1.12 GENERAL PROVISIONS AND OUTLINE FOR STANDARD CHARGE (Approved 11/98)

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Introduction

[The following language covers issues of general law applicable to virtually all civil cases.[1] The issues must be explained to the jury so that the jurors will understand the process and their role in the process.

There is no "magic language" that the Court must employ in explaining these issues to the jury. The following is not required language that Courts must use. The judge should employ his or her own style and explain the necessary concepts to the jury in a clear and understandable way. The following is suggested by the Committee as an appropriate means to explain these rules and concepts to the jury.

The material in parentheses is optional language that some judges customarily give. It is recommended that the language not in parentheses be covered in the charge in some manner. Judges should feel free to adjust the order of the sections.]

[1] Exceptions to this general charge are sections G, Burden of Proof, H, Preponderance of the Evidence (short version) and I, "Preponderance of the Evidence (long version). These sections should not be universally given in all causes of action, *e.g.*, condemnation, employment discrimination, defamation, etc.

A. Purpose of Charge

I am now going to tell you about the principles of law governing this case. You are required to accept my instruction as the law.

(You should consider these instructions as a whole, and do not pick out any particular instruction and place undue emphasis upon it).

(Any ideas you have of what the law is or what the law should be or any statements by the attorneys as to what the law may be, must be disregarded by you, if they are in conflict with my charge.)

B. Role of the Judge

I sit here as the judge of the law. As part of this responsibility, I have made various rulings and statements throughout this trial. Do not view these rulings and statements as clues about how I think this case should be decided. They are not. They are based solely on my understanding of the law and rules of evidence and they do not reflect any opinions of mine about the merits of this case. Even if they did, you should disregard them, because it is your role to decide this case, not mine.

C. Role of the Attorneys

The lawyers are here as advocates for their clients. In their opening statements and in their summations they have given you their views of the evidence and their arguments in favor of their client's position. While you may consider their comments, nothing that the attorneys say is evidence and their comments are not binding upon you. (In addition, you must not decide this case based on the performance of the attorneys.)

D. Role of the Jury

You sit here as judges of the facts. You alone have the responsibility of deciding the factual issues in this case. It is your recollection and evaluation of the evidence that controls. If the attorneys or I say anything about the facts in this case that disagrees with your recollection of the evidence, it is your recollection that you should rely on.

Your decision in this case must be based solely on the evidence presented and my instructions on the law.

E. The Evidence

The evidence in this case consists of *[refer to appropriate items]:*

1. the testimony that you heard from the witness (including any video-taped testimony);

2. the exhibits that have been marked into evidence;

3. the deposition testimony and answers to interrogatories that were read into the record;

4. the stipulations and admissions that were placed on the record. As you recall, the stipulation and admissions are facts that the parties agree are true. Therefore, you can accept all admissions and stipulations as true in your deliberations.

(*Use when applicable*)

Any testimony that I have stricken from the record is not evidence and should not be considered by you in your deliberations. This means that even though you may remember the testimony you are not to use it in your discussions or deliberations.

(*Use when applicable*)

Further, if I gave a limiting instruction as to how to use certain evidence, that evidence must be considered by you for that purpose only. You cannot use it for any other purpose. *[You may repeat limiting instructions if appropriate.]*

F. Contention of the Parties

[*Explain the contentions of the parties.*]

G. Burden of Proof[2]

The burden of proof is on the plaintiff/each party to establish his/her/their claim by a preponderance of the evidence. In other words, if a person makes an allegation then that person must prove the allegation.

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

[*Explain issues raised by plaintiff.*]

The defendant (____name____) has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues:

[*Explain issues raised by defendant.*]

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[2] T.P.1. - Civil 2.40 "Burden of Proof and Preponderance of Evidence", Tennessee Pattern Jury Instructions of the Committee of the Tennessee Judicial Conference (3rd Ed. 11/95).

H. Preponderance of the Evidence *(short version)*[3]

The term "preponderance of the evidence" means that amount of evidence that causes you to conclude that the allegation is probably true. To prove an allegation by the 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. Therefore, the party having the burden of proving that issue has failed with respect to that particular issue.

I. Preponderance of Evidence *(long version)* (2/98)

The party with the burden of proof has the burden of providing his/her/its claim by a preponderance of the evidence. If the party fails to carry that burden, the party is not entitled to your favorable decision on that claim.

To sustain the burden, the evidence supporting the claim must weigh heavier and be more persuasive in your minds than the contrary evidence. It makes no difference if the heavier weight is small in amount. As long as the

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[3] *Id.*

evidence supporting the claim weighs heavier in your minds, then the burden of proof has been satisfied and the party who has the burden is entitled to your favorable decision on that claim.

However, if you find that the evidence is equal in weight, or if the evidence weighs heavier in your minds against the party who has the burden, then the burden of proof has not been carried and the party with the burden is not entitled to your decision on that claim.

NOTE TO JUDGE

The following bracketed statements are different descriptions of the concept of burden of proof. Use the statement(s) that are applicable.

[When I talk about weighing the evidence, I refer to its capacity to persuade you. I do not mean that you are to count the number of witnesses presented by each side or measure the length of their testimony. The concept of weighing the evidence refers to its quality and not its quantity.]

[In order to decide whether the burden of proof has been carried, you are to sift through the believable evidence and determine the persuasive weight which you feel should be assigned to it.]

[The right of each party to have the other party bear the required burden of proof is a substantial one and is not a mere matter of form.]

[Proof need not come wholly from the witnesses produced by the party having the burden of proof, but may be derived from any believable evidence in the case.]

[Proof of "possibility" as distinguished from "probability" is not enough.]

J. Direct and Circumstantial Evidence or Inferences

[*Choose one*]

1. Direct and Circumstantial Evidence

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as the testimony of an eyewitness. Circumstantial evidence (sometimes called inferences) consists of a chain of circumstances pointing to the existence of certain facts. Circumstantial evidence is based upon deductions or logical conclusions that you reach from the direct evidence.

(Let me give you an example of direct and circumstantial evidence. If a witness testified that he/she observed snow falling last night, that would be an example of direct evidence. On the other hand, if a witness testified that there was no snow on the ground before going to

sleep and that when he/she arose in the morning the ground was snow covered, you could *infer* from these facts that it snowed during the night. That would be an example of circumstantial evidence.)

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

2. Inferences

When deciding this case, you are permitted to draw inferences from the evidence. Inferences are deductions or logical conclusions drawn from the evidence. Use logic, your collective common knowledge and your common sense when determining what inferences can be made from the evidence.

K. Credibility *(short version)*

You will have to decide which witnesses to believe and which witnesses not to believe. Regardless of whether the witness is a lay person or expert, you may believe everything a witness said or only part of it or none of it.

In deciding what testimony to believe, you may take into consideration:

1. the witness' interest, if any in the outcome of this case;

2. the accuracy of the witness' recollection;

3. the witness' ability to know what he/she is talking about;

4. the reasonableness of the testimony;

5. the witness' demeanor on the stand;

6. the witness' candor or evasion;

7. the witness' willingness or reluctance to answer;

8. the inherent believability of the testimony;

9. the presence of any inconsistent or contradictory statements.

L. Credibility *(long version)*

In deciding the facts of this case, you will have to decide which witnesses to believe and which witnesses not to believe. You may believe everything a witness says or only part of it or none of it.

In deciding what to believe here are some factors you may want to consider.

1. Does the witness have an interest in the outcome of this case?

2. How good and accurate is the witness' recollection?

3. What was the witness' ability to know what he/she was talking about?

4. Were there any contradictions or changes in the witness' testimony?

Did the witness say one thing at one time and something different at some other time? If so, you may consider whether or not the discrepancy involves a matter of importance or whether it results from an innocent mistake or willful lie. You may consider any explanation that the witness gave explaining the inconsistency.

5. You may consider the demeanor of the witness. By that I mean the way the witness acted, the way the witness talked, or the way the witness reacted to certain questions.

6. Use your common sense when evaluating the testimony of a witness. If a witness told you something that did not make sense, you have a right to reject that testimony. On the other hand if what the witness said seemed reasonable and logical, you have a right to accept that testimony.

7. Is the witness' testimony reasonable when considered in the light of other evidence that you believe?

M. False in One - False in All[4]

[A trial judge has the discretion to give this charge in any situation in which the judge reasonably believes a jury may find a basis for its application. *See State v. Ernst*, 32 *N.J.* 567 (1960). When given, this charge usually will follow the section on credibility.]

(Sample l)

If you believe that any witness deliberately lied to you, on any fact significant to your decision in this case, you have the right to reject all of that witness's testimony. However in your discretion you may believe some of the testimony and not believe other parts of the testimony.

(Sample 2)

If you believe that any witness or party willfully or knowingly testified falsely to any facts significant to your decision in the case, with intent to deceive you, you may give such weight to his or her testimony as you may deem it is entitled. You may believe some of it, or you may, in your discretion, disregard all of it.

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[4] Note: Do not use the words "false in one, false in all."

N. Liability

[Set forth the liability portion of the charge here. In a general negligence case be sure to include in the charge the definition of negligence (5.10A), proximate cause (6.10) and, where applicable, the comparative negligence/ultimate outcome charge (7.31) as well as the substantive areas of the law.]

O. Damages

I shall now instruct you on the law governing damages in the event you decide the liability issue in favor of plaintiff (____name____).

The fact that I instruct you on damages should not be considered as suggesting any view of mine about which party is entitled to prevail in this case. Instructions on damages are given for your guidance in the event you find that the plaintiff (_____name_____) is entitled to a verdict. I am required to provide instructions on damages in all cases where the trial includes a claim for damages.

The plaintiff (_____name_____) has the burden of establishing by a preponderance of the evidence each item of damages that he/she claims. The plaintiff must also prove that the damages were the natural and probable consequences of the defendant's negligence. The accident must have been a proximate cause of the damages. Damages may not be based on conjecture or speculation.

In this case the plaintiff (____name____) is seeking the following types of damages [select the appropriate categories]:

1. medical expenses [Charge 8.11A];

2. past and future lost wages [Charge 8.11C];

3. pain, suffering, disability, impairment and loss of enjoyment of life [Charge 8.11E];

4. aggravation of pre-existing disability [Charge 8.11F].

In addition, the plaintiff's spouse (___name____) is seeking compensation in what we call a *per quod* claim [Charge 8.30A].

I will now discuss each category of damages with you. [Be sure to include the life expectancy charge 8.11G whenever there is a claim of permanency.]

P. No Prejudice, Passion, Bias or Sympathy

Your oath as jurors requires you to decide this case fairly and impartially, without sympathy, passion, bias or prejudice. You are to decide this case based solely upon the evidence that you find believable and in accordance with the rules of law that I give you.

(Sympathy is an emotion which is normal for human beings. No one can be critical of you for feeling some degree of sympathy in this matter. However, that

sympathy must play no part in your thinking and in the decision you reach in the jury room.)

(Similarly, your decision must not be based upon bias or prejudice which you might have developed during the trial, for or against any party.)

(Your duty is to decide this case impartially and a decision based on sympathy, passion, bias or prejudice would violate that duty.)

Q. Deliberations

You are not advocates for either party. You are judges of the facts. Your sole interest is to determine the truth from the evidence in the case.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without compromising your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with the other jurors.

R. Alternates

There are now (seven/eight) of you in the jury box. Six of you will make up the jury which will deliberate and decide the case. The other(s) will be alternate jurors who will participate if one of the other jurors is unable to continue for some reason. Then the alternate will serve as a replacement. [*See R.* 1:8-2(d).]

S. Verdict

Since this is a civil case, any verdict of 5-1 or 6-0 is a legal verdict. Therefore, it is not necessary that all six jurors agree on each question. An agreement of any five jurors is sufficient. All six jurors must deliberate fully and fairly on each and every question, and all six jurors must determine and vote upon each question. It is not necessary that the same five jurors agree upon the answers to all questions. Whenever at least five jurors have agreed to any answer, that question has been decided, and you may move on to consider the remaining questions in the case if it is appropriate to do so. All six jurors must participate fully in deliberating on the remaining questions. A juror who has been outvoted on any question shall continue to deliberate with the other jurors fairly, impartially, honestly and conscientiously to decide the remaining questions. Each juror must consider each question with an open mind.

When at least five of you have agreed upon a verdict, knock on the jury room door. Indicate to the attendant that you have reached a verdict and say nothing more. The attendant will escort you back to the jury box so that the court may receive your verdict.

T. Jury Verdict Sheet

I have prepared a jury verdict sheet which I believe should make your task simpler. I will be sending that sheet with you to the jury room. The sheet has questions that you must consider and answer within the framework of the instructions that I have given you. I will now review these questions with you.

[Go over sheet.]

Answering the questions on this sheet will be your verdict.

U. Communications with Court *(long version)*

After you have begun deliberations, all communications are done by sending a note from your foreperson. Knock on the door and hand the note to the attendant. No member of the jury should communicate with anyone outside the jury room except in this fashion. No member of the jury should indicate at any time how the jury stands numerically or otherwise until after you have reached a verdict. When I receive your note that you have reached a verdict, the attorneys will be gathered,

and I will have the entire jury into court to receive the verdict. [Note: You may have the foreperson read the verdict sheet or the judge may ask the question on the verdict sheet and have the foreperson respond and give the vote.]

Should you desire to communicate for any other reason, you must send a note in the same fashion. After I have your note, I will discuss it with counsel and then reply to you in open court on the record.

V. Communications with Court *(short version)*

If during your deliberations you wish to communicate with the court, or you would like me to repeat any part of the jury instruction, please write your request or question and give the note to the attendant. I will respond as quickly as I can by having you in the courtroom on the record. I should caution you, however, that at no point until you reach your final verdict should you indicate to the attendant or anyone else what your vote has been on any question before you. That is a matter that only members of the jury should know until you have reached a verdict.

W. Thanking the Jury

Let me take this opportunity to thank you for your service on this jury. We realize this case has interfered with your daily lives and probably caused you some inconvenience. However, our judicial system could not function without people like you willing to serve on juries. It is a job that has to be done in order that people can resolve their differences by jury trial. We are extremely grateful for the time you have spent here.

X. Exceptions of Counsel

[TO COUNSEL] - Does Counsel wish to be heard at side bar? [If there are serious objections: "Since counsel have some comments about my instructions, I'm going to excuse you while I consider their points. Do not begin to discuss the case because after I hear the lawyer's comments, I may change some of the things that I have said to you. Our discussion will take only a few moments, and then I'll bring you back."]

> [See *R.* 1:7-2 which provides: "No party may urge as error any portion of the charge to the jury or omissions there from unless he objects thereto before the jury retires to consider its verdict, but opportunity shall be given to make the objection in open court, in the absence of the jury. If a party has no opportunity to object to a ruling, order or charge, the absence of an objection shall not thereafter prejudice him."]

[How individual judges handle charge conferences differs. Some give out a "draft charge" early on in the case to focus the attention of counsel. Then there is discussion on the record just before "closing arguments" when a final charge and the verdict sheet are decided.

Others prefer the informality of a "charge conference" in chambers. Then it is important for counsel to be given opportunity to place objections, if there be any, on the record before the jury is sent out. Whatever format the judge selects, he or she should be mindful of *Rule* 1:7-2 and even after he or she has given his or her charge, should ask counsel "if they have anything further before I send the jury out to deliberate". Sometimes in a complicated charge you may leave something out that counsel can correct.]

Y. Reduce Jury to Six [unless fewer than six or more than six will deliberate. *R.* 1:8-2(b) & (c)] (11/98)

[Explain that alternates must remain available so that they can be incorporated into the deliberating jury if a problem develops. Therefore, as to the alternates, they shall continue not to discuss the case.]

Z. Designate the Foreperson

[Explain that the foreperson is the first juror in the box after the alternates have been selected. The foreperson insures that each juror deliberates, writes any questions the jury may have for the court and marks the verdict and vote on the jury question sheet. When the jury returns to the court room, the foreperson must report the verdict to the court by giving the vote and answer to each of the questions on the jury verdict sheet as they are read by the court clerk.]

AA. Swear the Attendants

[Clerk to give oath.]

BB. Lawyers Check Exhibits [*See R.* 1:8-8]

[All exhibits that have been marked into evidence should be scrutinized by counsel and given to the attendant for delivery into the jury room. Exhibits marked for identification do not go into the jury room as they are not in evidence. Counsel are responsible to see that only exhibits marked into evidence go into the jury room.]

CC. Send Jury to Deliberate

[After the above steps have been concluded, the judge should read the following instructions before sending the jury to deliberate.]

"Ladies and Gentlemen: You may now retire to the jury room for your deliberations. Thank you."

DD. Receiving Verdict [*R.* 1:8-9; *R.* 1:8-10]

1. Roll Call

Court: "We will now take a roll call of the jury."

Clerk: "Members of the Jury, as your name is called, please answer 'here'."

2. Taking Verdict

"M. (foreperson), has the jury reached a verdict?" [If "yes," proceed]. On question No. 1, *was the vote 5-1 or 6-0?* [If "yes," read question and request the answer.]

[*Repeat procedure for each question*]

3. Polling Jury

[Court must poll jury on each question where vote was 5 to 1. Ask attorneys if they want jury polled on unanimous questions. Read question, then ask:] "On this question, was your vote "yes" or "no?" [Call each juror and get their answer.] [Enter count upon the record.] [On damage question, when polling jury ask] "Do you agree or disagree with that amount?"

4. "Before discharging jurors, is there anything further, counselors?"

5. [Thank jurors and discharge them. See following section for language.]

6. Based on jury's verdict, I enter judgment for (____). Request order of judgment to be submitted. (Optional.)

7. [Request that lawyers calculate prejudgment interest for tort action -- *R.* 4:42-11 — and submit amount in order of judgment.] [Calculate from date complaint filed or 6 months after cause of action arises, whichever is later. In exceptional cases, the judge may suspend the running of such prejudgment interest.]

8. [Return evidence and transcripts to the attorneys.]

EE. Thanking and Discharging Jury

Ladies and gentlemen of the jury, the function that you have performed is one of the most important tasks that you will ever be called upon to fulfill. With the return of your verdict, your service in this case is complete.

I know that your stay with us has involved sacrifice on your part. I trust you leave here knowing that you have made a meaningful contribution to the judicial process and hope that you have enjoyed the experience.

You have been a serious, attentive and extremely diligent jury. It has been my pleasure to have worked with you. On behalf of everyone in the court room, the citizens of (___name___) County and the entire judicial system, I thank you each and every one of you. We greatly appreciate your willingness to serve and your service.

You are now discharged. Thank you very much!