

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CHAD VEST, individually and as)
the Special Administrator of)
the ESTATE OF ALLEN J. VEST,)

Plaintiff,)

vs.)

FREIGHTLINER, LLC,)

Defendant.)

Civil No. 07-CV-2517-D

JURY INSTRUCTIONS

JURY INSTRUCTION NO. 1

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.

JURY INSTRUCTION NO. 2

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.

JURY INSTRUCTION NO. 3

ROLE OF JURY

As members of the jury, you are the sole and exclusive judges of the facts. You pass upon the evidence. You determine the credibility of the witnesses. You resolve such conflicts as there may be in the testimony. You draw whatever reasonable inferences you decide to draw from the facts as you have determined them, and you determine the weight of the evidence.

Since you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to the facts or what your verdict should be. The rulings I have made during the trial are not any indication of my views of what your decision should be as to whether or not the plaintiff has proven his case.

As to the facts, ladies and gentlemen, you are the exclusive judges. You are to perform the duty of finding the facts without bias or prejudice to any party.

JURY INSTRUCTION NO. 4

ROLE OF JURY

Your authority must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law which I give you. In making your determination of the facts in this case, your judgment must be applied only to that which is properly in evidence.

Arguments of counsel are not in evidence, although you may give consideration to those arguments in making up your mind on what inferences to draw from the facts which are in evidence.

From time to time the court has been called upon to pass upon the admissibility of certain evidence, although I have tried to do so, insofar as it was practicable, out of your hearing. You have no concern with the reasons for any such rulings and you are not to draw any inferences from them.

Whether offered evidence is admissible is purely a question of law in the province of the court and outside the province of the jury. In admitting evidence to which objection has been made, the court does not determine what weight should be given to such evidence, nor does it pass on the credibility of the evidence. Of course, you will dismiss from your mind completely, entirely any evidence which has been ruled out of the case by the court, and you will refrain from speculation or conjecture or any guesswork about the nature or effect of any discussion between court and counsel

held out of your hearing or sight.

JURY INSTRUCTION NO. 5

OBJECTIONS

It is the duty of the attorney on each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. Counsel also have the right and duty to ask the court to make rulings of law and to request conferences at the side bar out of the hearing of the jury. All those questions of law must be decided by me, the court. You should not show any prejudice against an attorney or his or her client because the attorney objected to the admissibility of evidence, or asked for a conference out of the hearing of the jury or asked the court for a ruling on the law.

As I already indicated, my rulings on the admissibility of evidence do not, unless expressly stated by me, indicate any opinion as to the weight or effect of such evidence. You are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

JURY INSTRUCTION NO.6

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.

JURY INSTRUCTION NO. 7

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.

JURY INSTRUCTION NO. 8

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 the light of your common sense, observations and experience.

JURY INSTRUCTION NO. 9

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 causes 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 was 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 to any evidence.

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

JURY INSTRUCTION NO. 10

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 the evidence in the 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.

JURY INSTRUCTION NO. 11

DEPOSITION TESTIMONY

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

JURY INSTRUCTION NO. 12

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.

JURY INSTRUCTION NO. 13

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:

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' testimony when you consider all of the evidence in the case?

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

JURY INSTRUCTION NO. 14

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.

JURY INSTRUCTION NO. 15

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.

JURY INSTRUCTION NO. 16

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.

JURY INSTRUCTION NO. 17

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 witnesses; and
2. The credibility of the witnesses; and
3. The facts relied upon by the witnesses to support the opinion; and
4. The reasoning used by witnesses 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.

JURY INSTRUCTION NO. 18

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.

JURY INSTRUCTION NO. 19

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.

JURY INSTRUCTION NO. 20

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:

1. Whether the Freightliner Century Class Truck was defective or unreasonably dangerous;
2. Whether the defective or unreasonably dangerous condition of the Freightliner Century Class Truck was the cause of Allen Vest's death and damages.

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

1. That John B. Latta crossing the center line of travel and striking the Freightliner Century Class truck being driven by Allen Vest was the cause of the injuries sustained by Allen Vest.

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.

JURY INSTRUCTION NO. 21

LEGAL THEORIES

Turning now to the legal theories in the case, it is my duty to tell you what the law is. If a lawyer or party has told you that the law is different from what I tell you it is, you must, of course, take the law as I give it to you. That is my duty, but it is your duty, and your duty alone, to determine what the facts are and after you have determined what the facts are, to apply those facts to the law as I give it to you, free from any bias, prejudice or sympathy, either one way or the other.

The plaintiff's first theory of recovery in this case is strict liability. The plaintiff's second theory of recovery in this case is negligence. The plaintiff's third theory of recovery is breach of warranty, specifically, the implied warranty of merchantability.

I will now discuss the legal theories of strict liability, negligence, and breach of warranty in more detail.

JURY INSTRUCTION NO. 22

STRICT LIABILITY

Plaintiff's first theory is strict liability. One who manufactures 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 is engaged in the business of manufacturing 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.

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 who knew of its dangerous condition. An "ordinary consumer" is a person who purchases or uses a product with the ordinary knowledge common to the community as to its characteristics. A "manufacturer" is a person or company that designs, fabricates, produces, compounds, processes or assembles any product or its component parts. The word "seller" includes a retailer, wholesaler, or distributor.

The manufacturer of a product is not responsible for any injury to a 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 manufacturer's control. In making this determination, you must apply the state of scientific and technological knowledge available to the manufacturer at the time the product was placed on the market, rather than at the time of the injury. Consider also the customary designs, methods, standards and techniques of manufacturing and testing by other manufacturers of similar products.

JURY INSTRUCTION NO. 23

NEGLIGENCE

The second claim by the plaintiff is that defendant was negligent. 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.

While the instructions as to negligence discuss the elements as they relate to plaintiff's claim against defendant, the same elements and analysis relates to defendant's claim that John Latta was negligent.

JURY INSTRUCTION NO. 24

NEGLIGENCE ELEMENTS

In order to establish a claim of negligence, the plaintiff must prove the following elements:

1. That the defendant owed Allen Vest a duty of care;
2. That defendant breached that duty through conduct falling below the applicable standard of care;
3. That an injury was suffered by Allen Vest;
4. That the injury would not have occurred but for the breach of duty by defendant; and
5. That the breach of duty of defendant was the legal cause of Allen Vest's injuries.

JURY INSTRUCTION NO. 25

ELEMENTS

The first element that the plaintiff must prove by a preponderance of the evidence in a negligence claim is that defendant owed Allen Vest a duty of care.

A duty is a legal obligation owed by one person to another. In this case, defendant owed to Allen Vest a duty to manufacture, design, and test a truck that may be used in the manner and for the purpose for which it was made.

The second element that the plaintiff must prove by a preponderance of the evidence to establish a claim of negligence against defendant is that defendant breached a duty of care owed to Allen Vest.

The third element that the plaintiff must prove by a preponderance of the evidence is that Allen Vest was injured.

The fourth element that the plaintiff must prove by a preponderance of the evidence is that the injuries to Allen Vest would not have occurred but for the breach of duty of defendant.

In order to satisfy this fourth element as to defendant, the plaintiff must show that defendant failed to use reasonable care in designing, manufacturing, and testing the truck and that the failure resulted in injuries to Allen Vest.

The fifth element the plaintiff must prove by a preponderance of the evidence is that the breach of duty as to defendant was the legal cause of Allen Vest's injuries.

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

JURY INSTRUCTION NO. 26

MANUFACTURER'S DUTY OF CARE

The manufacturer of a product has a duty to use reasonable care in designing, manufacturing and testing the product and in the selection and testing 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.

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 27

COMPARATIVE FAULT - THEORY AND EFFECT

In deciding this case you must determine the fault, if any, of each Freightliner and John Latta. If you find both of them at fault, you will then compare the fault of each of them. To do this, you will need to know the definition of fault.

A party or non-party is at fault if you find that party or non-party was negligent or has a basis of responsibility arising from strict liability or breach of warranty, and that the negligence or basis of responsibility was a legal cause of the injury for which the claims was made.

Fault has two parts: a basis of responsibility in either negligence, strict liability, or breach of warranty and causation. 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. The mere happening of an injury or accident does not, in and of itself, prove negligence. A person may assume that every other person will use reasonable care unless the circumstances indicate the contrary to a reasonably careful person.

The second part of fault is causation.

Causation has two components: (a) causation in fact and (b) legal cause.

A cause in fact of Allen Vest's death is a cause which directly contributed to the death and without which the death would not have occurred. To be a cause in fact, it is not necessary that a negligent act or omission be the sole cause of Allen Vest's death, only that it be a cause.

Once you have determined that a party's or non-party's negligence was a cause in fact of Allen Vest's death, the next question you must decide is whether the party's or non-party's negligence was also a legal cause of the plaintiff's injury.

Two requirements must be met to determine whether a party's or non-party's negligent act or conduct giving rise to strict liability was a legal cause of the injury or damage.

1. The conduct must have been a substantial factor in bringing about the harm being complained of; and

2. The harm giving rise to the action could have been reasonably foreseen or anticipated by a person of ordinary intelligence and prudence.

To be a legal cause of an injury there is no requirement that the cause be the only cause, the last act, or the one nearest to the injury, so long as it is a substantial factor in producing the injury or damage.

The foreseeability requirement does not require the person guilty of negligence to foresee the exact manner in which the injury takes place or the exact person who would be injured. It

is enough that the person guilty of negligence could foresee, or through the use of reasonable care, should have foreseen the general manner in which the injury or damage occurred.

A single injury can be caused by the negligent acts or omissions of one or more persons.

If you find that a party or non-party was negligent or has a basis of responsibility arising from strict liability or breach of warranty, and that negligence or basis of responsibility was a legal cause of the injury 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 the Defendant's fault to be zero. Likewise, Defendant has the burden to prove John Latta's fault. If the Defendant fails to do so, you should find John Latta's fault to be zero. 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 the Plaintiff. You must do so without reducing those damages by any percentage of fault you may have charged to a non-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 may award by any percentage of fault that you may have assigned to Jon Latta.

JURY INSTRUCTION NO. 28

WHERE CLAIM IS MADE AGAINST ONE NOT JOINED AS A PARTY

In this case, Freightliner claims that John Latta was at fault and has the burden of proving his fault.

Even though he has not appeared or offered evidence, it is necessary that you determine whether John Latta was at fault and determine the percentage of fault, if any, chargeable to him.

JURY INSTRUCTION NO. 29

COMPARATIVE FAULT BASIS OF COMPARISON

You have been instructed that if you find both Defendant and John Latta at fault, you must apportion the fault of Defendant and John Latta.

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

You should weigh the respective contributions of the Defendant and John Latta, considering the conduct of each as a whole, determine whether one made a larger contribution than the other, and if so, to what extent it exceeds that of the other.

JURY INSTRUCTION NO. 30

COMPARATIVE FAULT - ADDITIONAL FACTORS FOR
COMPARING FAULT

The percentage of fault assigned to either Defendant or John Latta depends upon all of the circumstances of the case. The conduct of either 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 factors(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 either Defendant or John Latta and the determination of the relative percentages of fault, if any, are matters for you alone to decide.

1. Whose conduct more directly caused Mr. Vest's death;
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; and,
4. What was the significance of what the person was attempting to accomplish by the conduct.

JURY INSTRUCTION NO. 31

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 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.

JURY INSTRUCTION NO. 32

BREACH OF WARRANTY

The third theory under which plaintiff seeks to establish liability is on a breach of warranty, specifically, breach of the implied warranty of merchantability. 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 of goods contains an implied warranty that goods are merchantable. This warranty requires that the goods are fit for the ordinary purposes for which such goods are used or sold. To prove breach of warranty, the plaintiff must prove that the truck was sold in a defective or unreasonably dangerous condition.

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.

JURY INSTRUCTION NO. 33

IMPLIED WARRANTY DEFINED

An implied warranty is a guarantee about the quality of goods or services purchased that is not written down or explicitly spoken. Virtually everything you buy comes with an implied warranty of merchantability.

JURY INSTRUCTION NO. 34

IMPLIED WARRANTY OF MERCHANTABILITY

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

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

JURY INSTRUCTION NO. 35

WRONGFUL DEATH

In this case, suit has been brought for damages alleging the death of Allen Vest was caused by the fault of Freightliner. 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. Loss of earning capacity; and
3. Loss of pension.

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 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.

JURY INSTRUCTION NO. 36

COMPENSATORY DAMAGES

If, under the Court's instructions, you find that the plaintiff is entitled to damages, then you must award plaintiff damages that will reasonably compensate the plaintiff for claimed loss or harm which has been proven by a preponderance of the evidence, provided you also find it was or will be suffered by the plaintiff and was legally caused by the act or omission or condition upon which you base your finding of liability.

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. In determining the amount of damages, you should consider the following elements:

Loss of earning capacity. Loss of earning capacity is the value of earning capacity that has been lost in the past and the present cash value of lost earning capacity that is likely to be lost in the future as a result of the injury in question.

It is not the loss of time or actual earnings that make up this item of damages, but the loss of the ability to earn. There may be a loss of earning capacity even though there has been no loss of earnings. The loss of the ability to earn money may include, but is not limited to, actual loss of income.

In deciding what, if any, award should be made for loss of the ability to earn, you should consider any evidence of Allen

Vest's earning capacity, including, among other things, his health, age, character, occupation, past earnings, intelligence, skill, talents, experience and record of employment.

Physical pain and mental suffering. Physical pain and suffering is reasonable compensation for any physical pain and suffering, physical and mental discomfort suffered by the Allen Vest. Mental suffering includes anguish, grief, shame, or worry.

Loss of enjoyment of life: Loss of the enjoyment of life takes into account the loss of the normal enjoyments and pleasures in life in the future.

Pain and suffering, and loss of enjoyment of life are separate types of losses. A plaintiff is entitled to recover for these losses if the plaintiff proves by a preponderance of the evidence that each was caused by the defendant's fault.

No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for pain and suffering, and loss of enjoyment of life. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for pain and suffering and loss of enjoyment of life, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

JURY INSTRUCTION NO. 37

DETERMINING DAMAGES - 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 reasonably certain.

JURY INSTRUCTION NO. 38

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 Allen Vest including evidence of the Allen Vest's health, occupation, habits and other activities.

JURY INSTRUCTION NO. 39

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 reasonably 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.

JURY INSTRUCTION NO. 40

PUNITIVE DAMAGES - PURPOSE AND STANDARD

The 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 damages as a legal result of Defendant's fault and you have made an award for compensatory damages.

The purpose of punitive damages is not to further compensate a 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 Defendant has acted recklessly.

Clear and convincing evidence is a different and higher standard than preponderance of the evidence. It means that 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 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.

JURY INSTRUCTION NO. 41

PUNITIVE DAMAGES - AMOUNT

If you decide that the plaintiff is entitled to punitive damages, you must 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 objectionable nature of the defendant's wrongdoing, the impact of the defendant's conduct on the plaintiff, and the relationship of the parties;
2. The defendant's awareness of the amount of harm being caused and the defendant's motivation in causing the harm;
3. The duration of the defendant's misconduct and whether the defendant attempted to conceal the conduct;
4. The amount of money the plaintiff has spent in the attempt to recover the losses;
5. 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; and
6. Any other circumstances shown by the evidence that bears on determining the proper amount of the punitive award.

If you decide to award the Plaintiff compensatory damages that is for the purpose for 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.

JURY INSTRUCTION NO. 42

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 [number of jurors]; and (4) to make the resulting average the amount you award.

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 43

EXPLANATION OF VERDICT

The percentage figure for each party or non-party may range from zero (0) to one hundred (100) percent. When the percentages of fault of all parties or non-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 person to whom you may assign fault are:

- (1) Freightliner, LLC
- (2) John Latta

Your next obligation is to determine the full amount of damages, if any, sustained by Chad Vest, the Administrator of the estate of Allen Vest, without considering the question of fault.

JURY INSTRUCTION NO. 44

CLOSING INSTRUCTIONS

Finally, ladies and gentlemen, we come to the point where we will discuss the form of your verdict and the process of your deliberations. You will be taking with you to the jury room a verdict form that will reflect your findings. The verdict form reads as follows:

[READ VERDICT FORM]

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations and be your spokesperson here in court. A Verdict Form has been prepared for your convenience. You will take this form and a copy of these instructions with you to the jury room.

When the jury has completed the Verdict Form, the foreperson will then date and sign the Verdict Form as so completed, and the jury will then return it to the courtroom.

It is proper to add the caution that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in anyway or manner any intimation as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

Your verdict must represent the considered judgment of each of you. In order to return a verdict, it is necessary that each of you agree to that verdict. That is, your verdict must be unanimous.

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 violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

We will be sending with you to the jury room all of the exhibits in the case. You may have not seen all of these previously and they will be there for your review and consideration. You may take a break before you begin the case. However, you may not deliberate at any time unless all of you are present together in the jury room. Some of you have taken notes. I remind you that these are for your own individual use only and are to be used by you only to refresh your recollection about the case. They are not to be shown to others or otherwise used as a

basis for your discussion about the case.

You will take the verdict form to the jury room and when you have reached a unanimous agreement as to your verdict, you will have your foreperson fill it in, date and sign it, and then return to the courtroom.

Remember at all times that you are not partisans. You are judges - judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the marshal, signed by your foreperson, or by one or more members of the jury. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the jury on any subject touching the merits of the case, other than in writing, or orally here in open court.

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

**CHAD VEST, individually and as the
Special Administrator of the ESTATE OF
ALLEN J. VEST,**)

Plaintiff,)

vs.)

FREIGHTLINER, LLC,)

Defendant.)

Civil No. 07-CV-2517-D

JURY VERDICT

1. Do you find Freightliner, LLC to be at fault due to strict liability? (Any liability arising out of strict liability must be compared to the result set out in question No. 5. The Plaintiff has the burden of proof.)

Yes _____

No _____

2. Do you find Freightliner, LLC to be at fault due to negligence? (Any liability arising out of negligence must be compared to the result set out in question No. 5. The Plaintiff has the burden of proof.)

Yes _____

No _____

3. Do you find Freightliner, LLC to be at fault due to breach of implied warranty?

(Any liability arising out of breach of warranty must be compared to the result set out in question No. 5. The Plaintiff has the burden of proof.)

Yes _____

No _____

If you answered Yes to any of the above questions, then go to the next question. If your answer to all of the above questions is No, return to the Courtroom with your Signed Verdict Form.

4. Do you find John Latta to be at fault due to negligence? (Any fault arising out of John Latta's negligence must be compared and the result set out in question 5. The Defendant has the burden of proof.)

Yes _____

No _____

If you answered Yes to Question 4, then go to Question 5. If your answer to Question 4 was No, then go to Question 6.

5. If you found Freightliner, LLC and John Latta 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?

Freightliner, LLC (0-100%) _____%

John Latta (0-100%) _____%

(Total must be equal to 100%)

6. Decide the total amount of damages sustained by the Plaintiff. Do not reduce those damages by any percentage of fault you assign to John Latta. 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 John Latta.

What amount of damages, if any, which have been proven by a preponderance of the evidence:

Past physical pain and suffering of Allen Vest	\$ _____
Present cash value of past and future loss of capacity for the enjoyment of life of Allen Vest	\$ _____
Present cash value of Allen Vest's past and future loss of earning capacity	\$ _____
Present cash value of Allen Vest's loss of pension benefits	\$ _____
Loss of consortium	\$ _____
TOTAL DAMAGES	\$ _____

7. Do you find that Plaintiff has proven by clear and convincing evidence the acts of Freightliner, LLC were reckless?

Yes _____
No _____

If you answered Yes to Question 7, then go to Question 8. If you answered No to Question 7, return to the Courtroom with your signed Verdict Form.

8. What is the total amount of punitive damages you award in this case?

\$ _____

Jury Foreperson

Date