cause emotional distress or with a reckless disregard of the probability of causing that distress.

### **T.P.I.—CIVIL 4.36 Negligent Infliction of Emotional Distress**

**RESERVED**

**T.P.I. – CIVIL 4.36A Negligent Infliction of Emotional Distress – Stand Alone Case**

To recover for negligent infliction of emotional distress, the plaintiff must prove all of the following:

1. The defendant was negligent;
2. The negligence, if any, caused an emotional injury to the plaintiff; and
3. The emotional injury to the plaintiff was serious or severe.

A serious or severe emotional injury is one which causes a reasonable person, normally constituted, to be unable to adequately cope with the mental stress arising from the circumstances of the event. The emotional injury must be established by expert medical or scientific proof.

**T.P.I. – CIVIL 4.36B – Negligent Infliction of Emotional Distress – Bystander Case**

To recover for negligent infliction of emotional distress, the plaintiff must prove all of the following:

- The defendant was negligent and caused physical injury to [\_\_\_\_\_];
- The plaintiff saw or heard the event causing the injury;
- The plaintiff reasonably believed the physical injury to [\_\_\_\_\_] was serious;
- The negligence of the defendant caused an emotional injury to the plaintiff; and
- The emotional injury to the plaintiff was serious or severe.

A serious or severe emotional injury is one which causes a reasonable person, normally constituted, to be unable to adequately cope with the mental stress arising from the circumstances of the event. The emotional injury must be established by expert medical or scientific proof.

**T.P.I.—CIVIL 4.37 Emotional Distress Defined**

Emotional distress is mental distress, mental suffering or mental anguish. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment and worry.

**T.P.I.—CIVIL 4.38 Severe Defined**

“Severe emotional distress” is emotional distress of such quantity or quality that no reasonable person in a civilized society should be expected to tolerate it. In determining whether emotional distress is severe, you should consider its intensity and duration.

#### **T.P.I.—CIVIL 4.39 Extreme and Outrageous Conduct Defined**

Extreme and outrageous conduct is conduct that goes beyond the bounds of decency and is considered atrocious and utterly intolerable in a civilized community. It is conduct that would cause an average member of the community to immediately react in outrage upon hearing the facts of the incident.

All persons are expected and required to be hardened to a certain amount of rough language and to occasional acts that are inconsiderate and unkind. Mere insults, indignities, threats, annoyances, petty oppressions and other trivialities are not extreme and outrageous conduct.

Plaintiff is entitled to damages if you find all of the following:

1. Defendant’s intentional or reckless conduct was so outrageous that it clearly exceeded the bounds of decency, making it intolerable in a civilized community.
2. Plaintiff suffered serious or severe emotional injury as a result of that conduct. A serious or severe emotional injury occurs when a reasonable person would be unable to adequately cope with the mental stress created by the defendant’s conduct.
3. [While expert testimony is not required to establish a serious or severe emotional injury, expert testimony is necessary to establish that the injury is permanent.]

#### **G. RESCUE DOCTRINE**

##### **T.P.I.—CIVIL 4.50 Emergency Situation—Rescue of a Person**

A person who is injured while attempting to rescue another from peril in an emergency situation is not negligent merely because the rescue may be dangerous. The law encourages efforts to save human life and approves of the natural impulse to respond to an urgent call for aid without complete regard for one’s own safety. An effort to preserve human life will not be considered negligent unless it is rashly or wantonly made. Conduct is rash or wanton when it is undertaken in total disregard of the consequences.

If a person acted in an emergency situation to rescue another from peril and if the person’s conduct was not rash or wanton, the conduct is not negligent. If there was no peril or if the person’s conduct was rash or wanton, then you may find that person negligent.

##### **T.P.I.—CIVIL 4.51 Emergency Situation—Rescue of Property**

A person who is injured while attempting to protect or preserve property is not negligent merely because the rescue may be dangerous. Every person has a right to protect one’s own property from

loss or damage provided reasonable care for personal safety is used. Reasonable care means that degree of care that a reasonably careful person would use under similar emergency circumstances.

If you find that a person who had an ownership or possessory interest in property was attempting to rescue that property from danger and, under the circumstances, was acting with reasonable care for personal safety, then that person will not be considered negligent. If you find there was no danger to the person's property or that the person did not act with reasonable care for personal safety in attempting to rescue the property, then you may find that person was negligent.

## **Chapter 5- MOTOR VEHICLES**

### **A. DUTY OF DRIVER**

#### **T.P.I.—CIVIL 5.01 Duty of Driver**

Each driver has a duty to drive with reasonable care, considering the hazards of weather, road, traffic and other conditions.

Each driver is under a duty to maintain a reasonably safe rate of speed; to keep the automobile [vehicle] under reasonable control; to keep a proper lookout under the existing circumstances; to see and be aware of what is in that driver's view; [and] to use reasonable care to avoid an accident [and to obey the traffic laws].

#### **T.P.I.—CIVIL 5.02 Right of Way Defined**

The term "right of way" means the privilege given by law to one person over another for the immediate use of the same space on a roadway. However, a person who has the right of way is not excused from using reasonable care to avoid an accident.

#### **T.P.I.—CIVIL 5.03 Right of Way May Be Waived**

A person who has the right of way may give it up. Or, that person may act in a way that suggests to a reasonably careful person that the right of way is being or has been given up.

#### **T.P.I. —CIVIL 5.04 Through Highway or Yield Intersection—Immediate Hazard Defined**

For purposes of this statute [T.C.A. § 55-8-130], an immediate hazard exists whenever a reasonably careful driver should realize that another vehicle, if it continued in the same direction and at the same speed, would probably collide with the driver's vehicle if the driver entered the intersection.

#### **T.P.I.—CIVIL 5.05 Intersection Controlled by Traffic Light**

The traffic laws require the driver of a vehicle to obey an official traffic control device.

[Proper parts of T.C.A. § 55-8-110 may be read.]

Any driver who enters an intersection against the red light in violation of the law is negligent.

A green light is an invitation to proceed. A driver having the green light has the right to assume that cross traffic has a red light and that those drivers will obey the law and stop. However, a driver having a green light is still required to use reasonable care under the circumstances. The driver should not proceed, if the driver, using reasonable care, sees or should see, that another vehicle is in the intersection or so near to it that a collision is likely unless the driver slows or stops.

#### **T.P.I.—CIVIL 5.06 Close Following**

A driver is required to comply with T.C.A. § 55-8-124 that provides:

*The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.*

A driver following another vehicle must stay far enough from the vehicle in front so that the driver can stop in the clear space between the vehicles if the vehicle in front is stopped with due care.

#### **T.P.I.—CIVIL 5.07 Turning a Vehicle**

A driver is not required to know that there is absolutely no chance of an accident before turning from a direct course or moving to the left or right on a public roadway. A driver is required to use the precaution that would satisfy a reasonably careful person that the turn or movement can be made safely under the circumstances.

#### **T.P.I.—CIVIL 5.08 Left Turn—Immediate Hazard Defined**

For purposes of this statute [T.C.A. § 55-8-129], an immediate hazard exists whenever a reasonably careful driver who intends to turn left should realize that a collision would probably occur

at some point during the turn if the driver does not yield the right of way to an oncoming vehicle approaching from the opposite direction and continuing in the same direction and at the same speed.

#### **T.P.I.—CIVIL 5.09 Definition of Roadway**

A roadway is that part of a highway improved, designed, or ordinarily used for vehicular traffic, exclusive of the berm or shoulder.

### **B. PEDESTRIANS**

#### **T.P.I.—CIVIL 5.20 General Duty**

Every person using a public roadway, whether as a pedestrian or as a driver of a vehicle, has a duty to exercise reasonable care at all times to avoid an accident. A pedestrian is a person traveling on foot.

#### **T.P.I.—CIVIL 5.21 Pedestrians—Right of Way**

A pedestrian crossing a roadway has certain rights and duties when crossing at a marked or unmarked crosswalk.

[An unmarked crosswalk is an unmarked portion of an intersection created by the imaginary lengthening or connection of sidewalk boundary lines where the roadways meet at approximately right angles [over which a pedestrian normally walks in crossing from a sidewalk on one side of a roadway to a sidewalk on the other side.]]

[A marked crosswalk is any portion of a roadway at an intersection or elsewhere that is lined or marked on the surface.]

Drivers of all vehicles must give up the right of way to a pedestrian who is crossing within a marked crosswalk or an unmarked crosswalk at an intersection. However, a pedestrian crossing a roadway at a marked or unmarked crosswalk still must exercise reasonable care for the pedestrian's own safety. [A pedestrian shall not suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to yield.]

A pedestrian who crosses at any place other than within a marked or unmarked crosswalk is required to give up the right of way to all vehicles upon the roadway. However, a driver of a vehicle must exercise reasonable care to avoid colliding with any pedestrian upon the roadway.

### **T.P.I.—CIVIL 5.22 Change of Signal After Crossing Begun**

At an intersection where traffic is controlled by a special pedestrian control signal, the following rules apply: If a pedestrian starts to cross when permitted by a signal and the signal changes during the crossing, the pedestrian is not required to stop or return to the original point of crossing. The pedestrian should go to a sidewalk or safety island.

In other words, when the signal changes, a pedestrian is required to use reasonable care for the pedestrian's own safety.

### **C. PASSENGERS**

#### **T.P.I.—CIVIL 5.30 Duty of Passenger**

A passenger has a duty to take action for self protection from danger only:

- (1) When it is apparent that the passenger can no longer rely upon the driver for protection, [as when the driver's conduct shows incompetence to drive or when the driver is unmindful or does not know of a danger known to the passenger]; and
- (2) If the passenger becomes aware of the danger at a time and under circumstances when the passenger could have prevented the harm.

#### **T.P.I. —CIVIL 5.31 Fault of Driver Not Imputed to Passenger**

A claim has been made by a passenger of a motor vehicle, (passenger), against (third person). The passenger was riding in a motor vehicle driven by (driver). You may not charge any fault on the part of the passenger's driver to the passenger.

### **D. EMERGENCY VEHICLES**

#### **T.P.I.—CIVIL 5.40 Authorized Emergency Vehicle Exemption**

The driver of an authorized emergency vehicle has certain protections when the driver:

1. Is using the required audible and visual signals; and
2. Is [responding to an emergency call] [pursuing an actual or suspected violator of the law] [responding to, but not returning from, a fire alarm].

If these requirements are met, the authorized emergency vehicle may: [park where necessary] [proceed past a red traffic signal or stop sign, after slowing down as necessary for safe operation] [exceed the speed limit so long as neither life nor property is endangered] [disregard normal requirements controlling the direction of traffic movements or turning directions].

However, even if these requirements are met, the driver of an authorized emergency vehicle is not relieved of the duty to drive with due regard for the safety of all persons using the highway. The driver is not protected if the driver acts with either knowledge that serious injury to another will probably result or with reckless disregard for the possible results. The question to be asked is, “What would a reasonably careful emergency driver do under all of the circumstances, including that of the emergency?”

[It has been established in this case that the vehicle driven by the defendant, \_\_\_\_\_, was an authorized emergency vehicle.]

### **T.P.I.—CIVIL 5.41 Test of Emergency**

The test to determine whether an emergency vehicle was being driven in response to an emergency call is whether the driver had received a report or request that reasonably would justify the driver’s belief that an emergency existed requiring a response in the line of duty. The test is not whether an emergency in fact existed.

### **T.P.I.—CIVIL 5.42 Emergency Vehicles—Duty of Others**

Upon the immediate approach of an authorized emergency vehicle making use of audible and visual signals, other motorists must:

1. Yield the right of way; and
2. Immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway clear of any intersection; and
3. Stop and remain stopped until the authorized emergency vehicle has passed.

A driver who fails to take these precautions is negligent.

## **Chapter 6 – OTHER NEGLIGENCE ACTIONS**

### **A. PROFESSIONAL NEGLIGENCE**

#### **T.P.I.—CIVIL 6.01 Professional Fault**

A person who undertakes to perform professional services for another must use reasonable care to avoid causing injury to that person. The knowledge and care required of the professional is the same as other reputable professionals practicing in the same or similar community and under similar circumstances. A professional not only must have that degree of learning and skill ordinarily possessed by other reputable professionals, but also must use the care and skill ordinarily used in like cases. In applying that skill and learning, a professional is required to use reasonable diligence and best judgment in an effort to accomplish the purpose of the employment.

A failure to have and use such knowledge and skill is negligence.

#### **T.P.I. – CIVIL 6.02 Duty of a Specialist**

A person who [holds oneself out as] [is] a specialist in a particular profession is required to have the knowledge and skill ordinarily possessed, and to use the care and skill ordinarily used, by reputable specialists practicing in the same field and in the same or a similar community and under similar circumstances.

A failure to have and use such knowledge and skill is negligence.

#### **T.P.I.—CIVIL 6.03 Professional Perfection Not Required**

A professional is not negligent merely because of an unsuccessful result or an error in judgment. It is negligence, however, if the error of judgment or lack of success is due to the failure to use the required care and skill as defined in these instructions.

#### **T.P.I.—CIVIL 6.04 Duration of Professional Responsibility**

The employment and duty of a professional continues until [ended by [consent] [or] [request] of the client] [or] [the professional withdraws from the employment, if it does not unduly jeopardize the interest of the client, after giving the client notice and a reasonable opportunity to employ another professional] [or] [the matter for which the professional was employed has been concluded].

#### **T.P.I. —CIVIL 6.05 Standard of Care Determined by Expert Testimony**

To determine the standard of professional learning, skill and care that was required of the defendant, you must consider only the opinions of the professionals [including the defendant] who have testified as expert witnesses as to that standard.

You must consider the opinion of each expert witness and reasons given for the opinion, as well as the qualifications of each witness. Give each opinion the weight you believe it should have.

## **B. ATTORNEY FAULT**

### **T.P.I.—CIVIL 6.07 Attorney Fault—Litigation—Burden of Proof**

To recover damages for the negligent handling of a lawsuit, the plaintiff must prove that:

1. The attorney was negligent; and
2. Except for that negligence, the prior lawsuit [would have resulted in a collectible judgment in plaintiff's favor] [would have been successfully defended].

### **T.P.I.—CIVIL 6.08 Attorney Fault—Non Litigation—Burden of Proof**

An attorney is at fault if you find by a preponderance of the evidence that the attorney was negligent and that the negligence was a legal cause of damages to the plaintiff.

## **C. MEDICAL NEGLIGENCE**

### **T.P.I.—CIVIL 6.10 Duty of Physician**

A physician who undertakes to perform professional services for a patient must use reasonable care to avoid causing injury to the patient. The knowledge and care required of the physician is the same as that of other reputable physicians practicing in the same or a similar community and under similar circumstances. A physician not only must have that degree of learning and skill ordinarily possessed by other reputable physicians, but also must use the care and skill ordinarily used in like cases. In applying that skill and learning, a physician is required to use reasonable diligence and best judgment in an effort to accomplish the purpose of the employment.

A failure to have and use such knowledge and skill is negligence

### **T.P.I.—CIVIL 6.11 Duty of Specialist**

The skill, knowledge and care required of a physician who practices a particular specialty is the same as that of other reputable physicians who specialize in the same field and practice in the same or similar community and under similar circumstances.

### **T.P.I.—CIVIL 6.12 Perfection Not Required**

By undertaking treatment a physician does not guarantee a good result. A physician is not negligent merely because of an unsuccessful result or an error in judgment. An injury alone does not

raise a presumption of the physician's negligence. It is negligence, however, if the error of judgment or lack of success is due to a failure to have and use the required knowledge, care and skill as defined in these instructions.

#### **T.P.I.—CIVIL 6.13 Duty to Disclose When Doctor Not Qualified**

A physician who discovers, or should discover, that the patient's ailment is beyond the physician's knowledge or technical skill or capacity to treat with a likelihood of success, has a duty to disclose that situation to the patient or advise the patient of the need for other or different treatment.

#### **T.P.I.—CIVIL 6.14 Alternate Methods**

When there is more than one accepted method of diagnosis or treatment, and no one of them is used exclusively and uniformly by all physicians of good standing, a physician is not negligent for selecting an accepted method of diagnosis or treatment that later turns out to be unsuccessful. This is true even if the method is one not favored by certain other physicians.

#### **T.P.I.—CIVIL 6.15 Duty to Not Abandon Patient**

When the physician begins treating a patient, there is a duty to continue treating and not abandon the patient unless and until [the patient discharges the physician] [the physician gives the patient notice of intent to discontinue treatment and provides an opportunity to obtain the services of another physician].

#### **T.P.I.—CIVIL 6.16 Medical Negligence—Referring Patient**

A physician may send a substitute physician to care for the patient. The physician is not responsible for any negligence of the substitute unless the original physician was negligent in the selection of the substitute or there was an agency or partnership relationship between the two physicians.

#### **T.P.I.—CIVIL 6.17 Vicarious Liability of Physician**

For a physician to be responsible for injuries caused by the negligence of a [nurse] [assisting physician], plaintiff must prove the following:

1. The [nurse] [assisting physician] was negligent in the performance of required duties during surgery [or treatment] of the plaintiff; and
2. The [nurse] [assisting physician] was under the direction or control of defendant at the time of the negligence, regardless of who employed or paid the [nurse] [assisting physician].

#### **T.P.I.—CIVIL 6.18 Standard of Medical Care Determined by Expert Testimony**

It is your obligation to determine the recognized standard of acceptable professional practice in defendant's profession for this or a similar community. In making this determination, you may consider only the opinions of the physicians, including the defendant, who have testified concerning this standard. Consider each opinion and the reasons given for the opinion, as well as the qualifications of the witnesses, giving each opinion the weight you believe it deserves.

[The testimony of a physician as to what that physician personally would do or would not do or the personal opinion of a physician of what should or could not have been done does not prove the standard of medical practice.]

#### **T.P.I.—CIVIL 6.19 Res Ipsa Loquitur—Disputed Causation—Medical**

If you find that the [medication] [treatment] [operation] that was [administered] [performed] by the defendant[s] was not a legal cause of the injury to the plaintiff, then your verdict will be in favor of the defendant[s]. If you find that the plaintiff's [injury] [condition] was legally caused by the [medication] [operation] [treatment] [administered] [performed] by [any one or more of] the defendant[s], then you must consider the following instructions concerning [that] [those] particular defendant[s]:

#### **T.P.I.—CIVIL 6.20 Res Ipsa Loquitur—Medical**

You may, but are not required to, infer from the happening of the injury in this case that a cause of the injury was some negligent conduct by the defendant[s].

This theory requires the plaintiff to prove all of the following:

1. The plaintiff received an injury that ordinarily would not occur in the absence of negligence. [Whether the injury is one that ordinarily does not occur in the absence of negligence may be determined from the evidence presented in this trial by physicians and surgeons called as expert witnesses.]
2. The injury was caused while the care of the plaintiff was under the exclusive care and control of the defendants. [The plaintiff is not required to identify the particular agent or instrumentality that caused the injury if unable to do so because of the patient's condition at the time the [medication] [treatment] [operation] was [administered] [performed]].

The defendant may overcome an inference of negligence by showing that due care was exercised or that the injury was brought about by a cause other than the defendant's negligence.

#### **T.P.I.—CIVIL 6.21 Patient's Duty to Follow Instructions**

A patient must follow all reasonable instructions given by the physician regarding the patient's care, activities and treatment. A physician is not liable for any injury caused by the patient's failure to follow those instructions. The physician remains responsible for any injury caused by the physician's own negligence.

#### **T.P.I.—CIVIL 6.22 Duty to Warn Family Members**

In a physician-patient relationship the physician has an affirmative duty to warn identifiable third persons in the patient's immediate family of foreseeable risks flowing from a patient's illness.

### **D. CONSENT**

#### **T.P.I.—CIVIL 6.25 Informed Consent**

A physician has a duty to give a patient certain information before treating the patient; the information the physician must disclose is that information about the treatment involved and its attendant risks to enable the patient to make an intelligent decision about whether to undergo the treatment. The information that must be provided to the patient is that information that would be provided by physicians in the specialty in the community in which the physician practices or in similar communities.

In this case, plaintiff has the burden of proving:

1. what a reasonable medical practitioner in the same or similar community would have disclosed to the patient about the [treatment] [procedure] and risks of it;
2. that the defendant departed from that standard; and
3. that a reasonable patient in plaintiff's position would have [refused the treatment/procedure] if properly advised of the risks of the [treatment] [procedure] [chosen an alternative treatment/procedure].

In determining how a reasonable patient would have acted under the circumstances, you should consider the testimony of the [patient] [plaintiff], the plaintiff's [idiosyncrasies], [fears], [age], [medical condition], [and] [religious beliefs], the presence or absence of alternative [procedures] [treatments] and the potential risks and benefits thereof, and the impact of no [treatment] [procedure] on plaintiff's health.

### **T.P.I.—CIVIL 6.26 Authorized Consent**

\_\_\_\_\_ was authorized to consent on behalf of the plaintiff to the [operation] [treatment]. You must decide whether consent was given by that person.

### **T.P.I.—CIVIL 6.27 Capacity to Consent**

Although the patient is [a minor] [a person with impaired mental capacity], the patient's consent may be effective if the patient was capable of appreciating the nature, extent and consequences of the [operation] [treatment]. If the patient is capable of giving consent, the patient's informed consent is sufficient even though the consent of a parent, guardian or other responsible person is not obtained or was expressly refused. You must decide if the patient is of sufficient age, ability, experience, education, learning and degree of maturity of judgment to appreciate the risks and consequences of the medical treatment.

[If the patient was a minor under age fourteen, the law presumes that the person did not have the capacity to appreciate the risks of the treatment, but you may find from the evidence that this particular minor was capable of doing so.] [If the patient was a minor between the ages of fourteen and eighteen, the law presumes that the patient did have the capacity to appreciate the treatment, but you may find from the evidence that this particular minor did not have the capacity to do so.]

### **T.P.I.—CIVIL 6.28 When Consent to an Operation Not Necessary**

Further consent is not required if, during an operation, a surgeon finds an unanticipated condition that requires immediate action that is necessary for the preservation of the life or health of the patient and it is impractical to obtain consent to further operation. A surgeon must conform to the usual and customary practice among surgeons in the same or a similar community faced with a comparable situation.

### **T.P.I.—CIVIL 6.29 Emergency Arising Before Treatment or Surgery**

Consent to necessary treatment or surgery will be implied in an emergency if it would be impossible or impractical to delay the treatment or surgery necessary to preserve the patient's life or health long enough to obtain consent from the patient or other authorized person.

The physician's decision to treat or operate, as well as the performance of that treatment or surgery, must comply with the standard of acceptable professional practice followed by physicians in good standing under similar conditions in the same or similar community.

### **T.P.I.—CIVIL 6.30 Reality of Contest—Duty to Disclose**

T.P.I. 4—Civil 6.30 has been subsumed by T.P.I. 4—Civil 6.25.

### **T.P.I.—CIVIL 6.31 Unauthorized Procedure—Medical Battery**

Performance by a doctor of an unauthorized procedure is a medical battery. The question in a medical battery case is simply whether the patient knew of and authorized a procedure. To determine whether a case constitutes a medical battery, the jury must answer two questions:

1. Was the patient aware that the doctor [dentist, etc.] was going to perform the procedure?
2. Did the patient authorize the procedure?

If either of these questions is answered "NO" then the doctor has performed an unauthorized procedure and has committed medical battery.

### **T.P.I.—CIVIL 6.32 Sudden Emergency During Treatment**

Refer to T.P.I. – Civil 3.08 on Sudden Emergency.

## **E. HOSPITALS**

### **T.P.I.—CIVIL 6.35 Duty of a Hospital**

A hospital must furnish the care, attention and protection reasonably required by the patient's known mental and physical condition. The amount of caution, attention and protection required is that generally used by hospitals in the same or a similar community and required by its express or implied contract with the patient.

### **T.P.I. – Civil 6.36 Vicarious Liability - Hospital**

A hospital is responsible for injuries caused by a hospital employee's negligent performance of duties while acting in the scope of employment. Hospitals are responsible for the negligent acts of their employees, [including interns,] even though they have been selected with due care.

### **T.P.I. 3—CIVIL 6.37 Medical Malpractice—Physician as Agent While Controlling Operation**

A physician who is in control of the treatment of a patient may at the same time be the agent of a hospital. A physician, however, does not become an agent of a hospital merely by admitting or treating patients in that hospital.

### **T.P.I.—CIVIL 6.38 Medical Malpractice—Liability for Negligence of Physician Selected**

A medical facility that selects a competent physician for the care of a patient is not liable for mistakes made by the selected physician in the treatment rendered. However, a medical facility is liable for the negligence of the physician selected by the medical facility if, before the injury, the medical facility knew, or should have known, that the physician was incompetent to perform those duties the physician was reasonably expected to undertake.

## **F. COMMON CARRIERS**

### **T.P.I.—CIVIL 6.45 General Duty of Carrier**

The defendant, \_\_\_\_\_, is a common carrier. A common carrier does not guarantee the safety of a passenger. It has a duty to its passengers, however, to use the highest degree of care considering the type of transportation provided and the practical operation of its business.

### **T.P.I.—CIVIL 6.46 Safe Place to Board and Alight**

It is the duty of a common carrier to select a reasonably safe place to receive or discharge passengers.

### **T.P.I.—CIVIL 6.47 Duty of Passenger**

The passenger has a duty to exercise ordinary care for the passenger's own safety.

### **T.P.I.—CIVIL 6.48 Relationship Between Passenger and Carrier**

The relationship of passenger and carrier begins when:

1. A person has arrived at a place designated by custom or notice as a site where the carrier will take on passengers;

2. The person has indicated to the operator an intention to board the vehicle by standing alongside or near the probable stopping or boarding place; and
3. The operator has taken some action which indicates an intention to receive that person.

It is not necessary that there be any physical contact between the passenger and the vehicle.

The relationship of passenger and carrier continues until the passenger has cleared the vehicle and has had a reasonable opportunity to reach a place of safety.

## **G. RAILROAD CROSSINGS**

### **T.P.I.—CIVIL 6.50 Duty of One Crossing Tracks**

A railroad track is a warning of danger. A person nearing a railroad track must use every reasonable opportunity to look and listen for the approach of a train and to yield the right of way to any train so close that it is an immediate hazard. The care required is to be determined by considering what a reasonably careful person would do under all of the same circumstances.

### **T.P.I.—CIVIL 6.51 Duty of Railroad Company at Crossing**

A railroad company must use reasonable care at public highway crossings to warn and to avoid injury to persons traveling upon the highway and crossing the railroad tracks. In determining reasonable care you must consider the hazards and dangers that are apparent to the railroad company or that would be apparent to a reasonably careful person under similar circumstances.

### **T.P.I.—CIVIL 6.52 Speed at Private Right of Way**

The railroad operated its train on tracks that were laid upon a private right of way [except where those tracks crossed \_\_\_\_\_]. Because there is no law that regulates the speed at which the railroad may operate its trains or cars over its private right of way, the railroad may operate at any speed consistent with the use of reasonable care.

### **T.P.I.—CIVIL 6.53 Speed at Public Highway Crossings**

It is the duty of a railroad company to exercise reasonable care for the speed at which it operates its equipment at public highway crossings.

### **T.P.I.—CIVIL 6.54 Ordinance or Regulation Fixes Minimum Care Required of Railroad**

The railroad company's duty to use reasonable care at public highway crossings is not necessarily fulfilled by compliance with an applicable law [read applicable ordinance or regulation].

That law prescribes only the minimum care required of the railroad company

You must decide whether or not compliance with that law amounted to reasonable care under the circumstances shown by the evidence.

### **T.P.I.—CIVIL 6.55 Failure of Warning Devices**

When a railroad company installs a mechanical device to warn persons approaching a railroad crossing, it must use reasonable care in the planning, construction, and installation of the device. After installation the railroad company must use reasonable care in the operation and maintenance of the device.

A railroad company is negligent in failing to keep a device in good repair if it had actual notice of the defective condition and was not reasonably diligent in making repairs. If the company did not have a notice of a defective condition, the company is negligent if its lack of notice was due to its failure to use reasonable care [or if the defective condition was caused by the company's own negligence in constructing or installing the device].

A railroad company's use of a flagman or other warning or signaling device at a railroad crossing is an invitation to a person approaching the crossing to rely upon the efficient operation of the warning system. A person who relies upon the operation of a warning system is not required to use the same amount of caution as when no method of warning is provided but still must use reasonable care.

## **H. ULTRAHAZARDOUS ACTIVITIES**

### **T.P.I.—CIVIL 6.60 Liability**

\_\_\_\_\_ is an ultrahazardous activity. Regardless of the level of care used, one who carries on an ultrahazardous activity is responsible for any damage or injury caused by that activity. That responsibility is limited to harm resulting from the dangerous propensity about which the defendant knew or should have known.

## **I. ANIMALS**

### **T.P.I.—CIVIL 6.65 Dangerous Animals**

Plaintiff is entitled to recover from defendant if you find that:

1. The plaintiff was injured by the \_\_\_\_\_ owned or kept by the defendant; and
2. Before the plaintiff was injured by that animal, the defendant knew, or had reason to know, of a vicious or dangerous trait or propensity in the animal that caused plaintiff's injuries. [An owner or keeper of an animal has reason to know of the traits or propensities of the animal when the owner has notice of facts that would inform a reasonable person of those traits.]

[If, however, a person voluntarily invites an attack by an animal, such person may be found at fault, along with the owner or keeper, for the consequences. A person invites an attack by voluntarily and knowingly doing something that is dangerous in relation to the animal and which induces an attack. A person does not invite an attack by acting reasonably while lawfully within a place].

### **T.P.I.—CIVIL 6.66 Dog Attack—Off Premises**

When an owner allows a dog to be at large, the owner is responsible for damages caused by the dog without regard to whether the dog previously had been vicious or whether the owner knew of the viciousness. A dog is at large when it is free and unrestrained and not under the control of the owner.

### **T.P.I. 3—CIVIL 6.67 Dog Attack—On Premises**

The owner [harborer] of a dog that attacks [injures] a person while that person is on the owner's premises is responsible for the damages caused by the attack [injury] if the owner [harborer] knows or has reason to know that the dog is vicious or dangerous. A person is lawfully upon the private property of a dog owner [when performing any duty imposed by law] [or] [at the express or implied invitation of the owner].

[If, however, a person voluntarily invites an attack by a dog, such person may be found at fault, along with the owner or harborer for the consequences. A person invites an attack by voluntarily and knowingly doing something that is dangerous in relation to the dog and which induces an attack. A person does not invite an attack by acting reasonably while lawfully within a place.]

### **T.P.I.—CIVIL 6.68 Livestock at Large**

Where the owner of livestock negligently [intentionally] allows it to run at large, the owner is responsible for damages caused by the livestock being at large. The owner is not responsible, if without fault, the livestock has escaped from a pasture enclosed by a lawful fence or by an ordinary fence that is generally required to restrain that kind of stock. Negligence must be proved and is not to be presumed from the mere fact that the livestock was at large.

### **T.P.I. – CIVIL 6.70 Negligent Food Contamination**

[Defendant] has a duty to use reasonable care to serve food that is not contaminated. [Defendant] is not an insurer of the safety and quality of the food served, but must use reasonable and ordinary care in the selection, preparation and serving of food.

[Plaintiff] has the burden of proving by a preponderance of the evidence that [Defendant] failed to use reasonable and ordinary care in the [selection] [preparation] [and] [or] [serving] of food and that consumption of the food caused an injury.

## **Chapter 7 - LIBEL**

### **T.P.I.—CIVIL 7.01 “Libel” Defined**

The law holds a person’s good reputation in high regard. A libel action to recover damages can be brought by a person whose reputation is falsely attacked.

A libel is a statement about a person that exposes that person to wrath, public hatred, contempt, or ridicule, or deprives that person of the benefits of public confidence or social interaction.

### **T.P.I.—CIVIL 7.02 Ordinary (Non-privileged) Libel—Essential Elements**

To recover damages for libel, the plaintiff must prove the following elements:

1. That the defendant communicated a statement that referred to the plaintiff; and
2. That the statement was made to persons other than the plaintiff by [newspaper] [television broadcast] [other writing or broadcast]; and
3. That the statement was libelous; and
4. That the statement was read or heard by [persons other than the plaintiff, namely \_\_\_\_\_] [members of the general public] who understood its libelous meaning and that it referred to the plaintiff; and
5. That the defendant [was negligent] [acted recklessly] in failing to determine if the statement was true before communicating it, or that the defendant knew the statement was false before communicating it; and
6. That the plaintiff was injured by the communication of the statement; and
- [7. That the statement referring to the plaintiff was false.]

### **T.P.I. – CIVIL 7.03 Ordinary (Non-privileged) Libel – Truth as a Defense**

Truth is a defense to a libel action. Substantial truth is sufficient. The defendant is not required to show that the statement at issue is absolutely or mathematically true. If you find that the statement was substantially true, then you must find for the defendant.

#### **T.P.I. – CIVIL 7.04 Libel in Privileged Situation – Essential Elements**

To recover damages for libel, the plaintiff must prove all of the following elements:

- a. That the defendant communicated a statement about the plaintiff; and
- b. That the statement was made to persons other than the plaintiff by [newspaper] [television broadcast] [other writing or broadcast] concerning the plaintiff, and
- c. That the statement was libelous; and
- d. That the statement was heard or read by persons other than the plaintiff who understood its libelous meaning and that it referred to the plaintiff; and
- e. That the statement was false; and
- f. That the plaintiff was injured by the communication of the statement; and
- g. That the defendant communicated the statement knowing that it was false or with reckless disregard of whether it was false or not.

The plaintiff has the burden of proving all of the first six (6) elements by a preponderance of the evidence.

*[add definition of preponderance of the evidence]*

The plaintiff has the burden of proving the seventh element by clear and convincing evidence, which is a higher standard than preponderance of evidence.

*[add definition of clear and convincing evidence]*

The plaintiff must present clear and convincing evidence that the defendant knew that the statement was false or that the defendant published the statement with reckless disregard of whether it was false or not.

If you find that the plaintiff has established all seven (7) elements by the applicable burden of proof, then you must find for the plaintiff. If you find that the plaintiff has failed to establish any of the seven (7) elements, then you must find for the defendant.

#### **T.P.I.—CIVIL 7.05 Recklessness—Public official**

Damages may not be awarded against a defendant for the defamation of a public official or public figure unless the defendant's actions were reckless. In order to establish that a defendant has acted recklessly, the plaintiff must prove that the defendant had a high degree of awareness that the published statements were probably false. A mere failure to exercise ordinary or reasonable care in determining the truth of published material does not, standing alone, mean that a defendant has acted recklessly.

### **T.P.I.—CIVIL 7.06 Compensatory Damages**

If you find that all of the elements of the plaintiff's claim have been proven, the plaintiff is entitled to compensatory damages.

Compensatory damages should include an amount that you find will fairly and adequately compensate the plaintiff for the losses the plaintiff has suffered. You may award damages for the following injuries if you find that they were legally caused by the alleged libel:

1. The plaintiff's economic losses; and
2. Injury to the plaintiff's reputation; and
3. Emotional distress suffered by the plaintiff.

### **T.P.I.—CIVIL 7.07 Punitive Damages in Libel Actions**

Punitive damages are those that may be awarded in your discretion for the purpose of punishing the defendant and serving as an example to others. In this case you may award punitive damages if, and only if, you find:

First, that the plaintiff has proven the essential elements of his claim;

Second, that the defendant communicated the libelous statement knowing that it was false or with reckless disregard of whether it was false or not; and

Third, that the defendant has been guilty of [oppression] [fraud] [actual malice] [or] [wanton, reckless or willful misconduct]. [Malice means a motive and willingness to vex, harass, annoy, or injure another person. Malice may be shown by direct evidence of declarations of hatred or ill will, or it may be inferred from acts and conduct, such as by showing that the defendant's conduct was willful, intentional, and done in reckless disregard of its possible results.]

The law provides no fixed standard as to the amount of such punitive damages, but leaves the amount to your sound discretion, exercised without passion or prejudice.

## **Chapter 8 – INTENTIONAL TORTS**

### **A. ASSAULT AND BATTERY**

#### **T.P.I.—CIVIL 8.01 Definition—Assault**

An assault consists of two elements:

1. An intentional attempt or the unmistakable appearance of an intentional attempt to do harm to another person; and
2. The present ability or the unmistakable appearance of the present ability to do that harm.

**T.P.I.—CIVIL 8.02 Definition—Battery**

A battery is any intentional, unlawful, and harmful [or offensive] physical contact by one person with another person.

The intent required for a battery is not an intent to cause harm. It is an intent to do the act that causes the harm.

**T.P.I.—CIVIL 8.03 Right to Recover**

A plaintiff who has suffered any bodily harm legally caused by [an assault] [and] [battery] by a defendant is entitled to recover damages from the defendant for that injury.

**T.P.I.—CIVIL 8.04 Words Not Provocation**

Words alone, no matter how objectionable or insulting, will not [justify] [excuse] an assault or battery against the person who has spoken the words. However, you may consider those words to mitigate or reduce the plaintiff's damages if you find that:

1. The words were calculated to provoke or arouse the passions of a reasonable person; and
2. The words were spoken at the time of the incident or so near to the assault as to become part of the incident.

**T.P.I.—CIVIL 8.05 Police Making A Lawful Arrest**

A person who knows, or by using reasonable care should know, that a police officer is making a lawful arrest has a duty not to resist the arrest. An arresting officer may use force that is reasonably necessary to make a lawful arrest. However, an officer who uses more force than is reasonably necessary to make a lawful arrest commits a battery upon the person arrested as to the excessive force that is used.

## **T.P.I.—CIVIL 8.06 Use of Deadly Force by an Officer**

A person who knows, or by using reasonable care should know, that a police officer is making a lawful arrest has a duty not to resist the arrest. An officer may use the force that is reasonably necessary to make the arrest.

An officer may use deadly force only if:

1. All other reasonable means of arrest have been exhausted or are unavailable; and
2. The officer has probable cause to believe either:
  - a) the suspect has committed a felony involving serious physical harm or the threat of serious physical harm to the officer or to any other person; or
  - b) the person poses a threat of serious physical harm to the officer or to others unless that person is immediately apprehended; and
3. Where feasible, a warning has been given. Identifying oneself as an officer and giving an oral warning that deadly force might be used unless resistance or flight ceases is a sufficient warning.

## **T.P.I.—CIVIL 8.07 Self Defense—Defense of Property**

A person who is unlawfully attacked or who reasonably fears an unlawful attack may use as much force in self-defense as reasonably appears necessary.

[A person who knows, or reasonably believes, that a third person is about to be unlawfully attacked may use as much force in defense of the third person as the third person would be permitted to use in self-defense, as long as the action is necessary for the protection of the third person.]

[A person whose property is unlawfully intruded upon may use such force in defense of self and property as reasonably appears necessary.]

## **B. FALSE IMPRISONMENT**

### **T.P.I.—CIVIL 8.10 Definition**

False imprisonment is the unlawful violation of the personal liberty of another. It is an intentional and unlawful restraint, confinement, or detention that compels the person to stay or go somewhere against the person's will.

The restraining necessary to create a false imprisonment may result either from the use of force or from a threat of force. The threat may be either stated or implied from all of the circumstances. [False imprisonment does not require confinement in a jail or prison.]

### **T.P.I.—CIVIL 8.11 Arrest by a Law Enforcement Officer Without Warrant**

A law enforcement officer may, without a warrant, lawfully arrest a person:

[Whenever a public offense is committed or a breach of the peace is threatened in the officer's presence],

[Whenever the person has committed a felony, though not in the officer's presence],

[Whenever a felony has in fact been committed, and the officer has reasonable cause to believe that the person arrested committed it],

[Whenever a charge is made, upon reasonable cause, that a felony has been committed by the person to be arrested],

[Whenever the person is attempting to commit suicide].

[At the scene of a traffic accident, whenever an officer, based on personal investigation, has probable cause to believe that the driver of a vehicle committed a traffic offense.]

[Within four (4) hours after a traffic accident, if the officer has probable cause to believe that the person was driving under the influence of an intoxicant or drug and if emergency medical treatment for the driver is required and the driver has been transported to a health care facility]

[When a law enforcement officer responds to a domestic violence call and both the victim and alleged assailant are present, and if:

1. The officer actually observes the commission of an assault and battery or a more serious offense against the victim; or
2. The officer has probable cause to believe that an assault and battery or more serious offense has been committed although not in the officer's presence and that more violence will occur if the alleged assailant is not immediately taken into custody.]

### **T.P.I.—CIVIL 8.12 Arrest by Private Person**

A person who is not a law enforcement officer may lawfully arrest another person:

[for a public offense committed in the arresting person's presence];

[when the person arrested has committed a felony, although not in the arresting person's presence];

[when a felony has been committed and the arresting person has reasonable cause to believe that the person arrested committed it].

### **T.P.I.—CIVIL 8.13 Right of Reasonable Detention by Property Owner**

If an owner of property has reasonable cause to believe a person is stealing the owner's property, the owner may restrain that person for a reasonable time to protect the property and to investigate.

### **T.P.I. – CIVIL 8.14 Reasonable Cause for Arrest**

In order to find a reasonable cause for the [arrest] [detention] of the plaintiff, the defendant must have actually believed, and had a reasonable basis for the belief, that the plaintiff did the act that was the basis for the arrest. That is, the defendant must have examined the situation in the same manner as an ordinarily careful person would have done. Factors to be considered in determining whether a careful examination has been made include:

1. What information concerning the act was available; and
2. The source of the information; and
3. Whether or not the accused had the opportunity to explain the information.

### **T.P.I.—CIVIL 8.15 Use of Force by a Merchant in Recovering Property From a Suspected Shoplifter**

If a merchant has probable cause to believe a person is stealing goods held for sale, the merchant may:

1. Detain the person in a reasonable manner and for a reasonable length of time; and
2. Use a reasonable amount of force to protect the merchant, to prevent escape of the person detained, or to prevent the loss or destruction of the property.

### **T.P.I.—CIVIL 8.16 Use of Force in an Arrest by a Private Person**

A private person who may lawfully arrest another person may take, seize, or detain the other person by showing an intention to take the person into custody and to control that person. The use of force is permitted if the force employed:

1. Is not more than the force the arresting person reasonably believed to be necessary to make the arrest; and
2. If the force did not subject the person arrested to unnecessary risk of harm.

[The arresting person may break an outer or inner door or window of a dwelling house only if the person to be arrested:

1. Has committed a felony; and
2. Has been given notice of the arresting person's intention to make the arrest; and
3. Has refused to allow the arresting person to enter.]

[The arresting person may use deadly force only to prevent the commission of a felony that threatened human life or serious injury. Deadly force is force that is likely to cause death or serious injury.]

#### **T.P.I.—CIVIL 8.17 Permissible Damages**

A plaintiff who has been [falsely arrested] [or] [falsely imprisoned] by a defendant is entitled to recover damages from that defendant.

In determining compensatory damages, you should consider the following elements if established by the evidence and caused by the [false arrest] [or] [false imprisonment]:

1. Physical suffering; and
2. Mental suffering and humiliation; and
3. Loss of time or interruption of business; and
4. Reasonable and necessary expenses incurred; and
5. Injury to reputation.

#### **C. MALICIOUS PROSECUTION**

##### **T.P.I.—CIVIL 8.20 Introduction**

A plaintiff is entitled to recover those damages that are proximately or legally caused by the malicious prosecution of the plaintiff by the defendant.

### **T.P.I.—CIVIL 8.21 Definition—Malicious Prosecution**

A malicious prosecution is the starting or bringing about of [criminal] [civil] proceedings against a person for an improper purpose and without probable cause. The proceedings must terminate in favor of the person who was prosecuted.

### **T.P.I.—CIVIL 8.22 Necessary Elements**

To recover damages for malicious prosecution, the plaintiff must prove all of the following elements:

1. That the defendant started or caused someone else to start the [criminal] [civil] proceeding against the plaintiff; and
2. That the defendant acted with malice; and
3. That the defendant acted without probable cause in starting or causing someone else to start the [criminal] [civil] proceeding against the plaintiff; and
4. That the case against the plaintiff ended in the plaintiff's favor.

[In this case, there is no dispute that the case against the plaintiff ended in the plaintiff's favor. I will instruct you on the remaining elements at issue in this case.]

The plaintiff has the burden of proving both a lack of probable cause and malice on the part of the defendant. I will give you definitions of both terms.

### **T.P.I.—CIVIL 8.23 Malice and Malicious Defined**

The words "malice" and "malicious," [as used in the instructions on malicious prosecution] mean a wish to annoy or injure another person. Malice means an attitude or state of mind that brings about the doing of an act for some improper or wrongful motive or purpose. It is not necessary that the defendant be angry or vindictive or bear an actual hostility or ill will toward the plaintiff.

Malice may be proved by direct evidence or it may be proved by circumstantial evidence. You may infer that malice has been proven if you find that the defendant acted without probable cause, or with bad faith, or in the absence of an honest and sincere belief that the [criminal] [civil] proceeding was justified by the existing facts and circumstances.

Malice alone, however, is not sufficient to support a finding of malicious prosecution. A person motivated by malice may nonetheless have a justifiable reason for prosecution of the matter.

The plaintiff must also establish that the defendant acted without probable cause in beginning the [criminal] [civil] proceeding against the plaintiff. You may not consider any evidence of malice in determining if the defendant acted without probable cause.

### **T.P.I.—CIVIL 8.24 Probable Cause**

Probable cause is the existence of such facts and circumstances that would lead a reasonable person to believe that the accused person committed the [crime] [act] [offense].

Probable cause is to be determined solely from an objective, disinterested, and impartial examination of the surrounding facts and circumstances existing at the time defendant made the accusation against the plaintiff. Facts appearing after the time the [criminal] [civil] proceeding is started may not be considered in evaluating the defendant's conduct.

You are not required to determine whether the plaintiff was guilty or innocent. [That the plaintiff was innocent of the charges] [or] [that the Grand Jury did not indict the plaintiff] [or] [that the action was decided in favor of the plaintiff] does not mean that there was a lack of probable cause at the time the defendant acted. The question in a malicious prosecution case is not whether the plaintiff was [guilty of the crime alleged] [legally responsible], but whether the facts, viewed objectively at the time of the incident, would lead a reasonable person to believe that the plaintiff [was guilty of the crime charged] [legally responsible].

If you find that the plaintiff has proven that there was not probable cause to believe that the plaintiff [committed the crime] [was legally responsible], you will consider whether the remaining elements have been proven by the plaintiff. If you find that the plaintiff has not proven the lack of probable cause, or find that there was probable cause, you must find in favor of the defendant.

#### **T.P.I.—CIVIL 8.25 Reasonable Investigation**

The plaintiff contends that the defendant failed to reasonably investigate the facts and circumstances surrounding the incident before starting the [criminal] [civil] proceeding. In determining whether or not probable cause existed at the time the [criminal] [civil] proceeding was started, you may consider:

1. Whether or not a reasonable person would have made a further investigation of the facts and circumstances before starting the [criminal] [civil] proceeding; and
2. What additional facts a reasonable investigation would have revealed; and
3. Whether, with the knowledge of those facts, a reasonable person would have started the [criminal] [civil] proceedings.

#### **T.P.I.—CIVIL 8.26 Probable Cause—Advice of Counsel**

The defendant relies upon the defense of advice of counsel. In order to prevail on this defense, the defendant must prove:

1. The defendant, in good faith, asked the advice of an attorney before [having the plaintiff arrested] [or] [starting or causing someone else to start the criminal action] [or] [beginning the civil action against the plaintiff]; and

2. The defendant made a full, fair, and complete disclosure to the attorney of all of the facts the defendant knew that tended to prove or disprove the [criminal charge] [civil allegations]; and
3. The defendant then acted upon the advice of the attorney in the belief that the plaintiff was [guilty] [legally responsible].

If you find that these three elements have been proven by the defendant, then you must find that the defendant had probable cause to [have the plaintiff arrested] [start or cause someone else to start the prosecution] [start the civil action against the plaintiff].

### **T.P.I.—CIVIL 8.27 Malicious Continuation of Prosecution**

After [criminal] [civil] proceedings are started, a person who takes an active part in continuing or causing someone to continue those proceedings is as responsible for a malicious prosecution, if any, as if that person had begun the proceedings.

The plaintiff must prove that the defendant took an active part in the continuation of the prosecution after learning that there was no probable cause for believing that the person accused is guilty of the charges. It is not enough that the defendant appears as a witness against the plaintiff that the defendant fails to take action to stop the prosecution. The defendant must have actively insisted upon or urged further prosecution.

## **D. ABUSE OF PROCESS**

### **T.P.I.—CIVIL 8.30 Definition—Abuse of Process—Elements**

Abuse of process is the use of legal process for a result for which the legal process was not designed and for a wrongful purpose.

To be entitled to damages for abuse of process, the plaintiff must show that the legal process was used for a purpose for which it was not designed in order to compel the plaintiff to do something that could not legally be compelled by the use of that legal process.

## **E. MISREPRESENTATION**

### **T.P.I.—CIVIL 8.35 Introduction**

The plaintiff seeks to recover damages for the alleged [intentional] [reckless] [negligent] misrepresentation of the defendant. To recover damages, the plaintiff must prove each of the following elements:

### **T.P.I.—CIVIL 8.36 Intentional Misrepresentation**

1. The defendant made a representation of a present or past material fact; and
2. The representation was false; and
3. The defendant knew that the representation was false when it was made [or the defendant made the representation recklessly without knowing whether it was true or false]; and
4. The defendant intended that the plaintiff rely upon the representation and act or not act in reliance on it; and

5. The plaintiff did not know that the representation was false and was justified in relying upon the truth of the representation; and
6. As a result of plaintiff's reliance upon the truth of the representation, the plaintiff sustained damage.

#### **T.P.I.—CIVIL 8.37 Expression of Opinion**

An expression of opinion usually is not a basis for an action alleging misrepresentation.

However, a defendant who makes a representation may be found to have made a representation of fact instead of an expression of opinion if:

1. The defendant either had or claimed to have had superior knowledge or information; and
2. The plaintiff reasonably relied upon the defendant's supposed superior knowledge or information.

A statement may also be considered a statement of fact if it is not made as a mere expression of that person's opinion, but is given in a way that a party may reasonably rely and act upon it as a statement of fact.

#### **T.P.I.—CIVIL 8.38 Misrepresentation by Concealment**

1. The defendant concealed or suppressed a material fact;
2. The defendant was under a duty to disclose the fact to the plaintiff;
3. The defendant intentionally concealed or suppressed the fact with the intent to deceive the plaintiff;
4. The plaintiff was not aware of the fact and would have acted differently if the plaintiff knew of the concealed or suppressed fact; and
5. As a result of the concealment or suppression of the fact, the plaintiff sustained damage.

#### **T.P.I.—CIVIL 8.39 Nondisclosure of Known Facts**

The failure of one party to disclose material facts known by that party and not the other party is not fraud unless there is some relationship between the parties that creates a duty to disclose those facts.

There is a duty to disclose known facts when the party having knowledge of the facts is in a fiduciary or a confidential relationship with the other party. There is a fiduciary or confidential relationship when one person may reasonably trust or have confidence in the integrity and fidelity of another.

[(In the absence of a fiduciary or a confidential relationship) a duty to disclose known facts arises where one party knows of material facts and also knows that those facts are neither known nor readily accessible to the other party.]

### **T.P.I.—CIVIL 8.40 Fraudulent Conveyance to Defeat Surviving Spouse of Share in Estate**

A married person may not fraudulently convey, transfer, or give property or funds to that person's children [and/or others], intending to prevent the surviving spouse from receiving the share of the deceased spouse's estate provided by law.

You must first determine whether the deceased spouse intended to prevent the surviving spouse from receiving part of the [property] [funds]. If you find no intent to do so, your verdict will be for the defendant. If you find an intent to prevent the surviving spouse from receiving part of the [property] [funds], then you must determine whether the [conveyance] [transfer] [gift] was fraudulent as to the surviving spouse.

To determine whether the [conveyance] [transfer] [gift] was fraudulent as to the surviving spouse, you should consider all of the surrounding circumstances, including:

1. Whether the transfer was made with or without consideration. Consideration means that something was given in return for the [conveyance] [transfer] [gift];
2. The size of the transfer in relation to the total estate of the deceased;
3. The length of time between the transfer and death;
4. The relationship between the husband and the wife at the time of the [conveyance] [transfer] [gift] [realizing that a strained marriage relationship does not of itself establish fraudulent intent];
5. The source of the [property] [funds];
6. Whether the surviving spouse was adequately provided for in a will or by other means; and
7. To what extent the deceased was anticipating death at the time of the transfer.

### **T.P.I.—CIVIL 8.41 Promise Without Intent to Perform**

Generally, the subject of a misrepresentation must be a past or existing fact and not a mere promise. If the promise is made without the intent to perform, however, the promise may be a misrepresentation. To recover under this theory, the plaintiff must prove each of the following:

1. The defendant made a promise as to a material matter and, at the time the promise was made, the defendant did not intend to perform it;
2. The defendant made the promise with an intent to deceive the plaintiff. In other words, the defendant made the promise to induce the plaintiff to rely upon it and to act or not act in reliance upon it;
3. The plaintiff was unaware that the defendant did not intend to perform the promise; the plaintiff acted in reliance upon the promise; and the plaintiff was justified in relying upon the promise made by the defendant; and
4. As a result of the reliance upon defendant's promise, the plaintiff has sustained damage.

#### **T.P.I.—CIVIL 8.42 Proof of Intent Not to Perform**

Evidence of the defendant's conduct before or after the promise was made may be considered in determining whether the defendant intended to perform when the promise was made.

#### **T.P.I.—CIVIL 8.43 Negligent Misrepresentation**

To prove negligent misrepresentation, plaintiff must prove that:

1. The defendant was acting in the course of [his] [her] [its] [business] [profession] [employment] [or in any other transaction in which defendant has a financial interest];
2. The defendant negligently supplied false information;
3. The defendant intended the information to guide plaintiff's business transaction;
4. The plaintiff justifiably relied upon the false information; and
5. As a result, plaintiff suffered a financial loss.

Plaintiff may prove that defendant negligently supplied false information by providing that (a) defendant failed to exercise reasonable care or competence in obtaining information about the business transaction or that (b) defendant failed to exercise reasonable care and competence in communicating that information.

### **T.P.I.—CIVIL 8.44 Liability to Third Persons for Negligent Misrepresentation**

To recover in this case, the plaintiff must be the person or a member of a limited group of persons that the defendant intended to benefit or guide with the information the defendant supplied, and the plaintiff must have relied on the information in a transaction the defendant intended to influence [or in a substantially similar transaction].

The plaintiff may also recover if the plaintiff received the information from another person whom the defendant knew intended to transmit the information to a similar group of persons, and if the plaintiff relied on the information in a transaction the defendant intended to influence.

### **T.P.I.—CIVIL 8.45 Person to Whom Representations Made**

[A person is subject to liability only to those persons to whom the person making the representation intends to induce to act in reliance upon the representation. If others become aware of the representation and act upon it, there is no liability even though the party who made the representation should reasonably have foreseen such a possibility.]

[A person does not need to make a representation directly to the person whom the defendant intends will act upon it. The defendant may make the representation to a third person intending that the third person communicate the representation to the person whom the defendant intends will act upon it.]

[A person who makes a representation intending to defraud the public or a particular class of persons, is considered in law to have intended to defraud every individual in the same category who was actually misled by the representation.]

### **T.P.I.—CIVIL 8.46 Reliance**

A party seeking recovery for [intentional] [negligent] misrepresentation must have relied upon the representation. In other words, the plaintiff would not have entered into the transaction without the representation. You must determine whether reliance upon the representation substantially influenced the party's action, even though other influences operated as well.

Reliance upon a representation may be shown by direct evidence or may be inferred from the circumstances.

### **T.P.I.—CIVIL 8.47 Right to Rely**

A person claiming to have been damaged by a false representation must not only have acted in reliance on the representation but must have been justified in that reliance. That is, it must be reasonable for the person, in the light of the circumstances and that person's intelligence, experience, and knowledge, to accept the representation without making an independent inquiry or investigation.

### **T.P.I.—CIVIL 8.48 Effect of Independent Investigation**

A person who makes an independent investigation of the subject matter of the alleged false representation is not entitled to recover damages if that person decides to enter into the transaction solely as the result of an independent investigation and not as a result of any reliance upon the representation.

### **T.P.I.—CIVIL 8.49 Damages—Benefit of the Bargain Rule**

If you find that the plaintiff is entitled to a verdict against the defendant, you must then award damages in an amount that will reasonably compensate the plaintiff for all the loss suffered by the plaintiff that was legally caused by the misrepresentation upon which you base your finding of liability.

You will award the plaintiff the “benefit of the bargain.” The “benefit of the bargain” is the difference between the value of what the plaintiff would have received if the misrepresentation had been true and the actual value of what the plaintiff received.

Actual value means market value. Market value is the highest selling price that real or personal property would bring on the open market. In making your finding of market value, you will assume that the seller has a reasonable time to sell and that the seller is willing to sell but not forced to do so. You will also assume that the buyer is ready, willing, and able to buy but is not forced to do so, and that the buyer has a reasonable time and full opportunity to investigate the property and to determine its condition, suitability for use, and all of the things about the property that would naturally and reasonably affect its market value.

## **F. RETALIATORY DISCHARGE FROM EMPLOYMENT**

### **T.P.I.—CIVIL 8.60 Retaliatory Discharge From Employment**

Generally an employer can discharge an employee-at-will, such as plaintiff, for good cause, for bad cause, or for no cause at all, without incurring liability for damages. However, there is an exception to this rule where the employer has violated the established public policy of our state. Such a violation of public policy occurs when the employee is discharged in retaliation for the employee’s exercise of a right or duty established by statute or recognized by public policy.

[It is the policy and the law of this state that employees must be able to exercise their rights under the workers’ compensation laws without fear of reprisal or penalty from an employer.]

[It is the policy and the law of this state that employees must be able to refuse to violate state law and to disclose a violation of state law without fear of reprisal or penalty from an employer.]

Therefore, if you find that plaintiff’s exercise of a right or duty [established by statute or recognized by public policy] was a substantial motivating factor in the defendant’s decision to discharge the plaintiff and the discharge was in retaliation for the plaintiff’s exercise of rights, then you may award damages.

To prevail in a retaliatory discharge case [alleging a violation of the workers' compensation law], an employee must prove:

1. That the plaintiff was employed by the defendant;
2. That the plaintiff [sought workers' compensation benefits].
3. That the defendant discharged the plaintiff; and
4. That the [request for workers' compensation benefits] was a substantial motivating factor in the defendant's discharge decision.

If you find that the plaintiff's exercise of rights [under the worker's compensation act] was a substantial motivating factor in the defendant's decision to discharge the plaintiff, then you must find that this was a retaliatory discharge, even though other reasons may have existed for discharge.

## **G. CONVERSION**

### **T.P.I. - CIVIL 8.65 Conversion**

A conversion is any assumption of control over property that is inconsistent with the rights the owner. A conversion may consist of the:

1. Use and enjoyment of personal property of another without the owner's consent; or
2. Destruction or dominion over the property of another by excluding or defying the owner's right; or
3. Withholding of personal property from the owner under a claim of title, inconsistent with the owner's claim of title.

[If personal property that has been entrusted to another is used in a different manner, or for a different purpose, or for a longer time than was agreed upon by the parties, the person who received the personal property is guilty of conversion. In that case, the person to whom the property is entrusted is answerable for all damages, including a loss that due care could not have prevented.]

## **H. INVASION OF PRIVACY**

### **T.P.I. – CIVIL 8.70 Invasion of Privacy**

The plaintiff [also] seeks to recover damages based on a claim of invasion of privacy. To recover damages, plaintiff must prove each of the following by a preponderance of the evidence:

The defendant intentionally intruded, physically or otherwise, upon the plaintiff's solitude or seclusion or the private affairs or concerns of the plaintiff;

The intrusion would be highly offensive to a reasonable person; and

The intrusion caused injury or loss to plaintiff.

## **Chapter 9 – OWNERS AND OCCUPIERS OF LAND**

### **A. OWNERS AND OCCUPIERS**

#### **T.P.I. – CIVIL 9.01 Duty of Owners, Occupants or Lessors of Premises**

One who owns, occupies or leases property is under a duty to use ordinary care, which is the care that ordinarily careful persons would use to avoid injury to themselves or others under the same or similar circumstances. There is no duty to guarantee the safety of those entering upon the property.

You should consider all the surrounding circumstances in deciding if the defendant used such care.

#### **T.P.I. – CIVIL 9.02 Premises – Unsafe Condition**

To recover for an injury caused by an unsafe condition of the property, the plaintiff must show that the defendant either created the unsafe condition or knew of it long enough to have corrected it [or given adequate warning of it] before plaintiff's injury, or that the unsafe condition existed long enough that the defendant, using ordinary care, should have discovered and corrected [or adequately warned of] the unsafe condition. An unsafe condition is a condition which creates an unreasonable risk of harm.

#### **T.P.I. – CIVIL 9.03 Trespassers**

A trespasser is a person who enters onto the land of another without actual or implied permission.

A trespasser is protected only against willful or reckless conduct by the owner or occupant. If the owner or occupant knows of the entry on the land, however, the owner or occupant must use reasonable care to warn the trespasser of any known danger that is not obvious.

#### **T.P.I. – CIVIL 9.04 Trespassing Children**

When an owner [possessor] of property maintains an unusually dangerous condition and knows or has reason to know children are likely to trespass onto the property where the condition exists, the owner [possessor] must use reasonable care to eliminate the danger or to otherwise protect the children. In order for you to find a landowner [possessor] negligent with regard to trespassing children, the plaintiff must prove by a preponderance of the evidence that:

The landowner [possessor] maintained a dangerous condition that was not a natural condition of the land and the landowner [possessor] knew or should have known it posed a risk of death or serious bodily harm to trespassing children;

The landowner [possessor] knew or should have known children were likely to trespass onto the property, either because they would be lured there by the dangerous condition itself or because children regularly used the property as a playground.

Either the dangerous condition was not apparent, or children, because of their youth, would be unlikely to discover and comprehend the risk;

Both the usefulness to the landowner [possessor] of maintaining the dangerous condition and the burden of eliminating the danger was significantly outweighed by the risk of harm to children who would foreseeably trespass onto the property; and

The owner failed to use reasonable care to either eliminate the danger or otherwise to protect the children.

### **T.P.I. – CIVIL 9.05 Plaintiff's Duty of Care**

The plaintiff has a duty to use reasonable care for the plaintiff's own safety and to make responsible use of plaintiff's senses. The plaintiff has a duty to see or be aware of an unsafe condition that is obvious or should be discovered through the use of reasonable care.

### **T.P.I. – CIVIL 9.06 Duty to Workers – Control**

When an [owner] [or] [occupant] of property remains in control of the premises where work is being done, the [owner] [or] [occupant] has a duty to use ordinary care in managing the property to avoid exposing the employees of a contractor or subcontractor to an unreasonable risk of harm.

When the contractor has complete control of the premises where the accident occurred and the [owner] [occupant] retains no control of that part of the property [except to the extent of determining if the work is being performed according to the contract], the [owner] [occupant] owes no duty of care to the employees of the [contractor] [subcontractor].

### **T.P.I. – CIVIL 9.07 Duty to Workers – Hazardous Situations**

An [owner] [occupant] of property who [conducts] [maintains] an inherently dangerous [activity] [substance] [instrumentality] upon the property does not guarantee the safety of others, but is required to use due care appropriate to the hazards arising from the dangerous [activity] [substance] [instrumentality]. [This duty of due care cannot be avoided by delegating the duty to a contractor or subcontractor.]

### **T.P.I. – CIVIL 9.08 Owner of Property Adjoining Sidewalk**

Normally the owner of property adjoining a public sidewalk does not have a duty to keep the sidewalk in a safe condition. If, however, the owner has changed the sidewalk to benefit the owner's property, then the owner has a duty to use ordinary care in making the change and to keep the changed portion of the sidewalk in a reasonably safe condition.

[This duty exists even if a former owner made the change, or if the local government changed the sidewalk at the request of the property owner.] A failure to meet this duty is negligence.

[A condition is not unsafe if the risk created by the condition was so insignificant in view of the surrounding circumstances that it did not create a substantial risk of injury when the sidewalk was used with due care in a manner that was reasonably foreseeable.]

### **T.P.I. – CIVIL 9.09 Adjoining Owner Creating Hazard on Sidewalk**

When the activities of a business are conducted in a way that creates a hazard on an adjoining sidewalk and the operator of the business knows or has reason to know of that hazard, the operator is under a duty to use reasonable care to remove the hazard within a reasonable time and to give warning of its existence prior to removal. Failure to do so is negligence.

[An operator of a business has reason to know of a hazard when it has existed for so long a time that by using reasonable care in inspecting the area the operator could have discovered the hazard in time to warn others or to correct it.]

### **T.P.I. – CIVIL 9.10 Pedestrian's Rights and Duties on Sidewalks**

A pedestrian using ordinary care and making normal use of a public sidewalk can assume that it is in a reasonably safe condition, unless the pedestrian knows or reasonably should know that it is not. To use ordinary care, a pedestrian does not have to look continuously at the sidewalk or be on a continuous lookout for danger. A pedestrian is required, however, to use ordinary care for the pedestrian's safety, including the reasonable use of eyesight and other senses.

## **B. NUISANCE**

### **T.P.I. – CIVIL 9.13 Nuisance – Definition**

A nuisance is the maintenance of a wrongful condition of one's own property [or property that one has a right to use] over an unreasonable length of time. A nuisance is not an act or failure to act or the result of a negligent or reckless act.

A nuisance is an unreasonable or unlawful use of property that results in material or substantial annoyance, inconvenience, discomfort, harm or injury to the plaintiff, to plaintiff's personal comfort or to the plaintiff's free use, possession or occupation of the plaintiff's own property.

It is not a defense to a nuisance that the defendant used great care or caution to prevent harm.

#### **T.P.I. – CIVIL 9.14 Temporary Nuisance – Damages**

A temporary nuisance is one that can be corrected by money, labor or both. The general measure of damages for a temporary nuisance is the decrease in rental value of the plaintiff's property while the nuisance exists. Special damages, apart from property damage, may be recovered for loss of profit, personal profit, personal discomfort, inconvenience, personal injury and emotional distress.

### **B. LEASED PREMISES**

#### **T.P.I. – CIVIL 9.20 Landlord's Liability – Accident on Leased Premises**

An owner who knows, or in the use of reasonable care should have known, of an unsafe condition existing when the tenant took possession has a duty to inform the tenant of the unsafe condition if it was unknown to the tenant, was not apparent and would not have been discovered by reasonable inspection of the property. An owner who fails to inform the tenant of the unsafe condition is responsible for damages resulting from the unsafe condition to a person lawfully on the premises. An unsafe condition is a condition which creates an unreasonable risk of harm.

#### **T.P.I. – CIVIL 9.21 Common Area or Area Under Landlord's Control**

The [owner] [landlord] is under a continuing duty to use reasonable care to keep in good repair and safe condition the common area(s) available to those lawfully on the premises. [An owner] [A landlord] has the duty to correct an unsafe condition within a reasonable period of time once the [owner] [landlord] has actual or constructive notice of the condition. An unsafe condition is a condition which creates an unreasonable risk of harm.

[An owner] [A landlord] who fails to meet this duty is responsible for damages legally caused by an unsafe condition in a common area under the [owner's] [landlord's] control.

#### **T.P.I. – CIVIL 9.22 Rented Premises – Promise to Put or Keep Premises in Repair**

A landlord who has promised at or before the time of renting to put [keep] the premises in repair has a duty to use reasonable care to make an inspection for latent or obscure defects [before transferring possession] [while the tenant has possession]. A landlord has a duty to correct a defect

discovered by the landlord's inspection or to warn the tenant of a defect if the defect was unknown and would not be discovered by the tenant making a reasonable inspection.

### **T.P.I. – CIVIL 9.23 Landlord's Liability to Invitee of Lessee – Property Leased for Public Purpose**

An owner who leases property to be used for a public or a semi-public purpose is subject to the same liability as the tenant if at the time the property was leased:

- (1) A condition existed on the property that made its intended use dangerous to other people or to their property; and
- (2) The owner knew of the condition or by using reasonable care should have known it.

## **Chapter 10 – PRODUCTS LIABILITY**

### **A. STRICT LIABILITY**

#### **T.P.I. – CIVIL 10.01 Strict Liability**

One who manufactures or sells a defective or unreasonably dangerous product is responsible to the ultimate consumer of the product for physical harm caused to the consumer or the consumer's property if:

- (1) The [manufacturer] [seller] is engaged in the business of [manufacturing] [selling] such a product; and
- (2) It is expected to and does reach the user or consumer without substantial change in the condition in which it was [manufactured] [sold].

A product is "defective" if it is unsafe for normal or reasonably anticipated handling and use. A product is "unreasonably dangerous" if it is more dangerous than would be reasonably expected by the ordinary consumer or would not be offered for sale by a reasonably careful manufacturer or seller who knew of its dangerous condition. An "ordinary consumer" is a consumer who purchases or uses the product with the ordinary knowledge common to the community as to its characteristics. A "manufacturer" is a person or company that designs, fabricates, products, compounds, processes or assembles any product or its component parts. The word "seller" includes a retailer, wholesaler, or distributor. A seller is any individual or organization in the business of selling a product, either for resale or for use or consumption. [A lessor or bailor engaged in the business of leasing or bailment of a product is a seller.]

A [seller] [manufacturer] of a product is not responsible for any injury to person or property caused by the product unless the product is determined to be in a defective condition or is unreasonably dangerous at the time it left the [seller's] [manufacturer's] control. In making this

determination, you must apply the state of scientific and technological knowledge available to the [seller] [manufacturer] at the time the product was placed on the market, rather than at the time of injury. Consider also the customary designs, methods, standards and techniques of manufacturing, inspecting and testing by other manufacturers [sellers] of similar products.

This instruction is based upon the *Restatement (Second) of Torts*, §402A, as modified by the Tennessee Products Liability Act of 1978, T.C.A. §29-28-10 to T.C.A. §29-28-108. The statute states Tennessee's position allowing liability for a product that is either unreasonably dangerous or defective, rather than requiring that the product meet both tests. *Smith v. Detroit Marine Engineering Corp.*, 712 S.W.2d 472 (Tenn. App. 1985); *Massey Seating v. 200 Easley Bridge*, 10 TAM 43-14 (Tenn. App. M.S., Sept. 25, 1985).

T.C.A. §29-28-104 creates a presumption that a product is not unreasonably dangerous when the manufacturer or seller complies with governmental standards, but the presumption is rebuttable.

T.C.A. §29-28-106 codifies the sealed container doctrine of *Walker v. Decora, Inc.*, 225 Tenn. 504, 471 S.W.2d 778 (1971), but permits an action against the seller of a sealed container if the manufacturer cannot be sued in this state.

A manufacturer is not an insurer of the product it designs, and it is not required that the design adopted be perfect, or render the product accident-proof, or incapable of causing injury, nor is it necessary to incorporate the ultimate safety features in the product. Hence, a departure from the required standard of care is not demonstrated where it is simply shown that there was a better, safer, or different design which would have averted the injury. *Kerley v. Stanley Works*, 553 S.W.2d 80 (Tenn. App. 1977).

Under Section 402A, damages are limited to physical harm to person or property. Economic loss is not included. See Manuel & Richards, *Economic Loss in Strict Liability – Beyond the Realm of 402A*, 16 Mem.St.U.L.Rev. 315 (1986).

Comparative fault principles apply in products liability actions based on strict liability in tort and a plaintiff's ability to recover damages in such a case should not be unaffected by the extent to which his injuries result from his own fault. Therefore a plaintiff can recover as long as his fault is less than fifty percent. These principles also apply in enhanced injury cases in which the defective product does not cause or contribute to the underlying accident. In this latter case, the respective fault of the manufacturer and of the consumer should be compared with respect to all damages and injuries for which the fault of each is a cause in fact and a proximate cause. *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684 (Tenn. 1995).

Joint and several liability against parties in the chain of distribution of a product is essential to the theory of strict products liability and these parties must be treated as a single unit for the purpose of determining and allocating fault. *Owens v. Truckstops of America*, 915 S.W.2d 420 (Tenn. 1996).

**Consumer Expectation Test:** Before a product is deemed unreasonably dangerous it must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Under this test, a product is not unreasonably dangerous if the ordinary consumer would appreciate the condition of the product and the risk of injury. **Prudent Manufacturer Test:** This test imputes knowledge of the condition of the product to the manufacturer and is whether, given that knowledge, a

prudent manufacturer would market the product requiring proof about the reasonableness of the manufacturer's or seller's decision to market the product. Here the court balances the usefulness of the product against the magnitude of risk or danger likely to be caused by the product. Factors to be considered and weighed include the usefulness and desirability of the product, the safety aspects of the product, the availability of a substitute product which would meet the same need, the manufacturer's ability to eliminate the unsafe character, the user's ability to avoid danger, the user's awareness of the danger, and the feasibility of spreading the loss. *Ray by Holman v. BIC Corp.*, 925 S.W.2d 102 (Tenn. App. 1998).

In T.C.A. §29-28-102(8), the word "ordinary" modifies the consumer, not the product, and applies to the customary or usual consumer of the product. Plaintiff is required to establish what an ordinary consumer purchasing the particular product would expect. *Hughes v. Lumbermens Mut. Cas. Co., Inc.*, 2 S.W.3d 218 (Tenn. App. 1999).

The consumer expectation test may be used in all products cases in which a party intends to establish that a product is unreasonably dangerous. The consumer expectations test and the prudent manufacturer test are not mutually exclusive, and therefore either or both tests are applicable in cases in which a product is alleged to be unreasonably dangerous. T.C.A. §29-28-102(8); *Jackson v. General Motors Corp.*, 60 S.W.3d 800 (Tenn. 2001).

An affirmative defense should not be charged if it is not pled. *Whaley v. Rheem Mfg. Co.*, 900 S.W.2d 296, 304 (Tenn. App. 1995).

### **T.P.I. – CIVIL 10.02 Strict Liability – Adequacy of Warning**

Where proper instructions for use and an adequate warning of hazards are given, the seller may reasonably assume that they will be read and followed. Thus, a product is not in a defective condition nor is it unreasonably dangerous, if:

1. The manufacturer or seller has given proper instructions for the use of a product and an adequate warning of the dangers associated with the use or misuse of the product; and
2. The product is safe for use if the instructions and warning are read and followed.

Adequate and proper instructions establish procedures for efficient use and for avoiding danger. An adequate warning is one calculated to call to the attention of a reasonably careful person the nature and extent of the danger involved in using or misusing the product.

In preparing instructions and warnings, manufacturers and sellers must take into account, among other things, the intended or reasonably expected users or consumers of the product. Where a danger or hazard is apparent to the ordinary user, a product is not unreasonably dangerous or defective even if no warning is given.

### **T.P.I. – CIVIL 10.03 Subsequent Alteration, Improper Maintenance and Abnormal Use**

The [seller] [manufacturer] of a product that is not defective or unreasonably dangerous at the time it leaves the [seller's] [manufacturer's] control, is not at fault if the product becomes defective or unreasonably dangerous by subsequent unforeseeable alteration, improper maintenance or abnormal use.

## **B. NEGLIGENCE LIABILITY**

### **T.P.I. – CIVIL 10.10 Manufacturer's Duty of Care**

The manufacturer of a product has a duty to use reasonable care in designing, manufacturing, testing and inspecting the product [and in the selection, testing and inspection of any component parts made by another] so that the product may be safely used in the manner and for the purpose for which it was made. The failure to fulfill that duty is negligence.

[When a product manufactured by another is marketed by a seller as its own, the seller has the same duty of care as a manufacturer.]

### **T.P.I. – CIVIL 10.11 Seller's Duty to Inspect**

Ordinarily, one who sells a product made by another does not have a duty to inspect or test the product for possible defects. If, however, a seller has reason to know that a product is likely to be unreasonably dangerous or defective, the seller has a duty to use reasonable care to inspect and test the product before selling it. A failure to fulfill this duty is negligence.

### **T.P.I. – CIVIL 10.12 Supplier's Duty to Warn**

A supplier who knows or reasonably should know that a product is likely to be dangerous for its intended use or foreseeable misuse has a duty to use reasonable care to warn of the product's danger or to reveal its unsafe condition. Warnings should be given to those persons whom the supplier should reasonably expect to use or to handle the product or be endangered by its use or handling, if the supplier reasonably should believe those persons would not realize the danger without the warnings. The failure to fulfill this duty is negligence.

[A "supplier" includes one who gives possession of a product for another's use or repair and one who permits another to use a product while it is still in the supplier's possession or control. Thus, a "supplier" includes, but is not limited to, sellers, lessors, donors, lenders, and bailors, including mechanics.]

## **T.P.I. – CIVIL 10.13 Maker of a Component Part**

The maker of a component part that is incorporated into a product completed or assembled by another has the same duty of care concerning that component part as the duty of care imposed upon a manufacturer.

### **C. MISREPRESENTATION - PRODUCTS**

## **T.P.I. – CIVIL 10.18 Misrepresentation – Products**

To recover for a claim of misrepresentation concerning a product, the plaintiff must prove:

1. Defendant's business included selling the product;
2. The defendant represented that the product [line] [was of a certain quality or character] [would perform (a) certain task(s)];
3. This representation was not merely opinion and was made to the general public or to those expected to buy [or use] the product;
4. The representation was not true;
5. The plaintiff knew of the representation but did not know it was untrue;
6. The plaintiff justifiably relied on the representation by [purchasing the product] [using the product consistent with the representation]; and
7. Plaintiff's reliance on the representation was a substantial factor in causing plaintiff's damages.

If the plaintiff proves all of the above factors, the plaintiff has established the defendant's fault even though the defendant's misrepresentation was not intentionally or negligently made.

### **D. WARRANTY LIABILITY**

## **T.P.I. – CIVIL 10.20 Breach of Warranty – Introduction**

In this case plaintiff seeks to establish liability on a breach of warranty. A breach of warranty may be established without proof of negligence on the part of the defendant and usually occurs in connection with a sale of goods.

A sale is the transfer of ownership of goods from a seller to a buyer for a price. "Goods" means any movable property and is interchangeable with the terms "product" or "article". "Seller"

includes the manufacturer, fabricator, producer, compounder, processor, assembler, retailer, wholesaler, distributor, lessor, or bailor.

“Buyer” includes the user or consumer of the product.

In this case, it has been alleged that a sale of \_\_\_\_\_ was made by \_\_\_\_\_, as seller, to \_\_\_\_\_ as buyer.

### **T.P.I. – CIVIL 10.21 Notice of Breach**

In order to recover for a breach of warranty, the buyer must have given the seller notice of the breach within a reasonable time after the buyer knew or, using reasonable care, should have known of the alleged defect. Determination of a reasonable time depends upon the circumstances and the kind of product involved.

While no particular form of notice is required, it must inform the seller of the alleged breach and the buyer’s intent to seek damages. Whether that notice was given within a reasonable time is for you to determine.

### **T.P.I. – CIVIL 10.22 Express Warranty**

A sale of goods may include a positive statement of fact or promise by the seller that the goods possess certain characteristics. An affirmation of fact or a promise is called a warranty. A warranty may be made orally or in writing, or it may be implied from the circumstances of the sale.

An affirmation of fact or promise made by the seller to the buyer that relates to the goods and upon which the buyer relies in making the decision to buy creates an express warranty that the goods shall conform to the affirmation or promise. [A sample or model upon which the buyer relies in making a decision to buy creates an express warranty that all of the goods will conform to the sample or model.] No particular word or expression is necessary to create an express warranty. It is not necessary for the seller to use formal words such as “warranty” or “guaranty” or that the seller would have a specific intention to make such warranty.

A statement that is merely the seller’s opinion or commendation of the goods shall not be construed to create a warranty. An opinion is the expression of a conclusion or judgment that does not purport to be based on actual knowledge. To determine whether a particular statement was a statement of fact or merely an expression of opinion, you may consider:

1. The circumstances under which the statement was made;
2. The manner in which the statement was made;
3. The ordinary effect, inference, and implication of the words used;
4. The relationship of the parties, including the history of the relationship; and

5. The subject matter of the statement.

### **T.P.I. – CIVIL 10.23 Exclusion of Express Warranty**

The buyer and seller may agree that there shall be no express warranties relating to the goods or they may agree that only certain warranties shall apply and all others be excluded. If such an agreement has been made, there can be no express warranty contrary to its terms.

### **T.P.I. – CIVIL 10.24 Buyer's Examination**

If, before making the purchase, the buyer examined the goods [a sample of the goods] [a model of the goods] to the buyer's satisfaction or refused to examine them, there is no implied warranty as to a defect that a reasonable examination should have revealed. If the defect could not have been discovered upon a reasonable inspection, the buyer's examination or refusal to examine the goods will not relieve the seller of responsibility for the defect.

If the defect is latent or concealed, a buyer may rely on an express warranty even though there has been an examination or an opportunity to examine the goods before making a purchase. If the buyer has actual knowledge, however, that the goods are defective, the buyer may not rely on an express warranty.

## **E. IMPLIED WARRANTIES**

### **T.P.I. – CIVIL 10.30 Implied Warranty of Fitness**

Unless excluded or modified by agreement, there is an implied warranty that goods shall be fit for the particular purpose for which the goods are required if, at the time of sale, the seller has reason to know the purpose and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods for that purpose.

### **T.P.I. – CIVIL 10.31 Implied Warranty of Merchantability**

[Unless excluded or modified by agreement of the parties,] [a] A sale of goods contains an implied warranty that goods are merchantable. This warranty requires that the goods:

[Pass without objection in the trade for goods of the description agreed upon in the contract between the parties].

[In the case of fungible goods, are of fair average quality for goods as described in the agreement between the parties. Goods are fungible if any unit, by its nature or usage of trade, is the equivalent of any other unit].

[Are fit for the ordinary purposes for which such goods are used].

[Run within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved].

[Are adequately contained, packaged, and labeled as the agreement may require].

[Conform to the promises or affirmations of fact made on the container or label, if any].

### **T.P.I. – CIVIL 10.32 Warranty Implied by Course of Dealing or Usage of Trade**

[Unless excluded or modified by agreement of the parties,] [a] A sale of goods may contain an implied warranty that the goods would be of a particular purpose. This warranty may arise [from the course of dealing between the seller and the buyer] [by a usage of trade]. [A course of dealing is a series of previous transactions between these parties that may fairly be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.] [A usage of trade is any practice or method of dealing having such regularity of observance in a locale, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.]

### **T.P.I. – CIVIL 10.33 Implied Warranty – Real Estate – New Building**

A seller who is in the business of building residential homes makes certain implied warranties when selling a home that [is under construction] [has recently been completed].

The seller warrants to the buyer that at the time [the deed is delivered to the buyer] [the buyer takes possession]:

1. The home with all its fixtures is free from major structural defects; and
2. The home is constructed in a workmanlike manner. Construction is of workmanlike quality if the work performed is generally acceptable in the building trade at the time and place of construction.

## **T.P.I. – CIVIL 10.34 Disclaimer of Implied Warranties**

Unless the circumstances indicate otherwise, implied warranties are excluded by expressions like “as is”, “with all faults” or other language that calls the buyer’s attention to the absence of warranties and makes it clear that there are no such warranties.

[For the implied warranty of merchantability to be excluded or modified, the seller must specifically make this fact known to the buyer and, if this information is contained in a writing, it must be conspicuous.]

[A warranty may also be excluded by a course of dealing between the seller and the buyer or a usage of trade. A course of dealing is a series of previous transactions between these parties that may fairly be regarded as establishing a common basis or understanding for interpreting their expressions and other conduct. A usage of trade is any practice or method of dealing having such regularity of observance in a locale, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.]

## **F. MISCELLANEOUS**

### **T.P.I. – CIVIL 10.40 Effect of User’s Allergy**

Unless the seller has reason to believe otherwise, the seller may reasonably assume that the product will be used by a person without an abnormal sensitivity to it.

If the plaintiff’s injury or damage resulted solely from an allergy or other abnormal physical sensitivity that the seller would have no reason to believe that a person using the product would have, the defendant is not at fault. If the plaintiff’s injury was caused partly by an allergy or other abnormal physical sensitivity and partly by a defect in the product, the seller is liable only for those damages caused by the defect.

## **Chapter 11 – STATUTORY ACTIONS**

### **A. EMINENT DOMAIN**

#### **T.P.I. – CIVIL 11.01 Power of Eminent Domain**

The constitution and laws of this state provide that all private property may be taken under the right of eminent domain. The right of eminent domain allows the state or authorized agencies to file a condemnation action to take property for public use provided the owner is paid just compensation.

The taking authority, \_\_\_\_\_, is authorized by law to use the right of eminent domain to take this landowner’s property for the purpose of \_\_\_\_\_. You may not consider the taking of the property, or the need for the property, or the wisdom locating the public use on the

landowner's property. As jurors, your only duty is to determine the just compensation to be paid to the landowner[s].

### **T.P.I. – CIVIL 11.02 Burden of Proof**

The landowner has the burden of proving by a preponderance of the evidence the fair cash value of the property taken [and the incidental damages, if any, to the landowner's remaining property].

[The taking authority has the burden of proving by a preponderance of the evidence the special benefits, if any, to the landowner's remaining property.]

### **T.P.I. – CIVIL 11.03 Measure of Damages – Property Taken**

The measure of damages is the fair cash market value of the land and improvements on \_\_\_\_\_, the date of taking. Fair cash market value means the amount of money that a willing buyer would pay for the property and that a willing seller would accept, when the owner is not compelled to buy and the landowner is not compelled to sell. In determining fair cash market value, you must consider all of the property's legitimate potential uses.

It is the fair cash market value at the time of the taking that must be determined and not what the property may be worth at some time in the future. You may, however, consider future value if, on the date of the taking, the probability of the future value had an effect upon its present value. The market value must be determined without regard to any increase or decrease in value because of the announcement or construction of the public improvement for which the property was taken.

The taking authority is not required to replace the property taken with other identical property or to reconstruct improvements on the property. The taking authority must pay the landowner[s] the cash market value of the property that has been taken. In other words, the landowner is not entitled to the replacement value of the property and you may not award a verdict based on replacement value.

### **T.P.I. – CIVIL 11.04 Partial Taking – Incidental Damages**

If the value of the landowner's remaining property has been or probably will be decreased by the construction of the improvements for which the property was taken, the landowner is entitled to additional damages called "incidental damages." Incidental damages are measured by the difference in the remaining property's fair cash market value, immediately before and immediately after the taking.

You should consider the following factors in determining the incidental damages, if any, to the remaining property:

1. The loss of its use for any lawful purpose;
2. Any unsightliness of the property or inconvenience in its use;

3. Any impairment to the owner's access to the property or between the property and nearby streets and highways; and
4. Any other consideration that could reduce the fair cash market value of the remaining property.

### **T.P.I. – CIVIL 11.05 Special Benefits**

Special benefits are advantages to the remaining property after the taking that are:

1. Reasonably certain to result to it from the construction of the public improvement as planned or proposed by the taking authority; and
2. Peculiar to the remaining property, as opposed to general benefits that result from advantages that will benefit the whole community or neighborhood.

If as a result of the public improvement you find any special benefits to the landowner's remaining property, then you should deduct the value of those benefits from the amount of incidental damages. Special benefits may be used only to reduce any incidental damages that you find. Special benefits cannot be used to reduce the just compensation due the landowner for the property taken. The landowner is entitled to receive the fair cash market value of the property taken without deduction.

### **T.P.I. – CIVIL 11.06 Moving Expenses**

The landowner is also entitled to the reasonable expense of removing furniture, household belongings, fixtures, equipment, machinery or stock in trade, if the removal was made necessary by the taking of the landowner's property rights. Expenses that may be recovered include the cost of:

1. Any necessary disconnections, dismantling, and disassembling;
2. Loading and moving to another location not more than fifty miles from the previous location; and
3. Reassembling, reconnecting and installing at the new location.

### **T.P.I. – CIVIL 11.07 Leasehold Value**

In this case you must apportion between the landowner and the lessee the fair cash market value of the property taken [and the amount of incidental damages, if any]. The lessee is the one renting or leasing the property.

To determine the portion of the damages to be recovered by the lessee, you should subcontract the rents due under the lease from the market value of the lease. The lessee is entitled to the

difference. [The lessee is also entitled to the amount of incidental damages that fairly applies to the leasehold].

After determining the lessee's portion of the damages, subtract that amount from the [fair cash market value of the property] [together with the incidental damages, if any,] to determine the landowner's portion.

The total amount that must be paid for the property by the taking authority cannot be increased because of the existence of the lease at the time of the taking, nor can the total amount exceed the total value of the property [plus incidental damages, if any].

### **T.P.I. – CIVIL 11.08 Leasehold Interest – Right of Lessee to Improvements**

You must also determine whether the improvements to the property are permanent and belong to the owners of the land or whether the improvements are temporary and removable from the property by the lessee.

The lessee's right to remove improvements that were erected at the lessee's expense depends upon the intention of the parties. As a general rule, a lessee is entitled to receive compensation for fixtures, structures and other improvements installed or erected by the lessee upon the property if the lessee has a right to remove such improvements prior to or upon the expiration of the lease. Improvements that are so attached to the land that their removal would cause serious injury to the property are generally considered to be a part of the land.

When the intention of the parties is not shown by expressed words, you may consider all of the facts and circumstances that might show what the parties intended at the time the improvement was placed on the land. If the parties intended that the items could be removed at the pleasure of the lessee, then the improvement is not part of the land.

If you find that the lessee has established by a preponderance of the evidence a right to remove the improvements that were erected at the lessee's expense, then the lessee is entitled to recover damages for the taking of the improvements.

If you find that the lessee did not have the right to remove the improvements erected at the lessee's expense, then the improvements are a part of the land and the value of the improvements belong to the landowner.

### **T.P.I. – CIVIL 11.09 Diversion of Traffic**

The landowner is not entitled to compensation because traffic flow has been diverted or rerouted from the roadway that adjoins the landowner's property.

### **T.P.I. – CIVIL 11.10 Inconvenience of Traffic Regulation**

You may not consider as an element of damages the inconvenience, if any, to a landowner resulting from the construction of a highway [center divider strip] [traffic island] [crossover] [\_\_\_\_\_]. Inconvenience is not compensable and you should not consider inconvenience in assessing damages, if any, to the remaining property.

### **T.P.I. – CIVIL 11.11 Loss of Business**

You must not include in your verdict any sum for loss of business or inconvenience to business, if any.

### **T.P.I. – CIVIL 11.12 Loss or Impairment of Access – No Other Property Taken**

The landowner has the right to go to and from the landowner's property, by using (Name of road or street). This is called the right of access and is part of the value of the property. The right of access is the access that is reasonably required for the landowner's property, considering all of the uses and purposes for which the property is adaptable and available. The landowner is entitled to compensation for a loss or serious impairment of the right of access.

The amount of compensation is measured by the difference, if any, in the fair cash market value of the landowner's property, valued immediately before and immediately after the loss or serious impairment of access. In determining the value of the access taken, you may consider whether the property has other access and whether access is created in the course of construction.

### **T.P.I. – CIVIL 11.13 Right of Access Extends to Next Intersecting Streets**

A landowner's right of access extends along the street on which the property is located to the next intersecting street[s]. Obstructing the street within this right of access may be a loss or serious impairment of the landowner's right of access.

## **B. EMINENT DOMAIN – VALUATION EVIDENCE**

### **T.P.I. – CIVIL 11.15 Opinion of Valuation Witnesses**

You must determine the fair cash market value of the subject property [and the incidental damages, if any,] [and special benefits, if any,] only from the opinions of the witnesses who have testified.

You may not find the market value of the property [or incidental damages] [or special benefits] if any, to be less than or more than that testified to by any witness.

While owners and valuation witnesses may express opinions on the issue of value, those opinions are worth no more than the reasons and factual data upon which they are based. The evidence you have heard concerning the reasons for their opinions of value, and all other evidence concerning the subject property [and other properties], is to be considered only for the limited purpose of enabling you to understand and weigh the opinions of the witnesses regarding the market value [and incidental damages [and special benefits], if any.

You should determine the weight that should be given to each opinion, and resolve conflicts in the testimony of different opinion witnesses. You should consider:

1. The education, qualifications, and experience of the witness[es];
2. The credibility of the witness[es];
3. The facts relied upon by the witness[es] to support the opinion; and
4. The reasoning used by the witness [es] to arrive at the opinion.

#### **T.P.I. – CIVIL 11.16 Comparable Sales**

To assist you in determining the fair cash market value of the property [and incidental damages, if any], you may consider the testimony of witnesses based upon sales or contracts to sell [the property or] other properties that witnesses consider comparable to the property. Generally, the more similar the properties, the closer their values.

In evaluating testimony concerning comparable sales you should consider the following:

1. Was the sale or contract to sell testified about made freely and in good faith;
2. How close in time are the date of valuation of this property to the date of the sale of the property being compared;
3. How similar are the sizes of the properties;
4. How similar are the physical features of the properties, including both improvements and natural features;
5. How similar are the uses that are or may be made of the properties;
6. How similar are the neighborhoods; and
7. Have proper adjustments been made for any dissimilarities between the properties.

#### **C. WILL CONTESTS**

(a) General

**T.P.I. – CIVIL 11.30 Will Contest – Nature of Proceedings**

This proceeding is a “will contest.” The plaintiff, \_\_\_\_\_, who is the \_\_\_\_\_ of the decedent, is contesting the validity of the will. The defendant, \_\_\_\_\_, is the [executor] [administrator] of the alleged will of the decedent, and is defending the validity of the will.

The plaintiff contends that the alleged will is not valid because:

[The alleged will was not executed and witnesses as required by law.]

[At the time of the execution of the alleged will, the decedent was not of sound mind.]

[The alleged will was obtained through the undue influence of \_\_\_\_\_.]

[The alleged will was obtained through the fraud of \_\_\_\_\_.]

**T.P.I. – CIVIL 11.31 Right of Testamentary Disposition**

Every person of sound mind, over the age of 18 years, has the right to make a will that disposes of that person’s property upon death. The person making the will is not required to dispose of the property wisely or in a way that would meet with the approval of a judge or jury. You may not set a will aside simply because it appears to be unreasonable or unjust.

**T.P.I. – CIVIL 11.32 Due Execution**

A will that is not properly executed and witnessed is not valid. A will must be in writing and must be executed and witnessed as follows:

1. It must be signed by the person making the will in the presence of two or more witnesses who are present at the same time; [or] [If the signature is already made, it must be acknowledged by the person making the will as that person’s signature in the presence of two or more witnesses who are present at the same time]; [or] [It may be signed by a person other than the person making the will if that maker adopts the signature in the presence of two or more witnesses who are present at the same time].
2. The person making the will must state [or otherwise indicate] to the witnesses at the time the will is signed [acknowledged] [adopted] that the document is that person’s will.
3. Each of the witnesses must sign the document as a witness at the end of the will. The witnesses must sign the will at the request of the person making the will, and they must sign their names in the presence of the person making the will and in the presence of each other.

[It is not necessary for the person making the will to state that the document is that person’s last will, or that the person making the will ask the witnesses to sign the will. It is sufficient if the conduct

and actions of the person making the will show that person's unmistakable intention to make a will and request that it be witnessed.]

### **T.P.I. – CIVIL 11.33 Testamentary Capacity**

To make a valid will a person must be of sound and disposing mind at the time the will was executed. Evidence of mental unsoundness before or after the making of the will must be considered in determining the person's mental condition when the will was made.

A person is of sound and disposing mind if, at the time of making the will, that person has sufficient mental capacity to:

1. Understand that the person is making a will; and
2. Understand and recall the nature of and situation of that person's property; [and]
- [3. Remember and understand relations to living descendants, spouse and parents, and to persons whose interests will be affected by the will].

In determining a person's mental competency to make a will, you should consider matters that show the person's mental condition at the time the will was made. You may consider that person's appearance, conduct, declarations, conversations, and all other evidence of that person's mental condition, both before and after the will was made.

### **T.P.I. – CIVIL 11.34 Mental Competency – Matters Not Determinative**

Circumstances such as, [eccentricities] [capricious and arbitrary likes and dislikes] [hatred of relatives] [old age] [forgetfulness] [mental feebleness] [physical infirmity] [disease] [The use, or even the excessive use, of intoxicants or drugs] [\_\_\_\_\_] will not make a person incompetent to make a will if the person making the will was of sound and disposing mind at the time the will was made.

### **T.P.I. – CIVIL 11.35 Mental Competency – Delusions**

A delusion is a false belief of the existence of something that in reality does not exist.

A person who has a delusion may be of sound and disposing mind to make a will if the delusion did not directly influence the creation and terms of the will, or if the delusion was based upon any facts, however unsubstantial.

A person who has a delusion is not of sound and disposing mind if:

1. The delusion arose spontaneously without reason or supporting facts and is held despite reason and evidence to the contrary; and

2. If the delusion directly influenced the creation and terms of the will so that the will would distribute the property in a way that the person would not have done, except for the existence of the delusion.

### **T.P.I. – CIVIL 11.36 Mental Competency – Adjudication of Incompetency**

Evidence that a person has been found [to be incompetent in a proceeding for the appointment of a guardian] [to be mentally ill in another proceeding] does not prove mental incompetency to make a will if you find the person making the will was of sound and disposing mind at the time the will was made.

#### (b) Undue Influence and Fraud

### **T.P.I. – CIVIL 11.37 Undue Influence**

A will may not be enforced if it is brought about by undue influence.

Undue influence is the overcoming of the mind of the person making a will by acts or conduct of another person.

Mere general influence of another person that does not affect the act of making a will is not undue influence. To be undue influence, the influence must amount to coercion that destroys the freedom of choice of the person making the will. It substitutes the wishes or desires of another person and compels the maker of the will to dispose of property in a way that would not have been done otherwise.

### **T.P.I. – CIVIL 11.38 Circumstances Probative of Undue Influence**

In determining the issue of undue influence, you may consider, among other things, the following:

1. Do the provisions of the will favor people who have no blood relationship to the maker of the will over people who have a blood relationship?
2. Do the terms of the will unduly benefit the chief beneficiary [beneficiaries] of the will?
3. Are the terms of the will different from the expressed intentions of the maker of the will?
4. Did the chief beneficiary's [beneficiaries'] relationship to the person making the will give the beneficiary [ies] an opportunity to influence the terms of the will?
5. Did the mental and physical condition of the maker of the will allow the maker's freedom of choice to be overcome by the actions of others?
6. Did the chief beneficiary [beneficiaries] of the will actively take part in determining the provisions of the will or in causing it to be executed?

### **T.P.I. – CIVIL 11.39 Undue Influence – Confidential Relationship**

A confidential relationship exists whenever the trust and confidence of one person is placed in the honesty and faithfulness of another.

There is a presumption that the will was obtained by the undue influence of \_\_\_\_\_ if you find:

1. That a confidential relationship existed between the person making the will and \_\_\_\_\_; and
2. That \_\_\_\_\_ was active in causing the will to be made and unduly profited from it.

This presumption may be overcome if \_\_\_\_\_ proves by clear and convincing evidence that the making of the will was not the result of undue influence.

### **T.P.I. – CIVIL 11.40 Fraud**

A will [or any part of a will] that is obtained by fraud is not valid.

Fraud is the misrepresentation of a material fact that:

1. Is made:
  - a. with the knowledge that the fact is false; or
  - b. without sufficient knowledge on the subject to justify a representation about the fact;
2. Is made with the intent to encourage the person to whom it is made to act upon it; and
3. Causes a person to act in reliance upon the representation to the damage of that person.

A misrepresentation may consist of any of the following:

1. Suggesting that something is true, when the person making the suggestion does not believe it to be true;
2. Making a positive statement about something that is not true, even if the person believes it to be true, when the person knows information that would not justify making the statement;
3. Concealing something that is true by someone who has knowledge or belief of the truth;
4. A promise made by someone who has no intention of performing the promise; or
5. Any other act calculated to deceive.

## D. CONSUMER PROTECTION LAW

### **T.P.I. – CIVIL 11.45 Consumer Protection Law (Consumer Protection Act of 1977) Actual Damages**

The plaintiff claims that the defendant violated the Tennessee Consumer Protection Law. The Tennessee Consumer Protection Law allows a plaintiff to recover actual damage for a loss of money, property or thing of value as a result of a defendant's use or an unfair or deceptive act or practice.

To recover damages from the defendant for violation of this law, the plaintiff must prove by a preponderance of the evidence that:

1. The defendant's act or practice is unfair or deceptive under this law; and
2. The plaintiff suffered a loss of money, property or thing of value as a result of the unfair or deceptive act or practice.

The plaintiff claims that defendant used the following unfair or deceptive acts or practices that violate the Tennessee Consumer Protection Law:

*[Read provisions of T.C.A. §47-18-104 relied on by plaintiff.]*

If you find that plaintiff has proven by a preponderance of the evidence that the defendant used any one or more of these acts or practices, then defendant has violated the Tennessee Consumer Protection Law. The plaintiff is entitled to actual damages for any loss of money, property or thing of value that was caused by the defendant's use of the unfair or deceptive act or practice.

### **T.P.I. – CIVIL 11.47 Consumer Protection Claim Brought With a Separate Claim for Punitive Damages Under Another Theory**

Plaintiff has sued defendant under two separate claims. First, the plaintiff has sued defendant under the Tennessee Consumer Protection Law. Second, the plaintiff has sued the defendant under the law of [fraud] [negligent misrepresentation] [deceit].

[charge Tennessee Consumer Protection Law and damage section T.P.I. – Civil 11.45]

[charge other theory, damages and punitive damages sections]

[go over verdict form]

You must consider each claim separately and determine whether the plaintiff should recover under one of the claims, both of the claims or neither of the claims. If you find in favor of the plaintiff the plaintiff will be awarded the amount of damages, if any, you find to be appropriate. However, if you find for the plaintiff on both the Tennessee Consumer Protection Law claim and the claim based

on [fraud] [negligent misrepresentation] [deceit], the plaintiff will not be permitted to collect damages under both claims but instead will have to choose whether to accept the damages under the Tennessee Consumer Protection Law or the damages under the claim based on [fraud] [negligent misrepresentation] [deceit]. In other words, if you decide the plaintiff should recover monetary damages from the defendant the plaintiff will be able to recover those damages only once, even if you find that the plaintiff has proved both the Tennessee Consumer Protection Law claim and the claim based on [fraud] [negligent misrepresentation] [deceit].

## E. TENNESSEE HUMAN RIGHTS ACT

### (a) Introduction and Definitions

#### **T.P.I. – CIVIL 11.50 Introduction**

This lawsuit is based on the defendant's alleged violation of the *Tennessee Human Rights Act*. This law is intended to prohibit discrimination in [employment] [public accommodations] [housing] based upon [race] [creed] [color] [religion] [sex or gender] [age (*applies only to discrimination in employment and public accommodations*)] or [national origin]. The Act is designed to protect each individual's personal dignity, to insure the realization of every citizen's full productive capacity and to preserve the rights and privileges of all persons in this state.

#### **T.P.I. – CIVIL 11.51 Discriminatory Practice Definitions**

The plaintiff contends that the defendant has engaged in certain discriminatory practices. A discriminatory practice is defined as any act or practice where a person or group of persons is given preferential or different treatment because of [race] [creed] [color] [religion] [sex or gender] [age] or [national origin].

#### **T.P.I. – CIVIL 11.52 Coercion – Intimidation**

It is a discriminatory practice for a person to [coerce] [intimidate] [threaten] [or] [interfere with] a person who has exercised any right granted or protected by the *Tennessee Human Rights Act* [or] [a person who has aided or encouraged a third person to exercise those rights protected by the *Tennessee Human Rights Act*.]

(b) Employment Discrimination

**T.P.I. – CIVIL 11.53 Employer Discriminatory Practices**

It is unlawful for an employer to discriminate against any person because of [race] [creed] [color] [religion] [gender] [age] [national origin] by [failing or refusing to hire that person] [discharging that person] [discriminating against that person with respect to compensation or to the terms, conditions or privileges of employment.]

**T.P.I. – CIVIL 11.54 Classification – Employees**

It is a discriminatory practice for an employer to limit, segregate or classify an employee or applicant for employment in any way that would adversely affect an employee's status or would deprive or tend to deprive an individual of employment opportunities because of [race] [creed] [color] [religion] [gender] [age] [national origin].

(c) Age Discrimination

**T.P.I. – CIVIL 11.55 Age Discrimination Requirements – Burden of Proof**

In order to recover, a plaintiff who alleges discrimination based upon age must prove by a preponderance of the evidence that:

1. The plaintiff was forty to seventy years of age and was qualified to perform the required duties;
2. The plaintiff was [discharged] [not hired];
3. [The plaintiff was replaced] [The position was filled] by a younger person; and,
4. Age was the determining factor in the defendant's decision to [discharge] [not hire] the plaintiff. If the defendant has presented evidence of a legitimate non-discriminatory reason for [discharging] [not hiring] the plaintiff, the plaintiff must prove by a preponderance of the evidence that the reason given was a pretext for what was, in fact, an age-based determination.

(d) Handicap Discrimination

**T.P.I. – CIVIL 11.56 Handicap Discrimination – Burden of Proof**

It is a discriminatory practice for an employer to hire, fire or insist upon terms and conditions of employment based solely upon a physical, mental, or visual handicap of any employee or applicant for employment.

To establish handicap discrimination, the plaintiff must prove by a preponderance of the evidence that:

1. The plaintiff has a physical or mental impairment that substantially limits one or more of the plaintiff's major life activities;
2. The plaintiff is qualified and able to perform the required job despite the handicap or disability; and
3. The defendant knowingly discriminated against the plaintiff because of the disability.

(e) Sexual Harassment

**T.P.I. – CIVIL 11.57 Sexual Harassment – Hostile Work Environment – Employee Liability – Burden of Proof**

Plaintiff claims to have been sexually harassed. Sexual harassment includes unwelcome sexual advances, unwelcome requests for sexual favors and similar verbal or physical conduct, or any unwelcome conduct which, while not overtly sexual, would not have occurred but for the plaintiff's gender.

In order to recover for sexual harassment against the employer, plaintiff must prove by a preponderance of the evidence that:

1. The plaintiff was sexually harassed; and
2. The sexual harassment created a hostile work environment or unreasonably interfered with plaintiff's work performance; and
3. The sexual harassment caused plaintiff's physical or mental well being to be seriously affected; and
4. The employer had notice of the sexual harassment and the hostile work environment or unreasonable interference with plaintiff's work performance; and
5. The employer failed to take prompt and appropriate corrective action to eliminate the harassment.

(f) Labor Organizations

**T.P.I. – CIVIL 11.58 Exclusion**

It is a discriminatory practice for a labor organization to exclude, expel from membership or otherwise discriminate against a member or applicant for membership because of [race] [creed] [color] [religion] [gender] [age] [national origin].

### **T.P.I. – CIVIL 11.59 Segregation or Classification**

It is a discriminatory practice for a labor organization to limit, segregate or classify its members or applicants for membership on the basis of [race] [creed] [color] [religion] [gender] [age] [national origin] if the practice limits or deprives any person of employment opportunities or adversely affects the status of an employee or an applicant for employment.

### **T.P.I. – CIVIL 11.60 Referral**

It is discriminatory practice for a labor organization to fail or refuse to refer a person for employment on the basis of [race] [creed] [color] [religion] [gender] [age] [national origin] if the practice limits or deprives any person of employment opportunities or adversely affects the status of an employee or an applicant for employment.

### **T.P.I. – CIVIL 11.61 Employment Agency**

It is a discriminatory practice for an employment agency to classify, refer for employment, fail or refuse to refer for employment or otherwise discriminate against any person because of [race] [creed] [color] [religion] [gender] [age] [national origin].

### **T.P.I. – CIVIL 11.62 Apprenticeship & Training Programs**

It is a discriminatory practice for [an employer] [labor organization] [joint labor management committee] controlling apprenticeships, training or retraining programs, to discriminate against any person because of [race] [creed] [color] [religion] [gender] [age] [national origin] in its admission or employment practices for these programs or by publishing or circulating any statement, advertisement or publication relating to admission or employment practices for these programs indicating a preference based on [race] [creed] [color] [religion] [gender] [age] [national origin]. [A statement, advertisement or publication may, however, indicate a preference based on religion or gender when religion or gender is a legitimate occupational qualification for employment.]

(g) Maternity Leave

### **T.P.I. – CIVIL 11.63 Maternity Leave**

A female employee who has been employed as a full-time employee at a job site or location by the same employer for at least twelve (12) consecutive months may be absent from her employment for a period not to exceed four (4) months for pregnancy, child birth and nursing the infant. To be entitled to this maternity leave the employee must give her employer at least three (3) months notice of her anticipated date of departure, her length of absence and her intent to return full-time employment.

Upon an employee's return to employment from maternity leave, she shall be restored to her previous or a similar position with the same status, pay, employment benefits, length of service and seniority as existed on the date the maternity leave began. A failure to comply with this requirement is a discriminatory practice.

(h) Public Accommodations

**T.P.I. – CIVIL 11.64 Place of Public Accommodations Discrimination Forbidden**

It is a discriminatory practice for any person to deny an individual the full and equal enjoyment of [goods] [services] [facilities] [privileges] [advantages] [accommodations] of a place of public accommodation, resort or amusement on the grounds of [race] [creed] [color] [religion] [gender] [age] [national origin].

(i) Real Estate

**T.P.I. – CIVIL 11.65 Real Estate Buying, Selling or Renting**

It is a discriminatory practice for any person, because of: [race] [creed] [color] [religion] [gender] [age] [handicap] [familial status] [national origin] to: (*select the relevant claim of discrimination*)

- (1) Refuse to sell or rent, refuse to negotiate for the sale or rental of or otherwise make unavailable any real property or housing to a person;
- (2) Discriminate against any person in the terms, conditions, or privileges of sale or rental of real property or housing or in the provision of services or facilities relating to the property or housing accommodation;
- (3) Refuse to receive or transmit a good faith offer to purchase, rent or lease real property or housing;
- (4) Represent to a person that real property or housing is not available for inspection, sale, rental or lease when it, in fact, is so available or to refuse to permit a person to inspect real property or housing;
- (5) Print, publish or circulate or cause to be printed, published or circulated a notice, statement, advertisement or sign, including a form of application for the purchase, rental or lease of real property or housing that indicates, directly or indirectly, a limitation, specification or discrimination as to race, color,

creed, religion, gender, handicap, familial status or national origin;

(6) Offer, solicit, accept, use or retain a sale or rental listing of real property or housing with the understanding that a person may be discriminated against in the sale, rental, lease or the furnishing of facilities and services relating to that real property or housing accommodation; or

(7) Deny any person access to, or membership or participation in, any multiple-listing services, real estate brokers' organization or other service, organization or facility relating to the business of selling or renting dwellings or to discriminate against such person in the terms or conditions of such access, membership or participation.

### **T.P.I. – CIVIL 11.66 Handicap Discrimination**

It is a discriminatory practice for a person to discriminate in the [sale] [rental] of, or otherwise make unavailable or deny a dwelling to any [buyer] [renter] because of a handicap of:

- (1) The [buyer] [renter];
- (2) A person residing in or intending to reside in the dwelling after it is [sold] [rented] or made available; or
- (3) Any person associated with the [buyer] [renter].

It is a discriminatory practice for a person to discriminate against another person in the terms, conditions, or privileges of the [sale] [rental] of a dwelling or in the provision of [services] [facilities] in connection with such dwelling, because of a handicap of:

- (1) The person;
- (2) A person residing in, or intending to reside in, the dwelling after it is [sold] [rented] or made available; or
- (3) Any person associated with the person.

### **T.P.I. – CIVIL 11.67 Hazard Insurance**

It is a discriminatory practice for a person in the insurance business to: [refuse to enter into] [discriminate in the terms, conditions, or privileges of] a contract of insurance against hazards relating to housing or real property because of the: [race] [creed] [color] [religion] [gender] [age] [national origin] of the person [owning the real property] [residing in or near the housing accommodation].

(j) Malicious Harassment

**T.P.I. – CIVIL 11.70 Malicious Harassment**

It is unlawful for any person knowingly to intimidate or harass another person because of the other person's [race] [color] [religion] [ancestry] [national origin] by [causing or threatening to cause, by word or act, physical injury to another person] [damaging, destroying, or defacing, or threatening to damage, destroy, or deface, by word or act, any real or personal property of another person.] [The word "deface" includes, but is not limited to, cross burning or the placing of any word or symbol commonly associated with racial, religious, or ethnic terrorism on the property of another person without permission.]

(k) Damages

**T.P.I. – CIVIL 11.74 Introduction**

If, under the court's instructions, you find that the defendant engaged in any one or more of the discriminatory practices alleged by the plaintiff, and you find that the plaintiff's damages were legally caused by the defendant's discriminatory practices, then you shall award the plaintiff the actual damages that the plaintiff has sustained. The damages you may award are:

For wrongful loss of employment, plaintiff shall be awarded back pay and the present value of any lost employment benefits. Back pay is the sum of wages the plaintiff would have earned from [the date of termination of employment] [the date defendant refused to hire] through today's date.

**T.P.I. – CIVIL 11.75 Embarrassment and Humiliation**

You shall award a sum of money to compensate plaintiff for any embarrassment and humiliation the plaintiff actually suffered as a legal result of the defendant's alleged unlawful discriminatory practice(s). The words "embarrassment" and "humiliation" are used in their everyday meaning. Not every embarrassment and humiliation, however, is compensable. Embarrassment and humiliation are compensable only when a reasonable person with ordinary sensibilities under the same or similar circumstances would be embarrassed or humiliated.

There is no mathematical formula for computing reasonable compensation for embarrassment and humiliation, nor is the opinion of any witness required as to the amount of such compensation.

In making an award for such damages, you must use your best judgment and establish and amount of damages that is fair and reasonable in light of the evidence before you.

**T.P.I. – CIVIL 11.76 Mitigation of Damages**

The plaintiff has a duty to mitigate damages. Any back pay and employment benefits you award the plaintiff shall be reduced by any employment earnings and benefits the plaintiff earned or could have earned through reasonable diligence.

The defendant has the burden of establishing that the plaintiff failed to use reasonable diligence in mitigating damages. The defendant must prove both the availability of suitable and comparable substitute employment and the lack of reasonable diligence on the part of the plaintiff.

## **Chapter 12 - VICARIOUS RESPONSIBILITY**

### **A. AGENCY**

#### **T.P.I. – CIVIL 12.01 Principal and Agent – Definition**

A principal can be held responsible for the acts or omissions of the principal's agent.

A person who is authorized to act for another person or in place of another person is an agent of that person. A person may be an agent whether or not payments is received [for services] [for the authorized act].

For purposes of this case, the term "agent" includes [both a servant and] an employee.

The person who authorizes the agent to act is called a principal. For purposes of this case, the term "principal" includes an employer.

#### **T.P.I. – CIVIL 12.02 Scope of Authority**

In order to be considered the act of the principal, the act of the agent must be within the scope of the agent's [authority] [employment].

It is not necessary that a particular act or failure to act be expressly authorized by the principal to bring it within the scope of the agent's [authority] [employment]. Conduct is within the scope of the agent's [authority] [employment] if it occurs while the agent is engaged in the duties that the agent was [authorized] [employed] to perform and if the conduct relates to those duties. Conduct for the benefit of the principal that is incidental to, customarily connected with, or reasonably necessary to perform an authorized act is within the scope of the agent's [authority] [employment].

#### **T.P.I. – CIVIL 12.03 Apparent Authority**

The agent's scope of [authority] [employment] is not limited to the actual authorization given by the principal to the agent. It also includes the authority that apparently has been given to the agent.

Apparent authority is:

- (1) Authority that the principal either knowingly allows the agent to have or holds out the agent as having; or

(2) Authority that the agent appears to have because of the agent's actual authority; or

(3) Authority that a reasonably [careful] [prudent] person, under all of the circumstances, would naturally expect the agent to have.

### **T.P.I. – CIVIL 12.04 Agent Attending to Personal Affairs**

When an agent who is acting for a principal and within the agent's scope of authority incidentally attends to a personal matter, the principal remains responsible for the agent's conduct.

However, the principal is not responsible for the agent's conduct when the agent departs from the business or service of the principal to do something that is not for the principal and not reasonably related to the agent's employment. [This is true even if the injury is caused by the agent's use of property or facilities entrusted to the agent by the principal].

### **T.P.I. – CIVIL 12.05 Directed Imputation – Both Principal and Agent Sued**

The defendants are sued as principal and agent. It has been established that the defendant, \_\_\_\_\_, is the principal and the defendant, \_\_\_\_\_, is the agent.

If you find that the agent is [negligent] [at fault] [responsible], you must also find that the principal is [negligent] [at fault] [responsible]. However, if you find that the agent is not [negligent] [at fault] [responsible], then you must also find that the principal is not [negligent] [at fault] [responsible].

#### **PRINCIPAL ONLY SUED**

It has been established that (agent) is the agent of (principal). Any act or omission of (agent) is in law the act or omission of (principal). [If you find that the agent is at fault, you also must find that the principal is at fault.]

### **T.P.I. – CIVIL 12.06 Contested Imputation – Principal and Agent Sued**

The plaintiff claims that the defendant (principal) was the principal and the defendant (agent) was an agent of the principal.

If you determine that the defendant (agent) [was the agent of the defendant (principal)] [and] [was acting within the scope of the agent's [authority] [employment] at the time of the [event(s)] [accident], and if you find the defendant (agent) [should be held responsible] [is at fault], then the plaintiff can recover damages against both defendants.

However, if you determine that defendant (agent) [should be held responsible] [is at fault] but [was not then the agent of defendant (principal)] [or] [was not acting within the scope of the agent's

(authority) (employment)] at the time of the [event(s)] [incident], then the plaintiff cannot recover damages against the principal.

If you find that defendant (agent) [should not be held responsible] [is not at fault], then the plaintiff can not recover damages against either defendant.

### **T.P.I. – CIVIL 12.07 Contested Imputation – Principal Sued, Not Agent**

The plaintiff claims that (agent), who is not a party to this suit, was acting as [agent] for defendant (principal) within the scope of agent’s [authority] [employment] at the time that the [event(s)] [incident] occurred.

If you find that (agent) [was the agent of defendant (principal) [and] [was acting within the scope of his (authority) (employment) during that time], then any act or omission of (agent) was in law the act or omission of (principal).]

However, if you find that at the time of the [event(s)] [incident] (agent) [was not the agent of defendant (principal) [or] [was not acting within the scope of the agents’s (authority) (employment) during that time], then you must find in favor of the defendant.

## **B. INDEPENDENT CONTRACTORS**

### **T.P.I. – CIVIL 12.10 Agent or Independent Contractor – Distinction**

One of the issues which you must decide is whether, at the time of the [event(s)] [incident], [the defendant] (alleged agent) was the agent of the defendant (alleged principal) or whether (alleged agent) was an independent contractor.

While both an agent and independent contractor work for another person, there is an important distinction between them.

An “agent” of another person, called the principal, is authorized to act for or in place of the principal. A principal has the right to control the agent’s actions. A principal ordinarily is legally responsible for the acts or omissions of the principal’s agent.

An independent contractor exercised an independent employment or occupation in providing services. The independent contractor is answerable to the employer only as to the results of the work and not as to how the work is performed. A person who employs an independent contractor ordinarily is not legally responsible to others for the acts or omissions of the independent contractor.

Whether one is an agent or independent contractor depends upon who has the right to general and immediate control over the methods and manner in which the work is done. If the one who performs the work has that right, then that person is an independent contractor. If the employer has that right, then the employer is a principal and the one who performs the work is the agent.

[An independent contractor may consider and follow any suggestions that the employer may make. These actions do not change the independent contractor into an agent so long as the independent contractor retains the right of control over the methods and manner in which the work is done.]

#### **T.P.I. – CIVIL 12.11 Employer of Independent Contractor – Inherently Dangerous Work**

Ordinarily, one who employs an independent contractor is not liable for the acts or omissions of the contractor or the contractor's employees. However, an employer of an independent contractor is subject to liability for bodily harm legally caused by the contractor if:

(1) The employer should recognize that the work as performed would necessarily create a condition involving a peculiar risk of bodily harm to others, unless special precautions are taken; and

(2) The contractor fails to exercise reasonable care to take such precautions against the risk; [and]

[(3) The employer of the independent contractor has not taken reasonable precautions against the risk.]

#### **T.P.I. – CIVIL 12.12 Employer of Independent Contractor – Nondelegable Duty**

A person who employs a contractor to perform work or services may be legally responsible for harm proximately caused to others by the contractor if:

(1) The employer is under a duty by [statute] [ordinance] [safety order] to provide safeguards or to maintain certain equipment in a specified condition; and

(2) The contractor employed to perform the work failed to provide those safeguards or failed to maintain certain equipment in a specified condition; and

(3) The failure to provide safeguards or maintain equipment was a proximate cause of harm to another person.

### **C. CORPORATIONS**

#### **T.P.I. – CIVIL 12.15 Corporations – Parent or Stockholder Liability**

A corporation has a separate and distinct existence from its stockholders. Stockholders of the corporation are not ordinarily responsible for the debts or liabilities of the corporation. Under certain circumstances, however, you may disregard the separate existence of a corporation if you find that the corporation is a sham or dummy and a mere instrumentality of the [parent corporation] [controlling stockholders].

The [parent corporation is] [controlling stockholders are] legally responsible for the debts or liabilities of the corporation only if you find that the plaintiff has carried the burden of proving each of the following three (3) elements:

(1) At the time of the transaction, [the parents corporation] [the controlling stockholders] dominated and controlled both [the subsidiary's] [the corporation's] finances and its policy and business practices relating to the transaction so that the corporation had no separate mind, will, or existence of its own; and

(2) The control was actually used:

a. to commit fraud or deceit; or

b. to violate a statutory or other positive legal duty; or

c. to commit a dishonest or unjust act in violation of the plaintiff's rights; and

(3) The control by the [parent corporation] [stockholders] and the wrongful use of that control combined together to be a proximate or direct cause of the [injury] [loss].

#### D. PARTNERSHIP

##### **T.P.I. – CIVIL 12.20 Definition**

A partnership is an association of two or more persons to carry on a business for profit as co-owners of that business.

##### **T.P.I. – CIVIL 12.21 Partner – Imputation of Negligence**

At the time of the events out of which this case arose, the defendant \_\_\_\_\_ and [defendant] \_\_\_\_\_ were partners. If the [defendant] \_\_\_\_\_ was acting in the ordinary course of the business of the partnership [or with the authority of the remaining partner(s)], then \_\_\_\_\_'s negligence, if any, is chargeable to the [defendant partnership] [defendant partner] \_\_\_\_\_.

A partner acts in the ordinary course of the business of the partnership when conducting partnership business or performing acts that are incidental to, customarily connected with, or reasonably necessary to conduct the business of the partnership.

## E. JOINT VENTURES

### **T.P.I. – CIVIL 12.30 Definition**

A joint venture is a relationship that arises from an agreement between two or more persons to undertake some common goal for the economic benefit of all. In pursuit of that goal, each is authorized to act for the other[s]. An agreement may be shown by the conduct of the parties or the surrounding circumstances.

### **T.P.I. – CIVIL 12.31 Imputation of Contributory Negligence to Plaintiff – Contested Joint Venture**

If, at the time [of the acts in question], (defendant) and the plaintiff were engaged in a joint venture, the fault, if any, of (defendant) must be charged to the plaintiff.

## F. PARENTS

### **T.P.I. – CIVIL 12.40 Parents – General Rule**

Ordinarily, a [parent] [guardian] is not responsible for the acts of a [minor child] [ward]. However, a [parent] [guardian] is responsible, for the parent's own failure to exercise reasonable means to restrain the wrongful conduct of the [child] [ward] if:

1. The [parent] [guardian] knows, or in using reasonable care, should know, of the [child's] [ward's] tendency to commit wrongful acts which can be expected to cause injury to persons or property; and
2. The [parent] [guardian] has an opportunity to control the child but fails to use reasonable means to do so; and
3. The wrongful conduct of the [child] [ward] legally causes injuries to persons or property.

[A [parent] [guardian] shall be presumed to know of a [child's] [ward's] tendency to commit wrongful acts if the [child] [ward] has previously been charged and found responsible for such actions.]

### **T.P.I. – CIVIL 12.41 Duty to Supervise Minor Child**

It is the duty of parents to exercise ordinary care in the training, supervision, and protection of their minor children. A failure to do so is negligence on the part of the parent or parents.

The amount of care to be used by a parent depends upon the age of the child, the physical and mental condition of the child, and the dangers to be avoided.

### **T.P.I. – CIVIL 12.42 Family Purpose Doctrine**

The plaintiff claims that the defendant (family member) is responsible for any fault of the defendant (driver) under the family purpose doctrine. The defendant, (family member) denies such responsibility.

The family purpose doctrine applies when:

- (1) A member of a family furnished a motor vehicle for the general use, pleasure, and convenience of the family; and
- (2) The person furnishing the vehicle gave specific or general consent or permission, either express or implied, for a member or for members of the family to use it for that family purpose; and
- (3) At the time of the accident, the member of the family was driving the vehicle in connection with a family purpose.

### **G. NEGLIGENCE ENTRUSTMENT**

### **T.P.I. – CIVIL 12.50 Negligent Entrustment**

An owner of a motor vehicle is legally responsible for the fault of another if:

- (1) The owner gives permission to the person to use the vehicle; and
- (2) The owner knows, or from the facts known to the owner should know, that the user is [under the influence of intoxicants or drugs] [a reckless driver] [or] [an incompetent driver]; and
- (3) The [intoxication] [recklessness] [or] [incompetence] of the person permitted to use the vehicle is a legal cause of the injuries to the plaintiff.

[The failure to have a driver's license is not in and of itself evidence of the driver's incompetence as a driver. That evidence, however, may be considered in connection with all other evidence for the limited purpose of determining if the owner knew or should have known that the owner was not entrusting the vehicle to one who was not a competent driver.]

## **Chapter 13 - CONTRACTS**

### **A. CONTRACTS DEFINED**

#### **T.P.I. – CIVIL 13.01 Definition**

This action is brought to recover damages for breach of contract.

A contract is an agreement or exchange of promises between two or more persons to do or not to do certain things. This agreement or exchange of promises can be oral or in writing and must be supported by something of value. The requirements for a valid contract are an offer, an acceptance, consideration, competent parties, and a legal purpose.

The issue[s] that you must decide is [are]:

### **B. FORMATION**

#### **T.P.I. – CIVIL 13.02 Offer**

An offer occurs when one party communicates to the other a willingness to enter into a contract. The communication must be made under circumstances that would justify the other party in understanding that an agreement would result if the offer were accepted.

[The plaintiff claims that the parties reached an agreement when the defendant made an offer that was accepted by the plaintiff. The defendant denies making an offer and therefore denies that any agreement was reached.]

#### **T.P.I. – CIVIL 13.03 Acceptance**

An acceptance occurs when a party communicates by words or actions an agreement to an offer. It must be made before the offer is withdrawn and must match the terms of the offer.

[The plaintiff claims that the parties reached an agreement when the plaintiff made an offer that was accepted by the defendant. The defendant denies accepting the plaintiff's offer and therefore denies that any agreement was reached.]

#### **T.P.I. – CIVIL 13.04 Consideration**

For there to be a sufficient exchange of consideration, something of value must be bargained for and given in exchange for the other party's promise. "Something of value" may be a promise, an act, or forbearance. It can be a benefit to one party or a detriment to the other party. Its actual value in money terms is not important.

#### **T.P.I. – CIVIL 13.05 Competent Parties**

In order for a contract to be binding, it must be made between parties competent to contract.

[If the defendant was incompetent when the contract was entered into, the plaintiff cannot enforce the contract. The defendant claims to have been incompetent at the time. The plaintiff denies this. In order to prove a defense based on incompetency, the defendant must show that, at the time the contract was made, the defendant was not capable of understanding the nature of the contract and its effect on defendant's interest.]

#### **T.P.I. – CIVIL 13.06 Legal Purpose**

The contract must be entered into for a legal purpose.

[The defendant claims that the contract cannot be enforced because it was for an illegal purpose. The plaintiff denies this. The defendant has the burden of proving the illegality.]

### C. FORM OF CONTRACT

#### **T.P.I. – CIVIL 13.07 Form of Contract**

A contract can be entirely oral or entirely written, or it can be partly oral and partly in writing. It is not necessary that the parties use any particular words or form of agreement. Words and phrases commonly used in daily life are sufficient.

[A contract can be made up of several different documents if the parties intended that the various documents would be one contract.]

#### **T.P.I. – CIVIL 13.08 Parol Agreements**

A contract may consist of both written and oral promises. The oral terms of the contract may be enforced just as though those terms had appeared in [the] [a] written agreement.

### D. WAIVER AND BREACH

#### **T.P.I. – CIVIL 13.09 Waiver**

Waiver is the voluntary surrender of a known right. It can be proved by statements, acts, or conduct of a party showing an intent not to claim a right.

The parties may jointly agree to waive one or more requirements of a contract. If a party to the contract claims the other party waived a contract right, the burden of proof is on the party claiming the waiver to show that the other party gave up a contract right and did so with full and complete knowledge of the relevant facts.

[If the plaintiff waived a particular term in the contract, the plaintiff can no longer enforce that part of the contract. The defendant claims that the plaintiff waived certain terms as follows: (state here what was allegedly waived and how it was allegedly waived). The plaintiff denies this.]

#### **T.P.I. – CIVIL 13.10 Breach**

If you find that a valid contract was entered into you must determine whether the defendant breached the contract. If a party does not perform according to the contract terms, that party has committed a breach of the contract. Any unexcused breach of contract allows a non-breaching party to recover damages.

[The plaintiff claims that the defendant breached the contract in the following instances: (State here the factual circumstances constituting the claimed breach.) The defendant denies this.]

The breach of contract must be a material breach. A minor and insubstantial failure of a party to meet the terms of a contract does not entitle the other party to reject the contract and not be responsible under it. A party who commits the first substantial breach of a contract cannot enforce the contract against the other party even if the other party later fails to abide by the terms of the contract.

#### **T.P.I. – CIVIL 13.11 Repudiation**

Any party to a contract has a legal right to abandon or refuse to perform the contract where the other party has actually defaulted, has unequivocally renounced the contract or is completely unable to perform the terms of the contract.

[The defendant claims to have abandoned or refused to perform the contract because the plaintiff [defaulted] [renounced the contract] [was unable to perform the contract]. The plaintiff denies this.]

#### **T.P.I. – CIVIL 13.12 Impossibility of Performance**

If a party can show that a contract cannot be performed because performance is impossible, that party's performance is excused. The party raising this defense must prove the following:

1. The party's performance has become impossible;
2. The event causing the impossibility was not reasonably foreseeable by that party at the time the contract was made; and
3. The party asking to be excused [did not cause] [could have prevented] [could have avoided] [could have remedied by appropriate corrective measures] the event that makes performance impossible.

### **T.P.I. – CIVIL 13.13 Rescission**

If the parties agreed to rescind the contract, the contract cannot be enforced. [The defendant claims that the parties agreed to rescind the contract in the following way: (state here the alleged circumstances of the rescission.) The plaintiff denies this.]

To prove rescission a party must show that both parties agreed to end the contract. In deciding whether the parties agreed to rescind, you should consider all of the circumstances, including what the parties said or did.

### **T.P.I. – CIVIL 13.14 Procurement of Breach of Contract**

The plaintiff is entitled to recover for procurement of breach of contract if the plaintiff establishes all of the following:

1. There was a contract;
2. The defendant had knowledge of the existence of the contract;
3. The defendant intended to bring about or cause its breach;
4. The defendant acted maliciously;
5. The contract was in fact breached;
6. Defendant's actions were the legal cause of the breach;
7. Plaintiff suffered damages as a result of the breach.

### **T.P.I. – CIVIL 13.15 Procurement of Breach of Contract – Damages**

If you find that plaintiff is entitled to recover damages for procurement of breach of contract, you shall award plaintiff an amount that will compensate plaintiff for all damages legally caused by defendant's interference with plaintiff's contract. The award of damages shall include compensation for:

1. The pecuniary loss of the benefits of the contract, that is, the sum of money necessary to place the plaintiff in the position that plaintiff would have been in if the contract had been performed according to its terms. [This includes plaintiff's loss of profits, if the injury involved is interference with a business relationship.]
2. Any consequential losses legally caused by the interference. A consequential loss is any direct out-of-pocket expense incurred by a party as a direct and legal result of a breach of contract. The out-of-pocket expense must have been within the contemplation of the parties to the contract.

3. Emotional distress and actual harm to plaintiff's reputation, where such losses should have been reasonably expected to result from the interference.

### **T.P.I. – CIVIL 13.16 Intentional Interference With Business Relationship**

The plaintiff seeks to recover damages that plaintiff alleges were caused by the defendant's wrongful conduct. The law does not permit a plaintiff to recover damages from a defendant who had engaged in proper competitive business practices. However, the law does prohibit a defendant from unfairly interfering with a business relationship by using improper means or by acting with the predominant purpose of injuring the plaintiff.

To recover damages, plaintiff must prove all of the following by a preponderance of the evidence.

1. [plaintiff had a specific, existing business relationship with / (name of specific third party) / [or] [plaintiff had a prospective business relationship with an identifiable class of persons]; and
2. defendant had knowledge of that relationship [and not a mere awareness of the plaintiff's business dealings with others in general]; and
3. the [prospective] business relationship ended; and
4. the defendant intentionally by improper motive or improper means caused the relationship to end; and
5. the defendant's action caused damage to the plaintiff.

## **E. INSURANCE CONTRACTS**

### **T.P.I. – CIVIL 13.20 Fire Insurance Claim**

The policyholder has brought suit against the insurance company seeking to recover benefits on a contract of insurance containing fire insurance coverage. The policyholder seeks payment under the contract terms. The insurance company contends it is not responsible for the loss.

### **T.P.I. – CIVIL 13.21 Theory of the Plaintiff**

The policyholder contends that the insurance company has breached the contract of insurance by failing to pay pursuant to the policy. *(Here state plaintiff's issues.)*

### **T.P.I. – CIVIL 13.22 Theories of Insurance Company**

The insurance company contends that the policyholder violated various provisions and conditions of the policy and, as a result, the insurance company is not required to pay for the loss.

[The insurance company claims that the policyholder brought about the fire and the resulting loss of property in violation of the policy.]

[The insurance company claims that the policyholder breached and voided the policy by making material misrepresentations in the [application] [claim of loss.]]

[The insurance company claims that the policyholder has failed to comply with the conditions or requirements of the insurance policy, and that the insurance company's ability to investigate and respond to the claim has been materially hindered.]

### **T.P.I. – CIVIL 13.23 Defense of Arson**

A policyholder who commits arson cannot recover under an insurance policy. To establish the defense of arson, the insurance company has the burden of proving that the policyholder intentionally or willfully set fire to the insured property or participated in or consented to the willful burning of the property. It is not necessary that the policyholder be the person who actually starts the fire.

Arson may be proved by direct or circumstantial evidence. When relying on circumstantial evidence to establish the defense of arson, the following must be proved:

1. The insured property was intentionally burned;
2. The policyholder had an opportunity to set the fire or to have it set by some other person; and
3. The policyholder had a motive for setting the fire.

Whether circumstantial evidence has been proved and whether that evidence establishes the defense of arson is for you to decide.

### **T.P.I. – CIVIL 13.24 Defense of Misrepresentation of Loss**

The insurance company refused to pay under the policy because it claims that the policyholder breached and voided the policy by making material misrepresentations in the claim for loss. The insurance policy contains a provision that states: *[read applicable insurance clause]*

To establish a defense of misrepresentation on proof of loss, the insurance company must show by a preponderance of the evidence:

1. A willful, substantial and false valuation of the property or amount of loss, and

2. An intent to deceive the insurance company by seeking to influence the judgment of the insurance company. An intent to deceive the insurer may be inferred from the insured's knowing or willful over-valuation of the property; or the insured's concealment of the nature or extent of the loss.

A person acts "knowingly" if that person desires to act in a particular manner and is aware of the probable consequences of those actions. A person acts "willfully" if that person desires to act in a particular manner and to cause the result that occurs.

An honest, good faith difference of opinion as to the value or amounts of loss is not a false and intentional misrepresentation. Slight or trivial misrepresentations or overvaluations do not void the policy.

### **T.P.I. – CIVIL 13.25 Defense of Misrepresentation on Application for Insurance**

To establish a defense of misrepresentation on an application for insurance, the insurance company must prove by a preponderance of the evidence that the policyholder's representations were:

1. False;
2. Material; and
3. [Made with the intent to deceive] [increased the risk of loss].

A misrepresentation is material if it relates to a matter that the insurance company would be expected to rely upon in its decision to issue the policy.

In order to establish an intent to deceive it must be proved that the policyholder sought to influence the judgment of the insurance company in issuing the policy. An intent to deceive may be inferred from a knowing and willful misrepresentation.

A person acts "knowingly" if that person desires to act in a particular manner and is aware of the probable consequences of those actions. A person acts "willfully" if that person desires to act in a particular manner and to cause the result that actually occurs.

### **T.P.I. – CIVIL 13.26 Insurance Contracts – Failure to Give Timely Notice**

[Defendant-Insurer] claims that [Plaintiff] breached the parties' contract of insurance by failing to provide timely notice as required by the terms of the policy. The applicable portion of the insurance policy is as follows [cite policy language]:

[Defendant-Insurer] has the burden of proving by a preponderance of the evidence that [Plaintiff] did not give timely notice to [Defendant-Insurer].

If you find that [Plaintiff] did not give timely notice, the law presumes that [Defendant-Insurer] has been prejudiced by failure to receive timely notice, and [Plaintiff] cannot recover under the policy. However, [Plaintiff] can overcome this presumption and recover under the policy by proving by a preponderance of the evidence that [Defendant-Insurer] was not prejudiced by the delay in providing timely notice.

In determining whether [Defendant-Insurer] was prejudiced by the delay in giving notice, you should consider the following factors to the extent shown by the evidence:

1. the availability of witnesses to the accident;
2. the ability to discover other information regarding the conditions of the locale where the accident occurred;
3. any physical changes in the location of the accident during the period of the delay;
4. the existence of official reports concerning the occurrence;
5. the preparation and preservation of demonstrative and illustrative evidence, such as the vehicles involved in the occurrence, or photographs and diagrams of the scene;
6. the ability of experts to reconstruct the scene and the occurrence; and
7. any other information which tends to show whether [Defendant-Insurer] was prejudiced by the delay in giving notice.

#### F. BAD FAITH

#### **T.P.I. – CIVIL 13.30 Insurance Company Penalty for Lack of Good Faith**

An insurance company owes to its policy holders the duty to use good faith and diligence in responding to claims. A penalty may be assessed against an insurance company that fails to act in good faith by refusing to pay a claim filed against an insurance policy.

Before a policy holder may recover a penalty for lack of good faith, the policy holder must show that (1) the policy of insurance has, by its terms, become due and payable, (2) a formal demand for payment was made, (3) the policy holder waited 60 days after making the formal demand before filing suit (unless there was a refusal to pay prior to the expiration of the 60 days), and (4) the refusal to pay was not in good faith.

An insurance company [defendant] did not use good faith if it frivolously or unjustifiably refused to comply with the policy holder's demand to pay according to the terms of the policy. If there is any reasonable ground for the insurance company's failure to pay the claim, the insurance company has acted in good faith. Negligence, which is the failure to use ordinary care, does not in itself constitute bad faith. The insurance company's negligence or lack of negligence, however, may be a factor in determining whether the insurance company failed to act in good faith.

The policy holder has the burden of proving the lack of good faith of the insurer [insurance company] in denying payment on the insurance policy.

If the insurance company failed to act in good faith, the policy holder may recover additional damages from the insurance company measured by the additional expense, loss, or injury caused the policy holder [plaintiff] by the insurance company's conduct. The additional amount cannot exceed 25% of the damages you have previously awarded to policy holder.

### **T.P.I. – CIVIL 13.31 Policy Holder Bad Faith Penalty**

A penalty may be assessed against the plaintiff if plaintiff did not act in good faith in bringing this lawsuit.

To receive a penalty, the insurance company must establish that:

1. The plaintiffs are not entitled to recover under the policy;
2. The suit was frivolous and unfounded and, therefore, was not brought in good faith; and
3. The insurance company experienced additional expense, loss, or injury as a result of the litigation.

A suit is "frivolous and unfounded" if there is no reasonable ground to establish a valid claim. The reasonableness of the grounds and the validity of the claim depend upon the circumstances.

Ultimately, the presence of bad faith depends on the circumstances. A reasonable mistake of judgment does not constitute bad faith. Plaintiff's negligence or lack of negligence may, however, be considered in determining the presence of absence of good faith.

If the plaintiff failed to act in good faith in filing the lawsuit, the insurance company may recover damages from the plaintiff measured by the additional expense, loss, or injury caused by the plaintiff's conduct. This amount cannot exceed 25% of the loss claimed under the policy.

## **G. VERDICT FORM – INTEREST**

### **T.P.I. – CIVIL 13.35 Pre-Judgment Interest**

Plaintiffs seek an award of prejudgment interest from the defendant. If the plaintiffs are entitled to recover a judgment under the insurance policy, you may in your discretion award interest on the amount awarded at a rate not greater than 10% per year calculated from any date you choose beginning on or after \_\_\_\_\_. The dollar amount of prejudgment interest will be calculated by the court at simple interest.

### **T.P.I. – CIVIL 13.36 Fire Insurance Claim Special Verdict Form**

1. Did the plaintiff make a material misrepresentation on the application for insurance [with the intent to deceive] [that increased the risk of loss]?

Yes \_\_\_\_\_ NO \_\_\_\_\_

If your answer to question 1 is “Yes”, you have found for the defendant and [you should turn in this verdict form]. [you should complete question 9].

If your answer is “No” continue to next question.

2. Did the plaintiff make a material misrepresentation on the proof of loss with the intent to deceive?

Yes \_\_\_\_\_ NO \_\_\_\_\_

If your answer to question 2 is “Yes”, you have found for the defendant and [you should turn in this verdict form]. [you should complete question 9].

If your answer is “No” continue to next question.

3. Did the plaintiff(s) cause or consent to the willful burning of the insured property?

Yes \_\_\_\_\_ NO \_\_\_\_\_

If your answer to question 3 is “Yes”, you have found for the defendant and [you should turn in this verdict form]. [you should complete question 9].

If your answer is “No” continue to next question.

4. We, the jury, find the plaintiff(s) are entitled to recover damages from the defendant for the fire loss incurred in this case in the following amounts:

[\$ \_\_\_\_\_ Dwelling (replacement) cost]

[\$ \_\_\_\_\_ Contents (replacement) cost  
(Not to exceed \$ \_\_\_\_\_)]

[\$ \_\_\_\_\_ Additional living expenses]

[\$ \_\_\_\_\_ Debris removal  
(Not to exceed \$ \_\_\_\_\_)]

5. Did \_\_\_\_\_ Insurance Company fail to act in good faith in denying plaintiffs’ claim?

Yes \_\_\_\_\_ NO \_\_\_\_\_

If your response to question 5 is “Yes”, then answer question 6. If your response to question 5 is “No”, skip questions 6 and 7 and answer question 8.

6. Did any failure of defendant to act in good faith cause additional expenses, loss, or injury to plaintiffs?

Yes \_\_\_\_\_ NO \_\_\_\_\_

If your response to question 6 is “Yes,” then answer question 7. If your response to question 7 is “No,” go to question 8.

7. What penalty, if any do you find that the plaintiffs are entitled to recover from the defendant? \_\_\_\_\_% (You may award any percentage not to exceed 25% of the damages in this case.)

8. What annual percentage of prejudgment interest, if any, do you award? \_\_\_\_\_% (Do not exceed ten (10%) percent.) From what date should prejudgment interest be awarded? \_\_\_\_\_ (The date cannot be earlier than \_\_\_\_\_, which is 60 days after the proof of loss was filed.) Note: The Court will calculate the total interest to be paid based on your responses to these questions.

9. Did the plaintiff(s) policyholder(s) fail to act in good faith in filing suit?

Yes \_\_\_\_\_ NO \_\_\_\_\_

If your answer to question 9 is “Yes,” please complete question 10.

10. Did any failure of plaintiff to act in good faith cause additional expense, loss, or injury to defendant?

Yes \_\_\_\_\_ NO \_\_\_\_\_

If your answer to question 10 is “Yes,” please complete question 11. If your answer is “No,” turn in this verdict form.

11. What penalty, if any, do you find that the defendant is entitled to recover from the plaintiffs. \_\_\_\_\_% (You may award any percentage not to exceed 25% of the damages claimed by plaintiff).

Presiding Juror \_\_\_\_\_

## **CHAPTER 14 – DAMAGES**

### **A. COMPENSATORY DAMAGES**

#### **T.P.I. – CIVIL 14.01 Compensatory Damages – Introduction**

If you decide a party is entitled to damages, you must fix an amount that will reasonably compensate that party for each of the following elements of claimed loss or harm, if you find it was [or will be] suffered by that party and was caused by the [act or omission] [defective product] [event] upon which you base your finding of fault.

Each of these elements of damage is separate. You may not duplicate damages for any element by also including that same loss or harm in another element of damage.

## **T.P.I. – CIVIL 14.02 Admitted Liability**

The defendant has admitted fault. As a result, the defendant is responsible for any damages legally caused by that fault. A legal cause of loss or harm and without which the loss or harm would not have occurred.

You should assess damages in an amount that will reasonably compensate the plaintiff for each of the following elements of loss or harm, if any, that the plaintiff has suffered or will suffer as the legal result of the fault of the defendant.

Each of these elements of damage is separate. You may not duplicate damages for any element by also including that same loss or harm in another element of damage.

### **B. MEASURE OF DAMAGES**

#### **(a) Personal Injury**

## **T.P.I. – CIVIL 14.10 Personal Injury – Pain and Suffering**

Plaintiff shall be awarded the following elements of damage experienced in the past:

[Physical pain and suffering]

[Mental or emotional pain and suffering]

[Loss of capacity for the enjoyment of life]

[Disfigurement]

[You shall also award compensation for the present cash value of:]

[Physical pain and suffering]

[Mental or emotional pain and suffering]

[Loss of capacity for the enjoyment of life]

[Disfigurement]

reasonably certain to be experienced by a party in the future].

Pain and suffering encompasses the physical discomfort caused by an injury. Mental or emotional pain and suffering encompasses anguish, distress, fear, humiliation, grief, shame or worry. Disfigurement is a specific type of permanent injury that impairs a plaintiff's appearance. Damages for loss of enjoyment of life compensate the injured person for the limitations placed on the ability to

enjoy the pleasures of life. Impairment of physical function prevents a person from living life in comfort by adding inconvenience or loss of physical ability.

There is no mathematical formula for computing reasonable compensation for [physical pain and suffering] [mental or emotional pain and suffering] [disfigurement] [loss of capacity for the enjoyment of life], nor is the opinion of any witness required as to the amount of such compensation.

In making an award for such damages, you must use your best judgment and establish an amount of damages that is fair and reasonable in light of the evidence before you.

#### **T.P.I. – CIVIL 14.11 Medical Expenses**

The next element of damages that the plaintiff may recover is for reasonable and necessary expenses for medical care, services, and supplies actually given in the treatment of a party as shown by the evidence [and the present cash value of medical expenses reasonably certain to be required in the future].

#### **T.P.I. – CIVIL 14.12 Medical Bill Presumption**

[In this case, some medical bills have been introduced in evidence. Because these bills do not exceed [a certain sum established by law], you shall presume these expenses were reasonable and necessary].

#### **T.P.I. – CIVIL 14.13 Loss of Earning Capacity**

The next element of damages that the plaintiff can recover is the value of the ability to earn money that has been lost in the past [and the present cash value of the ability to earn money that is reasonably certain to be lost in the future].

In deciding what, if any, award should be made for loss of the ability to earn, you should consider any evidence of the party's earning capacity, including among other things, the party's health, age, character, occupation, past earnings, intelligence, skill, talents, experience and record of employment. The loss of the ability to earn money may include, but is not limited to, actual loss of income.

#### **T.P.I. – CIVIL 14.14 Aggravation of Pre-Existing Condition**

A person who has a condition or disability at the time of an injury is entitled to recover damages only for any aggravation of the preexisting condition. Recovery is allowed even if the pre-

existing condition made plaintiff more likely to be injured and even if a normal, healthy person would not have suffered substantial injury.

A plaintiff with a pre-existing condition may recover damages only for any additional injury or harm resulting from the fault you may have found in this case. Damages shall include all the additional harm or disability even though it is grater because of the preexisting condition [and even though the preexisting condition caused no harm or disability before the occurrence].

#### **T.P.I. – CIVIL 14.15 Loss of Business Profits**

A plaintiff who is in a personal business may recover damages for profits lost as a direct result of plaintiff's inability, because of injury, to devote personal skill, talent or ability to the business. It must appear that plaintiff's personal services were [are] necessary to the business and that loss has resulted [will result] from plaintiff's absence. If plaintiff's services were [are] replaceable, the measure of damages would be the cost of hiring a substitute.

#### **T.P.I. – CIVIL 14.16 Damages for Permanent Injuries**

The plaintiff claims damages for permanent injury. To recover damages for permanent injury, the plaintiff must prove the future effect of the injury with reasonable certainty. While it is not necessary that the evidence show conclusively or absolutely that the injury is permanent, you may not award damages for a permanent injury based upon a mere conjecture or a possibility.

#### **T.P.I. – CIVIL 14.17 Negligent Infliction of Severe or Serious Emotional Injury**

Reasonable compensation for serious or severe emotional injury suffered by the plaintiff and legally caused by the defendant's conduct. A serious or severe emotional injury occurs when a reasonable person, normally constituted, would be unable to adequately cope with the mental stress caused and brought about by the circumstances of the case. [Such serious or severe emotional injury must be supported by expert medical or scientific proof.]

There is no mathematical formula for computing reasonable compensation for negligent infliction of serious or severe emotional injury, nor is the opinion of any witness required as to the amount of such compensation.

In making an award for such damages, you must use your best judgment and establish an amount of damages that is fair and reasonable in light of the evidence before you.

(b) Injury to Spouse

**T.P.I. – CIVIL 14.20 Personal Injury – Spouse**

If, in accordance with these instructions, you are to determine damages for the plaintiff (injured spouse) you should also determine the damages for the plaintiff (other spouse). (other spouse) would be entitled to recover the following elements of damage if established by the evidence:

1. The reasonable value of medical care, services and supplies reasonably required and actually given in the treatment of the spouse;
2. Expenses reasonably incurred in attending the spouse in the hospital;
3. The reasonable value of the injured spouse's services this plaintiff has lost [and the present cash value of such services plaintiff is reasonably certain to lose in the future;] and
4. The reasonable value of the spouse's companionship and acts of love and affection this plaintiff has lost [and the present cash value of such acts plaintiff is reasonably certain to lose in the future] but would have received in the usual course of the parties' married life.

(c) Injury to Minor

**T.P.I. – CIVIL 14.25 Injury to Minor – Suit by Parents and Minor**

This lawsuit involves two separate claims. First is a claim by (minor) for damages for injuries. The second claim is by (minor's parent[s]) for medical expenses incurred [and for loss of the earnings and services of the minor during minority].

If, in accordance with these instructions, you are to determine the amount of damages sustained by the minor, \_\_\_\_\_, and the parent[s] \_\_\_\_\_, you should fix an amount for each of the following elements of loss or harm provided it was or will be suffered by the minor or the parent[s] and legally resulted from the fault you have assigned.

*[Here list elements of damage set out in T.P.I. – Civil 14.26 & 14.27.]*

**T.P.I. – CIVIL 14.26 Minor's Damages**

The minor's damages shall include:

1. *[insert the general instruction for pain and suffering – T.P.I. – Civil 14.10];*
2. *The present cash value of the earning capacity that will be lost after the minor becomes 18 years of age;*
3. Medical expenses actually paid or incurred by the minor; and
4. The present cash value of any medical care and treatment reasonably certain to be required in the future.

### **T.P.I. – CIVIL 14.27 Parents' Damages**

The amount of the award to the parent[s] shall include:

1. The cost of medical [hospital, nursing] services and supplies reasonably required and actually incurred in the treatment of the minor;
2. Monetary loss, if any, actually suffered or reasonably certain to be suffered in the future by the parent[s] because of the loss of the minor's services that would have been performed prior to the child's 18<sup>th</sup> birthday; and
3. Loss of the minor's earnings, if any, actually suffered or reasonably certain to be suffered in the future by the parent[s] prior to the child's 18<sup>th</sup> birthday as a result of the minor's inability to pursue an occupation or employment.

#### **(d) Wrongful Death**

### **T.P.I. – CIVIL 14.30 Wrongful Death**

In this case, suit has been brought for damages alleging the death of [*(deceased)*] was caused by the fault of the defendant. If you decide to award damages, there are two classes of damages you may consider:

First, those damages sustained immediately by the injured party including compensation for the following:

1. The mental and physical suffering actually endured by the injured party between the injury and death;
2. Medical expenses necessitated by the injury, including expenditures for doctors, nurses, hospital care, medicine and drugs;
3. Reasonable funeral expenses; and
4. Loss of earning capacity during the period from injury to death.

You may not speculate as to whether conscious pain and suffering actually did exist between the injury and death. If, however, you find that there was such pain and suffering prior to death, you must award damages for it.

The second class of damages that may be awarded is the present cash value of the pecuniary value of the life of the deceased. In determining this value, you should take into consideration the following factors:

1. The age of the deceased;
2. The condition of health of the deceased;

3. The life expectancy of the deceased;
4. The strength and capacity of the deceased for work and for earning money through skill in any art, trade, profession, occupation, or business;
5. The personal habits of the deceased as to sobriety and industry; and
6. The reasonable value of the loss of consortium suffered by the [wife] [and] [children] of the deceased.

“Consortium” is a legal term consisting of several elements. It includes both tangible services provided by a family member, as well as intangible benefits each family member receives from the continued existence of other family members. Such intangible benefits include love, affection, attention, education, guidance, care, protection, training, companionship and cooperation [and, in the case of a spouse, sexual relations] that the [wife] [and] [children] would reasonably be certain to have received during the life of the deceased.

[In determining whether to award damages for loss of consortium for the death of a parent, you should consider the age of the [child] [children], closeness of relationship, dependence and any other factors that reflect upon the relationship between parent and child.]

In weighing these factors, you should consider the fact that expectancy of life is, at most, a probability based upon experience and statistics. You should be mindful of the possibility that the earnings of an individual are not always uniform over a period of time. You should consider not only the most optimistic expectations of the future, but also the most pessimistic, and all of the uncertainties between the extremes.

Finally, when determining the amount of damages based upon life expectancy and earning capacity, you should deduct the present cash value of the deceased’s living expenses had the deceased lived. These living expenses are those that under the deceased’s standard of living would have been reasonably necessary to keep the deceased in such a condition of health and well-being as to maintain the capacity to earn money.

### **T.P.I. – CIVIL 14.31 Present Cash Value – Wrongful Death**

I have used the expression “present cash value” in these instructions concerning damages for certain losses that may be awarded in this case.

In determining the pecuniary value of the life of [*deceased*], you must adjust the award to allow for the reasonable earning power of money and the impact of inflation.

“Present cash value” means the sum of money needed now, which when added to what that sum may reasonably be expected to earn in the future when invested, would equal the amount of damages at the time in the future when the earnings would have been received, living expenses incurred and the loss of consortium experienced. You should also consider the impact of inflation, its impact on wages and its impact on purchasing power in determining the present cash value of future damages.

(e) Damage to Personal Property

**T.P.I. – CIVIL 14.40 Damage to Personal Property**

The measure of damage to personal property is as follows:

If the damages have been repaired or the property is capable of repair so that the three factors of function, appearance, and value have been or will be restored to substantially the same value as before the incident, then the measure of damages is the reasonable cost of repairs necessary for the restoration plus any loss of use pending the repairs.

If [the damages have not been repaired] [the property is not capable of repair] so as to restore function, appearance, and value as they were immediately before the incident, then the measure of damages is the difference in the fair market value of the property immediately before the incident and immediately after the incident.

**T.P.I. – CIVIL 14.41 Repair Bill - Presumption**

In this case, some repair bills have been introduced in evidence. If you find that the bills were incurred and paid to repair the damaged property, to the extent the bills do not exceed the sum of One Thousand Dollars (\$1,000), there is a legal presumption that these expenses were reasonable and were necessary for the restoration of the property.

**T.P.I. – CIVIL 14.42 Personal Property – Lost or Destroyed**

The measure of damages for personal property either lost or destroyed is the fair market value of such property at the time and place of its loss or destruction.

**T.P.I. – CIVIL 14.43 Loss of Use**

The measure of damages for loss of use is reasonable compensation to the plaintiff for being deprived of the use of the [automobile] [property] during the time reasonable necessary for repair of the damage caused by the incident. In determining this amount, you may consider the reasonable

rental cost of an [automobile] [property] for that period of time and the use or lack of use the plaintiff would have made of it except for the incident.

(f) Damage to Real Property

**T.P.I. – CIVIL 14.45 Damage to Real Property**

The measure of damage to real property is the lesser of the following amounts:

1. The reasonable cost of repairing the damage to the property; or
2. The difference between the fair market value of the premises immediately prior to and immediately after the damage.

C. MISCELLANEOUS DAMAGE INSTRUCTIONS

**T.P.I. – CIVIL 14.50 Determining Future Damages Without Speculation**

If you are to determine a party's damages, you must compensate that party for loss or harm that is reasonably certain to be suffered in the future as a result of the injury in question. You may not include speculative damages, which is compensation for future loss or harm that, although possible, is conjectural or not reasonable certain.

**T.P.I. – CIVIL 14.51 Personal Injury – Duty to Mitigate**

A person who has been injured has the duty to mitigate damages by using reasonable diligence in caring for an injury and employing reasonable means to accomplish healing. When one does not use reasonable diligence to care for injuries and they are aggravated as a result of that failure, the damages you determine must be limited to the amount of damage that would have been suffered had the injured person used the diligence required.

[The mere fact that a competent physician advised an injured person to submit to a course of treatment or surgery does not require you to conclude that the injured person was negligent or unreasonable in declining that treatment or surgery. Other factors confronting the injured person must be considered in determining whether, although refusing to follow a physician's advice, the person nevertheless used reasonable diligence in caring for the injuries.]

**T.P.I. – CIVIL 14.52 Property Damage – Duty to Mitigate**

A person whose property has been damaged by the wrongful act of another is bound to use reasonable care to avoid loss and to minimize damages. A party may not recover for losses that could have been prevented by reasonable efforts or by expenditures that might reasonably have been made.

### **T.P.I. – CIVIL 14.53 Life Expectancy**

The life expectancy read to you is not conclusive but is an average life expectancy of persons who have reached a certain age. You should be aware that many persons live longer, and many die sooner, than the average. This figure may be considered by you in connection with other evidence relating to the probable life expectancy of [plaintiff] [deceased] including evidence of the [plaintiff's] [deceased's] health, occupation, habits and other activities.

### **T.P.I. – CIVIL 14.54 Meaning of Present Cash Value**

I have used the expression “present cash value” in these instructions concerning damages for future losses that may be awarded to the plaintiff.

In determining the damages arising in the future, you must determine the present cash value of those damages. That is, you must adjust the award of those damages to allow for the reasonable earning power of money and the impact of inflation.

“Present cash value” means the sum of money needed now which, when added to what that sum may reasonable be expected to earn in the future when invested, would equal the amount of damages, expenses, or earnings at the time in the future when the damages from the injury will be suffered, or the expenses must be paid, or the earnings would have been received. You should also consider the impact of inflation, its impact on wages, and its impact on purchasing power in determining the present cash value of future damages.

### **T.P.I. – CIVIL 14.55 Punitive Damages**

Plaintiff has asked that you make an award of punitive damages, but this award may be made only under the following circumstances. You may consider an award of punitive damages only if you find that the plaintiff has suffered actual damage as a legal result of the defendant's fault and you have made an award for compensatory damages.

The purpose of punitive damages is not to further compensate the plaintiff but to punish a wrongdoer and deter others from committing similar wrongs in the future. Punitive damages may be considered if, and only if, the plaintiff has shown by clear and convincing evidence that a defendant has acted either intentionally, recklessly, maliciously, or fraudulently.

Clear and convincing evidence is a different and higher standard than preponderance of the evidence. It means that the defendant's wrong, if any, must be so clearly shown that there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.

A person acts intentionally when it is the person's purpose or desire to do a wrongful act or to cause the result.

A person acts recklessly when the person is aware of, but consciously disregards a substantial and unjustifiable risk of injury or damage to another. Disregarding the risk must be a gross deviation from the standard of care that an ordinary person would use under all the circumstances.

A person acts maliciously when the person is motivated by ill will, hatred or personal spite.

A person acts fraudulently when: (1) the person intentionally either misrepresents an existing material fact or causes a false impression of an existing material fact to mislead or to obtain an unfair or undue advantage; and (2) another person suffers injury or loss because of reasonable reliance upon that representation.

If you decide not to award punitive damages, you will not assess an amount of punitive damages at this time. You will, however, report your finding to the court.

### **T.P.I. – CIVIL 14.56 Punitive Damages - Amount**

You have decided that the plaintiff is entitled to punitive damages. You must now decide the amount of those damages. The plaintiff has the burden of proving by a preponderance of the evidence the amount of punitive damages that you should award.

In making your decision you must consider the instructions I have already given you and also the following:

1. The defendant's net worth and financial condition;
2. The objectionable nature of the defendant's wrongdoing, the impact of the defendant's conduct on the plaintiff, and the relationship of the parties;
3. The defendant's awareness of the amount of harm being caused and the defendant's motivation in causing the harm;
4. The duration of the defendant's misconduct and whether the defendant attempted to conceal the conduct;
5. The amount of money the plaintiff has spent in the attempt to recover the losses;
6. Whether defendant profited from the activity, and if so, whether the punitive award should be in excess of the profit in order to deter similar future behavior;
7. The number and amount of previous punitive damage awards against the defendant based upon the same wrongful act;
8. Whether, once the misconduct became known to the defendant, the defendant tried to remedy the situation or offered a prompt and fair settlement for the actual harm caused; and
9. Any other circumstances shown by the evidence that bears on determining the proper amount of the punitive award.

You have already awarded the plaintiff compensatory damages for the purpose of making the plaintiff whole. The purpose of an award for punitive damages is to punish a wrongdoer and to deter misconduct by the defendant or others.

#### D. CONTRACT-WARRANTY-SALE OF GOODS

##### **T.P.I. – CIVIL 14.60 Introduction**

If you find the plaintiff is entitled to a verdict against the defendant for breach of a contract or warranty, you must award damages in an amount that will reasonably compensate the plaintiff for each of the following elements of claimed loss or harm, provided you find it was [or will be] suffered by the plaintiff as a result of the defendant's breach. The amount of such award shall include:

##### **T.P.I. – CIVIL 14.61 Buyer's Damages for Nondelivery or Rejection**

Any portion of the purchase price that has been paid and either of the following: (a) if the buyer purchased substitute goods without unreasonable delay, the amount of money in excess of the contract price that the buyer was reasonably and in good faith required to spend to purchase the substitute goods; or, (b) if substitute goods were not purchased within a reasonable time, the difference between the market price at the time the buyer learned of the breach and the contract price, less any expenses saved by the buyer because of the seller's breach.

##### **T.P.I. – CIVIL 14.62 Buyer's Incidental Damages**

Any expenses reasonably incurred by the buyer in the inspection, receipt, transportation, care and custody of goods that were rightfully rejected.

Any commercially reasonable charges, expenses or commissions incurred in connection with having made, in good faith and without undue delay, any reasonable purchase of or contract to purchase substitute goods.

##### **T.P.I. – CIVIL 14.63 Buyer's Consequential Damages**

Any loss resulting to the buyer from requirements and needs known to the seller at the time of contracting provided the loss could not have been prevented by the buyer having timely purchased or contracted to purchase substitute goods.

Injury to a person or property resulting from any breach of warranty.

**T.P.I. – CIVIL 14.64 Buyer’s Damages for Breach in Regard to Accepted Goods – Diminished Value**

The difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted.

**T.P.I. – CIVIL 14.65 Seller’s Incidental Damages**

Any reasonable charges, expenses or commissions incurred by the seller in stopping delivery of the goods, or in the transportation, care and custody of returned or resold goods together with any other expenses reasonably resulting from the buyer’s breach.

**T.P.I. – CIVIL 14.66 Seller’s Damages on Resale of Goods**

Where goods have been resold in good faith and in a commercially reasonable manner, the amount by which the resale price is less than the contract price less any costs saved due to the breach of contract.

**T.P.I. – CIVIL 14.67 Seller’s Damages for Non-Acceptance or Repudiation of Goods**

The greater of the following: (a) the amount by which the contract price of any goods [that were not accepted] [whose purchase was repudiated] exceeded the market price at the time and place delivery was to have been made, less expenses saved by the seller due to the breach of contract; or (b) the profit, including reasonable overhead, that the seller would have made had the contract been fully performed. The buyer is to receive credit against either amount for any payments made on the contract and for the proceeds of any resale of the goods.

**T.P.I. – CIVIL 14.68 Seller’s Damages for the Price of Goods**

The price of goods [that were accepted by the buyer] [that conformed to the contract and were lost or damaged after the risk of loss had passed to the buyer] [or] [that were identified to the contract and for which the seller was not able to obtain a fair price after a reasonable effort to resell them or the circumstances indicated such an effort would be useless.]

## E. CONTRACTS GENERALLY

### **T.P.I. – CIVIL 14.70 Contracts Generally**

When a contract is breached, the plaintiff is entitled to be placed in as good a position as would have been occupied had the contract been fulfilled in accordance with its terms. The plaintiff is not entitled to be put in a better position by a recovery of damages for breach of contract than would have been realized had there been full performance. The damages to be awarded are those that may fairly and reasonably be considered as arising out of the breach or those that may reasonably have been in the contemplation of the parties when the contract was made. Damages that are remote or speculative may not be awarded.

### **T.P.I. – CIVIL 14.71 Contracts – Wrongful Sale After Repossession**

If you find the sale of the (secured property) was not according to law, you will then determine the amount of damages to be awarded the plaintiff. Those damages shall include (a) (for equipment) the amount the fair market value of the (equipment) at the time of repossession exceeded the greater of the actual sales price of the (equipment) at the time of repossession exceeded the greater of the actual sales price of the (equipment) or the total amount still due on the (equipment), and any other loss suffered by plaintiff as a direct result of defendant's failure to follow the law. (b) (for consumer goods) any loss caused by defendant's failure to follow the law but no less than the credit service charge plus 10% of the principal amount of the debt or the time price differential plus 10% of the cash price.

## **Chapter 15 – INTRODUCTORY AND CONCLUDING INSTRUCTIONS**

### A. JUROR'S DUTIES – INTRODUCTORY

#### **T.P.I. – CIVIL 15.01 Respective Duties of Judge and Jury**

Members of the jury, now that you have heard all of the evidence and the arguments of the lawyers, it is my duty to instruct you on the law that applies to this case. [You will be provided with a written copy of these jury instructions.]

It is your duty to find the facts from all the evidence in the case. After you determine the facts, you must apply the law that has been given to you, whether you agree with it or not. You must not be influenced by any personal likes or dislikes, prejudice or sympathy. You must decide the case solely on the evidence before you and according to the law given to you.

### **T.P.I. – CIVIL 15.02 Instructions to Be Considered as a Whole**

All of the instructions are equally important. The order in which these instructions are given has no significance. You must follow all of the instructions and not single out some and ignore others.

### **T.P.I. – CIVIL 15.03 Statements of Counsel – Evidence Stricken Out – Insinuations of Questions**

In reaching your verdict you may consider only the evidence that was admitted. Remember that any questions, objections, statements or arguments made by the attorneys during the trial are not evidence. If the attorneys have stipulated or agreed to any fact, however, you will regard that fact as having been proved.

Testimony that you have been instructed to disregard is not evidence and must not be considered. If evidence has been received only for a limited purpose, you must follow the limiting instructions I have given you. You are to decide the case solely on the evidence received at trial.

### **T.P.I. – CIVIL 15.04 Ordinary Observations and Experiences**

Although you must only consider the evidence in this case in reaching your verdict, you are not required to set aside your common knowledge. You are permitted to weigh the evidence in light of your common sense, observations and experience.

## **B. MULTIPLE PARTIES – INTRODUCTORY**

### **T.P.I. – CIVIL 15.07 Two or More Plaintiffs – Case of Each Separate**

Although there are \_\_\_\_\_ plaintiffs in this lawsuit, the case of each plaintiff is separate and independent.

Unless you are instructed to the contrary, the instructions apply to the facts of each plaintiff's case. You will decide each plaintiff's case separately, as if you were deciding different lawsuits.

### **T.P.I. – CIVIL 15.08 Each Defendant Entitled to Separate Consideration**

There is more than one defendant in this lawsuit. If you find that one defendant is [at fault] [liable] you are not required to return a verdict against [both] [all]. You will decide each defendant's case separately. Each defendant is entitled to a fair and separate consideration. Unless you are instructed to the contrary, the instructions apply to the facts of each defendant's case.

## C. SUPPLEMENTARY INSTRUCTIONS – CONCLUDING

### **T.P.I. – CIVIL 15.10 Worker’s Compensation Benefits**

There has been evidence that the plaintiff in this case has received worker’s compensation benefits. Those workers’ compensation benefits were paid by (employer or compensation insurer) who was [the plaintiff’s employer] [the workers’ compensation insurer for plaintiff’s employer].

Payment of workers’ compensation benefits is based only upon the fact that a compensable industrial accident happened to an employee. Workers’ compensation benefits do not depend upon blame or fault. In the event that the plaintiff does not obtain a judgment in his favor in this case, the plaintiff is not required to repay any amount of these payments to the employer or the employer’s insurer. If the plaintiff does obtain a judgment in his favor in this case, however, the employer or the employer’s insurer will be entitled to certain reimbursement for the benefits paid to the plaintiff. The amount of such reimbursement will be determined by the Court.

### **T.P.I. – CIVIL 15.11 All Instructions Not Necessarily Applicable**

The Court has given you various rules of law to help guide you to a just and lawful verdict. Whether some of these instructions will apply will depend upon what you decide are the facts. The Court’s instructions on any subject [including instructions on damages], must not be taken by you to indicate the Court’s opinion of the facts you should find or the verdict you should return.

### **T.P.I. – CIVIL 15.12 Use of Juror Notes (*After Trial*)**

Some of you may have taken notes during the trial. Once you retire to the jury room you may refer to your notes, but only to refresh your own memory of the witnesses’ testimony. You are free to discuss the testimony of the witnesses with your fellow jurors, but each of you must rely upon your own individual memory as to what a witness did or did not say.

In discussing the testimony, you may not read your notes to your fellow jurors or otherwise tell them what you have written. You should never use your notes to persuade or influence other jurors. Your notes are not evidence. Your notes should carry no more weight than the unrecorded recollection of another juror.

## D. JUROR’S VERDICT - CONCLUDING

### **T.P.I. – CIVIL 15.15 How Jurors Should Approach Their Task**

Your attitude and conduct at the beginning of your deliberations are very important. It is rarely productive for any juror to immediately announce a determination to hold firm for a certain verdict before any deliberations or discussions take place. Taking that position might make it difficult for you to consider the opinions of your fellow jurors or change your mind, even if you later decide that you might be wrong. Please remember that you are not advocates for one party or another. You are the judges of the facts of this case.

**T.P.I. – CIVIL 15.16 Each Juror Should Deliberate and Vote on Each Issue to be Decided**

Each of you should deliberate and vote on each issue to be decided.

Before you return your verdict, however, each of you must [agree on the verdict] [agree on the answer to each question] so that each of you will be able to state truthfully that the verdict is yours.

**T.P.I. – CIVIL 15.17 Instructions as to Unanimous Verdict**

The verdict you return to the Court must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror [agree to that verdict] [agree to each answer]. Your verdict must be unanimous.

It is your duty to consult with one another and to reach an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and to change your opinion if you are convinced that it is not correct. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

**T.P.I. – CIVIL 15.18 Chance or Quotient Verdict Prohibited**

The law forbids you to determine any issue in this case by chance. If you decide that a party is entitled to recover damages, you must not arrive at the amount of those damages by agreeing in *advance*: 1) to use each juror's independent estimate of the amount to be awarded; 2) to total those amounts; 3) to divide the total by twelve; and 4) to make the resulting average the amount that you award.

**T.P.I. – CIVIL 15.19 Questions During Deliberations**

If a question arises during deliberations and you need further instructions, please print your question on a sheet of paper, knock on the door of the jury room, and give the question to my court officer.

I will read your question and I may call you back into the courtroom to try to help you. Please understand that I may only answer questions about the law and I cannot answer questions about the evidence.

**T.P.I. – CIVIL 15.20 Concluding Instruction**

You will now retire and select one of you to be the presiding juror for your deliberations. As soon as all of you have agreed upon a verdict, [you will return to this room to report your verdict] [the presiding juror will complete and sign the verdict form and you will return with it to this room].

You may deliberate only when all of you are present in the jury room. You may not resume your deliberations after any breaks until all of you have returned to the jury room.