

**Memorandum**

**To:** Trial Counsel in Medical Malpractice Cases

**From:** John E. Wetsel, Jr., Judge

**Date:** December 11, 2012

**Subject:** Sample Instructions

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Here is a complete set of instructions, which represent a compilation of instructions that were given in Medical Malpractice cases in 2012. All of these instructions are either verbatim from, or modified from, the Model Jury Instructions. These instructions are a good starting point for the instructions in your case.

INSTRUCTION NO. \_\_\_\_\_

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

The issues in this case are:

1. Whether any of the health care providers violated the standard of care when they treated the Plaintiff?
2. If so, whether that violation of the standard of care was a proximate cause of the Plaintiff's injuries and damages?
3. If the plaintiff is entitled to recover, what is the amount of his damages?

On these issues the plaintiff has the burden of proof.

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

INSTRUCTION NO. \_\_\_\_\_

When a party has the burden of proof on an issue, then he or she must prove that issue by the greater weight of all the evidence. This is sometimes called the preponderance of the evidence. It is that evidence which you find more convincing. The testimony of one witness whom you believe can be the greater weight of the evidence.

M.J.I. No. 3.100

INSTRUCTION NO. \_\_\_\_\_

A proximate cause of an injury or damage is a cause that in natural and continuous sequence produces the injury or damage. It is a cause without which the injury or damage would not have occurred.

M.J.I. 5.000

INSTRUCTION No. \_\_\_\_\_

The fact that the Plaintiff may have been injured does not of itself entitle the Plaintiff to recover. The Plaintiff must prove by the greater weight of the evidence that the defendant physician violated the standard of care and that the violation of the standard of care was a proximate cause of the Plaintiff's injury and damages.

MJI 4.010, 4.015

INSTRUCTION No. \_\_\_\_\_

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

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

INSTRUCTION No. \_\_\_\_\_

The fact that a doctor's efforts on behalf of his patient were unsuccessful does not, by itself, establish negligence.

INSTRUCTION NO. \_\_\_\_\_

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

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

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



INSTRUCTION No. \_\_\_\_\_

You must determine the degree of care that was required of the defendant or any other health care provider whose care is at issue in this case by considering only the expert testimony on that subject.

INSTRUCTION NO. \_\_\_\_\_

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

INSTRUCTION NO. \_\_\_\_\_

Any fact that may be proved by direct evidence may be proved by circumstantial evidence; that is, you may draw all reasonable and legitimate inferences and deductions from the evidence.

INSTRUCTION NO. \_\_\_\_\_

During the trial evidence was introduced that a witness had previously made a statement that was inconsistent with his or her testimony at this trial. The only purpose for which that evidence was admitted was its bearing on the witness's credibility. It is not proof that what the witness may have said earlier is true.

INSTRUCTION NO. \_\_\_\_\_

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

INSTRUCTION NO. \_\_\_\_\_

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

INSTRUCTION NO. \_\_\_\_\_

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

INSTRUCTION No. \_\_\_\_\_

It is been stipulated that Dr. \_\_ was acting within the scope of his employment with Winchester \_\_\_ at all times during his care and treatment of the plaintiff. Therefore, the verdict that you reach for Dr. \_\_\_ will also be your verdict for Winchester \_\_\_.



INSTRUCTION NO. \_\_\_\_\_

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

1. The defendant violated the applicable standard of care; and that
2. The defendant's violation of the standard of care was a proximate cause of the plaintiff's injury and damages.

You shall find your verdict for the defendants if the plaintiff failed to prove either or both of the two elements above.

INSTRUCTION NO. \_\_\_\_\_

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

INSTRUCTION NO. \_\_\_\_\_

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

(May need to be modified to fit the facts)

INSTRUCTION NO. \_\_\_\_\_

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

(Give with caution, see Monahan v. Obici, 271 Va. 621. May need expert witness if applies to injury, may limit to fail to mitigate lost wage claim)

If you find that the plaintiff did not act reasonably to minimize his damages with respect to his claims for past and future lost earnings,

INSTRUCTION NO. \_\_\_\_\_

The statistical life expectancy of the Plaintiff under the mortality tables in the Code of Virginia is 47.8 years, and you should consider this figure along with any other evidence relating to the health, constitution, and habits of the plaintiff in determining his probable life expectancy.

INSTRUCTION No. \_\_\_\_\_

The amount sought by the Plaintiff is not evidence in this case, and you should not consider it in arriving at the amount of your verdict.

INSTRUCTION NO. \_\_\_\_\_

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

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

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