

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BECKLEY DIVISION**

**MARY WEBB, individually, and in
her capacity as Administratrix of the
Estate of Robert A. Webb,**

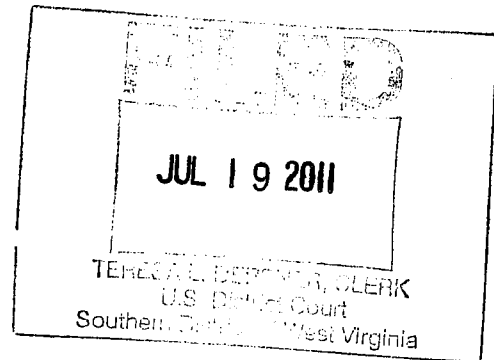
Plaintiff,

V.

CIVIL ACTION NO. 5:09-cv-01253

**RALEIGH COUNTY COMMISSION,
DEPUTY GREG S. KADE, individually
and in his official capacity, and
DEPUTY JOHN E. HAJASH, individually
and in his official capacity.**

Defendants.



THE COURT'S CHARGE AND INSTRUCTIONS

1. INTRODUCTION

Members of the jury:

Now that you have heard all of the evidence, it becomes my responsibility to instruct, or charge you, concerning the law that applies to this case. It is my exclusive responsibility and duty to consider, determine and explain the rules of law that apply in a particular case. It is the jury's, or your, exclusive responsibility and duty to consider and determine what occurred factually; that is, what the jury believes the true facts are from among all of the evidence and testimony which has been produced. I have no right to tell you which facts are established by the testimony and any exhibits, as that determination is exclusively yours. You, and

only you, are the judges of the facts. If any expression of mine or anything I may or may not have done or said would seem to indicate any opinion relating to any factual matters in this case, I instruct you to disregard it.

2. DUTY TO FOLLOW INSTRUCTIONS

It is your duty as jurors to accept and follow the law as contained in these instructions, and to apply that law to the facts that you believe have been proven and established from all of the evidence in the case. If I state any rule, direction or idea in varying ways, no emphasis is intended by me and none must be inferred by you. Each instruction is as important as any other. You are not to single out one statement or instruction alone as stating the law and ignore the other instructions or parts of instructions. You are to consider and apply these instructions together as a whole, and you are to regard each instruction in the light of all others. Neither are you to be concerned with the wisdom of any rule of law stated by me. If you have any personal opinion as to what the law is, or ought to be, you must put that opinion aside and accept and apply the law as it is. It would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in these instructions; just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in this case. In performing your duties as jurors, you must not permit yourself to be influenced or swayed by sympathy, bias, prejudice or favor as to any party. All parties expect that you will carefully and impartially consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

This case must be considered and decided by you as an action between persons of equal standing in the community and holding the same or similar stations in life. All persons, including governmental agencies, stand equal under the law.

A governmental entity, such as the Raleigh County Commission, can only act through its officers, agents and employees. Consequently, any act or omission by an officer, agent or employee of the Raleigh County Commission in the performance of his or her duties is held in law to be the act of the Raleigh County Commission.

3. BURDEN OF PROOF

The burden of proof is on the plaintiff in a civil action, such as this, to prove each and every essential element of her claim by a preponderance of the evidence. If the proof should fail to establish any element of plaintiff's claim by a preponderance of the evidence in the case, or if the defendant's evidence outweighs the plaintiff's, or if the evidence is evenly balanced in the case, the jury should find for the defendant as to that claim.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence, as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds a belief that that which is sought to be proved is more likely true than not true.

While the burden is on the plaintiff to prove his or her claim by a preponderance of the evidence, this rule does not require proof to an absolute certainty. Such proof to an absolute certainty is seldom possible in any case. In a

civil case, such as this, as opposed to criminal cases, it is proper to find that the plaintiff has succeeded in carrying the burden of proof, if, after consideration of all the evidence in the case, you believe that what is sought to be proven on that issue is more likely true than not true.

4. CONSIDERATION OF THE EVIDENCE

You are to determine the facts of this case from the evidence alone. The "evidence" in the case always consists of the sworn testimony of all the witnesses, whether the witness appeared in person or by deposition, regardless of who may have called the witness; and all exhibits received in evidence, regardless of who may have produced them; and all facts which may have been admitted by stipulation or admission. When the attorneys for all parties stipulate or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard that fact as conclusively proven. For instance, in this case, the parties have stipulated that at the time the officers fired at Robert Webb, Robert Webb had his weapon raised, shouldered and pointed directly at the deputies. Accordingly, during your deliberations, you should carefully consider the testimony of each and every witness and all exhibits, and not disregard or overlook any testimony, witness, exhibit or evidence. There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence -- such as the testimony of any eyewitness. The other is indirect or circumstantial evidence -- the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with all of the evidence in this case, both direct and circumstantial. You may not guess or speculate as to the existence of any facts in this case. But, in your consideration of the evidence, you are not limited solely to what you see and hear as the witnesses testify. On the contrary, you are permitted to draw, from the facts which you find have been established and proven, such reasonable inferences and conclusions which reason and common sense lead you to make and as seem justified in the light of your own observations and experience in the ordinary affairs of life.

Nothing that I have said or done at any time during the trial is to be considered by you as evidence of any fact or as indicating any opinion concerning any fact, the credibility of any witness, the weight of any evidence or the verdict that should be reached.

Nothing said or done by the attorneys is to be considered by you as evidence of any fact. Opening statements and final arguments are intended to help you to understand the evidence and apply the law, but they are not evidence.

Disregard entirely questions and exhibits to which an objection was sustained or answers and exhibits ordered stricken out of the evidence. Do not draw any inferences therefrom, or speculate as to matters thereby hinted.

Anything you may have seen or heard outside the courtroom is not evidence, and must be entirely disregarded.

5. CREDIBILITY OF WITNESSES

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You, as jurors, are the sole judges of the "credibility of a witness" and the "weight of the evidence." The "credibility of a witness" means the truthfulness or lack of truthfulness of the witnesses, and the "weight of the evidence" means the extent to which you are or are not convinced by the evidence. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which the witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident may see or hear it differently, and innocent misrecollection, like failure of recollection, is not an uncommon experience. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of differing witnesses, should be considered by you, but, in weighing their effect, you should consider whether the inconsistencies or discrepancies pertain to a matter of importance or an unimportant detail, and whether the discrepancy or inconsistency results from innocent error or willful falsehood.

The number of witnesses testifying on one side or the other of an issue is not alone the test of the "credibility of the witnesses" and the "weight of the evidence." If warranted by the evidence, you may believe one witness against a number of witnesses testifying differently. The tests are: How truthful is the witness, and how convincing is his or her evidence, and which witnesses and which evidence appeals to your minds as being most accurate and otherwise trustworthy in the light of all the evidence and circumstances shown.

In determining the credit and weight you will give to the testimony of any witness who has testified before you, you may consider, if found by you from the evidence:

- 1) his or her good memory or lack of memory;
- 2) the interest or lack of interest of the witness in the outcome of the trial;
- 3) the relationship of any witness to any of the parties or other witnesses;
- 4) his or her demeanor and manner of testifying;
- 5) his or her opportunity and means or lack of opportunity and means of having knowledge of the matters concerning which he or she testified;
- 6) the reasonableness or unreasonableness of his or her testimony;
- 7) his or her apparent fairness or lack of fairness;
- 8) the intelligence or lack of intelligence of the witness;
- 9) the bias, prejudice, hostility, friendliness or unfriendliness of the witness for or against any of the parties;
- 10) contradictory statements of any witness, if you believe that such were

made by the witness and that the same are contradictory of his or her testimony; however, contradictory statements, if any, may or may not be considered by the jury to establish the truth of such statements;

11) contradictory acts of any witness, if you believe that such were committed by the witness and that they were contradictory of his or her testimony.

The Court instructs the jury that a witness may be impeached, and discredited by prior inconsistent statements, and if the jury believes from the evidence in the case that the witness made inconsistent and contrary statements concerning the events of this case, then the jury has the right to disregard his whole testimony, or give it such weight to which they think it is entitled.

From these considerations and all other conditions and circumstances appearing from the evidence, you may give to the testimony of the witness such credit and weight as you believe it is entitled to receive.

If you believe that any witness in this case has knowingly testified falsely as to any material fact, you may, after considering and weighing the testimony of such witness, disregard the whole of the testimony of such witness or give it, or any part thereof, such weight and credit as you believe it to be entitled to receive.

6. EXPERT WITNESSES - OPINIONS

Ordinarily, witnesses are not permitted to testify as to opinions or conclusions. However, the rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill,

experience, training or education, may testify and state his opinion concerning such matters, and may state the reasons for the opinion. You should consider each expert opinion received in evidence in this case, and the reasons given in support of the opinion, and give it such weight as you may think it deserves. In determining the weight to be given to the opinion of an expert, you should consider the education, training and experience of the expert, the basis for the opinion, the confidence of the witness, the reasons and reasoning stated by the witness, the opinions of other similar witnesses on the same matters, and the rules generally applicable to other witnesses in this case. If you should decide that the opinion of an expert witness is not based upon sufficient education and/or experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely, or give it such weight as you find it deserves.

7. EXPERT WITNESS - HYPOTHETICAL

Expert witnesses were, at times, asked hypothetical questions, and they gave answers to such questions. "A hypothetical question has been defined as a form of question in which facts that counsel claims or assumes to have been proved are stated as a hypothesis and the opinion of an expert is asked thereon."

In answering a hypothetical question, an expert witness must accept as true every fact stated therein, but this does not mean that the jury must. If the jury finds that assumed conditions, circumstances or facts are not proven by the evidence, the validity of the opinion may dissolve, and both the question and the answer may be

disregarded entirely, or given such weight as you may deem it entitled to receive.

8. NEGLIGENCE

The jury is instructed that negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to those shown by the evidence. It is the failure to use ordinary or reasonable care. Ordinary or reasonable care is that which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence. Negligence does not require intentional or willful acts.

You will note that the person whose conduct is set up as a standard is a person of reasonable and ordinary prudence. The conduct in question must be viewed in light of all of the surrounding circumstances as shown by the evidence.

9. PROXIMATE CAUSE

You are instructed that the "proximate cause" is that which produces an injury directly, or in the natural and normal sequence of events without the intervention of any independent, intervening cause. It is the direct and immediate cause, the predominant causality which directly or in the natural sequence of events, produces the event and resulting injury, and without which the injury would have not occurred. You are further instructed that an injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or death; and that the injury or death was either a direct result or a reasonably

probable consequence of the act or omission.

An intervening cause, in order to relieve a person charged with negligence in connection with an injury, must be a negligent act, or omission, which constitutes a new effective cause and operates independently of any act, making it and it only, the proximate cause of injury.

However, a person, whose negligence is a substantial factor in bringing about injuries, is not relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct.

This does not mean that the law recognizes only one proximate cause of an injury or damage, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in such case, each be a proximate cause.

Where two or more persons are guilty of separate acts of negligence which in point of time and place concur, and together proximately cause injury to another, they are guilty of concurrent negligence for which they may be held jointly and severally liable in an action by the injured person or, in case death results therefrom, by his personal representative.

In determining whether the decedent's death and damages, if any, were proximately caused by the negligence of any of the Defendants, you are instructed that the Plaintiff need not show that it was the sole cause of death, but only that it

was a contributing factor to the damages complained of. If you determine that any Defendant's negligence was a contributing factor to his injuries and death, you may award damages as you determine have been proven by the Plaintiff against that Defendant.

10. WRONGFUL DEATH

The Plaintiff has brought a cause of action against the Defendants under West Virginia's wrongful death statute.

In order for the Plaintiff to prevail on this wrongful death claim, the Plaintiff must prove that the death of Robert Webb was caused by a wrongful act, neglect or default on the part of the Defendants as would, if death had not ensued, have entitled Robert Webb to maintain such action to recover damages from the Defendants.

11. COMPARATIVE NEGLIGENCE

West Virginia recognizes the law of comparative negligence. Under this law, you may find that both the decedent, Robert Webb, and the defendants are negligent and, if so, you are required to apportion the percentage of negligence between the decedent and the defendants, the total of which may not exceed 100 per cent.

In other words, under the law of comparative negligence, as applied to this case, if you determine that both parties are negligent (not solely one or the other), you are required to compare the percentage of negligence of the decedent, Robert Webb, if any, with the percentage of the negligence of the Defendants, Kade and Hajash, if any, and to assign a figure representing the percentage of negligence of such person.

There is one additional role involved in West Virginia's law of comparative negligence. The Court instructs the jury that where Robert Webb, by his own overt actions or failure to act where a reasonably prudent person would have done so, facilitated the events which brought about his death, you, the jury, may find that Robert Webb was negligent. If you find that the decedent, Robert Webb, is guilty of negligence which equals or exceeds the negligence of the Defendants, Kade and/or Hajash, (i.e., 50 percent or more), you must return a verdict for the Defendants, Kade and Hajash. This is because West Virginia law recognizes that the decedent's estate should not recover a verdict if he is 50 percent or more at fault for his own death.

The law of comparative negligence applies only under such circumstances where both decedent, Robert Webb, and defendants are found to be negligent. If you find that only one of the parties in this lawsuit was negligent, you should not apply the doctrine of comparative negligence.

Therefore, if you, the jury, believe from a preponderance of the evidence in this case that the Defendant(s) at the time of the event were guilty of negligence and that their negligence was the proximate cause of the death of Robert Webb, and that Robert Webb was not guilty of an equal or greater amount of negligence, then you should find a verdict for the Plaintiff, Mary Webb, and against the Defendant(s).

However, the Court instructs the jury that if you believe from a preponderance of all of the evidence that the sole cause of the event herein was negligence of the decedent, Robert Webb, then you should find for the Defendants.

12. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The Plaintiff has alleged intentional infliction of emotional distress against the Defendants. To prevail on this cause of action, the Plaintiff must prove, by a preponderance of the evidence: (1) that the Defendants' conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the Defendants acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from their conduct; (3) that the actions of the Defendants caused the Plaintiff to suffer emotional distress; and (4) that the emotional distress suffered by the Plaintiff was so severe that no reasonable person could be expected to endure it. If you find that the Plaintiff failed to prove any of these four elements of intentional infliction of emotional distress, you should find for the Defendants on this cause of action. However, if you find by a preponderance of the evidence that the Plaintiff has proven these elements, then you must find in favor of the Plaintiff.

13. CONSTITUTIONAL LAW CLAIMS

The Plaintiff in this case has sued Deputy Greg Kade and Deputy John Hajash in their individual capacities. With respect to alleged violations of federal law, a public official, such as a police officer, may be found personally liable for his or her official acts if it is shown that the official, in the exercise of discretionary powers, has injured a party through the violation of clearly established statutory or constitutional rights of which a reasonable person would have known. This is commonly known as a 1983 action.

The purpose of a 1983 action is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief for victims if such deterrence fails.

However, an official will not be held personally liable for his or her official acts if it is shown that his or her conduct did not violate clearly established law of which a reasonable official would have known, in other words, if the official acted in good faith.

To succeed on a claim of failure to provide medical attention, Plaintiff must prove each of the following things by a preponderance of the evidence:

- 1) that Mr. Webb had a serious medical need;
- 2) that Deputy Kade and Deputy Hajash were deliberately indifferent to Mr. Webb's serious medical need;
- 3) that Deputy Kade and Deputy Hajash's conduct caused harm to Mr. Webb; and that
- 4) Deputy Kade and Deputy Hajash acted under color of law.

Deliberate indifference is a very high standard – a showing of mere negligence will not meet it. When I use the term “deliberately indifferent,” I mean that Deputy Kade and Deputy Hajash consciously disregarded this risk by failing to take reasonable measures to deal with it. In deciding whether Deputy Kade and Deputy Hajash failed to take reasonable measures, you may consider whether it was practical for them to take corrective action.

If Deputy Kade and Deputy Hajash took reasonable measures to respond to

a risk, then they were not deliberately indifferent, even if Mr. Webb was ultimately harmed.

In order for the Plaintiff to hold these Defendants personally liable in this case, the Plaintiff must prove by a preponderance of the evidence that these Defendants injured the decedent, Robert Webb, through the violation of a clearly established statutory or constitutional right which a reasonable person would have known. If the Plaintiff fails to prove such a violation or if the Defendants prove that they acted in good faith, the Defendants may not be held personally liable.

14. DAMAGES

If, after considering all of the evidence, you should find from a preponderance thereof that the Defendants were not guilty of any negligence that proximately caused the damages alleged by the Plaintiff, then your verdict should be for the Defendants.

If, after considering all of the evidence, you find from a preponderance of the evidence that the Defendants were guilty of negligence that proximately caused the damages alleged by the Plaintiff, and the Plaintiff's decedent, Robert Webb, was not guilty of any negligence that proximately caused the Plaintiff's damages, then your verdict should be for the Plaintiff, and you should assess her damages utilizing the verdict form which will be submitted to you.

If you find from a preponderance of the evidence that the Defendants were guilty of negligence which proximately caused damages alleged by the Plaintiff, and you further find from a preponderance of the evidence that the Plaintiff's decedent,

Robert Webb, was also guilty of negligence which proximately caused the Plaintiff's damages, you must determine the percentage of negligence attributable to each party.

You should only award the Plaintiff such a sum as compensatory damages as will reasonably and fairly compensate for the losses that have been proven by a preponderance of the evidence to have actually been suffered and proven by a preponderance of the evidence to have been a proximate result of the conduct of the Defendant or Defendants in this case. In order for any act to proximately cause damages, you must find that the act significantly caused or contributed to Plaintiff's alleged damages. If you believe that any alleged damages are not proximately caused by any negligence of the Defendants, then you may not award compensation for such damages.

If the jury is uncertain as to whether any particular element of damage was directly or proximately caused by the alleged conduct of the Defendant(s), or if it appears just as probable that any injury or element of damage complained of resulted from a cause other than the alleged conduct of the Defendant(s), then the Plaintiff cannot recover therefor against the Defendant(s).

You shall not award compensatory damages based on speculation or sympathy. Your assessment of compensatory damages must be based only upon that evidence which is presented at trial.

In determining the amount of Plaintiff's damages, if any, you may take into consideration any pain and suffering of the decedent prior to his death, as well as

any sorrow, mental anguish, loss of solace (including society, companionship, comfort, guidance, kindly offices and advice) which the decedent's family suffered as a result of the actions of the Defendants. You are instructed that the law cannot give you a precise formula or yardstick by which you can fix with any degree of exactness compensation for such an intangible item as sorrow, mental anguish, pain and suffering, or loss of solace (including society, companionship, comfort, guidance, kindly offices and advice), but the law contemplates that six intelligent jurors, exercising common sense and calling upon their experiences in life, can satisfactorily fix and determine a proper award of money for this item of damages under proper instructions from the Court. Damages for sorrow, mental anguish, suffering, or loss of solace are never awarded on the basis of punishment to a defendant for the injuries which the plaintiff sustained. Nor are they to be measured by the amount of money which you as jurors would demand or ask for enduring the pain which the plaintiff has endured. On the contrary, damages for these items are to be awarded solely on the basis of compensation -- fair, reasonable and adequate compensation -- taking into consideration the nature and extent of the injury, the character and frequency of the pain resulting from it, and the period it has persisted. You can also award compensatory damages, if any, for the reasonably expected loss of income of the decedent, Robert Webb, and services, protection, care and assistance provided by Robert Webb, as well as, expenses for his care, treatment and transport together with his reasonable funeral expenses.

The Court instructs you that the "reasonably expected loss of Robert Webb's

income” is the total amount, properly discounted to present value, that he would reasonably have been expected to earn had he lived out a normal life span. It is not merely the amount of his future earnings which his family and other beneficiaries might reasonably have expected to receive from Robert Webb had he lived out a normal life span.

The Plaintiff in this case has brought a claim for suffering of Robert Webb prior to death. In order to recover damages for pain and suffering on the part of Robert Webb, the Plaintiff has the burden of proving conscious pain and suffering of Robert Webb prior to death. Where death is instantaneous or where there is no evidence that Robert Webb consciously perceived pain and suffering, no damages for pain and suffering are allowed. However, the existence of a decedent’s conscious pain and suffering may be inferred from other evidence that does not explicitly establish the fact. If you find that Robert Webb was alive for a period after the fatal shooting of July 4, 2006, you may award such damages for suffering prior to death as you see fit.

In the event you find for the Plaintiff, you are to reduce the loss of the decedent’s future earnings and fringe benefits, if any, to present dollar value. However, in arriving at a fair verdict, you are not to attempt to reduce to present dollar value the damages, if any, for pain and suffering, sorrow, mental anguish, loss of solace (including society, companionship, comfort, guidance, kindly offices and advice) suffered by Mr. Webb’s widow and children. As the Court has stated, there is no measure for the jury to use, other than your sense of fairness, to determine

these indefinite damages suffered by the Plaintiff, Mary Webb.

15. PUNITIVE DAMAGES

If you find that the Plaintiff is entitled to an award of compensatory damages, then you may also consider whether the Plaintiff is entitled to any punitive damages. Punitive damages are damages that are awarded to punish a defendant who has damaged the plaintiff by acting willfully, wantonly, maliciously or oppressively; or through gross fraud; or by reckless conduct affecting the rights of others. They are intended to deter the defendant and others from engaging in a similar course of conduct in the future. Punitive damages are not compensation for injury. An award of punitive damages means that you, the jury, believe that the Defendant(s) should be punished for his conduct as proven by the evidence in this case.

A plaintiff is not entitled to punitive damages as a matter of right. In other words, even if you should find that a defendant's conduct rises to the level of gross fraud, malice or oppression; wanton, willful or reckless misconduct; or criminal indifference to civil obligations affecting the rights of others, the decision to impose or to withhold punitive damages lies within your sound discretion.

The amount of punitive damages (if any) that may be awarded is that amount of damages which will be sufficient in the jury's judgment to punish the Defendant(s) and to deter others from engaging in a similar course of conduct. In determining the amount of punitive damages, if any, to award in this case, you should take into consideration all the circumstances surrounding the particular occurrences involved here, including the nature of the Defendant's wrongdoing, the extent of the harm it

inflicted on the Plaintiff, the Defendant's intent in committing its wrongful acts, and Defendant's wealth, as well as any mitigating circumstances.

You are instructed that if you find by a preponderance of the evidence that the acts of the Defendant(s) were willful, malicious, wanton or with reckless disregard for the Plaintiff, then you may award punitive damages against the Defendant. You should remember that punitive damages, if any, can only be awarded against the Defendants, Kade and/or Hajash.

In determining the amount of punitive damages which should be awarded, you must consider the following factors:

- 1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the Defendant's conduct as well as the harm that actually occurred;
- 2) You should consider how long the Defendant's malicious, wanton, willful or reckless actions continued, and whether the Defendant(s) were aware that their actions were causing or likely to cause harm;
- 3) You should consider whether the Defendant(s) attempted to conceal or cover up their actions;
- 4) You should consider whether the Defendant(s) engaged in similar conduct in the past;
- 5) You should consider whether the Defendant(s) made reasonable efforts to make amends;
- 6) As a matter of fundamental fairness, punitive damages should bear a

reasonable relationship to the amount of compensatory damages.

7) The financial position of the Defendant(s) is relevant in determining the appropriate amount of punitive damages, if any, against the Defendant(s) in this case.

The Court instructs the jury that you can only assess punitive damages against the Defendant(s) if you find that they acted outside the scope of their employment.

The Court instructs the jury that the fact that the Court has instructed you relative to damages must not be considered by you as an indication that the Court has an opinion relative to whether damages should be awarded. It is for you, and you alone, to determine whether there should be a recovery in this case.

16. THE JURY'S DUTY DURING DELIBERATIONS

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions, and speak for you here in Court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all of the evidence, discussed it fully with your fellow jurors, and

listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussions persuade you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the security officer, signed by your foreperson. I will respond as soon as possible either in writing or verbally in open court. Remember that you should not tell anyone - including me - how your votes stand numerically.

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. NOTHING I have said or done is intended to suggest what your verdict should be - that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date, and advise the security officer that you are ready to return to the courtroom and report your verdict.