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SECTION 101 — OATHS

101.1 Oath of Jurors Before Voir Dire

101.2 Oath of Jurors After Voir Dire

101.3 Oath of a Witness

101.4 Oath of an Interpreter

101.1 OATH OF JURORS BEFORE VOIR DIRE

Do you solemnly swear or affirm that you will answer truthfully all questions asked of you as prospective jurors [so help you God]?

101.2 OATH OF JUROR AFTER VOIR DIRE

Do you solemnly swear or affirm that you will well and truly try this case between the [plaintiff(s)] [petitioner(s)] and [defendant(s)] [respondent(s)], and a true verdict render according to the law and evidence [so help you God]?

101.3 OATH OF A WITNESS

Do you solemnly swear or affirm that the evidence you are about to give will be the truth, the whole truth, and nothing but the truth [so help you God]?

101.4 OATH OF AN INTERPRETER

Do you solemnly swear or affirm that you will make a true interpretation to the witness of all questions or statements made to [him] [her] in a language which that person understands, and a true interpretation of the witness' statements into the English language [so help you God]?

SECTION 200 — PRELIMINARY INSTRUCTIONS

Qualifications Instruction

A. During Jury Selection

201.1 Description of the Case

201.2 Introduction of Participants and Their Roles

201.3 Explanation of the Voir Dire Process

B. After Jury Selected and Sworn

202.1 Introduction

202.2 Explanation of the Trial Procedure

202.3 Note-Taking by Jurors

202.4 Juror Questions

202.5 Jury to Be Guided by Official English Translation/Interpretation

QUALIFICATIONS INSTRUCTION

Many of you have electronic devices such as cell phones, smartphones, tablets, and laptops. Even though you have not yet been selected as a juror, there are some strict rules that you must follow about electronic devices.

When you are called to a courtroom, the judge will give you specific instructions on the use of electronic devices. These rules are so important that the judge may tell you that you must turn off your cell phone or other electronic devices completely or that you cannot have your cell phone or electronic devices in the courtroom. If someone needs to contact you in case of an emergency, the judge will provide you with a phone number where you can receive messages.

If the trial judge allows you to keep your cell phones, computers, or other electronic devices, you cannot use them to take photographs, video recordings, or audio recordings of the proceedings in the courtroom or your fellow jurors. You must not use them to search the Internet or to find out anything related to any cases in the courthouse.

Why is this restriction imposed? This restriction is imposed because jurors must decide the case without distraction and only on the evidence presented in the courtroom. I know that, for some of you, these restrictions affect your normal daily activities and may require a change in the way you are used to communicating and perhaps even in the way you are used to learning.

If you investigate, research, or make inquiries on your own, the trial judge has no way to make sure that the information you obtain is proper for the case. The parties likewise have no opportunity to dispute or challenge the accuracy of what you find. Any independent investigation by a juror unfairly and improperly prevents the parties from having that opportunity our judicial system promises.

Between now and when you have been discharged from jury

duty by the judge, you must not discuss any information about your jury service with anyone, including friends, co-workers, and family members. You may tell those who need to know where you are that you have been called for jury duty. If you are picked for a jury, you may tell people that you have been picked for a jury and how long the case may take. However, you must not give anyone any information about the case itself or the people involved in the case. You must also warn people not to try to say anything to you or write to you about your jury service or the case. This includes face-to-face, phone or computer communications.

I want to stress that you must not use electronic devices or computers to talk about this case, including tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all. Do not send or accept any messages, including e-mail and text messages, about your jury service. You must not disclose your thoughts about your jury service or ask for advice on how to decide any case.

The judge will tell you when you are released from this instruction. Remember, these rules are designed to guarantee a fair trial. It is important that you understand the rules as well as the impact on our system of justice if you fail to follow them. If it is determined that any one of you has violated this rule, and conducted any type of independent research or investigation, it may result in a mistrial. A mistrial would require the case to be tried again at great expense to the parties and the judicial system. The judge may also impose a penalty upon any juror who violates this instruction. All of us are depending on you to follow these rules, so that there will be a fair and lawful resolution of every case.

NOTE ON USE

This instruction should be given in addition to and at the conclusion of the instructions normally given to the prospective jurors. The portion of this instruction dealing with communication with others and outside research may need to be modified to include

other specified means of communication or research as technology develops.

(Revised December 4, 2014.)

A. DURING JURY SELECTION

201.1 DESCRIPTION OF THE CASE (PRIOR TO VOIR DIRE)

Welcome. [I] [The clerk] will now administer your oath.

Now that you have been sworn, I'd like to give you an idea about what we are here to do.

This is a civil trial. A civil trial is different from a criminal case, where a defendant is charged by the state prosecutor with committing a crime. The subject of a civil trial is a disagreement between people or companies [or others, as appropriate], where the claims of one or more of these parties have been brought to court to be resolved. It is called "a trial of a lawsuit."

This is a case about (insert brief description of claim(s) and defense(s) brought to trial in this case)**.***

The incident involved in this case occurred on (date) **at** (location)**.** (Add any other information relevant to voir dire)**.**

The principal witnesses who will testify in this case are (list witnesses)**.**

NOTE ON USE FOR 201.1

*See, for example, 401.2.

201.2 INTRODUCTION OF PARTICIPANTS AND THEIR ROLES

Who are the people here and what do they do?

Judge/Court: **I am the Judge. You may hear people occasionally refer to me as "The Court." That is the formal name for my role. My job is to maintain order and decide how to apply the rules of the law to the trial. I will also explain various rules to you that you will need to know in order to do your job as the jury. It is my job to remain neutral on the issues of this lawsuit.**

Parties: **A party who files a lawsuit is called the Plaintiff. A party that is sued is called the Defendant.**

Attorneys: **The attorneys have the job of representing their clients. That means they speak for their client here at the trial. They have taken oaths as attorneys to do their best and to follow the rules for their profession.**

Plaintiff's Counsel: **The attorney on this side of the courtroom,** (introduce by name)**, represents** (client name) **and is the person who filed the lawsuit here at the courthouse. [His] [Her] job is to present [his] [her] client's side of things to you. [He] [She] and [his] [her] client will be referred to most of the time as "the plaintiff."** (Attorney name)**, will you please introduce who is sitting at the table with you?**

[Plaintiff without Counsel: (Introduce claimant by name)**, on this side of the courtroom, is the person who filed the lawsuit at the courthouse.** (Claimant) **is not represented by an attorney and will present [his] [her] side of things to you [himself] [herself].]**

Defendant's Counsel: **The attorney on this side of the courtroom,** (introduce by name)**, represents** (client name)**, the one who has been sued. [His] [Her] job is to present [his] [her] client's side of things to you. [He] [She] and [his] [her] client will usually be referred to here as "the defendant."** (Attorney name)**, will you please introduce who is sitting at the table with you?**

[Defendant's Counsel: **The attorney on this side of the**

courtroom, (introduce by name)**, represents** (client name)**, the one who has been sued. [His] [Her] job is to present [his] [her] client's side of things to you. [He] [She] and [his] [her] client will usually be referred to here as "the defendant." [His] [Her] client** (defendant uninsured or underinsured motorist carrier) **is** (claimant's name) **motor vehicle insurance company and provided [him] [her] [uninsured] [underinsured] motorist coverage, which may be available to pay some or all of the damages that may be awarded.]***

**Use the bracketed paragraph above when the case involves an uninsured or underinsured motorist carrier.*

[Defendant without Counsel: (Introduce defendant by name)**, on this side of the courtroom, is the one who has been sued.** (Defendant) **is not represented by an attorney and will present [his] [her] side of things to you [himself] [herself].]**

Court Clerk: **This person sitting in front of me,** (name)**, is the court clerk. [He] [She] is here to assist me with some of the mechanics of the trial process, including the numbering and collection of the exhibits that are introduced in the course of the trial.**

Court Reporter: **The person sitting at the stenographic machine,** (name)**, is the court reporter. [His] [Her] job is to keep an accurate legal record of everything we say and do during this trial.**

Bailiff: **The person over there,** (name)**, is the bailiff. [His] [Her] job is to maintain order and security in the courtroom. The bailiff is also my representative to the jury. Anything you need or any problems that come up for you during the course of the trial should be brought to [him] [her]. However, the bailiff cannot answer any of your questions about the case. Only I can do that.**

Jury: **Last, but not least, is the jury, which we will begin to select in a few moments from among all of you. The jury's job will be to decide what the facts are and what the facts mean. Jurors should be as neutral as possible at this point and have no**

fixed opinion about the lawsuit.

In order to have a fair and lawful trial, there are rules that all jurors must follow. A basic rule is that jurors must decide the case only on the evidence presented in the courtroom. You must not communicate with anyone, including friends and family members, about this case, the people and places involved, or your jury service. You must not disclose your thoughts about this case or ask for advice on how to decide this case.

The law requires that jurors consider only the testimony and other evidence presented during the trial. The law also requires that jurors keep an open mind and not discuss their opinions with other jurors until the jury retires to deliberate at the end of the case. If you are selected as a juror in this case, you cannot discuss the case with your fellow jurors before you are permitted to do so at the conclusion of the trial, or with anyone else until after a decision has been reached by the jury. Therefore, starting now, you cannot talk about the case or otherwise have any communication about the case with anyone, including your fellow jurors, until I tell you that such discussions may take place.

In addition to not having face-to-face discussions with your fellow jurors or anyone else, you must not communicate with anyone about the case in any way, whether orally or in writing, including electronically, or on the Internet through e-mail, text messaging, blogs, or social media such as (insert examples of social media platforms)**, or any other electronic communication whatsoever.**

You also must not conduct any type of independent or personal research or investigation regarding any matters related to this case. You must not look up words, names, [maps,] or anything else that may have anything to do with this case. Do not use your cellphones or any other device to do any research regarding this case, the matters in the case, the legal issues in the case, or the individuals or entities involved in the case. And you must ignore any information about the case you might see, even accidentally, in the news media, on the Internet, or on

social media. This is because you must base the decisions you will have to make in this case solely on what you hear and see in this courtroom.

I want to stress again that this rule means you must not use electronic devices to communicate about this case. Do not send or accept any messages to or from anyone about this case or your jury service.

This applies whether you are in the courthouse, at home, or anywhere else.

Many of you may have cell phones or other electronic devices with you here in the courtroom.**

***The trial judge should select one of the following two alternative instructions explaining the rules governing jurors' use of electronic devices, as explained in Note on Use 1.*

Alternative A: **[All cell phones, computers, tablets, or other types of electronic devices must be turned off while you are in the courtroom. Turned off means that the phone or other electronic device is actually off and not in a silent or vibrating mode. You may use these devices during recesses, but even then you may not use your cell phone or electronic device to find out any information about the case or communicate with anyone about the case or the people involved in the case. Do not take photographs, video recordings, or audio recordings of the proceedings or of your fellow jurors. After each recess, please double check to make sure your cell phone or electronic device is turned off. At the end of the case, while you are deliberating, you must not communicate with anyone outside the jury room. You cannot have in the jury room any cell phones, computers, or other electronic devices. If someone needs to contact you in an emergency, the court can receive messages and deliver them to you without delay. A contact phone number will be provided to you.]**

Alternative B: **[You cannot have any cell phones, tablets, laptops, or other electronic devices in the courtroom. You may**

use these devices during recesses, but even then you may not use your cell phone or electronic device to find out any information about the case or communicate with anyone about the case or the people involved in the case. Do not take photographs, video recordings, or audio recordings of the proceedings or your fellow jurors. At the end of the case, while you are deliberating, you must not communicate with anyone outside the jury room. If someone needs to contact you in an emergency, the court can receive messages and deliver them to you without delay. A contact phone number will be provided to you.]

What are the reasons for these rules? These rules are imposed because jurors must decide the case without distraction and only on the evidence presented in the courtroom. If you investigate, research, or make inquiries on your own outside of the courtroom, the trial judge has no way to make sure that the information you obtain is proper for the case. The parties likewise have no opportunity to dispute or challenge the accuracy of what you find. That is contrary to our judicial system, which assures every party the right to ask questions about and challenge the evidence being considered against it and to present argument with respect to that evidence. Any independent investigation by a juror unfairly and improperly prevents the parties from having that opportunity our judicial system promises.

Any juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. A mistrial is a tremendous expense and inconvenience to the parties, the court, and the taxpayers. If you violate these rules, you may be held in contempt of court, and face sanctions, such as serving time in jail, paying a fine or both.

All of your communications with courtroom personnel, or me, will be part of the record of these proceedings. That means those communications must either be made in open court with the court reporter present or, if they are in writing, the writing

will be filed with the court clerk. This means, if you are outside the courtroom, any communication with me must be in writing, unsigned, and handed directly to the bailiff. Do not share the content of the writing with anyone, including other jurors. I have instructed the courtroom personnel that any communications you have with them outside of my presence must be reported to me, and I will tell the parties [and their attorneys] about any communication from you that I believe may be of interest to the parties [and their attorneys].

However, you may communicate directly with courtroom personnel about matters concerning your comfort and safety, such as [juror parking] [location of break areas] [how and when to assemble for duty] [dress] [what personal items can be brought into the courthouse or jury room] [list any other types of routine ex parte communications permitted].

Attorneys and jurors are not permitted to interact outside of the courtroom. If an attorney will not look at you or speak to you, the attorney is not being impolite, so do not be offended or form a conclusion about that behavior.

If you become aware of any violation of these instructions or any other instruction I give in this case, you must tell me by giving a note to the bailiff.

NOTES ON USE FOR 201.2

1. Florida Rule of Judicial Administration 2.451 directs trial judges to instruct jurors on the use of cell phones and other electronic devices. During the trial, the trial judge may remove the jurors' cell phones or other electronic devices. The trial judge also has the option to allow the jurors to keep the cell phones and electronic devices during trial until the jurors begin deliberations. Rule 2.451 prohibits jurors from using the cell phones or electronic devices to find out information about the case or to communicate with others about the case. The jurors also cannot use the electronic devices to record, photograph, or videotape the proceedings. In recognition of the discretion rule 2.451 gives trial judges, this instruction provides two alternatives: (A) requiring jurors to turn off electronic devices

during court proceedings and removing their cell phones and electronic devices during deliberations; or (B) removing the cell phones and electronic devices during all proceedings and deliberations. These instructions may be modified to fit the practices of a trial judge in a particular courtroom. These instructions are not intended to limit the discretion of the trial court to control the proceedings.

2. The portion of this instruction dealing with communication with others and outside research may be modified to include other specified means of communication or research as technology develops.

3. Florida Rule of Civil Procedure 1.431(i)(2) requires the court, by pretrial order or statement on the record with opportunity for objection, to set forth the scope of routine, ex parte communications. Rule 1.431(i)(3) mandates an instruction during voir dire regarding the limitations on jurors' communications with the court and courtroom personnel. The court should make sure that courtroom personnel are also aware of the limitations on their communications with jurors.

4. The introduction of the uninsured/underinsured motorist carrier is required because the plaintiffs are entitled to have the jury know that the joined carrier is the plaintiffs' uninsured/underinsured carrier. *Lamz v. Geico General Insurance Co.*, 803 So. 2d 593 (Fla. 2001); *Medina v. Peralta*, 724 So. 2d 1188 (Fla. 1999).

(Revised November 16, 2017,
revised October 27, 2022,
revised June 17, 2026.)

201.3 EXPLANATION OF THE VOIR DIRE PROCESS

Voir Dire:

The last thing I want to do, before we begin to select the jury, is to explain to you how the selection process works.

Questions/Challenges: **This is the part of the case where the parties and their lawyers have the opportunity to get to know a little bit about you, in order to help them come to their own conclusions about your ability to be fair and impartial, so they can decide who they think should be the jurors in this case.**

How we go about that is as follows: First, I'll ask some general questions of you. Then, each of the lawyers will have more specific questions that they will ask of you. After they have asked all of their questions, I will meet with them and they will tell me their choices for jurors. Each side can ask that I exclude a person from serving on the jury if they can give me a reason to believe that he or she might be unable to be fair and impartial. That is what is called a challenge for cause. The lawyers also have a certain number of what are called peremptory challenges, by which they may exclude a person from the jury without giving a reason. By this process of elimination, the remaining persons are selected as the jury. It may take more than one conference among the parties, their attorneys, and me before the final selections are made.

Purpose of Questioning: **The questions that you will be asked during this process are not intended to embarrass you or unnecessarily pry into your personal affairs, but it is important that the parties and their attorneys know enough about you to make this important decision. If a question is asked that you would prefer not to answer in front of the whole courtroom, just let me know and you can come up here and give your answer just in front of the attorneys and me. If you have a question of either the attorneys or me, don't hesitate to let me know.**

Response to Questioning: **There are no right or wrong answers to the questions that will be asked of you. The only thing that I ask is that you answer the questions as frankly and as honestly**

and as completely as you can. You [will take] [have taken] an oath to answer all questions truthfully and completely and you must do so. Remaining silent when you have information you should disclose is a violation of that oath as well. If a juror violates this oath, it not only may result in having to try the case all over again but also can result in civil and criminal penalties against a juror personally. So, again, it is very important that you be as honest and complete with your answers as you possibly can. If you don't understand the question, please raise your hand and ask for an explanation or clarification.

In the process of selecting the jury, some of the lawyers' questions may be meant to help them anticipate if your beliefs, experiences, or attitudes might make it difficult for you to apply the rules of law. Jurors take an oath to follow the law. After the jury is chosen and sworn in, I will instruct the jury on the rules they must follow in deciding this case. It is important for you to remember that it will not be the jury's job to decide what the law ought to be. Rather, the jury is to determine what the facts are, then apply the law to those facts, using the court's instructions on the rules of law to apply—which will be fully given to the jury at the appropriate time.

In sum, this is a process to assist the parties and their attorneys to select a fair and impartial jury. All of the questions they ask you are for this purpose. If, for any reason, you do not think you can be a fair and impartial juror, you must tell us.

NOTE ON USE FOR 201.3

The publication of this recommended instruction is not intended to intrude upon the trial judge's own style and manner of delivery. It may be useful in cataloging the subjects to be covered in an introductory instruction.

(Revised December 4, 2014; revised January 23, 2020 (288 So. 3d 1093); revised October 27, 2022.)

B. AFTER JURY SELECTED AND SWORN

202.1 INTRODUCTION

Administer oath:

You have now taken an oath to serve as jurors in this trial.

It is my intention to give you [all] [most] [some] of the rules of law but it might be that I will not know for sure all of the law that will apply in this case until all of the evidence is presented. However, I can anticipate [some] of the law and give it to you now so that you will better understand what to be looking for while the evidence is presented. If I later decide that different or additional law applies to the case, I will tell you. In any event, at the end of the evidence I will give you the final instructions on which you must base your verdict. At that time, you will have a complete written set of the instructions so you do not have to memorize what I am about to tell you.

NOTES ON USE FOR 202.1

1. The timing of instructions is within the sound discretion of the trial judge, to be determined on a case-by-case basis.

2. The second paragraph should be given only if the court reads rules of law at the beginning of the trial. If so, continue with the substantive law, damages, and general instructions from the applicable sections of this book, followed by the applicable parts of 202.2 through 202.5.

(Revised March 2, 2023; June 25, 2025.)

202.2 EXPLANATION OF THE TRIAL PROCEDURE

Now [that you have heard the law,] let me explain the trial procedure.

Opening Statements: **In a few moments, the attorneys will each have a chance to make what are called opening statements. In an opening statement, an attorney is allowed to give you [his] [her] views about what the evidence will be in the trial and what you are likely to see and hear in the testimony.**

Evidentiary Phase: **After the attorneys' opening statements the plaintiffs will bring their witnesses and evidence to you.**

Evidence: **Evidence is the information that the law allows you to see or hear in deciding this case. Evidence includes the testimony of the witnesses, documents, and anything else that I instruct you to consider.**

Witnesses: **A witness is a person who takes an oath to tell the truth and then answers attorneys' questions for the jury. The answering of attorneys' questions by witnesses is called "giving testimony." Testimony means statements that are made when someone has sworn an oath to tell the truth.**

The plaintiff's lawyer will normally ask a witness the questions first. That is called direct examination. Then the defense lawyer may ask the same witness additional questions about whatever the witness has testified to. That is called cross-examination. Certain documents or other evidence may also be shown to you during direct or cross-examination. After the plaintiff's witnesses have testified, the defendant will have the opportunity to put witnesses on the stand and go through the same process. Then the plaintiff's lawyer gets to do cross-examination. The process is designed to be fair to both sides.

It is important that you remember that testimony comes from witnesses. The attorneys do not give testimony and they are not themselves witnesses.

Objections: **Sometimes the attorneys will disagree about the rules for trial procedure when a question is asked of a witness. When that happens, one of the lawyers may make what is called an "objection." The rules for a trial can be complicated, and there are many reasons for attorneys to object. You should simply wait for me to decide how to proceed. If I say that an objection is "sustained," that means the witness may not answer the question. If I say that the objection is "overruled," that means the witness may answer the question.**

When there is an objection and I make a decision, you must not assume from that decision that I have any particular opinion other than that the rules for conducting a trial are being correctly followed. If I say a question may not be asked or answered, you must not try to guess what the answer would have been. That is against the rules, too.

Side Bar Conferences: **Sometimes I will need to speak to the attorneys about legal elements of the case that are not appropriate for the jury to hear. The attorneys and I will try to have as few of these conferences as possible while you are giving us your valuable time in the courtroom. But, if we do have to have such a conference during testimony, we will try to hold the conference at the side of my desk so that we do not have to take a break and ask you to leave the courtroom.**

Recesses: **Breaks in an ongoing trial are usually called "recesses." During a recess you still have your duties as a juror and must follow the rules, even while having coffee, at lunch, or at home.**

Instructions Before Closing Arguments: **After all the evidence has been presented to you, I will instruct you in the law that you must follow. It is important that you remember these instructions to assist you in evaluating the final attorney presentations, which come next, and, later, during your deliberations, to help you correctly sort through the evidence to reach your decision.**

Closing Arguments: **The attorneys will then have the**

opportunity to make their final presentations to you, which are called closing arguments.

Final Instructions: **After you have heard the closing arguments, I will instruct you further in the law as well as explain to you the procedures you must follow to decide the case.**

Deliberations: **After you hear the final jury instructions, you will go to the jury room and discuss and decide the questions I have put on your verdict form. [You will have a copy of the jury instructions to use during your discussions.] The discussions you have and the decisions you make are usually called "jury deliberations." Your deliberations are absolutely private and neither I nor anyone else will be with you in the jury room.**

Verdict: **When you have finished answering the questions, you will give the verdict form to the bailiff, and we will all return to the courtroom where your verdict will be read. When that is completed, you will be released from your assignment as a juror.**

What are the rules?

Finally, before we begin the trial, I want to give you just a brief explanation of rules you must follow as the case proceeds.

Keeping an Open Mind: **You must pay close attention to the testimony and other evidence as it comes into the trial. However, you must avoid forming any final opinion or telling anyone else your views on the case until you begin your deliberations. This rule requires you to keep an open mind until you have heard all of the evidence and is designed to prevent you from influencing how your fellow jurors think until they have heard all of the evidence and had an opportunity to form their own opinions. The time and place for coming to your final opinions and speaking about them with your fellow jurors is during deliberations in the jury room, after all of the evidence has been presented, closing arguments have been made, and I have instructed you on the law. It is important that you hear all of the facts and that you hear the law and how to apply it before**

you start deciding anything.

Consider Only the Evidence: **It is the things you hear and see in this courtroom that matter in this trial. The law tells us that a juror can consider only the testimony and other evidence that all the other jurors have also heard and seen in the presence of the judge and the lawyers. Doing anything else is wrong and is against the law. That means that you must not do any research or investigation, directly or indirectly, about the case. You must not obtain any information about the case or about anyone involved in the case, from any source whatsoever. This includes reading newspapers, watching television, or using a computer, cell phone, the Internet, any electronic device, or any other means at all to get information related to this case or the people and places involved in this case. You must ignore any information about the case you might see, even accidentally, from news media or the Internet or your social media platforms. This is because you must base the decisions you will have to make in this case solely on what you hear and see in this courtroom. This applies whether you are in the courthouse, at home, or anywhere else. You must not visit places mentioned in the trial or use the Internet to look at maps or pictures of any place discussed during trial.**

Do not provide any information about this case to anyone, including friends or family members. Do not let anyone, including the closest family members, make comments to you or ask questions about the trial. Jurors must not have discussions of any sort with friends or family members about the case or the people and places involved. So, do not let even the closest family members make comments to you or ask questions about the trial. In this age of electronic communication, I want to stress again that just as you must not talk about this case face-to-face, you must not talk about this case by using an electronic device. You must not use phones, tablets, computers, or other electronic devices to communicate about this case. Do not send or accept any messages related to this case or your jury service. Do not discuss this case or ask for advice by any means at all, including posting on social media, including electronically, or on the

Internet through e-mail, text messaging, blogs, or social media such as (insert examples of social media platforms)**, or any other electronic communication whatsoever.**

No Mid-Trial Discussions: **When we are in a recess, do not discuss anything about the trial or the case with each other or with anyone else. If attorneys approach you, don't speak with them. The law says they are to avoid contact with you. If an attorney will not look at you or speak to you, do not be offended or form a conclusion about that behavior. The attorney is not supposed to interact with jurors outside of the courtroom and is only following the rules. The attorney is not being impolite. As a reminder, attorneys and jurors are not permitted to interact outside of the courtroom. If an attorney or anyone else does try to speak with you or says something about the case in your presence, please inform the bailiff immediately.**

Only the Jury Decides: **Only you get to deliberate and answer the verdict questions at the end of the trial. I will not intrude into your deliberations at all. I am required to be neutral. You should not assume that I prefer one decision over another. You should not try to guess what my opinion is about any part of the case. It would be wrong for you to conclude that anything I say or do means that I am for one side or another in the trial. Discussing and deciding the facts is your job alone.**

Use of Cell Phones and Electronic Devices in the Courtroom and Jury Room:*

**The trial judge should select one of the following two alternative instructions explaining the rules governing jurors' use of electronic devices, as explained in Note on Use for 202.3.*

Alternative A: **[All cell phones or other types of electronic devices must be turned off while you are in the courtroom. Turned off means that the phone or other electronic device is actually off and not in a silent or vibrating mode. You may use these devices during recesses, but even then you may not use your phone or electronic device to find out any information about the case or communicate with anyone about the case or**

the people involved in the case. Do not take photographs, video recordings or audio recordings of the proceedings or your fellow jurors. After each recess, please double check to make sure your device is turned off. At the end of the case, while you are deliberating, you must not communicate with anyone outside the jury room. You cannot have in the jury room any cell phones, computers, or other electronic devices. If there are breaks in the deliberations, I may allow you to communicate with your family or friends, but do not communicate about the case or your deliberations. If someone needs to contact you in an emergency, the court can receive messages and deliver them to you without delay. The court's phone number will be provided to you.]

Alternative B: **[You cannot have any cell phones, computers, or other electronic devices in the courtroom. You may use these devices during recesses, but even then you may not use your phone or electronic device to find out any information about the case or communicate with anyone about the case or the people involved in the case. Do not take photographs, video recordings or audio recordings of the proceedings or your fellow jurors. At the end of the case, while you are deliberating, you must not communicate with anyone outside the jury room. If there are breaks in the deliberations, I may allow you to communicate with your family or friends, but do not communicate about the case or your deliberations. If someone needs to contact you in an emergency, the court can receive messages and deliver them to you without delay. The court's phone number will be provided to you.]**

NOTES ON USE FOR 202.2

1. This instruction is intended for situations in which at the end of the case the jury is going to be instructed before closing argument. The committee strongly recommends instructing the jury before closing argument. If, however, the court is going to instruct the jury after closing argument, this instruction will have to be amended.

2. The publication of this recommended instruction is not intended to intrude upon the trial judge's own style and manner of

delivery. It may be useful in cataloging the subjects to be covered in an introductory instruction.

3. Florida Rule of Judicial Administration 2.451 directs trial judges to instruct jurors on the use of cell phones and other electronic devices. During the trial, the trial judge may remove the jurors' cell phones or other electronic devices. The trial judge also has the option to allow the jurors to keep the cell phones and electronic devices during trial until the jurors begin deliberations. Rule 2.451 prohibits jurors from using the cell phones or electronic devices to find out information about the case or to communicate with others about the case. The jurors also cannot use the electronic devices to record, photograph, or videotape the proceedings. In recognition of the discretion rule 2.451 gives trial judges, this instruction provides two alternatives. The trial judge should give the jurors one of the following alternative instructions: (A) requiring jurors to turn off electronic devices during court proceedings and removing their phones and electronic devices during deliberations; or (B) removing the cell phones and electronic devices during all proceedings and deliberations. These instructions may be modified to fit the practices of a trial judge in a particular courtroom. These instructions are not intended to limit the discretion of the trial court to control the proceedings.

4. The portion of this instruction dealing with communication with others and outside research may be modified to include other specified means of communication or research as technology develops.

(Revised December 4, 2014; revised October 27, 2022; revised June 25, 2025, revised June 17, 2026.)

202.3 NOTE-TAKING BY JURORS

If you would like to take notes during the trial, you may do so. On the other hand, of course, you are not required to take notes if you do not want to. That will be left up to you individually.

You will be provided with a note pad and a pen for use if you wish to take notes. Any notes that you take will be for your personal use. However, you should not take them with you from the courtroom. During recesses, the bailiff will take possession of your notes and will return them to you when we reconvene. After you have completed your deliberations, the bailiff will collect your notes, which will be immediately destroyed. No one will ever read your notes.

If you take notes, do not get so involved in note-taking that you become distracted from the proceedings. Your notes should be used only as aids to your memory.

Whether or not you take notes, you should rely on your memory of the evidence and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than each juror's memory of the evidence.

NOTES ON USE FOR 202.3

1. The court should furnish all jurors with the necessary pads and pens for taking notes. Additionally, it may be desirable for jurors to be furnished with envelopes to place the notes for additional privacy.

2. Florida Rule of Judicial Administration 2.430(k) provides that at the conclusion of the trial, the court shall collect and immediately destroy all juror notes.

3. Florida Rule of Civil Procedure 1.455 provides that the trial court may, in its discretion, authorize the use of juror notebooks to contain documents and exhibits as an aid to the jurors in performing their duties.

4. When it is impractical to take exhibits into the jury room, this instruction should be modified to describe how the jury will have access to the exhibits.

(Revised February 1, 2018.)

202.4 JUROR QUESTIONS

Questions for the court or courtroom personnel:

During the trial, you may have a question about these proceedings. If so, please write it down and hand it to the bailiff, who will then hand it to me. I will review your question with the parties [and their attorneys] before responding.

Questions for witnesses:

You also may have a question you think should be asked of a witness. If so, there is a way for you to request that I ask the witness a question. After all the attorneys have completed their questioning of the witness, you should raise your hand if you have a question. I will then give you sufficient time to write the question on a piece of paper, fold it, and give it to the bailiff, who will pass it to me. Do not put your name on the question, show it to anyone or discuss it with anyone.

It is important to know that if you have a question you believe should be asked of a witness, you must raise your hand and request that I ask the witness the question before the witness leaves the witness stand. You will not have an opportunity to ask the witness a question once the witness leaves the courtroom. I will then review the question with the attorneys. Under our law, only certain evidence may be considered by a jury in determining a verdict. You are bound by the same rules of evidence that control the attorneys' questions. If I decide that the question may not be asked under our rules of evidence, I will tell you. Otherwise, I will direct the question to the witness. The attorneys may then ask follow-up questions if they wish. If there are additional questions from jurors, we will follow the same procedure again.

By providing this procedure, I do not mean to suggest that you must or should submit written questions for witnesses. In most cases, the lawyers will have asked the necessary questions.

NOTES ON USE FOR 202.4

1. Florida Rule of Civil Procedure 1.431(i)(3) requires an instruction that jurors' questions must be submitted in writing to the court, which will review them with the parties and counsel before responding. Rule 1.431 does not prevent jurors from asking the bailiff about routine matters affecting comfort and safety. The committee notes to rule 1.431 recognize that this instruction may need to be modified to reflect that individual trial judges may have reasonable differences regarding the type of communications considered routine.

2. Florida Rule of Civil Procedure 1.452 mandates that jurors be permitted to submit written questions directed to witnesses or the court.

(Revised November 16, 2017.)

202.5 JURY TO BE GUIDED BY OFFICIAL ENGLISH TRANSLATION/INTERPRETATION

[A] [Some] witness[es] may testify in (language to be used) **which will be interpreted in English.**

The evidence you are to consider is only that provided through the official court interpreters. Although some of you may know (language used)**, it is important that all jurors consider the same evidence. Therefore, you must accept the English interpretation. You must disregard any different meaning.**

If, however, during the testimony there is a question as to the accuracy of the English interpretation, you should bring this matter to my attention immediately by raising your hand. You should not ask your question or make any comment about the interpretation in the presence of the other jurors, or otherwise share your question or concern with any of them. I will take steps to see if your question can be answered and any discrepancy resolved. If, however, after such efforts a discrepancy remains, I emphasize that you must rely only upon the official English interpretation as provided by the court interpreter and disregard any other contrary interpretation.

NOTE ON USE FOR 202.5

When instructing the jury at the beginning of the trial, this instruction should be used in lieu of 601.3. See *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998); *United States v. Fuentes-Montijo*, 68 F.3d 352, 355–56 (9th Cir. 1995). For an example, see Model Instruction No. 1.

202.6 INSTRUCTION ON ADJOURNMENT

As I instructed before this trial started, you, as jurors, will decide this case based solely on the evidence presented in this courtroom. After you leave here, you must not conduct any research, directly or indirectly, about this case, including the facts, the legal issues, or the individuals and entities involved. This is important for the same reasons that jurors have long been instructed to limit their exposure to traditional forms of media and information such as television and newspapers. You also must not communicate with anyone, in any way, about this case. And you must ignore any information about the case that you might see on the Internet or social media, including through e-mail, text messaging, blogs, or social media such as (insert examples of social media platforms)**, or any other electronic communication whatsoever.**

NOTE ON USE 202.6

The publication of this recommended instruction is not intended to intrude on the trial judge's own style and manner of delivery.

(Adopted October 27, 2022)

SECTION 300 — EVIDENCE INSTRUCTIONS

301.1 Deposition Testimony, Interrogatories, Stipulated Testimony, Stipulations, and Admissions

301.2 Instruction when First Item of Documentary, Photographic, or Physical Evidence Is Admitted

301.3 Instruction when Evidence Is First Published to Jurors

301.4 Instruction Regarding Visual or Demonstrative Aids

301.5 Evidence Admitted for a Limited Purpose

301.6 Jury to Be Guided by Official English Translation/Interpretation

301.7 Jury to Be Guided by Official English Transcript of Recording in Foreign Language (Accuracy Not in Dispute)

301.8 Jury to Be Guided by Official English Translation/Interpretation — Transcript of Recording in Foreign Language (Accuracy in Dispute)

301.9 Disregard Stricken Matter

301.10 Instruction Before Recess

301.11 Failure to Maintain Evidence or Keep a Record

301.1 DEPOSITION TESTIMONY, INTERROGATORIES, STIPULATED TESTIMONY, STIPULATIONS, AND ADMISSIONS

a. Deposition or prior testimony:

Members of the jury, the sworn testimony of (name)**, given before trial, will now be presented. You are to consider and weigh this testimony as you would any other evidence in the case.**

b. Interrogatories:

Members of the jury, answers to interrogatories will now be read to you. Interrogatories are written questions that have been presented before trial by one party to another. They are answered under oath. You are to consider and weigh these questions and answers as you would any other evidence in the case.

c. Stipulated testimony:

Members of the jury, the parties have agreed that if (name of witness) **were called as a witness, [he] [she] would testify** (read or describe the testimony)**. You are to consider and weigh this testimony as you would any other evidence in the case.**

d. Stipulations:

Members of the jury, the parties have agreed to certain facts. You must accept these facts as true. (Read the agreed facts)**.**

e. Admissions:

1. Applicable to all parties:

Members of the jury, (identify the party or parties that have admitted the facts) **[has] [have] admitted certain facts. You must accept these facts as true.** (Read the admissions)**.**

2. Applicable to fewer than all parties:

Members of the jury, (identify the party or parties that have

admitted the facts) **[has] [have] admitted certain facts. You must accept these facts as true in deciding the issues between** (identify the affected parties)**, but these facts should not be used in deciding the issues between** (identify the unaffected parties)**.** (Read the admissions)**.**

f. Judicially noticed facts:

Members of the jury, the court has taken judicial notice of certain facts. You must accept those facts as true. The facts are (read or describe the noticed facts)**.**

NOTE ON USE FOR 301.1

The applicable instruction (a.–f.) should be read immediately before the evidence is introduced or read to the jury.

(Revised June 19, 2024.)

301.2 INSTRUCTION WHEN FIRST ITEM OF DOCUMENTARY, PHOTOGRAPHIC, OR PHYSICAL EVIDENCE IS ADMITTED

The (describe item of evidence) **has now been received in evidence. Witnesses may testify about or refer to this or any other item of evidence during the remainder of the trial. This and all other items received in evidence will be available to you for examination during your deliberations at the end of the trial.**

NOTE ON USE FOR 301.2

This instruction should be given when the first item of evidence is received in evidence. It may be appropriate to repeat this instruction when items received in evidence are not published to the jury. It may be combined with 301.5 in appropriate circumstances. It may also be given in conjunction with 301.4 if a witness has used exhibits which have been admitted in evidence and demonstrative aids which have not.

301.3 INSTRUCTION WHEN EVIDENCE IS FIRST PUBLISHED TO JURORS

The (describe item of evidence) **has been received in evidence. It is being shown to you now to help you understand the testimony of this witness and other witnesses in the case, as well as the evidence as a whole. You may examine** (describe item of evidence) **briefly now. It will also be available to you for examination during your deliberations at the end of the trial.**

NOTE ON USE FOR 301.3

This instruction may be given when an item received in evidence is handed to the jurors. It may be combined with 301.5 in appropriate circumstances.

301.4 INSTRUCTION REGARDING VISUAL OR DEMONSTRATIVE AIDS

a. Generally:

This witness will be using (identify demonstrative or visual aid(s)) **to assist in explaining or illustrating [his] [her] testimony. The testimony of the witness is evidence; however, [this] [these]** (identify demonstrative or visual aid(s)) **[is] [are] not to be considered as evidence in the case unless received in evidence, and should not be used as a substitute for evidence. Only items received in evidence will be available to you for consideration during your deliberations.**

b. Specially created visual or demonstrative aids based on disputed assumptions:

This witness will be using (identify demonstrative aid(s)) **to assist in explaining or illustrating [his] [her] testimony. [This] [These] item[s] [has] [have] been prepared to assist this witness in explaining [his] [her] testimony. [It] [They] may be based on assumptions which you are free to accept or reject. The testimony of the witness is evidence; however, [this] [these]** (identify demonstrative or visual aid(s)) **[is] [are] not to be considered as evidence in the case unless received in evidence, and should not be used as a substitute for evidence. Only items received in evidence will be available to you for consideration during your deliberations.**

NOTES ON USE FOR 301.4

1. Instruction 301.4a should be given at the time a witness first uses a demonstrative or visual aid which has not been specially created for use in the case, such as a skeletal model.

2. Instruction 301.4b is designed for use when a witness intends to use demonstrative or visual aids which are based on disputed assumptions, such as a computer-generated model. This instruction should be given at the time the witness first uses these demonstrative or visual aids. This instruction should be used in

conjunction with 301.3 if a witness uses exhibits during testimony, some of which are received in evidence, and some of which are not.

301.5 EVIDENCE ADMITTED FOR A LIMITED PURPOSE

The (describe item of evidence) **has now been received into evidence. It has been admitted only [for the purpose of** (describe purpose)**] [as to** (name party)**]. You may consider it only [for that purpose] [as it might affect** (name party)**]. You may not consider that evidence [for any other purpose] [as to [any other party] [**(name other party(s)**].**

301.6 JURY TO BE GUIDED BY OFFICIAL ENGLISH TRANSLATION/INTERPRETATION

Introduction:

The law requires that the court appoint a qualified interpreter to assist a witness who does not readily speak or understand the English language in testifying. The interpreter does not work for either side in this case. [He] [She] is completely neutral in the matter and is here solely to assist us in communicating with the witness. [He] [She] will repeat only what is said and will not add, omit, or summarize anything. The interpreter in this case is (name of interpreter)**. The oath will now be administered to the interpreter.**

Oath to Interpreter:

Do you solemnly swear or affirm that you will make a true interpretation to the witness of all questions or statements made to [him] [her] in a language which that person understands, and interpret the witness's statements into the English language, to the best of your abilities [so help you God]?

Foreign Language Testimony:

You are about to hear testimony of a witness who will be testifying in (language used)**. This witness will testify through the official court interpreter. Although some of you may know** (language used)**, it is important that all jurors consider the same evidence. Therefore, you must accept the English translation of the witness's testimony. You must disregard any different meaning.**

If, however, during the testimony there is a question as to the accuracy of the English interpretation, you should bring this matter to my attention immediately by raising your hand. You should not ask your question or make any comment about the interpretation in the presence of the other jurors, or otherwise share your question or concern with any of them. I will take steps to see if your question can be answered and any

discrepancy resolved. If, however, after such efforts a discrepancy remains, I emphasize that you must rely only upon the official English interpretation as provided by the court interpreter and disregard any other contrary interpretation.

NOTE ON USE FOR 301.6

This instruction should be given to the jury immediately before the testimony of a witness who will be testifying through the services of an official court interpreter. Compare *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998) (jury properly instructed that it must accept translation of foreign-language tape-recording when accuracy of translation is not in issue); *United States v. Fuentes-Montijo*, 68 F.3d 352, 355–56 (9th Cir. 1995).

301.7 JURY TO BE GUIDED BY OFFICIAL ENGLISH TRANSCRIPT OF RECORDING IN FOREIGN LANGUAGE (ACCURACY NOT IN DISPUTE)

You are about to listen to a tape recording in (language used)**. Each of you has been given a transcript of the recording which has been admitted into evidence. The transcript is a translation of the foreign language tape recording.**

Although some of you may know (language used)**, it is important that all jurors consider the same evidence. Therefore, you must accept the English translation contained in the transcript and disregard any different meaning.**

If, however, during the testimony there is a question as to the accuracy of the English translation, you should bring this matter to my attention immediately by raising your hand. You should not ask your question or make any comment about the translation in the presence of the other jurors, or otherwise share your question or concern with any of them. I will take steps to see if your question can be answered and any discrepancy resolved. If, however, after such efforts a discrepancy remains, I emphasize that you must rely only upon the official English translation as provided by the court interpreter and disregard any other contrary translation.

NOTE ON USE FOR 301.7

This instruction is appropriate immediately prior to the jury hearing a tape-recorded conversation in a foreign language if the accuracy of the translation is not an issue. See, *e.g.*, *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998); *United States v. Fuentes-Montijo*, 68 F.3d 352, 355–56 (9th Cir. 1995).

301.8 JURY TO BE GUIDED BY OFFICIAL ENGLISH TRANSLATION/INTERPRETATION — TRANSCRIPT OF RECORDING IN FOREIGN LANGUAGE (ACCURACY IN DISPUTE)

You are about to listen to a tape recording in (language used)**. Each of you has been given a transcript of the recording. The transcripts were provided to you by [the plaintiff] [the defendant] so that you could consider the content of the recordings. The transcript is an English translation of the foreign language tape recording.**

Whether a transcript is an accurate translation, in whole or in part, is for you to decide. In considering whether a transcript accurately describes the meaning of a conversation, you should consider the testimony presented to you regarding how, and by whom, the transcript was made. You may consider the knowledge, training, and experience of the translator, as well as the nature of the conversation and the reasonableness of the translation in light of all the evidence in the case. You should not rely in any way on any knowledge you may have of the language spoken on the recording; your consideration of the transcripts should be based on the evidence introduced in the trial.

NOTE ON USE FOR 301.8

This instruction is appropriate immediately prior to the jury hearing a tape-recorded conversation in a foreign language if the accuracy of the translation is an issue. See, *e.g.*, *United States v. Jordan*, 223 F.3d 676, 689 (7th Cir. 2000). See also Seventh Circuit Federal Criminal Jury Instructions §3.18.

301.9 DISREGARD STRICKEN MATTER

NOTE ON USE FOR 301.9

No standard instruction is provided. The court should give an instruction that is appropriate to the circumstances. In drafting a curative instruction, the court must decide on a measured response that will do more good than harm, going no further than necessary. The language of curative instructions should be carefully selected so as not to punish a party or attorney.

301.10 INSTRUCTION BEFORE RECESS

We are about to take [our first] [a] recess. Remember that all of the rules I have given you apply even when you are outside the courtroom, such as at recess.

Remember the basic rule: Do not talk to anyone, including your fellow jurors, friends, family or co-workers about anything having to do with this trial, except to speak to court staff. This means no e-mailing, text messaging, tweeting, blogging, or any other form of communication. You cannot do any research about the case or look up any information about the case. Remember to observe during our recess the other rules I gave you. If you become aware of any violation of any of these rules at all, notify court personnel of the violation.

After each recess, please double check to make sure [that your cell phone or other electronic device is turned off completely] [that you do not bring your cell phone or other electronic device into the courtroom or jury room].

NOTES ON USE FOR 301.10

1. This instruction should be given before the first recess. Before later recesses, the court has the discretion to give an abbreviated version of this instruction.

2. The publication of this recommended instruction is not intended to intrude upon the trial judge's own style and manner of delivery. Instead, this instruction is intended to remind jurors throughout the proceedings of the importance of the rules limiting their use of cell phones and other electronic devices.

(Revised December 4, 2014.)

301.11 FAILURE TO MAINTAIN EVIDENCE OR KEEP A RECORD

a. Adverse inference.

If you find that:

(Name of party) **[lost] [destroyed] [mutilated] [altered] [concealed] or otherwise caused the** (describe evidence) **to be unavailable, while it was within [his] [her] [its] possession, custody, or control; and the** (describe evidence) **would have been material in deciding the disputed issues in this case; then you may, but are not required to, infer that this evidence would have been unfavorable to** (name of party)**. You may consider this, together with the other evidence, in determining the issues of the case.**

NOTES ON USE FOR 301.11a

1. This instruction is not intended to limit the trial court's discretion to impose additional or other sanctions or remedies against a party for either inadvertent or intentional conduct in the loss, destruction, mutilation, alteration, concealment, or other disposition of evidence material to a case. See, *e.g.*, *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 780 (Fla. 4th DCA 2006); *Am. Hosp. Mgmt. Co. of Minnesota v. Hettiger*, 904 So. 2d 547 (Fla. 4th DCA 2005); *Jost v Lakeland Reg. Med. Ctr.*, 844 So. 2d 656 (Fla. 2d DCA 2003); *Nationwide Lift Trucks, Inc. v. Smith*, 832 So. 2d 824 (Fla. 4th DCA 2002); *Torres v. Matsushita Elec. Corp.*, 762 So. 2d 1014 (Fla. 5th DCA 2000); and *Sponco Mfg, Inc. v. Alcover*, 656 So. 2d 629 (Fla. 3d DCA 1995).

2. The inference addressed in this instruction does not rise to the level of a presumption. *Pub. Health Tr. of Dade Cty. v. Valcin*, 507 So. 2d 596 (Fla. 1987), and Instruction 301.11b.

3. This instruction may require modification in the event a factual dispute exists as to which party or person is responsible for the loss of any evidence.

4. For electronically stored information, see *Fla. R. Civ. P.* 1.380.

b. Burden shifting presumption.

The court has determined that (name of party) **had a duty to [maintain** (describe missing evidence)**] [keep a record of** (describe subject matter as to which party had record keeping duty)**].** (Name of party) **did not [maintain** (describe missing evidence)**] [or] [keep a record of** (describe subject matter as to which party had recordkeeping duty)**].**

Because (name of party) **did not [maintain** (describe missing evidence)**] [or] [keep a record of** (describe subject matter as to which party had a record keeping duty)**], you should find that** (name of invoking party) **established [his] [her]** (describe applicable claim or defense) **unless** (name of party) **proves otherwise by the greater weight of the evidence.**

NOTES ON USE FOR 301.11b

1. This instruction applies only when the court has determined that there was a duty to maintain or preserve the missing evidence at issue and the party invoking the presumption has established to the satisfaction of the court that the absence of the missing evidence hinders the other party's ability to establish its claim or defense. See *Pub. Health Tr. of Dade Cty. v. Valcin*, 507 So. 2d 596 (Fla. 1987).

2. This instruction may require modification in the event a factual dispute exists as to which party or person is responsible for the loss of any evidence.

3. The committee recommends that the trial court rely on the language of Florida Rule of Civil Procedure 1.380 when electronically stored information is not maintained by a party.

(Adopted April 21, 2016;
revised February 11, 2026.)

301.12 REDACTED DOCUMENTS

When you review the documents admitted into evidence in this trial, you may see that certain portions of a document have been [blacked out] [whited out] [(describe other methods of redactions)**] and removed from your consideration by the court. You should not speculate as to the content of the portions that have been [blacked out] [whited out] [**(describe other method of redaction)**], nor should you consider as part of your deliberation the fact that certain portions have been removed from your consideration. Rather, you should consider only those portions that have been admitted into evidence.**

NOTES ON USE FOR 301.12

This instruction was created to address redacted documents. The instruction can be adapted to address other forms of evidence such as photographs, audio recordings, or video recordings.

(Adopted November 19, 2021.)

SECTION 400 — SUBSTANTIVE INSTRUCTIONS

401 General Negligence

402 Professional Negligence

403 Products Liability

404 Insurer's Bad Faith

405 Defamation

406 Malicious Prosecution

407 False Imprisonment

408 Tortious Interference with Business Relationships

409 Misrepresentation

410 Outrageous Conduct Causing Severe Emotional Distress

411 Civil Theft

412 Contribution Among Tortfeasors

413 Claim for Personal Injury Protection (PIP) Benefits (Medical Benefits only)

414 Intentional Tort As an Exception to Exclusive Remedy of Workers' Compensation

415 Unlawful Retaliation

NOTE ON USE

These substantive instructions should be followed by the applicable sections from Damages, Substantive Instructions — General, and Closing Instructions (Before Final Argument).

401 GENERAL NEGLIGENCE

401.1 Introduction

401.2 Summary of Claims

401.3 Greater Weight of the Evidence

401.4 Negligence

401.5 Negligence of a Child

401.6 Negligence of a Common Carrier

401.7 Res Ipsa Loquitur

401.8 Violation of Non-Traffic Penal Statute as Negligence per Se

401.9 Violation of Statute, Ordinance, or Regulation as Evidence of Negligence

401.10 Equal and Reciprocal Rights of Motorists and Pedestrians

401.11 Duty of Motorist Toward Children

401.12 Legal Cause

401.13 Preemptive Charges

401.14 Preliminary Issues — Vicarious Liability

401.15 Preliminary Issues — Common Carrier

401.16 Preliminary Issues — Premises Liability

401.17 Burden of Proof on Preliminary Issues

401.18 Issues on Plaintiff's Claim — General Negligence

401.19 Issues on Plaintiff's Claim — Common Carrier

401.20 Issues on Plaintiff's Claim — Premises Liability

401.21 Burden of Proof on Main Claim

401.22 Defense Issues

401.23 Burden of Proof on Defense Issues

401.24 Counterclaims, Cross Claims, and Third Party

Claims

401.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 401.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 401.1. See Model Instruction No. 1. Instruction 401.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 401.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including an explanation for the difference, such as where the court has directed a verdict on an issue.

2. "The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations." *Fla. R. Civ. P.* 1.470(b).

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla. R. Civ. P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge, as the judge reads the instructions aloud.

(Revised June 25, 2025.)

401.2 SUMMARY OF CLAIMS

The claims [and defenses] in this case are as follows. (Claimant) **claims that** (defendant) **was negligent in** (describe alleged negligence) **which caused [him] [her] harm.**

(Defendant) **denies that claim [and also claims that** (claimant) **was [himself] [herself] negligent in** (describe the alleged comparative negligence) **which caused [his] [her] harm]. [Additionally** (describe any other affirmative defenses)**.]**

[The parties] [(claimant)**] must prove [his] [her] [their] claims by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.**

401.3 GREATER WEIGHT OF THE EVIDENCE

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTES ON USE FOR 401.3

1. *Greater or lesser number of witnesses*. The committee recommends that no instruction be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. *Circumstantial evidence*. The committee has not drafted an instruction addressing circumstantial evidence and takes no position on whether such an instruction is needed. For criminal cases, see *Matter of Use by Trial Cts. of Standard Jury Instructions in Crim. Cases*, 431 So. 2d 594 (Fla. 1981).

(Revised February 11, 2026.)

401.4 NEGLIGENCE

Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

NOTES ON USE FOR 401.4

1. *No inference of negligence from mere fact of accident.* The committee recommends that no instruction be given to the effect that "negligence may not be inferred from the mere happening of an accident alone." *Belden v. Lynch*, 126 So. 2d 578, 581 (Fla. 2d DCA 1961). Such an instruction is argumentative and negative.

2. *Unavoidable accident.* The committee recommends that no instruction be given on the subject of "unavoidable accident," this being a more appropriate subject for argument by counsel.

3. *Presumption of reasonable care; right to assume others will exercise.* The committee recommends that no instruction be given to the effect that one is presumed to have exercised reasonable care for one's own safety or for the safety of others or that one has the right to assume others will exercise reasonable care. Whether a person is entitled so to assume and to act on that assumption ultimately depends on whether a reasonably careful person in the same circumstances would so assume and act. See 3 Fla. Jur. *Automobiles* §93 at 562; 23 Fla. Jur. *Negligence* §79 at 319, also §§77 and 78; 65A C.J.S. *Negligence* §15 at 592, §118 at 30; 60 C.J.S. *Motor Vehicles* §249 at 610; 61 C.J.S. *Motor Vehicles* §459 at 13.

4. *Sudden Emergency.* The committee recommends that no instruction be given on the subject of sudden emergency. In the circumstances of an emergency, as in "ordinary circumstances," the applicable standard of care is reasonable care under the circumstances.

5. *Traffic.* The committee recommends that no instruction be

given on the following subjects: (a) duty to keep lookout; (b) duty to inspect vehicle or to maintain vehicle in safe condition; or (c) the supposed "range of vision" rule. Negligence is properly and completely defined as the failure to use that degree of care which a reasonable person would use under like circumstances.

6. *Railroads.* The committee recommends that no instruction be given on the following subjects: (a) the supposed duty of a pedestrian or motorist to "yield the right of way" to an approaching train; (b) reciprocal duties at railroad crossings; or (c) the "standing train" doctrine. Negligence is properly and completely defined as the failure to use that degree of care which a reasonable person would use under like circumstances.

401.5 NEGLIGENCE OF A CHILD

Reasonable care on the part of a child is the care that a reasonably careful child of the same age, mental capacity, intelligence, training and experience would use under like circumstances.

NOTE ON USE FOR 401.5

This instruction should be given, when applicable, immediately following instruction 401.4. This instruction is applicable when the claim involves negligence of a child occurring while that child is engaged in activities appropriate to a child of his or her age, experience and wisdom. This instruction may not be applicable when the claim involves negligence of a child occurring while he or she is engaged in an activity normally undertaken principally by adults and for which adult qualifications are usually required, such as operating an automobile, airplane, motorboat, or motorcycle, *e.g.*, *Medina v. McAllister*, 202 So. 2d 755 (Fla. 1967).

401.6 NEGLIGENCE OF A COMMON CARRIER

Negligence is the failure to use reasonable care. (Defendant) **is a common carrier. [The reasonable care required of** (defendant) **is different from the reasonable care required of a passenger.]**

The reasonable care required of a common carrier for the safety of a passenger is the highest degree of care that is consistent with the type of transportation used and the practical operation of the business of a common carrier of passengers. Negligence of a common carrier is doing something that a very careful person would not do under like circumstances or failing to do something that a very careful person would do under like circumstances.

[In connection with (defendant's) **defense that** (claimant) **was [himself] [herself] negligent, reasonable care is what a reasonably careful person would do under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.]**

NOTE ON USE FOR 401.6

1. Instruction 401.6 should be given instead of instruction 401.4 in a passenger's case to define the standard of care applicable to a common carrier.

2. In cases involving multiple defendants, with non-common carrier defendants, refer to instruction 401.4 for the applicable negligence instruction for the non-common carrier defendants.

401.7 RES IPSA LOQUITUR

If you find that ordinarily the [incident] [injury] would not have happened without negligence,

> **[and that the** (name the item) **causing the injury was in the exclusive control of** (defendant) **at the time it caused the injury,]***
>
> **[and that the** (name the item) **causing the injury was in the exclusive control of** (defendant**) at the time the negligent act or omission, if any, must have occurred and that the** (name the item)**, after leaving** (defendant's) **control, was not improperly used or handled by others or subjected to harmful forces or conditions,]***

you may infer that (defendant) **was negligent unless, taking into consideration all of the evidence in the case, you find that the** (describe the event) **was not due to any negligence on the part of** (defendant)**.**

NOTE ON USE FOR 401.7

*Use the second bracketed paragraph in cases involving exploding bottles, see, *e.g.*, *Burkett v. Panama City Coca-Cola Bottling Co.*, 93 So. 2d 580 (Fla. 1957), or other instrumentalities that are no longer in the defendant's control at the time of plaintiff's injury. Compare *Wagner v. Associated Shower Door Co.*, 99 So. 2d 619 (Fla. 3d DCA 1958). Use the first bracketed paragraph in all other cases.

401.8 VIOLATION OF NON-TRAFFIC PENAL STATUTE AS NEGLIGENCE PER SE

Read or paraphrase the applicable statute or refer to the ordinance admitted in evidence.

Violation of this [statute] [ordinance] is negligence. If you find that (defendant or individual(s) claimed to have been negligent) **violated this [statute] [ordinance], then** (defendant or individual(s) claimed to have been negligent) **[was] [were] negligent. You should then decide whether such negligence was a legal cause of** (claimant's) **[loss] [injury] [or] [damage].**

NOTES ON USE FOR 401.8

1. This instruction should not be given in a case involving violation of a traffic regulation prescribed by statute or ordinance or in other cases in which the violation is only evidence of negligence. Use instruction 401.9 instead. It is "negligence per se" to violate a penal statute or ordinance, not regulating traffic, which was enacted to protect a particular class of persons from a particular injury or type of injury. *deJesus v. Seaboard Coast Line Railroad Co.*, 281 So. 2d 198 (Fla. 1973). When the legislative authority enacts such a statute or ordinance, it thereby prescribes a minimum standard of reasonable care to which every reasonably careful person will adhere. The jury is not at liberty to determine that the violation of such a standard is not negligence. *Richardson v. Fountain*, 154 So. 2d 709 (Fla. 2d DCA 1963), and cases cited at 154 So. 2d at 711; 38 AM.JUR. *Negligence* §158, at 827–29; but compare *Mastrandrea v. J. Mann, Inc.*, 128 So. 2d 146 (Fla. 3d DCA 1963).

2. This instruction should not be used in "strict liability" cases in which liability is predicated on violation of a statute enacted to protect a particular class of persons who are unable to protect themselves. In such cases, the violator is strictly liable for the consequent injury, even though the violation was not the "proximate" or "legal" cause by traditional tests. *Sloan v. Coit International, Inc.*, 292 So. 2d 15 (Fla. 1974); *Tamiami Gun Shop v. Klein*, 109 So. 2d 189 (Fla. 3d DCA 1959), *cert. disch.* 116 So. 2d 421; see *deJesus*.

401.9 VIOLATION OF STATUTE, ORDINANCE, OR REGULATION AS EVIDENCE OF NEGLIGENCE

Read or paraphrase the applicable statute or refer to the ordinance or regulation admitted in evidence.

Violation of this [statute] [ordinance] [regulation] is evidence of negligence. It is not, however, conclusive evidence of negligence. If you find that (defendant or individual(s) claimed to have been negligent) **violated this [statute] [ordinance] [regulation], you may consider that fact, together with the other facts and circumstances, in deciding whether such person was negligent.**

NOTES ON USE FOR 401.9

1. This instruction as written renders it applicable in a generic sense to all statutory or regulatory violations, which are determined to constitute evidence of negligence, in addition to violations of traffic regulations. For instruction related to statute or ordinance violations, which constitute negligence per se, see instruction 401.8.

2. This instruction is to be used for the violation of both traffic and nontraffic regulations, ordinances, or codes where the violation constitutes evidence of negligence, for example: (1) building code violations, see *Lindsey v. Bill Arflin Bonding Agency Inc.*, 645 So. 2d 565 (Fla. 1st DCA 1994); *Morowitz v. Vistaview Apartments, Ltd.*, 613 So. 2d 493 (Fla. 3d DCA 1993); *Holland v. Baguette, Inc.*, 540 So. 2d 197 (Fla. 3d DCA 1989); (2) OSHA regulations, see *Jupiter Inlet Corp. v. Brocard*, 546 So. 2d 1 (Fla. 4th DCA 1988); (3) governmental statutes or ordinances, see *Gabriel v. Tripp*, 576 So. 2d 404 (Fla. 2d DCA 1991) (statutory violation making it unlawful to knowingly transmit a sexually transmissible disease); *Bennett M. Lifter, Inc. v. Varnado*, 480 So. 2d 1336 (Fla. 3d DCA 1985) (violation of residential Landlord Tenant Act, *F.S.* 83.51 (1983)); *Walt Disney World Co. v. Merritt*, 404 So. 2d 1077 (Fla. 5th DCA 1981) (violation of State Fire Marshal's rules); *Hines v. Reichhold Chemicals, Inc.*, 383 So. 2d 948 (Fla. 1st DCA 1980) (statutory violation of emission of gases and noxious odors); *Jones & Fla. East Coast R.R. Co.*, 220 So. 2d 922 (Fla.

4th DCA 1969) (violation of municipal ordinance requiring railroad crossing signals); *Conroy v. Briley*, 191 So. 2d 601 (Fla. 1st DCA 1966) (violation of city ordinance regarding handrail on stairways); *Florida East Coast Railway Co. v. Pollack*, 154 So. 2d 346 (Fla. 3d DCA 1963) (city ordinance regulating speed of trains within municipal limits).

3. This instruction should not be given if the statute or ordinance in question provides that its violation is not evidence of negligence, *e.g.*, *F.S.* 316.613 (1997) (failure to provide and use a child passenger restraint inadmissible in civil action as evidence of negligence).

401.10 EQUAL AND RECIPROCAL RIGHTS OF MOTORISTS AND PEDESTRIANS

All persons [whether [pedestrians] [or] [motorists] [or] (other)**] may use the [street] [highway] but each has a duty [to comply with lawful regulations of its use applicable to [him] [her] and]* to use reasonable care for [his] [her] own safety and for the safety of others.**

NOTE ON USE FOR 401.10

*The bracketed portion indicated with an asterisk should be given only when such a regulation, applicable to a party, is referred to either in evidence or in the court's instruction.

401.11 DUTY OF MOTORIST TOWARD CHILDREN

A motorist must use reasonable care to guard against the unpredictable and erratic behavior of children on or near the [street] [highway] if [he] [she] knows or should know of their presence.

NOTES ON USE FOR 401.11

1. This instruction is designed for use in cases involving a younger child when the child is observed or is at a place where children may reasonably be expected.

2. The committee recommends that this instruction not be given in cases involving an older child in circumstances where youthful inattention or immaturity is not involved.

401.12 LEGAL CAUSE

a. Legal cause generally:

Negligence is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the negligence, the [loss] [injury] [or] [damage] would not have occurred.

b. Concurring cause:

In order to be regarded as a legal cause of [loss] [injury] [or] [damage] negligence need not be the only cause. Negligence may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the negligence contributes substantially to producing such [loss] [injury] [or] [damage].

c. Intervening cause:

*Do not use the bracketed first sentence if this instruction is preceded by the instruction on concurring cause:**

***[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], negligence need not be its only cause.] Negligence may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the negligence occurs if [such other cause was itself reasonably foreseeable and the negligence contributes substantially to producing such [loss] [injury] [or] [damage]] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the negligence and the negligence contributes substantially to producing it].**

NOTES ON USE FOR 401.12

1. Instruction 401.12a (legal cause generally) is to be given in all cases. Instruction 401.12b (concurring cause), to be given when

the court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether negligence was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his or her negligence by reason of some other cause concurring in time and contributing to the same damage. Instruction 401.12c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. The jury will properly consider instruction 401.12a not only in determining whether defendant's negligence is actionable but also in determining whether claimant's negligence contributed as a legal cause to claimant's damage, thus reducing recovery.

3. Instruction 401.12b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the occurrence or resulting injury. If there is an issue of aggravation of a preexisting condition or of subsequent injuries/multiple events, instructions 501.5a or 501.5b should be given as well. See *Hart v. Stern*, 824 So. 2d 927, 929–32 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So. 2d 833, 834–35 (Fla. 4th DCA 1992).

4. Instruction 401.12c (intervening cause) embraces two situations in which negligence may be a legal cause notwithstanding the influence of an intervening cause: (1) when the damage was a reasonably foreseeable consequence of the negligence although the other cause was not foreseeable, *Mozer v. Semenza*, 177 So. 2d 880 (Fla. 3d DCA 1965), and (2) when the intervention of the other cause was itself foreseeable, *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So. 2d 520 (Fla. 1980).

5. *"Probable" results.* The committee recommends that the jury not be instructed that the damage must be such as would have appeared "probable" to the actor or to a reasonably careful person at the time of the negligence. In cases involving an intervening cause, the term "reasonably foreseeable" is used in place of "probable." The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165 So. 2d 806, 810 (Fla. 1st DCA 1964); Prosser, *Torts* 291 (3d ed.); 2 Harper & James, *The Law of Torts*, 1137.

6. The term "substantially" is used throughout the instruction to describe the extent of contribution or influence negligence must have in order to be regarded as a legal cause. "Substantially" was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test of causation not only in relation to defendant's negligence, *Loftin v. Wilson*, 67 So. 2d 185, 191 (Fla. 1953), but also in relation to plaintiff's comparative negligence, *Shayne v. Saunders*, 176 So. 495, 498 (Fla. 1937).

(Revised June 19, 2024.)

401.13 PREEMPTIVE CHARGES

The court has determined and now instructs you that

a. Duty to use reasonable care:

the circumstances at the time and place of the incident involved in this case were such that (defendant) **had a duty to use reasonable care for** (claimant's) **safety.**

(skip to instruction 401.18 on negligence issues)

NOTE ON USE FOR 401.13a

This preemptive instruction is not for use routinely, but only when the reasonable care standard was contested before the jury, as by an instruction 401.14 issue now to be withdrawn as a matter of law. In that event instruction 401.13a properly emphasizes reasonable care as embodied in instruction 401.17 or 401.19 and 401.4. Otherwise it is argumentative.

b. Vicarious liability:

(Defendant) **is responsible for any negligence of** (name) **in** (describe alleged negligence)**.**

(skip to instruction 401.18 on negligence issues)

c. Negligence:

(Defendant) **was negligent. The issue for you to decide [on** (claimant's) **claim] is whether such negligence was a legal cause of [loss] [injury] [or] [damage] to** (claimant or person on whose behalf the claim is made)**.**

(skip to causation, damage issues and general instructions)

d. Directed verdict on liability:

(Defendant) **was negligent and such negligence was a legal cause of [loss] [injury] [or] [damage] to** (claimant)**.** (Claimant) **is**

therefore entitled to recover from (defendant) **for the [loss] [injury] [or] [damage] as is shown by the greater weight of the evidence to have been caused by** (defendant)**.**

(skip to damage issues and general instructions)

NOTE ON USE FOR 401.13d

This instruction should be given only when the sole issue to be determined by the jury is damages.

NOTES ON USE FOR 401.13

1. This instruction covers only preemptive instructions on issues arising on claims. Preemptive instructions on defense issues are covered in instruction 401.22 and should be given at that stage of the instruction.

2. It may be necessary or desirable in some cases for the court to introduce this instruction by calling attention to the evidence or arguments of counsel in which the issue now to be withdrawn was raised or discussed.

401.14 PRELIMINARY ISSUES — VICARIOUS LIABILITY

On the (claimant's) **claim there is a preliminary issue for you to decide. That issue is:**

a. Owner, lessee, or bailee of vehicle driven by another:

whether (defendant) **was the [owner] [lessee] [or] [bailee] of the vehicle driven by** (driver) **[or] whether** (driver) **was operating the vehicle with the express or implied consent of** (defendant)**. A person who [owns] [is the lessee of] [or] [is the bailee of] a vehicle and who expressly or impliedly consents to another's use of it is responsible for its operation.**

[An owner of a vehicle is one who has legal title to the vehicle and who has the right of control and authority over its use.]

[A lessee of a vehicle is one who has leased or rented the vehicle from its owner.]

[A bailee of a vehicle is one to whom the vehicle has been furnished or delivered by [its owner] [a person with authority over its use] for a particular purpose, with the understanding that it will be returned.]

NOTES ON USE FOR 401.14a

1. The general rules stated above will be appropriate in most cases in which there is an issue concerning the status of a defendant under Florida's "dangerous instrumentality" doctrine. See generally *Aurbach v. Gallina*, 753 So. 2d 60 (Fla. 2000). They are subject to a number of exceptions, however. For example, the owner of a vehicle who has delivered possession of it to another under a conditional sales contract, and who has complied with all the requirements of F.S. 319.22, is not liable for its negligent operation. See *Aurbach*; *Palmer v. R. S. Evans, Jacksonville, Inc.*, 81 So. 2d 635 (Fla. 1955). The owner of a vehicle who has leased it to another under a lease for one year or longer and who has complied with all the requirements of

F.S. 324.021(9)(b)1, is not liable for its negligent operation. See *Ady v. American Honda Finance Corp.*, 675 So. 2d 577 (Fla. 1996). Additional limitations upon vicarious liability are set forth in *F.S.* 324.021(9)(b) and 324.021(9)(c). An owner or lessee who has delivered a vehicle to a repair shop for maintenance is ordinarily not liable for its negligent operation during servicing, service-related testing, or transport of the vehicle by the bailee. See *Michalek v. Shumate*, 524 So. 2d 426 (Fla. 1988); *Castillo v. Bickley*, 363 So. 2d 792 (Fla. 1978). Although an owner is liable for a personal injury or wrongful death negligently inflicted by a bailee upon a third party, an owner is not liable for a personal injury or wrongful death negligently inflicted by a bailee upon a co-bailee. See *Toombs v. Alamo Rent-A-Car, Inc.*, 833 So. 2d 109 (Fla. 2002); *Raydel, Ltd. v. Medcalfe*, 178 So. 2d 569 (Fla. 1965); *May v. Palm Beach Chemical Co.*, 77 So. 2d 468 (Fla. 1955). And proof of express or implied consent is not required where an unattended vehicle has been stolen because the owner left the keys in the ignition. See *Hendeles v. Sanford Auto Auction, Inc.*, 364 So. 2d 467 (Fla. 1978); *Vining v. Avis Rent-A-Car System, Inc.*, 354 So. 2d 54 (Fla. 1977). Other exceptions may exist for which special instructions may be required. See generally 4A FLA.JUR.2d, *Automobiles and Other Vehicles*, §§667–690. The instruction may also have to be tailored to fit the particular factual circumstances of the case.

2. *Dangerous instrumentality*. The committee recommends that the court not instruct the jury that an automobile is a "dangerous instrumentality," such an instruction being unnecessary and essentially argumentative.

b. Agency.

(1). Agency, master and servant (independent contractor distinguished):

> **whether** (name) **was an agent of** (defendant) **and was acting within the scope of [his] [her] employment at the time and place of the incident in this case. [An agent is a person who is employed to act for another, and whose actions are controlled by [his] [her] employer or are subject to [his] [her] employer's right of control.] An employer is responsible for the negligence of [his] [her] [its] agent if**

such negligence occurs while the agent is performing services which [he] [she] was employed to perform or while the agent is acting at least in part because of a desire to serve [his] [her] employer and is doing something that is reasonably incidental to [his] [her] employment or something the doing of which was reasonably foreseeable and reasonably to be expected of persons similarly employed.

[But a person is not responsible for the negligence of an independent contractor or of the agents or employees of an independent contractor. An independent contractor is a [person] [business] who is engaged by another to perform specific work according to [his] [her] [its] own methods and whose methods of performing the work are not controlled by the person engaging [him] [her] [it] and are not subject to that person's right of control.]

NOTES ON USE FOR 401.14b(1)

1. For purposes of defining liability for negligence, there is no reason to distinguish between the relationship of principal and agent and the relationship of master and servant. See *Lynch v. Walker*, 31 So. 2d 268 (Fla. 1947).

2. For judicial opinions relating to an agency instruction in the context of a franchise relationship, see *Domino's Pizza, LLC v. Wiederhold*, 306 So. 3d 384 (Fla. 5th DCA 2020) and *Ross v. Elaine Powers Figure Salon*, 289 So. 2d 70 (Fla. 4th DCA 1974).

(2). Apparent agency:

whether (name) **was an apparent agent of** (defendant) **and was acting within the scope of [his] [her] apparent authority at the time and place of the incident in this case. [An agent is a person who is employed to act for another, and whose actions are controlled by [his] [her] employer or [is] [are] subject to [his] [her] employer's right of control.]**

(Name) **was an apparent agent if** (defendant) **by [his] [her] [its] words or conduct caused or allowed** (claimant) **to believe that** (name) **was an agent of and had authority to act for** (defendant)**, if** (claimant) **reasonably relied upon the words or conduct, and if** (claimant) **changed [his] [her] [its] position in reliance on the words of conduct.**

A person is responsible for the negligence of [his] [her] [its] apparent agent occurring while the apparent agent is acting within the scope of [his] [her] apparent authority.

NOTE ON USE FOR 401.14b(1) AND (2)

If the court determines that issues on both actual agency and apparent agency should be submitted to the jury, give both instructions 401.14b(1) and b(2), omitting the bracketed language in b(2). When instruction 401.14b(2) is used alone, give the bracketed language.

c. Ultrahazardous work (exception to nonliability for negligence of independent contractor):

whether (defendant) **[authorized or permitted another to carry on] [or] [knowingly assisted or participated in carrying on], upon premises owned or possessed by [him] [her], an activity which** (defendant) **knew or should have known was ultrahazardous. The performance of work is ultrahazardous if there is a real and substantial danger inherent in the work itself and if the work is of such a nature that, in the ordinary course of events, performance of the work will probably cause injury if proper precautions are not taken. A person who [authorizes or permits another to carry on] [or] [knowingly assists or participates in carrying on] ultra-hazardous work on premises owned or possessed by the employer is responsible for negligence in the performance of the work by the other or by his or her agents and employees.**

NOTE ON USE FOR 401.14c

Price v. Florida Power & Light Co., 159 So. 2d 654 (Fla. 2d DCA 1963), rev'd 170 So. 2d 293. If the activity in question is ultrahazardous as a matter of law, this instruction should be omitted and instruction 401.13b, the preemptive instruction on vicarious liability, should be given.

d. Partnership:

whether (name) **was a partner of** (defendant) **and was acting on behalf of the partnership and within the scope of its business at the time and place of the incident in this case. A partnership exists when two or more persons join together or agree to join together in a business or venture for their common benefit, each contributing property, money or services and each having an interest in any profits. Each member of a partnership is responsible for the negligence of any partner if such negligence occurs while the partner is acting on behalf of the partnership and within the scope of the partnership's business.**

e. Joint venture:

whether at the time and place of the incident complained of, (name) **was engaged in a joint venture with** (defendant) **and was acting on behalf of the joint venture and within the scope of its business at the time and place of the incident in this case. A joint venture exists when two or more persons combine their resources or efforts and agree to undertake some particular business transaction in which they have common interests in the purposes to be accomplished, joint control or right of control of the venture, joint ownership interest in the subject matter of the venture and a common right and duty to share in profits and losses. Each member of a joint venture is responsible for the negligence of another member if such other member's negligence occurs while he or she is acting on behalf of the joint venture and within the scope of its business.**

f. Joint enterprise (automobile):

whether (driver) **was operating the automobile at the time and place of the [collision] [incident complained of] to further the purposes of a joint enterprise in which [he] [she] was engaged with** (defendant passenger)**. A joint enterprise exists when two or more persons agree, expressly or impliedly, to engage in an activity in which they have a common interest in the purposes to be accomplished and equal rights to control and manage the operation of an automobile in the enterprise. Each member of a joint enterprise is responsible for the negligence of another member in the operation of the automobile if that negligence occurs while he or she is acting under the agreement and to further the purposes of the joint enterprise.**

NOTE ON USE FOR 401.14

Instruction 401.14 should be followed by instruction 401.17, Burden of Proof on Preliminary Issues, unless there are other preliminary issues, in which case instruction 401.17 would follow all preliminary issue instructions.

(Amended July 28, 2022, revised June 17, 2026.)

401.15 PRELIMINARY ISSUES — COMMON CARRIER

On (claimant's) **claim there is [a preliminary] [another] issue for you to decide. That issue is whether at the time and place of the incident in this case,** (claimant) **was a passenger of** (defendant)**, a common carrier. A person is a passenger of a common carrier when**

a. Passenger before boarding:

[intending to take passage, [he] [she] enters and occupies a station, waiting room or other place provided by the carrier for the reception of passengers at a time when such place is open for reception of persons intending to take passage on the carrier's vehicle or conveyance.] or

b. Passenger boarding or in transit:

[[he] [she] enters or occupies the carrier's vehicle or conveyance for the purpose of transportation with the carrier's express or implied consent.] or

c. Passenger temporarily leaving conveyance:

[[he] [she] enters or occupies the carrier's vehicle or conveyance for the purpose of transportation with the carrier's express or implied consent. Such a person does not cease to be a passenger by leaving the carrier's vehicle or conveyance temporarily for a reasonable purpose and without intending to abandon the carrier's transportation.] or

d. Passenger departing at destination:

[[he] [she] enters or occupies the carrier's vehicle or conveyance for the purpose of transportation with the carrier's express or implied consent. Such a person does not cease to be a passenger at [his] [her] destination until [he] [she] has safely left the carrier's vehicle or conveyance [or, if [he] [she] is discharged at the station or premises of

the carrier, until [he] [she] has had a reasonable opportunity to leave the premises].]

NOTES ON USE FOR 401.15

1. *Atlantic Greyhound Lines v. Lovett*, 134 Fla. 505, 184 So. 133 (Fla. 1938); *Florida Southern Railway Co. v. Hirst*, 30 Fla. 1, 11 So. 506 (Fla. 1892); *Henderson v. Tarver*, 123 So. 2d 369 (Fla. 2d DCA 1960); *Pividal v. City of Miami*, 105 So. 2d 502 (Fla. 3d DCA 1958).

2. Instruction 401.15 should be followed by instruction 401.17, Burden of Proof on Preliminary Issues.

401.16 PRELIMINARY ISSUES — PREMISES LIABILITY

On (claimant's) **claim, there is a preliminary issue for you to decide. That issue is:**

a. Invitee or invited licensee:

whether, at the time and place of the incident in this case (claimant) **was invited on premises owned by or in the possession of** (defendant)**. A person is invited on land or premises of another when he enters or remains there at the invitation of the owner or possessor. An invitation may be either express or reasonably implied from the circumstances. [A person remains invited as long as [he] [she] uses the premises in the customary manner or in a manner which the owner or possessor of the premises might reasonably have expected and at a place where the visitor was invited or where [he] [she] was permitted to be or where [he] [she] might reasonably have been expected by the owner or possessor.]**

b. Discovered trespasser [or licensee (uninvited) whose presence is foreseeable]:

*Use the bracketed language indicated with an asterisk if claimant was a licensee (uninvited) but not if claimant was a trespasser.**

whether, at the time and place of the incident in this case, (defendant) **had a duty to use reasonable care for the safety of** (claimant)**. A person who owns or has possession of land or premises who knows of a condition on the premises which involves an unreasonable risk of harm to another person on the premises has a duty to use reasonable care to warn the other person of the condition and the risk involved, if the presence of the other person is known *[or reasonably foreseeable] by the owner or possessor and if the other neither knew nor should have known of the condition and risk by the use of reasonable care.**

NOTES ON USE FOR 401.16b

1. *Byers v. Gunn*, 81 So. 2d 723 (Fla. 1955); *Crutchfield v. Adams*, 152 So. 2d 808 (Fla. 1st DCA 1963); *Seaboard Air Line Railroad. Co. v. Branham*, 99 So. 2d 621 (Fla. 3d DCA 1958).

2. In the case of a person having an express or implied invitation, use instruction 401.16a instead of instruction 401.16b. As a result of *Wood v. Camp*, 284 So. 2d 691 (Fla. 1973), the former licensee category now consists only of "uninvited licensees."

c. Attractive nuisance:

The first clause, bracketed and indicated with an asterisk, and the last clause, bracketed and indicated with a dagger, should be used only if there are jury issues on those matters.†

***[whether** (defendant) **[owned] [possessed] [or] [controlled] the land or premises in question];**

whether the (identify structure or other artificial condition) **was located at a place on the land or premises in question where** (defendant) **knew or had reason to know children were likely to be [as trespassers or otherwise];**

whether (claimant child) **was attracted by the [**(identify structure or other artificial condition)**] [**(land or premises in question)**];**

whether the (identify structure or other artificial condition) **had an unreasonable risk of death or serious harm to children who, because of their age, were not likely to discover the condition or realize the risk involved in meddling with it or in coming within the area made dangerous by it;**

[and] whether (defendant) **knew or had reason to know of the risk to the children;**

†[and whether (claimant child)**, because of his age, did not discover the condition or realize the risk involved in**

meddling with it or in coming within the area made dangerous by it].

NOTES ON USE FOR 401.16c

1. Derived from RESTATEMENT (2D) OF TORTS §339; *Cockerham v. Vaughan, Inc.*, 82 So. 2d 890 (Fla. 1955); *Banks v. Mason*, 132 So. 2d 219 (Fla. 2d DCA 1961); *Fouraker v. Mullis*, 120 So. 2d 808 (Fla. 1st DCA 1960). Considered together, instructions 401.16c and 401.20c cover all elements of the attractive nuisance doctrine. Since plaintiff must, in effect, negate negligence in order to prevail on this doctrine, comparative negligence is not a defense. *Larnel Builders, Inc. v. Martin*, 110 So. 2d 649 (Fla. 1959).

2. Caselaw also uses the phrases "enticed" and "allured" instead of, or in addition to, "attracted". See, *e.g.*, *Concrete Const., Inc., of Lake Worth v. Petterson*, 216 So. 2d 221, 223 (Fla. 1968); *Martinello v. B & P USA, Inc.*, 566 So. 2d 761 (Fla. 1990). This instruction uses "attracted" because it is more likely to be understood by the average juror; however, "enticed" or "allured" may be used instead of, or in addition to, "attracted" if the facts warrant.

3. The Committee takes no position as to whether the claimant must have been attracted or lured onto the premises by its general condition or by the condition that ultimately caused the claimant's harm. See, *e.g.*, *Stark v. Holtzclaw*, 105 So. 330 (Fla. 1925); *Martinello v. B & P USA, Inc.*, 556 So. 2d 761 (Fla. 1990); *Mueller v. South Fla. Water Mgmt. Dist.*, 620 So. 2d 789 (Fla. 4th DCA 1993); *Estate of Starling v. Saha*, 451 So. 2d 516 (Fla. 5th DCA 1984).

NOTES ON USE FOR 401.16

1. Instruction 401.16 should be used when the jury could reasonably decide either for claimant or for defendant on the issue of whether defendant owed claimant the degree of care that is an essential part of the claim made by claimant, *e.g.*, as when claimant contends he was an invitee on the defendant's premises and defendant contends that plaintiff was a trespasser.

2. Instruction 401.16 is intended to frame the issues

determining claimant's status or defendant's duty. It is not intended as a statement of the degree of care owed. The matter of degree of care is covered in the instructions on negligence issues.

3. The variations of instruction 401.16 state affirmatively the circumstances that must be shown in order for claimant to prevail on this particular issue. If these circumstances are not shown by the greater weight of the evidence, claimant cannot prevail on a claim that depends on such a showing.

4. Instruction 401.16 should be followed by instruction 401.17, Burden of Proof on Preliminary Issues.

401.17 BURDEN OF PROOF ON PRELIMINARY ISSUES

If the greater weight of the evidence does not support (claimant's) **claim on [this issue] [these issues], that** (describe preliminary issue)**, then your verdict on the claim of** (claimant) ***[because of the claimed negligence of** (name)**] should be for** (defendant)**.**

However, if the greater weight of the evidence supports the claim of (claimant) **on [this issue] [these issues], that** (describe preliminary issue)**, then you shall decide the other issues on** (claimant's) **claim.**

NOTES ON USE FOR 401.17

1. Give instruction 401.17 if instructing the jury on any preliminary issues from instructions 401.14, 401.15 or 401.16.

2. If there are multiple defendants, this instruction will have to be modified to account for the issues related to each defendant.

3. *There is no need to give that portion of the instruction contained within brackets unless the case involves multiple defendants or the claimant makes an alternative claim not predicated on simple negligence. In such a case it is necessary to distinguish between different claims or a claim of negligence from the other claim.

401.18 ISSUES ON PLAINTIFF'S CLAIM — GENERAL NEGLIGENCE

The [next] issues you must decide on (claimant's) **claim against** (defendant) **are:**

a. Negligence, generally:

whether (defendant) **was negligent in** (describe alleged negligence)**, and, if so, whether that negligence was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made)**.**

b. Two drivers' negligence:

whether (defendant) **or** (defendant) **was negligent or whether both were negligent in operating the vehicles, and, if so, whether that negligence was a legal cause of [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made)**.**

c. Negligence of parent (damage caused by child):

whether (defendant parent(s)) **negligently [provided] [left in the possession of] [or] [left accessible to] [his] [her] child,** (name)**,** (name item) **which, because of the child's age or lack of judgment or experience, was an unreasonable risk of harm to others [or] [failed to restrain or control [his] [her] child,** (name)**,] [or] [directed or encouraged [his] [her] child,** (name)**, to do something involving an unreasonable risk of harm to others]; and, if so, whether that negligence was a legal cause of [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made)**].**

d. Railroad, airline, or bus line negligence:

whether (defendant) **was negligent in the operation of its [train] [airplane] [bus], and, if so, whether that negligence was a legal cause of [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made)**.**

NOTE ON USE FOR 401.18d

For the degree of care required for passengers of common carriers, see instruction 401.6. If the claimant is a passenger of railroad, airline, bus line, or other common carrier, use instruction 401.9 instead of this instruction.

401.19 ISSUES ON PLAINTIFF'S CLAIM — COMMON CARRIER

The [next] issues on (claimant's) **claim, for you to decide are: whether** (defendant) **in** (describe conduct) **failed to exercise the highest degree of care for the safety of** (claimant)**; and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made)**.**

401.20 ISSUES ON PLAINTIFF'S CLAIM — PREMISES LIABILITY

The [next] issues on (claimant's) **claim, for you to decide are:**

a. Landowner or possessor's negligence (toward invitee and invited licensee):

whether (defendant) **[negligently failed to maintain the premises in a reasonably safe condition by failing to correct a dangerous condition about which** (defendant) **either knew or should have known, by the use of reasonable care,] [or] *[negligently failed to warn** (claimant) **of a dangerous condition about which** (defendant) **had, or should have had, knowledge greater than that of** (claimant)**]; and, if so, whether such negligence was a legal cause of [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made)**.**

NOTES ON USE FOR 401.20a

1. If there is an issue of whether claimant had status as an invitee or invited licensee, give instructions 401.16a and 401.17 as preliminary instructions before giving instruction 401.20a. The final segment of instruction 401.20a, marked with an asterisk (*), is inapplicable when plaintiff does not proceed on a theory of defendant's failure to warn.

2. The committee amended this instruction in response to the Fourth District's decision in *North Lauderdale Supermarket, Inc. v. Puentes*, 332 So. 3d 526 (Fla. 4th DCA 2021). This instruction may be used in cases arising under *F.S.* 768.0755 involving transitory foreign substances.

b. Landowner or possessor's negligence (toward discovered trespasser or foreseeable licensee):

whether (defendant) **negligently failed to warn** (claimant) **of a dangerous condition and risk which were known to** (defendant) **and of which** (claimant) **neither knew nor should**

have known, by the use of reasonable care; and, if so, whether such negligence was a legal cause of [loss] [injury] [or] [damage] to (claimant, decedent or person for whose injury claim is made)**.**

NOTE ON USE FOR 401.20b

Give preliminary instructions 401.16b and 401.17 before giving instruction 401.20b if there is a jury question of whether defendant owned or had possession of the land or premises, or whether he knew of the dangerous condition, or whether he knew of claimant's presence (if claimant was a trespasser) or should have foreseen claimant's presence (if claimant was a licensee).

c. Attractive nuisance:

whether (defendant) **was negligent in maintaining or in failing to protect** (claimant child) **from the** (describe structure or other artificial condition) **on the land or premises in question; and, if so, whether that negligence was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made)**.**

NOTE ON USE FOR 401.20c

This instruction and instruction 401.16c, taken together, state all elements of the attractive nuisance doctrine. The committee considers subsections (d) and (e) of RESTATEMENT (SECOND) OF TORTS §339 to be unnecessary to the instruction because negligence is otherwise defined by instruction 401.4.

d. Landlord's negligence (toward tenant):

(1). When leased premises are not residential:

whether (defendant landlord) **negligently failed to disclose to** (claimant tenant) **a dangerous condition on the leased premises which was known to** (defendant)**, which was not known to** (claimant) **or discoverable by [him] [her] by the use of reasonable care, and which**

(defendant) **had reason to believe** (claimant) **could not discover; and, if so, whether that negligence was a legal cause of [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made)**.**

(2). When leased premises are residential (not common areas):

whether, [before allowing (claimant tenant) **to take possession of the dwelling,** (defendant landlord) **negligently failed to repair a defect that was discoverable by a reasonable inspection] [or] [after** (claimant tenant) **took possession of the dwelling,** (defendant landlord) **negligently failed to repair a dangerous or defective condition on the premises of which [he] [she] [it] had actual notice]; and, if so, whether that negligence was a legal cause of [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made)**.**

NOTES ON USE FOR 401.20d

1. This instruction, reflecting a greater duty by landlord to tenant on leased residential premises, was derived from *Mansur v. Eubanks*, 401 So. 2d 1328 (Fla. 1981), overruling to that extent *Brooks v. Peters*, 25 So. 2d 205 (Fla. 1946). See also *F.S.* 83.51 (1981), which may impose on the landlord greater duties, in respect to conditions arising after a tenant's possession, than were addressed in *Mansur*. If other or greater duties are imposed by the statute, this instruction should be modified to express those duties in the terms of the case. This instruction pertains to the landlord's duties, not the tenant's, but the committee calls attention to statutes in *F.S.* Chapter 83 imposing certain duties on the tenant, which may affect the landlord's duties as expressed in this instruction.

2. *Common areas.* In the absence of an agreement otherwise, a landlord's duty in common areas when the leased premises are residential is set forth in *F.S.* 83.51(2)(a)3. *Fieldhouse v. Tam Inv. Co.*, 959 So. 2d 1214 (Fla. 4th DCA 2007); *Haynes v. Lloyd*, 533 So. 2d 944 (Fla. 5th DCA 1988).

3. *Persons invited on leased residential premises by tenant.* The landlord's duty to persons invited on leased residential premises by the tenant is the same as the landlord's duty to the tenant. *Mansur v. Eubanks*, 401 So. 2d 1328 (Fla. 1981).

4. *Waiver.* The committee expresses no opinion about whether a tenant may waive duties owed him by the landlord. Compare *Mansur v. Eubanks*, 401 So. 2d 1328 (Fla. 1981), with *F.S.* 83.51(1)(b), 83.51(4), and 83.47 (1981).

e. Municipality's negligence in maintenance of sidewalks and streets:

whether (defendant) **negligently failed to maintain its [sidewalk] [or] [street] in a reasonably safe condition by failing to correct a dangerous condition about which** (defendant) **either knew or should have known, by the use of reasonable care,] [or] *[negligently failed to correct or warn** (claimant) **of a dangerous condition of which** (defendant) **either knew or should have known, by the use of reasonable care]; and, if so, whether that negligence was a legal cause of [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made)**.**

NOTE ON USE FOR 401.20e

1. *City of Tampa v. Johnson*, 114 So. 2d 807 (Fla. 2d DCA 1959); *Schutzer v. City of Miami*, 105 So. 2d 492 (Fla. 3d DCA 1958).

2. The final segment of instruction 401.20e, marked with an asterisk (*), is inapplicable when plaintiff does not proceed on a theory of defendant's failure to warn.

f. Multi-family residential property owners, negligence in security cases:

NOTE ON USE FOR 401.20f

If the owner or principal operator of a multifamily residential property substantially implements the security measures listed in *F.S.*

768.0706(2)(a), *F.S.* 768.0706 provides for a rebuttable presumption against liability in connection with criminal acts that occur on the premises that are committed by third parties who are not employees or agents of the owner or operator. See *F.S.* 90.301–90.304. The committee offers no standard instruction on this presumption pending further development in the law.

(Revised January 24, 2024; revised December 4, 2024.)

401.21 BURDEN OF PROOF ON MAIN CLAIM

If the greater weight of the evidence does not support [one or more of] (claimant's) **claim[s], your verdict should be for** (defendant)(s) **[on [that] [those] claim(s)].**

[However, if the greater weight of the evidence supports [one or more of] (claimant's) **claim[s], then your verdict should be for** (claimant) **and against** (defendant) **[on [that] [those] claim(s).]**

[However, if the greater weight of the evidence supports (claimant's) **claim against one [or] [both] [more] of the defendants, then you should decide and write on the verdict form the percentage of the total negligence of [both] [all] defendants that you apportion to each of them.]**

NOTE ON USE FOR 401.21

Use the first paragraph in all cases. If there is an affirmative defense to the claim that is the subject of the instruction, do not use either of the bracketed paragraphs; instead, turn to instruction 401.22. If there is no affirmative defense, use the first or the second bracketed paragraph depending on whether there is one defendant or more than one.

(Revised February 1, 2018.)

401.22 DEFENSE ISSUES

If, however, the greater weight of the evidence supports [(claimant's) **claim] [one or more of** (claimant's) **claims], then you shall consider the defense[s] raised by** (defendant)**.**

On the [first]* defense, the issue[s] for you to decide [is] [are]:

**The order in which the defenses are listed below is not necessarily the order in which the instructions should be given.*

a. Comparative negligence generally:

whether (claimant or person for whose injury or death claim is made) **was [himself] [herself] negligent in** (describe alleged negligence) **and, if so, whether that negligence was a contributing legal cause of injury or damage to** (claimant)**.**

NOTES ON USE FOR 401.22a

1. Instruction 401.4, defining negligence, is applicable both to defendant's negligence and claimant's negligence. The consequences of negligence on claimant's part are explained to the jury by instruction 401.22a. There being no need to give claimant's negligence the special designation "comparative negligence," the committee recommends that "comparative negligence" not be referred to in the instruction and that the term not be defined.

2. *Special verdicts and special interrogatories*. Special verdicts are required in all jury trials involving comparative negligence. *Lawrence v. Florida East Coast Railway Co.*, 346 So. 2d 1012 (Fla. 1977).

3. *Presumption of reasonable care*. The committee recommends that no instruction be given to the effect that a deceased person or an injured person or either party is presumed to have exercised reasonable care for his own safety or for the safety of others. If such a presumption is thought to take the place of evidence and make a prima facie case for the party having the burden of proof, the

presumption "disappears" upon the introduction of any evidence tending to overcome it. *Gulle v. Boggs*, 174 So. 2d 26 (Fla. 1965). If the presumption is thought to operate *against* the party having the burden of proof, as in the case of the presumption that a decedent was not comparatively negligent but was exercising reasonable care for his own safety, such an instruction is merely a way (and a confusing way, at that) of stating that the burden of proving comparative negligence is on the party asserting it. In either case, an instruction on the subject is superfluous. But compare *Louisville & Nashville Railroad Co. v. Yniestra*, 21 Fla. 700 (1886); *Jacksonville Electric Co. v. Sloan*, 52 Fla. 257, 42 So. 516 (Fla. 1906); and *Martin v. Makris*, 101 So. 2d 172 (Fla. 3d DCA 1958).

b. Driver's comparative negligence (when owner sues third party):

whether (driver), **while operating a vehicle owned by** (claimant) ***[with [his] [her] consent, express or implied,] was [himself] [herself] negligent in the operation of the vehicle and, if so, whether that negligence was a contributing legal cause of the injury or damage to** (claimant)**.**

**The phrase within brackets should be used only if there is an issue as to the owner's knowledge and consent.*

c. Joint enterprise (driver's negligence):

whether (driver) **was operating the automobile at the time and place of the [collision] [incident in this case] to further the purposes of a joint enterprise in which [he] [she] was engaged with** (claimant passenger)**; if so, whether** (driver) **was negligent in the operation of the automobile; and, if so, whether that negligence was a contributing legal cause of [loss] [injury] [or] [damage] to** (claimant)**. A joint enterprise exists when two or more persons agree, expressly or impliedly, to engage in an activity in which they have a common interest in the purposes to be accomplished and equal rights to control and manage the operation of an automobile in the enterprise. Each member of a joint enterprise is responsible for the**

negligence of another member in the operation of the automobile if that negligence occurs while [he] [she] is acting under the agreement and to further the purposes of the joint enterprise.

d. Comparative negligence of parent predicated on other parent's negligence (claim for death of child):

whether (parent) **was negligent in caring for and supervising the child,** (name)**; if so, whether that negligence was a contributing legal cause of the death of** (child)**, and, if so, whether** (other parent)**, in the exercise of reasonable care, should have anticipated that negligence on the part of** (parent)**.**

e. Comparative negligence of custodian of child other than parent:

whether, before the incident in this case, *(claimant)* **placed** (child) **in the care and custody of** (custodian)**, if so, whether** (custodian) **was negligent in caring for and supervising the child,** (name)**; and, if so, whether that negligence was a contributing legal cause of [injury] [and] [death] to** (child)**.**

NOTE ON USE FOR 401.22e

Wynne v. Adside, 163 So. 2d 760 (Fla. 1st DCA 1964). See also *Winner v. Sharp*, 43 So. 2d 634 (Fla. 1950).

f. Apportionment of fault:

whether (identify additional person(s) or entit(y)(ies)) **[was] [were] also [negligent] [at fault] [responsible] in** (describe alleged negligence)**; and, if so, whether that [negligence] [fault] [responsibility] was a contributing legal cause of [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made)**.**

NOTES ON USE FOR 401.22f

1. See *F.S.* 768.81 (2019); *Fabre v. Marin*, 623 So. 2d 1182

(Fla. 1993). In most cases, use of the term "negligence" will be appropriate. If another type of fault is at issue, it may be necessary to modify the instruction and the verdict form accordingly.

2. For fault to be apportioned among multiple tortfeasors, the tortfeasors must be joint tortfeasors. See *Grobman v. Posey*, 863 So. 2d 1230, 1234 (Fla. 4th DCA 2003). Joint tortfeasors are those "who act together in committing wrong, or whose acts if independent of each other, unite in causing single injury." *Letzter v. Cephas*, 792 So. 2d 481, 486 (Fla. 4th DCA 2001) (internal quotations omitted). For discussions as to whether apportionment is appropriate, see, *e.g.*, *Specialty Hosp.-Gainesville, Inc. v. Barth*, 277 So. 3d 201, 215 (Fla. 1st DCA 2019) (apportionment is not appropriate where the defendant and the third part are successive tortfeasors); *Grobman*, 863 So. 2d at 1236 (apportionment is not appropriate where liability between the defendant and the third party is derivative); *Suarez v. Gonzalez*, 820 So. 2d 342, 344 (Fla. 4th DCA 2002) (apportionment is not appropriate between a defendant and a third party where the defendant hired the third party to perform a nondelegable duty).

g. Assumption of risk:

whether (claimant) **knew of the existence of the danger complained of; realized and appreciated the possibility of injury as a result of such danger; and, having a reasonable opportunity to avoid it, voluntarily and deliberately exposed [himself] [herself] to such danger.**

NOTE ON USE FOR 401.22g

Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977), abolished the assumption of risk defense except in cases identified in that opinion.

(Adopted March 4, 2010 (35 So. 3d 666); revised August 13, 2021.)

401.23 BURDEN OF PROOF ON DEFENSE ISSUES

If the greater weight of the evidence does not support

(defendant's) **defense[s] and the greater weight of the evidence does support** (claimant's) **claim, then [your verdict should be for** (claimant) **in the total amount of [his] [her] damages] *[you should decide and write on the verdict form what percentage of the total negligence of [both] [all] defendants you apportion to each defendant whose negligence you find was a legal cause of loss, injury, or damage to** (claimant)**].**

**Use second bracketed alternative above when there is more than one defendant.*

If, however, the greater weight of the evidence shows that both (claimant) **and [**(defendant)**] [one or more of** (defendants)**] were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by** (claimant)**, you should decide and write on the verdict form what percentage of the total negligence of [both] [all] parties to this action you apportion to each of them.**

Use the following instruction in cases with a comparative negligence defense and an apportionment of a non-party defense:

If, however, the greater weight of the evidence shows that (claimant) **and [**(defendant)**] [one or more of** (defendants)**] and** (identify additional person(s) or entit(y)(ies)) **were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by** (claimant)**, you should decide and write on the verdict form what percentage of the total negligence of [both] [all] parties to this action and** (identify additional person(s) or entit(y)(ies)) **you apportion to each of them.**

Use the following instruction in cases without a comparative negligence defense but with an apportionment of a non-party defense:

If, however, the greater weight of the evidence shows that [(defendant)**] [one or more of** (defendants)**] and** (identify additional person(s) or entit(y)(ies)) **were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage]**

sustained by (claimant)**, you should decide and write on the verdict form what percentage of the total negligence of [**(defendant)**] and** (identify additional person(s) or entit(y)(ies)) **you apportion to each of them.**

NOTES ON USE FOR 401.23

1. *Preemptive instructions on defense issues.* If a preemptive instruction for claimant is appropriate on a defense issue, as when comparative negligence or assumption of risk has been brought to the jury's attention on voir dire or by opening statements or argument and is now to be withdrawn, an instruction in the form of instruction 401.13 should be given immediately following instruction 401.21. If a preemptive instruction for defendant is required on some aspect of a defense, as when, for example, the court holds that any comparative negligence of the driver will reduce claimant's recovery, a preemptive instruction announcing the ruling should be given immediately after framing the defense issues (instruction 401.22a).

2. *Instructions on issues raised by replies to affirmative defenses.* Plaintiff bears the burden of proof on issues raised by any replies to affirmative defenses, and instruction 401.23 should be modified as appropriate for those issues.

(Revised February 1, 2018.)

401.24 COUNTERCLAIMS, CROSS CLAIMS, AND THIRD PARTY CLAIMS

NOTE ON USE FOR 401.24

Generally counterclaims, cross claims, and third party claims should follow the same pattern of issues, applicable rules, burden of proof, and defenses as on the main claim. For an example of how a counterclaim can be integrated into an instruction, see Model Instruction No. 4.

401.25 UNINSURED OR UNDERINSURED MOTORIST

(The insurer) **provided [uninsured] [underinsured] [uninsured or underinsured] motorist coverage to** (claimant) **that applies to the accident between** (claimant) **and** (adverse driver)**.**

(The insurer) **is responsible for any negligence of** (adverse driver) **that was a legal cause of [loss] [injury] [or] [damage] to** (claimant)**.** (The insurer) **has the right to assert any defenses that would be available to the** (adverse driver)**.**

NOTES ON USE FOR 401.25

1. See *F.S.* 627.727 regarding uninsured and underinsured vehicle coverage.

2. See also *Lamz v. GEICO*, 803 So. 2d 593 (Fla. 2001); *Medina v. Peralta*, 724 So. 2d 1188 (Fla. 1999); *GEICO v. Krawzak*, 675 So. 2d 115 (Fla. 1996); *GEICO Gen. Ins. Co. v. Tsao*, 397 So. 3d 1186, 1190 (Fla. 5th DCA 2024); *Armstrong v. Wal-Mart Stores, Inc.*, 870 So. 2d 232 (Fla. 4th DCA 2014).

(Adopted October 12, 2023;
revised February 11, 2026.)

402 PROFESSIONAL NEGLIGENCE

402.1 Introduction

402.2 Summary of Claims

402.3 Greater Weight of the Evidence

402.4 Medical Negligence

402.5 Other Professional Negligence

402.6 Legal Cause

402.7 Legal Cause (Treatment Without Informed Consent)

402.8 Preemptive Charges

402.9 Preliminary Issues — Vicarious Liability

402.10 Burden of Proof on Preliminary Issues

402.11 Issues on Main Claim

402.12 Issues on Claim of Attorney Malpractice Arising Out of Civil Litigation

402.13 Burden of Proof on Main Claim

402.14 Defense Issues

402.15 Burden of Proof on Defense Issues

NOTES ON USE

1. Professional negligence claims are, for the most part, similar. The committee has, therefore, included all such claims in a single section. There are, however, some specific instructions that deal with issues unique to certain professions, such as instruction 402.4(d) (missing medical records) and instruction 402.12 (issues involved in certain legal malpractice claims). For cases involving allegations of negligence of professions other than medical or legal, instructions 402.11(a) and (b) and 402.12(a) and (b) should be appropriately modified.

2. If a professional malpractice case involves a claim of

product defect, jury instructions for such claims should be adopted from the applicable sections of this book.

402.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 402.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 402.1. See Model Instruction No. 1. Instruction 402.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 402.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including an explanation for the difference, such as where the court has directed a verdict on an issue.

2. "The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations." *Fla. R. Civ. P.* 1.470(b).

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla. R. Civ. P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge, as the judge reads the instructions aloud.

(Revised June 25, 2025.)

402.2 SUMMARY OF CLAIMS

The claims [and defenses] in this case are as follows. (Claimant) **claims that** (defendant) **was negligent in** (describe alleged negligence) **which caused [him] [her] harm.**

(Defendant) **denies that claim [and also claims that** (claimant) **was [himself] [herself] negligent in** (describe the alleged comparative negligence) **which caused [his] [her] harm]. [Additionally** (describe any other affirmative defenses)**.]**

The parties must prove all claims [and defenses] by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

402.3 GREATER WEIGHT OF THE EVIDENCE

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTES ON USE FOR 402.3

1. *Greater or lesser number of witnesses.* The committee recommends that no charge be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. *Circumstantial evidence.* The committee has not drafted an instruction addressing circumstantial evidence and takes no position on whether such an instruction is needed. For criminal cases, see *Matter of Use by Trial Cts. of Standard Jury Instructions in Crim. Cases*, 431 So. 2d 594 (Fla. 1981).

(Revised February 11, 2026.)

402.4 MEDICAL NEGLIGENCE

a. Negligence (physician, hospital or other health provider):

Negligence is the failure to use reasonable care. Reasonable care on the part of a [physician] [hospital] [health care provider] is that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers]. Negligence on the part of a [physician] [hospital] [health care provider] is doing something that a reasonably careful [physician] [hospital] [health care provider] would not do under like circumstances or failing to do something that a reasonably careful [physician] [hospital] [health care provider] would do under like circumstances.

NOTE ON USE FOR 402.4a

See *F.S.* 766.102. Instruction 402.4a is derived from *F.S.* 766.102(1) and is intended to embody the statutory definition of "prevailing professional standard of care" without using that expression itself, which is potentially confusing.

b. Negligence (treatment without informed consent):

[Negligence is the failure to use reasonable care.] Reasonable care on the part of a [physician] [health care provider] in obtaining the [consent] [informed consent] to treatment of a patient consists of

(1). When issue is whether consent was obtained irregularly:

obtaining the consent of the patient [or one whose consent is as effective as the patient's own consent such as (describe)**], at a time and in a manner in accordance with an accepted standard of medical practice among members of the profession with similar training and experience in the same or a similar medical community.**

(2). When issue is whether sufficient information was given:

providing the patient [or one whose informed consent is as effective as the patient's informed consent, such as (describe)**] information sufficient to give a reasonable person a general understanding of the proposed treatment or procedure, of any medically acceptable alternative treatments or procedures, and of the substantial risks and hazards inherent in the proposed treatment or procedure which are recognized by other [physicians] [health care providers] in the same or a similar community who perform similar treatments or procedures.**

NOTE ON USE FOR 402.4b

This instruction is derived from the provisions of *F.S.* 766.103.

c. Foreign bodies:

[Negligence is the failure to use reasonable care.] The presence of (name of foreign body) **in** (patient's) **body establishes negligence unless** (defendant(s)) **prove(s) by the greater weight of the evidence that [he] [she] [it] was not negligent.**

NOTES ON USE FOR 402.4c

1. This instruction is derived from *F.S.* 766.102(3). The statute uses the term "prima facie evidence of negligence." The committee recommends that term not be used as not helpful to a jury. Rather, the committee has used the definition of prima facie. See, *e.g.*, *State v. Kahler*, 232 So. 2d 166, 168 (Fla. 1970) ("prima facie" means "evidence sufficient to establish a fact unless and until rebutted").

2. Before this instruction is given, the court must make a finding that the foreign body is one that meets the statutory definition. See *Kenyon v. Miller*, 756 So. 2d 133 (Fla. 3d DCA 2000).

d. Failure to maintain evidence or keep a record:

(1). Adverse Inference.

If you find that:

(Name of party) **[lost] [destroyed] [mutilated] [altered] [concealed] or otherwise caused the** (describe evidence) **to be unavailable, while it was within [his] [her] [its] possession, custody, or control; and the** (describe evidence) **would have been material in deciding the disputed issues in this case; then you may, but are not required to, infer that this evidence would have been unfavorable to** (name of party)**. You may consider this, together with the other evidence, in determining the issues of the case.**

NOTES ON USE FOR 402.4d(1)

1. This instruction is not intended to limit the trial court's discretion to impose additional or other sanctions or remedies against a party for either inadvertent or intentional conduct in the loss, destruction, mutilation, alteration, concealment, or other disposition of evidence material to a case. See, *e.g.*, *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 780 (Fla. 4th DCA 2006); *Am. Hosp. Mbmt. Co. of Minnesota v. Hettiger*, 904 So. 2d 547 (Fla. 4th DCA 2005); *Jost v Lakeland Reg. Med. Ctr.*, 844 So. 2d 656 (Fla. 2d DCA 2003); *Nationwide Lift Trucks, Inc. v. Smith*, 832 So. 2d 824 (Fla. 4th DCA 2002); *Torres v. Matsushita Elec. Corp.*, 762 So. 2d 1014 (Fla. 5th DCA 2000); and *Sponco Mfg., Inc. v. Alcover*, 656 So. 2d 629 (Fla. 3d DCA 1995).

2. The inference addressed in this instruction does not rise to the level of a presumption. *Pub. Health Tr. of Dade Cty. v. Valcin*, 507 So. 2d 596 (Fla. 1987), and Instruction 402.4d(2).

3. This instruction may require modification in the event a factual dispute exists as to which party or person is responsible for the loss of any evidence.

(2). Burden shifting presumption.

The court has determined that (name of party) **had a duty to [maintain** (describe missing evidence)**] [keep a record of** (describe subject matter as to which party had record keeping duty)**].** (Name of party) **did not [maintain** (describe missing evidence)**] [or] [keep a record of** (describe subject matter as to which party had record

keeping duty)**].**

Because (name of party) **did not [maintain** (describe missing evidence)**] [or] [keep a record of** (describe subject matter as to which party had a record keeping duty)**], you should find that** (name of invoking party) **established [his] [her]** (describe applicable claim or defense) **unless** (name of party) **proves otherwise by the greater weight of the evidence.**

NOTES ON USE FOR 402.4d(2)

1. This instruction applies only when the court has determined that there was a duty to maintain or preserve the missing evidence at issue and the party invoking the presumption has established to the satisfaction of the court that the absence of the missing evidence hinders the other party's ability to establish its claim or defense. See *Pub. Health Tr. of Dade Cty. v. Valcin*, 507 So. 2d 596 (Fla. 1987).

2. This instruction may require modification in the event a factual dispute exists as to which party or person is responsible for the loss of any evidence.

e. Res Ipsa Loquitur:

[Negligence is the failure to use reasonable care.] If you find that ordinarily the [incident] [injury] would not have happened without negligence, and that the (describe the item) **causing the injury was in the exclusive control of** (defendant) **at the time it caused the injury, you may infer that** (defendant) **was negligent unless, taking into consideration all of the evidence in the case, you find that the** (describe event) **was not due to any negligence on the part of** (defendant)**.**

(Revised September 13, 2018.)

402.5 OTHER PROFESSIONAL NEGLIGENCE

Negligence is the failure to use reasonable care. Reasonable care on the part of a (identify professional) **is the care that a reasonably careful** (identify professional) **would use under like circumstances. Negligence is doing something that a reasonably careful** (identify professional) **would not do under like circumstances or failing to do something that a reasonably careful** (identify professional) **would do under like circumstances.**

NOTE ON USE FOR 402.5

This instruction should be used, appropriately adapted or revised, for all nonmedical professional negligence claims, as for example, claims of accountant, architect or attorney malpractice. The committee, however, expresses no opinion as to what undertakings constitute a "profession."

402.6 LEGAL CAUSE

a. Legal cause generally:

Negligence is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the negligence, the [loss] [injury] [or] [damage] would not have occurred.

b. Concurring cause:

In order to be regarded as a legal cause of [loss] [injury] [or] [damage] negligence need not be the only cause. Negligence may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the negligence contributes substantially to producing such [loss] [injury] [or] [damage].

c. Intervening cause:

*Do not use the bracketed first sentence if this charge is preceded by the charge on concurring cause:**

***[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], negligence need not be its only cause.] Negligence may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the negligence occurs if [such other cause was itself reasonably foreseeable and the negligence contributes substantially to producing such [loss] [injury] [or] [damage]] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the negligence and the negligence contributes substantially to producing it].**

NOTES ON USE FOR 402.6

1. Instruction 402.6a (legal cause generally) is to be given in all cases. Instruction 402.6b (concurring cause), to be given when the

court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether negligence was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his negligence by reason of some other cause concurring in time and contributing to the same damage. Instruction 402.6c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. The jury will properly consider instruction 402.6a not only in determining whether defendant's negligence is actionable but also in determining whether claimant's negligence contributed as a legal cause to claimant's damage, thus reducing recovery.

3. Instruction 402.6b must be given whenever there is a contention that some other cause may have contributed, in whole or in part, to the occurrence or resulting injury. If there is an issue of aggravation of a preexisting condition or of subsequent injuries or multiple events, instruction 501.5a or 501.5b should be given as well. See *Hart v. Stern*, 824 So. 2d 927, 929–32 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So. 2d 833, 834–35 (Fla. 4th DCA 1992).

4. Instruction 402.6c (intervening cause) embraces two situations in which negligence may be a legal cause notwithstanding the influence of an intervening cause: (1) where the damage was a reasonably foreseeable consequence of the negligence although the other cause was not foreseeable, *Mozer v. Semenza*, 177 So. 2d 880 (Fla. 3d DCA 1965), and (2) where the intervention of the other cause was itself foreseeable, *Ellingson v. Willis*, 170 So. 2d 311 (Fla. 1st DCA 1964).

5. "*Probable*" *results*. The committee recommends that the jury not be charged that the damage must be such as would have appeared "probable" to the actor or to a reasonably careful person at the time of the negligence. In cases involving an intervening cause, the term "reasonably foreseeable" is used in place of "probable." The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165 So. 2d 806, 810 (Fla. 1st DCA 1964); Prosser, TORTS (3d ed.) 291; 2 Harper & James, THE LAW OF TORTS 1137.

6. The term "substantially" is used throughout the charge to describe the extent of contribution or influence negligence must have in order to be regarded as a legal cause. "Substantially" was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test of causation not only in relation to defendant's negligence, *Loftin v. Wilson*, 67 So. 2d 185, 191 (Fla. 1953), but also in relation to plaintiff's comparative negligence, *Shayne v. Saunders*, 129 Fla. 355, 176 So. 495, 498 (Fla. 1937).

(Revised December 4, 2024.)

402.7 LEGAL CAUSE (TREATMENT WITHOUT INFORMED CONSENT)

Negligence is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes to producing such [loss] [injury] [or] [damage] so that it can reasonably be said that, but for the negligence, the [loss] [injury] [or] [damage] would not have occurred. The negligent failure to obtain [informed] consent to a medical treatment or procedure is a legal cause of injury resulting from the treatment or procedure if, as a result of such negligence, the patient was induced to undergo a medical treatment or procedure to which the patient would not reasonably have consented had he been adequately informed.

NOTES ON USE FOR 402.7

1. Instruction 402.7 is to be used in conjunction with instruction 402.4b defining negligence (treatment without informed consent).

2. See Notes On Use for instruction 402.6.

402.8 PREEMPTIVE CHARGES

The court has determined and now instructs you that

a. Duty to use reasonable care:

the circumstances at the time and place of the incident complained of were such that (name) **had a duty to use reasonable care for** (claimant's) **safety.**

(skip to instruction 402.11 on negligence issues)

NOTE ON USE FOR 402.8a

This preemptive charge is not for use routinely, but only when the reasonable care standard was contested before the jury, as by an instruction 402.9 issue now to be withdrawn as a matter of law. In that event instruction 402.8a properly emphasizes reasonable care. Otherwise, it is argumentative.

b. Vicarious liability:

(Defendant) **is responsible for any negligence of** (name) **in** (describe alleged negligence)**.**

(skip to instruction 402.11 on negligence issues)

c. Negligence:

(Defendant) **was negligent. The issue for your determination [on the claim of** (name)**] is:**

(skip to damage issues)

d. Directed verdict on liability:

(Defendant) **was negligent and that negligence was a legal cause of [loss] [injury] [or] [damage] to** (claimant)**.** (Claimant) **is therefore entitled to recover from** (defendant) **for the [loss] [injury] [or] [damage] as is shown by the greater weight of the evidence to have thus been caused by** (defendant)**.**

NOTE ON USE FOR 402.8d

This charge should be given only when the sole issue to be determined by the jury is damages.

NOTES ON USE FOR 402.8

1. This charge covers only preemptive charges on issues arising on claims. Preemptive charges on defense issues are covered in instruction 402.14 and should be given at that stage of the charge.

2. It may be necessary or desirable in some cases for the court to introduce this charge by calling attention to the evidence or arguments of counsel in which the issue now to be withdrawn was raised or discussed.

402.9 PRELIMINARY ISSUES — VICARIOUS LIABILITY

On (claimant's) **claim there is a preliminary issue for you to decide. That issue is:**

a. Agency:

(1). Employment, including independent contractor and exceptions:

whether (name) **was an employee of** (defendant) **and was acting within the scope of [his] [her] employment at the time and place of the incident in this case. An employee is a person who is hired by** (defendant) **to act on behalf of** (defendant)**, and whose actions are controlled by** (defendant) **or are subject to** (defendant's) **right of control. An employer is responsible for the negligence of an employee if the negligence occurs while the employee is performing services which [he] [she] was employed to perform or while the employee is acting at least in part because of a desire to serve [his] [her] employer and is doing something that is reasonably incidental to [his] [her] employment or something the doing of which was reasonably foreseeable and reasonably to be expected of persons similarly employed.**

[But a person is not responsible for the negligence of an independent contractor or of the agents or employees of an independent contractor. An independent contractor is a [person] [business] engaged by another to perform specific work according to [his] [her] [its] own methods and whose methods of performing the work are not controlled by the person engaging [him] [her] [it] and are not subject to that person's right of control. Whether a [person] [business] is an independent contractor is to be determined on the basis of all of the circumstances of the parties' dealings with each other and not on the basis of the labels used by them.

A person is, however, responsible for the negligence of an independent contractor if [the independent contractor is an [actual] [or] [apparent] agent of that person], [the employer did not exercise due care in the [selection] [or] [retention] of the independent contractor] [or] [the employer undertook to perform the services resulting in the injury to (claimant)**.]***

[(Name) **is an agent if** (defendant) **authorized [him] [her] to act on** (defendant's) **behalf.] [**(Name) **is an apparent agent if, by words or conduct,** (defendant) **caused or allowed** (claimant) **to believe that** (name) **was an agent of and had authority to act for** (defendant)**.] A person is responsible for the negligence of [his] [her] independent contractor if, at the time and place of the incident, the independent contractor was an [agent] [or] [apparent agent] of the employer and was acting within the scope of his or her [apparent] authority.***

[In [hiring] [or] [retaining] another to perform services, the employer must exercise due care to assure that the person is competent to perform the services. A person is responsible for the negligence of [his] [her] independent contractor if, in [hiring] [or] [retaining] the independent contractor, the employer failed to exercise due care.]

[When a [person] [facility] undertakes to perform services, [he] [she] [it] cannot transfer the obligation to perform those services to an independent contractor and remains responsible for the negligence of [his] [her] independent contractor.]

NOTES ON USE FOR 402.9a(1)

1. The bracketed language contained in the second and third paragraphs is only to be used when there is a claim of independent contractor status. See *Carlisle v. Carnival Corp.*, 864 So. 2d 1 (Fla. 3d DCA 2003); *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842 (Fla. 2003). If an exception to independent contractor status is claimed, then the applicable portions of the fourth paragraph should

also be given.

2. Both bracketed sections of the fourth paragraph should be used with appropriate transitional language if the court determines that issues on both *actual agency* and *apparent agency* should be submitted to the jury.

3. As to the fifth paragraph regarding due care when hiring another, see *Insigna v. LaBella*, 543 So. 2d 209 (Fla. 1989); *F.S.* 766.110 (2011).

4. The sixth and final paragraph, concerning nondelegable duty, is similar to instruction "b" in *Irving v. Doctors Hospital of Lake Worth, Inc.*, 415 So. 2d 55, 57–60 n.2 (Fla. 4th DCA 1982), a case concerning an implied contractual nondelegable duty. In addition to implied contracts, nondelegable duties arise out of other legal obligations—for example, express contracts, the common law, statutes, and regulations. See, *e.g.*, *Pope v. Winter Park Healthcare Group, Ltd.*, 939 So. 2d 185, 188 (Fla. 5th DCA 2006). One court has noted the lack of any "specific criteria for determining whether or not a duty is nondelegable except for the rather ambiguous defining characteristic that the responsibility is so important to the community that the employer should not be allowed to transfer it to a third party." *Dixon v. Whitfield*, 654 So. 2d 1230, 1232 (Fla. 1st DCA 1995). Courts have determined the existence or nonexistence of a nondelegable duty in pretrial rulings as a matter of law. See, *e.g.*, *Wax v. Tenet Health Sys. Hosps., Inc.*, 955 So. 2d 1, 6 (Fla. 4th DCA 2006). Because disagreements on nondelegable duties exist among the courts—see, *e.g.*, *Tabraue v. Doctors Hosp., Inc.*, 272 So. 3d 468, 474–75 (Fla. 3d DCA 2019) (certifying conflict with *Wax*, *Irving*, and one other case)—the committee takes no position on whether the instruction is appropriate in every case, or any particular case.

(2). Agency without claim of independent contractor:

whether (name) **is an agent of** (defendant). **[**(Name) **is an agent of** (defendant) **if** (defendant) **authorized [him] [her][it] to act on** (defendant's) **behalf.] [**(Name) **is an apparent agent if, by words or conduct,** (defendant) **caused or allowed** (claimant) **to believe that** (name) **was an agent of and had**

authority to act for (defendant)**.] A person is responsible for the negligence of an [agent] [or] [apparent agent] if at the time and place of the incident complained of the [agent] [or] [apparent agent] is acting within the scope of [his] [her] [apparent] authority.**

NOTE ON USE FOR 402.9a(2)

Roessler v. Novak, 858 So. 2d 1158 (Fla. 2d DCA 2003); *Orlando Regional Medical Center v. Chmielewski*, 573 So. 2d 876 (Fla. 5th DCA 1990). If the court determines that issues on both *actual agency* and *apparent agency* should be submitted to the jury, both bracketed sections should be used with appropriate transitional language.

b. Joint venture:

whether at the time and place of the incident complained of, (name) **was engaged in a joint venture with** (defendant) **and was acting on behalf of the joint venture and within the scope of its business at the time and place of the incident in this case. A joint venture exists when two or more persons combine their resources or efforts and agree to undertake some particular business transaction in which they have common interests in the purposes to be accomplished, joint control or right of control of the venture, joint ownership interest in the subject matter of the venture and a common right and duty to share in profits and losses. Each member of a joint venture is responsible for the negligence of another member if the other member's negligence occurs while [he] [she] is acting on behalf of the joint venture and to further the purpose of the joint venture.**

NOTE ON USE FOR 402.9b

Arango v. Reyka, 507 So. 2d 1211 (Fla. 4th DCA 1987).

(Revised September 13, 2018; revised June 30, 2021.)

402.10 BURDEN OF PROOF ON PRELIMINARY ISSUES

If the greater weight of the evidence does not support (claimant's) **claim on [this issue] [these issues], that** (describe preliminary issue)**, then your verdict on the claim of** (claimant) ***[because of the claimed negligence of** (name)**] should be for** (defendant)**.**

If, however, the greater weight of the evidence supports (claimant's) **claim on [this issue] [these issues], that** (describe preliminary issue)**, then you shall consider the other issues on** (claimant's) **claim.**

NOTES ON USE FOR 402.10

1. Give instruction 402.10 if instructing the jury on any preliminary issues.

2. If there are multiple defendants, this instruction will have to be modified to account for the issues related to each defendant.

3. *There is no need to give that portion of the charge contained within brackets unless the claimant makes multiple claims involving other defendants. In such a case it is necessary to distinguish this claim from claims against other defendants.

402.11 ISSUES ON MAIN CLAIM

The [next] issues you must decide on (claimant's) **claim against** (defendant) **are:**

a. Negligence of physician or hospital, generally:

whether (defendant physician or hospital) **was negligent in** (describe conduct in question)**, and, if so, whether that negligence was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made)**.**

b. Negligence of multiple defendants:

whether (defendant) **or** (defendant) **was negligent or whether both were negligent in** (describe alleged negligence) **and, if so, whether that negligence was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made)**.**

c. Negligence of physician, osteopath, chiropractor, podiatrist or dentist in treatment without informed consent:

whether Doctor (name) **negligently failed to obtain the informed consent of** (claimant or person whose consent would be effective) **to the medical treatment or procedure complained of, and, if so whether that negligence was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made)**.**

NOTE ON USE FOR 402.11c

The committee recognizes that, depending on circumstances, the tort of injury by treatment without informed consent may be pleaded, proved, and presented to the jury as an assault or battery, rather than in terms of negligence. *Brown v. Wood*, 202 So. 2d 125 (Fla. 2d DCA 1967); *Chambers v. Nottebaum*, 96 So. 2d 716 (Fla. 3d DCA 1957). When the issues on such a claim are to be presented in terms of negligence, instruction 402.4b is to be used in conjunction with

instruction 402.11c, defining negligence in these circumstances, and instruction 402.7, defining legal cause in terms appropriate to these cases. Together these three instructions contain all of the elements of the tort as specified in *F.S.* 766.103. When it is appropriate to charge the jury instead in terms of assault or battery, appropriate instructions may be derived from the same source.

d. Negligence of health care facility to assure comprehensive risk management and competence of medical staff:

whether (defendant facility) **was negligent in failing to assure [comprehensive risk management] [and] [the competence of its medical staff], and, if so, whether that negligence was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made)**.**

NOTE ON USE FOR 402.11d

Derived from *F.S.* 766.110.

402.12 ISSUES ON CLAIM OF ATTORNEY MALPRACTICE ARISING OUT OF CIVIL LITIGATION

The [next] issue(s) for you to decide on (claimant's) **claim against** (defendant) **[is] [are] whether** (defendant) **was negligent in** (describe alleged negligence) **and, if so, if** (defendant) **had not been negligent, whether** (claimant) **would [have been successful] [have obtained a more favorable outcome] in [his] [her] [their] [its] [claim against** (original adverse party)**] [defense in** (original proceedings)**].**

a. Negligence of plaintiff's counsel:

In (claimant's) **claim against** (original defendant) (claimant) **would have had to prove by the greater weight of the evidence that** (original defendant) **was negligent in** (describe conduct involved in original claim) **and that** (original defendant's) **negligence was a legal cause of the [loss] [injury] [or] [damage] to** (claimant)**.**

Depending on the particular cause of action in the original proceeding, add appropriate substantive law instructions from section 400 to frame the appropriate issues from the original proceeding.

[To have been successful in [his] [her] [their] [its] claim against (original defendant) (claimant) **must show that any judgment would have been collectible.]**

b. Negligence of defendant's counsel:

In (claimant's) **defense in the case of** (identify original case) (claimant) **would have had to prove by the greater weight of the evidence that [**(original claimant) **was negligent and that [his] [her] [their] [its] negligence was a contributing legal cause of the injury or damage to** (original claimant)**]** (describe issues in other applicable defenses)**.**

Depending on the particular cause of action in the original proceeding, add appropriate substantive law instructions from

section 400 to frame the appropriate issues from the original proceeding.

NOTES ON USE FOR 402.12

1. When defendant's professional negligence deprives a party of a chance to resolve a contested claim or defense and the circumstances do not readily permit determining the value of the lost claim or defense, the party may have to prove the value of the claim or defense in the form of a "trial within a trial." *Freeman v. Rubin*, 318 So. 2d 540 (Fla. 3d DCA 1975); *Fernandes v. Barrs*, 641 So. 2d 1371 (Fla. 1st DCA 1994). In such circumstances, instruction 402.12 should be used to describe the issues instead of instruction 402.11. The committee expresses no opinion on the type of evidence that may be used to prove such a claim. *Farish v. Bankers Multiple Line Insurance Co.*, 425 So. 2d 12 (Fla. 4th DCA 1983); *Tarleton v. Arnstein & Lehr*, 719 So. 2d 325 (Fla. 4th DCA 1998). When defendant's professional negligence results in other kinds of direct loss, such as the loss of an inheritance or insurance benefits, the normal issue instruction, 402.11, should be used.

2. Use the last bracketed paragraph in instruction 402.12a when there is an issue as to the collectibility of any judgment that could have been obtained in the original action. When, however, an attorney's negligence makes it impossible to prove the collectibility of a claim, the burden shifts to the attorney defendant to prove that the judgment or any portion thereof was uncollectible. *Fernandes v. Barrs*, 641 So. 2d 1371 (Fla. 1st DCA 1994).

3. This instruction should be followed by instruction 402.13, appropriately modified to describe the burden of proof in both the pending claim as well as the original proceedings.

(Revised June 19, 2024.)

402.13 BURDEN OF PROOF ON MAIN CLAIM

If the greater weight of the evidence does not support [one or more of] (claimant's) **claim(s), then your verdict should be for** (defendant)(s) **[on [that] [those] claim(s)].**

[However, if the greater weight of the evidence supports [one or more of] (claimant's) **claim(s), then your verdict should be for** (claimant) **and against** (defendant)(s) **[on [that] [those] claim(s).]**

[However, if the greater weight of the evidence supports (claimant's) **claim against one [or] [both] [more] of the defendants, then you should determine and write on the verdict form what percentage of the total negligence of [both] [all] defendants you apportion to each of them.]**

NOTE ON USE FOR 402.13

Use the first paragraph in all cases. If there is an affirmative defense to the claim that is the subject of the charge, do not use either of the bracketed paragraphs; instead, use instruction 402.14. If there is no affirmative defense, use the first or the second bracketed paragraph depending on whether there is one defendant or more than one, then proceed to Damages.

(Revised February 1, 2018.)

402.14 DEFENSE ISSUES

If, however, the greater weight of the evidence supports [(claimant's) **claim] [one or more of** (claimant's) **claims], then you shall consider the defense(s) raised by** (defendant)**.**

On the [first]* defense, the issue(s) for you to decide [is] [are]:

**The order in which the defenses are listed below is not necessarily the order in which the instruction should be given.*

a. Statute of limitations:

whether (claimant)*** knew, or by the use of reasonable care should have known, before** (date) **that [he] [she] [**(person for whose injury the claim is made)**] had been injured or damaged and that there was a reasonable possibility that the injury or damage was caused by [medical] [legal] [**(other profession)**] negligence.**

**In some cases, it may be necessary to insert the name of a person other than the claimant. The committee expresses no opinion as to whose knowledge may trigger the statute of limitations. See, e.g., Stone v. Rosenthal, 665 So. 2d 276 (Fla. 4th DCA 1995); Arthur v. Unicare Health Facilities, Inc., 602 So. 2d 596 (Fla. 2d DCA 1992).*

If the greater weight of the evidence supports (defendant's) **defense on this issue, the plaintiff's claim is time barred and your verdict is for the defendant. If, however, the greater weight of the evidence does not support** (defendant's) **defense on this issue [you shall consider the following additional defenses] [your verdict should be for** (claimant) **in the full amount of [his] [her] damages].**

NOTES ON USE FOR 402.14a

1. When the statute of limitations is asserted as a defense, it

should ordinarily be the first defense.

2. In medical negligence actions the date inserted in the instruction will ordinarily be two years before the date on which either the notice of intent was served or the petition to extend the statute of limitations was filed. F.S. 95.11(4)(b), 766.106, and 766.104(2). In legal negligence actions predicated on acts committed in the course of litigation, the statute of limitations does not begin to run until the underlying litigation is concluded by final judgment and the final disposition of any appeal. See *Silvestrone v. Edell*, 721 So. 2d 1173 (Fla. 1998). This may be extended if there is an issue regarding whether the client knew or should have known that the litigation was concluded. *F.S.* 95.11(4)(a).

b. Comparative negligence generally:

whether (claimant or person for whose injury or death claim is made) **was [himself] [herself] negligent in** (describe conduct in question) **and, if so, whether that negligence was a contributing legal cause of the injury or damage to** (claimant)**.**

NOTE ON USE FOR 402.14b

1. Conduct on a patient's part prior to seeking treatment, which furnishes the need for medical treatment, is not a defense to malpractice in the treatment. *Whitehead v. Linkous*, 404 So. 2d 377 (Fla. 1st DCA 1981); see *Swamy v. Hodges*, 583 So. 2d 1095 (Fla. 1st DCA 1991).

2. *Special verdicts and special interrogatories.* Special verdicts are required in all jury trials involving comparative negligence. *Lawrence v. Florida East Coast Railway Co.*, 346 So. 2d 1012 (Fla. 1977).

c. Comparative negligence of parent predicated on other parent's negligence (claim for death of child):

whether (parent) **was negligent in caring for and supervising** (child)**, and if so, whether that negligence was**

a contributing legal cause of the death of (child)**; and, if so, whether** (other parent)**, in the exercise of reasonable care, should have anticipated such negligence on the part of** (parent)**.**

d. Comparative negligence of custodian of child other than parent:

whether, before the incident in this case, (claimant) **placed** (child) **in the care and custody of** (custodian)**, and if so, whether** (custodian) **was negligent in caring for and supervising the child,** (name)**; and, if so, whether that negligence was a contributing legal cause of the [injury] [and] [death] of** (child)**.**

NOTE ON USE FOR 402.14d

Wynne v. Adside, 163 So. 2d 760 (Fla. 1st DCA 1964); see also *Winner v. Sharp*, 43 So. 2d 634 (Fla. 1949).

e. Apportionment of fault:

whether (identify additional person(s) or entit(y)(ies)) **[was] [were] also [negligent] in** (describe alleged negligence, fault, or responsibility)**; and, if so, whether that [negligence] [fault] [responsibility] was a contributing legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made)**.**

NOTES ON USE FOR 402.14e

1. See *F.S.* 768.81 (2020); *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993). Conduct of third parties, however, who cause the need for medical treatment is not to be compared to any malpractice in the treatment. *D'Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001); *Jackson v. York Hannover Nursing Centers*, 876 So. 2d 8 (Fla. 5th DCA 2004).

2. For fault to be apportioned among multiple tortfeasors, the tortfeasors must be joint tortfeasors. See *Grobman v. Posey*, 863 So. 2d 1230, 1234 (Fla. 4th DCA 2003). Joint tortfeasors are those "who

act together in committing wrong, or whose acts if independent of each other, unite in causing single injury." *Letzter v. Cephas*, 792 So. 2d 481, 486 (Fla. 4th DCA 2001) (internal quotations omitted). For discussions as to whether apportionment is appropriate, see, *e.g.*, *Specialty Hosp.-Gainesville, Inc. v. Barth*, 277 So. 3d 201, 215 (Fla. 1st DCA 2019) (apportionment is not appropriate where the defendant and the third part are successive tortfeasors); *Grobman*, 863 So. 2d at 1236 (apportionment is not appropriate where liability between the defendant and the third party is derivative); *Suarez v. Gonzalez*, 820 So. 2d 342, 344 (Fla. 4th DCA 2002) (apportionment is not appropriate between a defendant and a third party where the defendant hired the third party to perform a nondelegable duty).

f. Defense to claim of lack of informed consent:

whether (claimant) **would reasonably, under all the circumstances, have undergone such treatment or procedure had [he] [she] been advised by** (defendant) **of the substantial risks and hazards inherent in the proposed treatment or procedure which are recognized by other [physicians] [health care providers] in the same or similar community who perform similar treatments or procedures.**

NOTE ON USE FOR 402.14f

Derived from *F.S.* 766.103(3)(b).

(Adopted March 4, 2010 (35 So. 3d 666); revised August 13, 2021.)

402.15 BURDEN OF PROOF ON DEFENSE ISSUES

If the greater weight of the evidence does not support (defendant's) **defense[s] of** (describe defense) **and the greater weight of the evidence supports** (claimant's) **claim, then [your verdict should be for** (claimant) **in the total amount of [his] [her] damages] [you should determine and write on the verdict form what percentage of the total negligence of [both] [all] defendants you apportion to each defendant whose negligence you find was a legal cause of loss, injury, or damage to** (claimant)**].***

**Use second bracketed alternative above when there is more than one defendant.*

If, however, the greater weight of the evidence shows that both (claimant) **and [**(defendant)**] [one or more of** (defendants)**] [was] [were] negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by** (claimant)**, you should decide and write on the verdict form what percentage of the total negligence of [both] [all] parties to this action you apportion to each of them.**

Use the following instruction in cases with a comparative negligence defense and an apportionment of a nonparty defense:

[If, however, the greater weight of the evidence shows that (claimant) **and [**(defendant)**] [one or more of** (defendants)**] and** (identify additional person(s) or entit(y)(ies)) **were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by** (claimant)**, you should decide and write on the verdict form what percentage of the total negligence of [both] [all] parties to this action and** (identify additional person(s) or entit(y)(ies)) **you apportion to each of them.]**

Use the following paragraph in cases without a comparative negligence defense but with an apportionment of nonparty defense:

[If, however, the greater weight of the evidence shows that

[(defendant)**] [one or more of** (defendants)**] and** (identify additional person(s) or entit(y)(ies)) **were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by** (claimant)**, you should decide and write on the verdict form what percentage of the total negligence of [**(defendant)**] and** (identify additional person(s) or entit(y)(ies)) **you apportion to each of them.]**

NOTES ON USE FOR 402.15

1. *Preemptive charges on defense issues.* If a preemptive charge for claimant is appropriate on a defense issue, as when comparative negligence has been brought to the jury's attention on voir dire or by opening statements or argument and is now to be withdrawn, an instruction in the form of 402.8 should be given immediately following instruction 402.13. If a preemptive charge for defendant is required on some aspect of a defense, as when the court holds that comparative negligence will reduce claimant's recovery, a preemptive charge announcing the ruling should be given immediately after framing the applicable defense issue.

2. *Charges on issues raised by replies to affirmative defenses.* Plaintiff bears the burden of proof on issues raised by any replies to affirmative defenses, and instruction 402.15 should be modified as appropriate for those issues.

(Revised February 1, 2018.)

403 PRODUCTS LIABILITY

403.1 Introduction

403.2 Summary of Claims

403.3 Greater Weight of the Evidence

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403.7 Strict Liability

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403.17 Burden of Proof on Main Claim

403.18 Defense Issues

403.19 Burden of Proof on Defense Issues

403.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 403.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 403.1. Instruction 403.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 403.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences, with appropriate language in the final instructions, including an explanation for the difference, such as when the court has directed a verdict on an issue.

2. "The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations." *Fla. R. Civ. P.* 1.470(b).

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla. R. Civ. P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge as the judge reads the instructions aloud.

(Adopted March 26, 2015;
revised June 25, 2025.)

403.2 SUMMARY OF CLAIMS

The claims [defenses] in this case are as follows. (Claimant) **claims that the** (describe product) **[designed] [manufactured] [distributed] [imported] [sold] [or] [supplied] by** (defendant) **was defective and that the defect in the** (describe product) **caused [him] [her] harm.**

[(Claimant) **[also] claims that [he] [she] sustained greater injuries than what [he] [she] would have sustained in the** (describe accident) **if the** (describe product) **had not been defective.]**

[(Claimant) **[also] claims that** (defendant) **was negligent in** (describe alleged negligence)**, which caused [him] [her] to be injured by** (the product)**.]**

(Defendant) **denies [that] [those] claim(s) [and also claims that** (claimant) **was [himself] [herself] negligent in** (describe the alleged comparative negligence)**, which caused [his] [her] harm]. [Additionally** (describe any other affirmative defenses)**.]**

[The parties] [(claimant)**] must prove [his] [her] [their] claims by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.**

NOTE ON USE FOR 403.2

Use the second paragraph for crashworthiness claims. See instruction 403.16. Use the first bracketed phrase in the fourth paragraph when there is a claim of comparative negligence. Use the second bracketed sentence where there are additional affirmative defenses.

(Adopted March 26, 2015.)

403.3 GREATER WEIGHT OF THE EVIDENCE

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTES ON USE FOR 403.3

1. *Greater or lesser number of witnesses.* The committee recommends that no instruction be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. *Circumstantial evidence*. The committee has not drafted an instruction addressing circumstantial evidence and takes no position on whether such an instruction is needed. For criminal cases, see *Matter of Use by Trial Cts. of Standard Jury Instructions in Crim. Cases*, 431 So. 2d 594 (Fla. 1981).

(Adopted March 26, 2015,
revised February 11, 2026.)

403.4 EXPRESS WARRANTY

A product is defective if it does not conform to representations of fact made by (defendant)**, orally or in writing, in connection with the [sale] [transaction] on which** (name) **relied in the [purchase and] use of the product. [The representation must be one of fact, rather than opinion.]**

(Adopted March 26, 2015.)

403.5 IMPLIED WARRANTY OF MERCHANTABILITY

A product is defective if it is not reasonably fit for either the uses intended or the uses reasonably foreseeable by (defendant)**.**

(Adopted March 26, 2015.)

403.6 IMPLIED WARRANTY OF FITNESS FOR PARTICULAR PURPOSE

A product is defective if it is not reasonably fit for the specific purpose for which (defendant) **knowingly sold the product and for which, in reliance on the judgment of** (defendant)**, the purchaser bought the product.**

(Adopted March 26, 2015.)

403.7 STRICT LIABILITY

a. Manufacturing defect

A product is defective because of a manufacturing defect if it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] and the product is expected to and does reach the user or consumer without substantial change affecting that condition.

A product is unreasonably dangerous because of a manufacturing defect if it is different from its intended design and fails to perform as safely as the intended design would have performed.

b. Design defect

A product is defective because of a design defect if it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] and the product is expected to and does reach the user without substantial change affecting that condition.

A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the manufacturer] [or] [the risk of danger in the design outweighs the benefits].

[In deciding whether (the product) **was defective because of a design defect, you shall consider the state-of-the-art of scientific and technical knowledge and other circumstances that existed at the time of** (the product's) **manufacture, not at the time of the [loss] [injury] [or] [damage].]**

NOTES ON USE FOR 403.7

1. Consumer expectations test; risk/benefit test. See *Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 512 (Fla. 2015) (Consumer expectations test and risk/benefit test are alternative definitions of

design defect); *Cavanaugh v. Stryker Corp.*, 308 So. 3d 149 (Fla. 4th DCA 2020); *R.J. Reynolds v. Larkin*, 225 So. 3d 886 (Fla. 3d DCA 2017); *Font v. Union Carbide Corp.*, 199 So. 3d 323 (Fla. 3d DCA 2016). When the consumer expectation test is used to define a product defect in a case involving an injury to a bystander or someone not directly using the product, the instruction should be modified to inform the jury that the relevant "ordinary consumer" is the professional or other type of consumer who actually used the allegedly defective product. See *Cavanaugh*, 308 So. 3d at 156.

2. *Foreseeability of injured bystander.* Strict liability applies to all foreseeable bystanders. When the injured person is a bystander, use the language "a person in the vicinity of the product" instead of "the user." Strict liability does not depend on whether the defendant foresaw the particular bystander's presence. See *West v. Caterpillar Tractor Co. Inc.*, 336 So. 2d 80, 89 (Fla. 1976) ("Injury to a bystander is often feasible. A restriction of the doctrine to the users and consumers would have to rest on the vestige of the disappearing privity requirement."). See also *Sanchez v. Hussey Seating Co.*, 698 So. 2d 1326 (Fla. 1st DCA 1997). When there is an issue regarding whether the presence of bystanders was foreseeable, additional instructions may be needed.

3. When strict liability and negligence claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instructions to the effect that a product is defective if unreasonably dangerous even though the seller has exercised all possible care in the preparation and sale of the product. RESTATEMENT (SECOND) TORTS, § 402A(2)(a). In cases involving claims of both negligence and defective design, submission of both claims may result in an inconsistent verdict. See, *e.g.*, *Consolidated Aluminum Corp. v. Braun*, 447 So. 2d 391 (Fla. 4th DCA 1984); *Ashby Division of Consolidated Aluminum Corp. v. Dobkin*, 458 So. 2d 335 (Fla. 3d DCA 1984). See also *Coba v. Tricam Indus., Inc.*, 164 So. 3d 637, 648 n. 2 (Fla. 2015); *Moorman v. American Safety Equip.*, 594 So. 2d 795 (Fla. 4th DCA 1992).

4. In some cases, it may be appropriate to instruct the jury that, in addition to the designer and manufacturer, any distributor,

importer, or seller in the chain of distribution is liable for injury caused by a defective product. *Samuel Friedland Family Enterprises v. Amoroso*, 630 So. 2d 1067 (Fla. 1994); *Rivera v. Baby Trend, Inc.*, 914 So. 2d 1102 (Fla. 4th DCA 2005); *Porter v. Rosenberg*, 650 So. 2d 79 (Fla. 4th DCA 1995).

5. For the state-of-the-art defense see, *F.S.* 768.1257.

(Adopted March 26, 2015; revised February 27, 2020 (290 So. 3d 840 (Fla. 2020)); revised February 17, 2022.)

403.8 STRICT LIABILITY FAILURE TO WARN

A product is defective when the foreseeable risks of harm from the product could have been reduced or avoided by providing reasonable instructions or warnings, and the failure to provide those instructions or warnings makes the product unreasonably dangerous.

NOTE ON USE FOR 403.8

1. When strict liability and negligent failure to warn claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instruction to the effect that a product is defective if unreasonably dangerous even though the seller has exercised all possible care in the preparation and sale of the product. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

(Adopted March 26, 2015; revised February 27, 2020 (290 So. 3d 840 (Fla. 2020)).)

403.9 NEGLIGENCE

Negligence is the failure to use reasonable care, which is the care that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would use under like circumstances. Negligence is doing something that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would not do under like circumstances or failing to do something that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would do under like circumstances.

NOTES ON USE FOR 403.9

1. If a product fails under circumstances precluding any other reasonable inference other than a defect in the product, a plaintiff is not required to pinpoint any specific defect in the product. See, *e.g.*, *Armor Elevator Co. v. Wood*, 312 So. 2d 514 (Fla. 3d DCA 1975); *Ford Motor Co. v. Cochran*, 205 So. 2d 551 (Fla. 2d DCA 1967).

2. In order to clarify the differences between strict liability and negligence when the two claims are tried together, it may be necessary to add language to the strict liability instructions to the effect that a product is defective if unreasonably dangerous even though the seller has exercised all possible care in the preparation and sale of the product. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

(Adopted March 26, 2015.)

403.10 NEGLIGENT FAILURE TO WARN

[Negligence is the failure to use reasonable care, which is the care that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would use under like circumstances.] Reasonable care on the part of (defendant) **requires that** (defendant) **give appropriate warning(s) about particular risks of** (the product) **which** (defendant) **knew or should have known are involved in the reasonably foreseeable use(s) of the product.**

NOTES ON USE FOR 403.10

1. The cases recognize a claim for negligent failure to warn. *Ferayorni v. Hyundai*, 711 So. 2d 1167 (Fla. 4th DCA 1998). When strict liability and negligent failure to warn claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instruction to the effect that a product is defective if unreasonably dangerous even though the seller has exercised all possible care in the preparation and sale of the product. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

2. Under certain circumstances, a manufacturer has a duty to warn about particular risks of a product even after the product has left the manufacturer's possession, and has been sold or transferred to a consumer or end-user. See *High v. Westinghouse Elec. Corp.*, 610 So. 2d 1259, 1263 (Fla. 1992) (finding the defendant "had a duty to timely notify the entity to whom it sold the electrical transformers . . . once it was advised of the PCB contamination"); *Sta-Rite Indus., Inc. v. Levey*, 909 So. 2d 901, 905 (Fla. 3d DCA 2004) (jury question existed on failure to warn claim "in the light of similar severe accidents which occurred both before and after the sale of the pump in question"). A special instruction may be needed in cases raising issues of a post-manufacture or post-sale duty to warn.

3. The bracketed list of potential defendants in this instruction is intended to be illustrative and may be modified to fit the facts of each case.

(Adopted March 26, 2015.)

403.11 INFERENCE OF PRODUCT DEFECT OR NEGLIGENCE

NOTES ON USE FOR 403.11

1. *F.S.* 768.1256 provides for a rebuttable presumption in the event of compliance or noncompliance with government rules. The statute does not state whether the presumption is a burden-shifting or a vanishing presumption. See *F.S.* 90.301–90.304; *University Insurance Co. of North America v. Warfel*, 82 So. 3d 47 (Fla. 2012); *Birge v. Charron*, 107 So. 3d 350 (Fla. 2012). Pending further development in the law, the committee offers no standard instruction on this presumption, leaving it up to the parties to propose instructions on a case-by-case basis.

2. *Cassisi v. Maytag Co.*, 396 So. 2d 1148 (Fla. 1st DCA 1981), held that when a product malfunctions during normal operation, a legal inference of product defectiveness arises, and the injured plaintiff has thereby established a prima facie case for jury consideration. Pending further development of Florida law, the Committee takes no position on the sufficiency of these instructions in cases in which the *Cassisi* inference applies. See *Gencorp, Inc. v. Wolfe*, 481 So. 2d 109 (Fla. 1st DCA 1985); see also *Parke v. Scotty's, Inc.*, 584 So. 2d 621 (Fla. 1st DCA 1991); *Miller v. Allstate Insurance Co.*, 650 So. 2d 671 (Fla. 3d DCA 1995).

(Adopted March 26, 2015.)

403.12 LEGAL CAUSE

a. Legal cause generally:

[A defect in a product] [Negligence] is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the [defect] [negligence], the [loss] [injury] [or] [damage] would not have occurred.

b. Concurring cause:

In order to be regarded as a legal cause of [loss] [injury] [or] [damage], [a defect in a product] [negligence] need not be the only cause. [A defect in a product] [Negligence] may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the [defect] [negligence] contributes substantially to producing such [loss] [injury] [or] [damage].

c. Intervening cause:

**Do not use the bracketed first sentence if this charge is preceded by the charge on concurring cause:*

***[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], [a defect in a product] [negligence] need not be its only cause.] [A defect in a product] [Negligence] may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the [product defect] [negligence] occurs if such other cause was itself reasonably foreseeable and the [product defect] [negligence] contributes substantially to producing such [loss] [injury] [or] [damage] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the [product defect] [negligence] and the [product defect] [negligence] contributes substantially to producing it].**

NOTES ON USE FOR 403.12

1. Instruction 403.12a (legal cause generally) is to be given in all cases. Instruction 403.12b (concurring cause), to be given when the court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether negligence was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his or her negligence by reason of some other cause concurring in time and contributing to the same damage. Instruction 403.12c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. The jury will properly consider instruction 403.12a not only in determining whether defendant's negligence is actionable but also in determining whether claimant's negligence contributed as a legal cause to claimant's damage, thus reducing recovery.

3. Instruction 403.12b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the occurrence or resulting injury. If there is an issue of aggravation of a preexisting condition or of subsequent injuries or multiple events, instruction 501.2h(1) or (2) should be given as well. See *Hart v. Stern*, 824 So. 2d 927, 929–32 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So. 2d 833, 834–35 (Fla. 4th DCA 1992).

4. Instruction 403.12c (intervening cause) embraces two situations in which negligence may be a legal cause notwithstanding the influence of an intervening cause: (1) where the damage was a reasonably foreseeable consequence of the negligence although the other cause was not foreseeable, *Mozer v. Semenza*, 177 So. 2d 880 (Fla. 3d DCA 1965); and (2) when the intervention of the other cause was itself foreseeable, *Gibson v. Avis Rent-A-Car System Inc.*, 386 So. 2d 520 (Fla. 1980).

5. *"Probable" results.* The committee recommends that the jury not be charged that the damage must be such as would have appeared "probable" to the actor or to a reasonably careful person at the time of the negligence. In cases involving an intervening cause,

the term "reasonably foreseeable" is used in place of "probable." The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165 So. 2d 806, 810 (Fla. 1st DCA 1964); Prosser, TORTS (3d ed.) 291; 2 Harper and James, THE LAW OF TORTS 1137.

6. The term "substantially" is used throughout the instruction to describe the extent of contribution or influence negligence must have in order to be regarded as a legal cause. "Substantially" was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test of causation not only in relation to defendant's negligence, *Loftin v. Wilson*, 67 So. 2d 185, 191 (Fla. 1953), but also in relation to plaintiff's contributory negligence, *Shayne v. Saunders*, 129 Fla. 355, 176 So. 495, 498 (Fla. 1937).

(Adopted March 26, 2015,
revised December 4, 2024.)

403.13 PRELIMINARY ISSUE

NOTES ON USE FOR 403.13

1. At this time, the Committee does not propose a standard instruction on preliminary issues in products liability cases. See note on use 6 to instruction 403.7 for cases where there is an issue of whether a defendant was in a position to correct the defect in the product. *Samuel Friedland Family Enters. v. Amoroso*, 630 So. 2d 1067 (Fla. 1994); *Rivera v. Baby Trend, Inc.*, 914 So. 2d 1102 (Fla. 4th DCA 2005); *Porter v. Rosenberg*, 650 So. 2d 79 (Fla. 4th DCA 1995).

2. *Privity.* In general, plaintiffs are not required to prove privity to establish strict liability. *Kramer v. Piper Aircraft Corp.*, 520 So. 2d 37, 39 (Fla. 1988). These instructions on products liability issues assume that if there is any question of privity, it has been resolved in favor of the claimant. If it is necessary to submit a factual issue on privity to the jury, the committee recommends that it be submitted in the style of a preliminary charge on status or duty. For the effect of the strict liability doctrine on claims of warranty previously requiring privity, see *F.S.* 672.318 and *Kramer*, 520 So. 2d at 39 & n.4.

(Adopted March 26, 2015.)

403.14 BURDEN OF PROOF ON PRELIMINARY ISSUE

If the greater weight of the evidence does not support (claimant's) **claim on this issue, then your verdict [on this issue] [on the claim of** (claimant)**] should be for** (defendant) **[and you should decide the other issues on** (claimant's) **claim].**

However, if the greater weight of the evidence supports (claimant's) **claim [on this issue], then you shall decide whether** (the product) **was defective [and also decide the other issues on** (claimant's) **claim].**

NOTE ON USE FOR 403.14

The bracketed language is for use if claimant makes alternative claim(s) of liability.

(Adopted March 26, 2015.)

403.15 ISSUES ON MAIN CLAIM

The [next] issues you must decide on (claimant's) **claim against** (defendant) **are:**

a. Express Warranty:

whether (the product) **failed to conform to representations of fact made by** (defendant)**, orally or in writing, in connection with the [sale] [transaction], on which** (name) **relied in the [purchase and] use of the product, and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made)**.**

b. Implied Warrant of Merchantability:

whether (the product) **was not reasonably fit for either the uses intended or the uses reasonably foreseeable by** (defendant) **and, if so, whether that lack of fitness was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made)**.**

c. Implied Warranty of Fitness for Particular Purpose:

whether (the product) **was not reasonably fit for the specific purpose for which** (defendant) **knowingly sold** (the product) **and for which** (claimant) **bought** (the product) **in reliance on the judgment of** (defendant) **and, if so, whether that lack of fitness was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made)**.**

d. Strict Liability — Manufacturing Defect:

whether (the product) **[was made differently than its intended design and thereby failed to perform as safely as intended and** (the product) **reached** (claimant) **without substantial change affecting the condition and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made)**.**

e. Strict Liability — Design Defect:

whether [(the product) **failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] [or] [the risk of danger in the design of the product outweighs the benefits of the product] and** (the product) **reached** (claimant) **without substantial change affecting the condition and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made)**.**

f. Strict Liability — Failure to Warn:

whether the foreseeable risks of harm from (the product) **could have been reduced or avoided by providing reasonable instructions or warnings and the failure to provide those warnings made** (the product) **unreasonably dangerous and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made)**.**

g. Negligence:

whether (defendant) **was negligent in** (describe alleged negligence)**, and, if so, whether that was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made)**.**

h. Negligent Failure to Warn:

whether (defendant) **negligently failed to warn about particular risks involved in the use of** (the product)**, and, if so, whether that failure to warn was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made)**.**

(Adopted March 26, 2015; revised February 27, 2020 (290 So. 3d 840 (Fla. 2020)).)

403.16 ISSUES ON CRASHWORTHINESS AND "ENHANCED INJURY" CLAIMS

NOTE ON USE FOR 403.16

In 2011, the legislature amended *F.S.* 768.81 to state that in a products liability case in which the plaintiff claims that a defect in the product increased the injury, the defendant should be treated the same as all other defendants for the purposes of apportionment of fault. The legislative history states that the legislature intended this amendment to overrule the decision in *D'Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001). See Ch. 2011–215, §2, Laws of Fla. As explained in the note on use to instruction 403.2, the summary of claims in a crashworthiness case should explain that the plaintiff claims to have sustained greater injuries than would have been sustained if the product were not defective. Otherwise, the standard instructions applicable in other cases should be given in crashworthiness cases.

(Adopted March 26, 2015.)

403.17 BURDEN OF PROOF ON MAIN CLAIM

If the greater weight of the evidence does not support [one or more of] (claimant's) **claim[s], your verdict should be for** (defendant(s)) **[on [that] [those] claim(s)].**

[However, if the greater weight of the evidence supports [one or more of] (claimant's) **claim[s], then your verdict should be for** (claimant) **and against** (defendant) **[on [that] [those] claim(s)].]**

[However, if the greater weight of the evidence supports (claimant's) **claim against one or [both] [more] of the defendants, then you should decide and write on the verdict form the percentage of the total fault of [both] [all] defendants that you apportion to each of them.]**

NOTE ON USE FOR 403.17

Use the first paragraph in all cases. If there is an affirmative defense to the claim, do not use either of the bracketed paragraphs; instead turn to instruction 403.18. If there is no affirmative defense, use the first or second bracketed paragraph depending on whether there is one defendant or more than one.

(Adopted May 17, 2012, revised November 22, 2017; revised February 27, 2020 (290 So. 3d 840 (Fla. 2020)).)

403.18 DEFENSE ISSUES

If, however, the greater weight of the evidence supports [(claimant's) **claim] [one or more of** (claimant's) **claims], then you shall consider the defense[s] raised by** (defendant)**.**

On the [first]* defense, the issue[s] for you to decide [is] [are]:

**The order in which the defenses are listed below is not necessarily the order in which the instruction should be given.*

a. Comparative Negligence:

whether (claimant or person for whose injury or death claim is made) **was [himself] [herself] negligent *in** (describe alleged negligence) **and, if so, whether that negligence was a contributing legal cause of the injury or damage to** (claimant)**.**

**If the jury has not been previously instructed on the definition of negligence, instruction 401.4 should be inserted here.*

b. Apportionment of fault:

whether (identify additional person(s) or entit(y)(ies)) **[was] [were] also [negligent] [at fault] [responsible] in** (describe alleged negligence, fault, or responsibility)**; and, if so, whether that [negligence] [fault] [responsibility] was a contributing legal cause of [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made)**.**

c. Learned intermediary defense to failure to warn claims for products supplied through an intermediary:

whether (the defendant) **provided reasonable instructions or warnings to** (intermediary) **and reasonably relied upon [it] [him] [her] to provide reasonable instructions or warnings to the user of** (the product)**.**

In determining whether (defendant) **reasonably relied on**

(intermediary) **to provide reasonable instructions or warnings to users of** (the product)**, you may consider the nature and significance of the risk involved in using the product, the likelihood that** (intermediary) **would convey the instructions or warnings to the user of** (the product)**, and the feasibility and effectiveness of** (defendant) **directly warning the user.**

NOTES ON USE FOR 403.18

1. Comparative negligence is a defense to strict liability claims if based on grounds other than the failure of the user to discover the defect or to guard against the possibility of its existence. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 90 (Fla. 1976).

2. The "patent danger doctrine" is not an independent defense but, to the extent applicable (see note 1), it is subsumed in the defense of comparative negligence. *Auburn Machine Works Inc. v. Jones*, 366 So. 2d 1167 (Fla. 1979).

3. *Apportionment of fault.* See *F.S.* 768.81 (2020) *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993). In most cases, use of the term "negligence" will be appropriate. If another type of fault is at issue, it may be necessary to modify the instruction and the verdict form accordingly. In strict liability cases, the term "responsibility" may be the most appropriate descriptive term.

For fault to be apportioned among multiple tortfeasors, the tortfeasors must be joint tortfeasors. See *Grobman v. Posey*, 863 So. 2d 1230, 1234(Fla. 4th DCA 2003). "Joint tortfeasors are defined as those who in committing wrong, or whose acts if independent of each other, unite in causing single injury." *Letzter v. Cephas*, 792 So. 2d 481, 486 (Fla.4th DCA 2001) (internal quotations omitted). For some examples as to whether apportionment is appropriate, see, *Specialty Hosp.-Gainesville, Inc. v. Barth*, 277 So. 3d 201 (Fla. 1st DCA 2019) (holding that apportionment is not appropriate where the defendant and the third party are successive tortfeasors); *Grobman v. Posey*, 863 So. 2d 1230 (Fla. 4th DCA 2003)(holding that apportionment is not appropriate where liability between the defendant and the third party is derivative); *Suarez v. Gonzalez*, 820 So. 2d 342, 344 (Fla. 4th DCA 2002) (holding that apportionment was not appropriate between a

defendant and a third-party where the defendant hired the third-party to perform a nondelegable duty). Apportionment of fault does not apply to "to any action based upon an intentional tort..." § 768.81, Fla. Stat. (2020).

4. *Learned intermediary defense.* See *Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 515–16 (Fla. 2015). The list of factors set forth in this instruction is not exclusive and may be modified to fit the facts of the case.

5. *Government Rules Defense. F.S.* 768.1256 provides for a rebuttable presumption in the event of compliance or noncompliance with government rules. The statute does not state whether the presumption is a burden-shifting or a vanishing presumption. See *F.S.* 90.301–90.304; *Universal Insurance Co. of North America v. Warfel*, 82 So. 3d 47 (Fla. 2012); *Birge v. Charron*, 107 So. 3d 350 (Fla. 2012). Pending further development in the law, the committee offers no standard instruction on this presumption, leaving it up to the parties to propose instructions on a case-by-case basis.

6. *Unavoidable unsafe defense.* The committee has not proposed a standard instruction patterned after RESTATEMENT (SECOND) OF TORTS § 402A (1965), comment k (unavoidably unsafe products) pending further development in the law. Thus far, comment k has only been applied in Florida to medical devices, drugs, and vaccines, see *Adams v. G.D. Searle & Co.*, 576 So. 2d 728, 733 (Fla. 2nd DCA 1991) (medical device), and has not been extended to any other class of product.

(Adopted March 26, 2015; revised February 27, 2020 (290 So. 3d 840 (Fla. 2020)); revised August 13, 2021.)

403.19 BURDEN OF PROOF ON DEFENSE ISSUES

If the greater weight of the evidence does not support (defendant's) **defense[s] and the greater weight of the evidence supports** (claimant's) **[claim] [one or more of** (claimant's) **claims], then [your verdict should be for** (claimant) **in the total amount of [his] [her] damages.] *[you should decide and write on the verdict form what percentage of the total [negligence] [fault] [responsibility] of [both] [all] defendants you apportion to each defendant whose [negligence] [fault] [responsibility] you find was a legal cause of loss, injury, or damage to** (claimant)**.]**

**Use the second bracketed language when there is more than one defendant.*

If, however, the greater weight of the evidence shows that both (claimant) **and [**(defendant)**] [one or more of the defendants] [and] [**(identify additional person(s) or entit(y)(ies))**] were [negligent] [at fault] [responsible] and that the [negligence] [fault] [responsibility] of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by** (claimant)**, you should decide and write on the verdict form what percentage of the total [negligence] [fault] [responsibility] of [both] [all] parties to this action you apportion to each of them.**

Use the following instruction in cases with a comparative negligence defense and an apportionment of a non-party defense:

[If, however, the greater weight of the evidence shows that (claimant) **and [**(defendant)**] [one or more of** (defendants)**] [and] [**(identify additional person(s) or entit(y)(ies))**] were [negligent] [at fault] [responsible] and that the [negligence] [fault] [responsibility] of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by** (claimant)**, you should decide and write on the verdict form what percentage of the total [negligence] [fault] [responsibility] of [both] [all] parties to this action [and] [**(identify additional person(s) or entit(y)(ies))**] you apportion to each of them.]**

Use the following paragraph in cases without a comparative negligence defense but with an apportionment of non-party defense:

[If, however, the greater weight of the evidence shows that [(defendant)**] [one or more of** (defendants)**] and [**(identify additional person(s) or entit(y)(ies))**] were [negligent] [at fault] [responsible] and that the [negligence] [fault] [responsibility] of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by** (claimant)**, you should decide and write on the verdict form what percentage of the total [negligence] [fault] [responsibility] of [**(defendant(s))**] [and] [**(identify additional person(s) or entit(y)(ies))**] you apportion to each of them.]**

NOTES ON USE FOR 403.19

1. *Preemptive instructions on defense issues.* If a preemptive instruction for claimant is appropriate on a defense issue, as when comparative negligence or assumption of risk has been brought to the jury's attention on voir dire or by opening statements or argument and is now to be withdrawn, an instruction in the form of instruction 401.13 should be given immediately following instruction 403.15. If a preemptive instruction for defendant is required on some aspect of a defense, as when, for example, the court holds that any comparative negligence of the driver will reduce claimant's recovery, a preemptive instruction announcing the ruling should be given immediately after framing the defense issues (instruction 403.18).

2. In most cases, use of the term "negligence" will be appropriate. If another type of fault is at issue, it may be necessary to modify the instruction and the verdict form accordingly. In strict liability cases, the term "responsibility" may be the most appropriate descriptive term.

(Adopted March 26, 2015; revised February 27, 2020 (290 So. 3d 840 (Fla. 2020)).)

404 INSURER'S BAD FAITH

404.1 Introduction

404.2 Summary of Claims or Contentions

404.3 Greater Weight of the Evidence

404.4 Insurer's Bad Faith (Failure to Settle)

404.5 Medical Malpractice Insurer's Bad Faith Failure to Settle

404.6 Legal Cause

404.7 Issues on Claim

404.8 Burden of Proof

404.9 Concluding Instruction when Court to Award Damages

404.10 Damages (Cases with Claims for Mental Distress)

404.11 Burden of Proof on Mental Distress Claim

404.12 Damages on Mental Distress Claim

404.13 Punitive Damages

404.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 404.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of 404.1. See Model Instruction No. 1. Instruction 404.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 404.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including an explanation for the difference, such as where the court has directed a verdict on an issue.

2. "The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations." *Fla. R. Civ. P.* 1.470(b).

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla. R. Civ. P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge, as the judge reads the instructions aloud.

(Revised June 25, 2025.)

404.2 SUMMARY OF CLAIMS OR CONTENTIONS

The claims [and defenses] in this case are as follows. (Claimant) **claims that** (defendant/insurer) **acted in bad faith in** (describe alleged bad faith) **[which caused [him] [her] [it] harm].**

(Defendant) **denies that claim [and also claims that** (describe any affirmative defenses)**].**

(Claimant) **[**(Defendant)**] must prove [his] [her] [their] claim(s) [and defenses] by the greater weight of the evidence.**

NOTE ON USE FOR 404.2

Use the bracketed clause in the first paragraph on causation and instruction 404.6 if the issue of damages is going to be submitted to the jury. If the court is going to determine damages (see instruction 404.9), or the only damages are those already determined in the underlying action, then the bracketed clause in the first paragraph and instruction 404.6 should be omitted.

404.3 GREATER WEIGHT OF THE EVIDENCE

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTES ON USE FOR 404.3

1. *Greater or lesser number of witnesses.* The committee recommends that no instruction be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. *Circumstantial evidence.* The committee has not drafted an instruction addressing circumstantial evidence and takes no position on whether such an instruction is needed. For criminal cases, see *Matter of Use by Trial Cts. of Standard Jury Instructions in Crim. Cases*, 431 So. 2d 594 (Fla. 1981).

(Revised February 11, 2026.)

404.4 INSURER'S BAD FAITH (FAILURE TO SETTLE)

Bad faith on the part of an insurance company is failing to settle a claim when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward [its policyholder] [its insured] [an excess carrier] and with due regard for [his] [her] [its] [their] interests.

NOTES ON USE FOR 404.4

1. Instruction 404.4 does not distinguish statutory claims from common law claims or first party claims from third party claims. See *State Farm Mutual Automobile Insurance Co. v. LaForet*, 658 So. 2d 55 (Fla. 1995).

2. Instruction 404.4 is applicable when the particular matter in issue is the insurance company's failure to settle a claim. This instruction does not exhaust the subject. Other instructions may be necessary if liability is asserted for the insurance company's violation of some other duty. See, *e.g.*, *Harvey v GEICO*, 259 So.3d 1 (Fla. 2018); *Boston Old Colony Insurance Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980) (duty "to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same"); *Brink v. Direct General*, 38 F.4th 917 (11th Cir. 2022) (federal court held standard 404.4 instruction was insufficient where issues involved more than liability for failure to settle) .

3. In cases brought under *F.S.* 624.155, issues of notice and cure generally will be determined by the court. See *Talat Enterprises, Inc. v. Aetna Casualty & Surety Co.*, 753 So. 2d 1278 (Fla. 2000). Therefore, no standard jury instruction is provided on those issues.

4. The committee has reviewed new law *F.S.* 624.155 and determined that a change to the instruction is not necessary at this time, subject to experience with application of the law. See *F.S.* 624.155 (Section 4, Chapter 2023-015, Laws of Florida, commonly known as section 4, HB 837).

(Revised June 19, 2024.)

404.5 MEDICAL MALPRACTICE INSURER'S BAD FAITH FAILURE TO SETTLE

In determining whether (defendant) **acted in bad faith, you shall consider the following factors or circumstances;**

(Defendant's) **willingness to negotiate with** (claimant) **in anticipation of settlement,**

the propriety of (defendant's) **methods of investigating and evaluating the claim of** (claimant)**,**

whether (defendant) **timely informed** (insured) **of an offer to settle within the limits of coverage, the right to retain personal counsel, and the risk of litigation,**

whether (insured) **denied liability or requested that the case be defended after** (defendant) **fully advised** (insured) **as to the facts and risks,**

whether (claimant) **imposed any condition, other than the tender of the policy limits, on the settlement of the claim,**

whether (claimant) **provided relevant information to** (defendant) **on a timely basis,**

whether and when other defendants in the case settled or were dismissed from the case,

whether there were multiple claimants seeking, in the aggregate, compensation in excess of policy limits from (insured) **or from** (defendant)**,**

whether (insured) **misrepresented material facts to** (defendant) **or made material omissions of fact to** (defendant)**,**

and (list such additional factors as the court may determine to be relevant)**.**

NOTE ON USE FOR 404.5

1. This instruction implements *F.S.* 766.1185(2), and should be used only in cases to which that statute applies. It should be given in conjunction with and immediately after instruction 404.4.

2. The statute requires that the jury "shall consider" all of the enumerated factors. The absence of a factor may be relevant for the jury's consideration. The court should therefore instruct on all factors unless there is no issue as to a particular factor.

404.6 LEGAL CAUSE

a. Legal cause generally:

Bad faith conduct is a legal cause of [loss] [damage] [or] [harm] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [damage] [or] [harm], so that it can reasonably be said that, but for the bad faith conduct, the [loss] [damage] [or] [harm] would not have occurred.

b. Concurring cause:

In order to be regarded as a legal cause of [loss] [damage] [or] [harm] bad faith conduct need not be the only cause. Bad faith conduct may be a legal cause of [loss] [damage] [or] [harm] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the bad faith conduct contributes substantially to producing such [loss] [damage] [or] [harm].

c. Intervening cause:

*Do not use the bracketed first sentence if this instruction is preceded by the instruction on concurring cause.**

***[In order to be regarded as a legal cause of [loss] [damage] [or] [harm], bad faith conduct need not be its only cause.] Bad faith conduct may also be a legal cause of [loss] [damage] [or] [harm] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the bad faith conduct occurs if [such other cause was itself reasonably foreseeable and the bad faith conduct contributes substantially to producing such [loss] [damage] [or] [harm] [or] [the resulting [loss] [damage] [or] [harm] was a reasonably foreseeable consequence of the bad faith conduct and the bad faith conduct contributes substantially to producing it].**

NOTES ON USE FOR 404.6

1. Instruction 404.6a (legal cause generally) is to be given in all cases in which causation is an issue. Instruction 404.6b (concurring cause), to be given when the court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether bad faith conduct was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his or her bad faith conduct by reason of some other cause concurring in time and contributing to the same damage. Instruction 404.6c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. Instruction 404.6b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the occurrence or resulting injury. If there is an issue of aggravation of a preexisting condition or of subsequent injuries/multiple events, instruction 501.5a or 501.5b should be given as well. See *Hart v. Stern*, 824 So. 2d 927, 929–32 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So. 2d 833, 834–35 (Fla. 4th DCA 1992).

3. Instruction 404.6c (intervening cause) embraces two situations in which bad faith conduct may be a legal cause notwithstanding the influence of an intervening cause: (1) when the damage was a reasonably foreseeable consequence of the bad faith conduct although the other cause was not foreseeable, *Mozer v. Semenza*, 177 So. 2d 880 (Fla. 3d DCA 1965), and (2) when the intervention of the other cause was itself foreseeable, *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So. 2d 520 (Fla. 1980).

4. *"Probable" results*. The committee recommends that the jury not be instructed that the damage must be such as would have appeared "probable" to the actor or to a reasonably careful person at the time of the bad faith conduct. In cases involving an intervening cause, the term "reasonably foreseeable" is used in place of "probable." The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165 So. 2d 806, 810 (Fla. 1st DCA 1964); Prosser, TORTS 291 (3d ed.); 2 Harper & James, THE LAW OF TORTS 1137.

5. The term "substantially" is used throughout the

instruction to describe the extent of contribution or influence bad faith conduct must have in order to be regarded as a legal cause. "Substantially" was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test of causation not only in relation to defendant's negligence, *Loftin v. Wilson*, 67 So. 2d 185, 191 (Fla. 1953), but also in relation to plaintiff's comparative negligence, *Shayne v. Saunders*, 176 So. 495, 498 (Fla. 1937).

(Revised December 4, 2024;
revised September 16, 2026.)

404.7 ISSUES ON CLAIM

The issue you must decide on (claimant's) **claim against** (defendant) **is whether** (defendant) **acted in bad faith in failing to settle the claim [of] [against]** (insured) **[and, if so, whether that bad faith was a legal cause of [loss] [damage] [or] [harm] to** (claimant)**].**

NOTE ON USE FOR 404.7

For cases in which the court will determine damages, or the only damages are those already determined in the underlying action, omit the bracketed phase on causation. If the issue of damages is being submitted to the jury for determination, then the entire instruction should be given.

404.8 BURDEN OF PROOF

If the greater weight of the evidence does not support the claim of (claimant)**, your verdict should be for** (defendant)**.**

However, if the greater weight of the evidence does support the claim of (claimant)**, then [your verdict should be for** (claimant) **and against** (defendant)**] [you shall consider the defense raised by** (defendant)**].**

404.9 CONCLUDING INSTRUCTION WHEN COURT TO AWARD DAMAGES

If your verdict is for (claimant)**, the court will award damages in an amount allowable under Florida law.**

NOTE ON USE FOR 404.9

This instruction does not ask the jury to insert on the verdict form the amounts of the judgment, interest, costs and attorneys' fees in the underlying case, because these amounts, in many cases, will be decided by the court as a matter of law. The committee does not intend the omission of these issues from the instructions to affect the admissibility of such amounts. When any damages are to be determined by the jury, appropriate instructions and verdict form will be needed. See instruction 404.10–13.

404.10 DAMAGES (CASES WITH CLAIMS FOR MENTAL DISTRESS)

If your verdict is for (claimant)**, you will next decide** (claimant's) **claim for mental distress. On** (claimant's) **claim for mental distress, the issues for your determination are:**

whether (defendant's) **[denial of] [failure to timely pay] the claim resulted in** (insured's) **failure to receive necessary or timely health care; and if so**

whether this failure caused or aggravated (insured's) **[medical] [psychiatric] condition; and if so**

whether (insured) **suffered mental distress related to the condition or the aggravation of the condition.**

NOTES ON USE FOR 404.10

1. Use this instruction only if the court determines that there is a sufficient predicate to support a claim for mental distress. See *Time Insurance Co. v. Burger*, 712 So. 2d 389 (Fla. 1998). The committee takes no position on whether claims for mental distress may be available in other situations.

2. This instruction should be followed by instructions 404.11 and 404.12.

404.11 BURDEN OF PROOF ON MENTAL DISTRESS CLAIM

If the greater weight of the evidence does not support the claim of (claimant) **for mental distress, your verdict should be for** (defendant) **on this issue.**

However, if the greater weight of the evidence does support the claim of (claimant) **for mental distress, then your verdict should be for** (claimant) **and against** (defendant) **on this issue.**

404.12 DAMAGES ON MENTAL DISTRESS CLAIM

If you find for (claimant) **on the claim for mental distress, then you should award** (claimant) **an amount of damages that the evidence shows will fairly compensate claimant for [his] [or] [her] [loss] [injury] [or] [damage] as a result of the mental distress. Your damage award should be for mental distress only. The court will enter judgment for other damages to which** (claimant) **is entitled under the law.**

404.13 PUNITIVE DAMAGES

Punitive damages are warranted if you find by clear and convincing evidence that:

the acts giving rise to the violation occurred with such frequency as to indicate a general business practice; and

these acts were willful, wanton, and malicious, or in reckless disregard for the rights of the (insured) (beneficiary)**.**

"Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. "Clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

NOTES ON USE FOR 404.13

1. If a claim for punitive damages is made pursuant to *F.S.* 624.155, use this instruction instead of instructions 503.1 and 503.2. For common law punitive damages claims, see instructions 503.1 and 503.2.

2. The committee has assumed that the clear and convincing evidence burden of proof provided in *F.S.* 768.725 applies to punitive damages claims made pursuant to *F.S.* 624.155.

405 DEFAMATION

Introduction for Practitioners

405.1 Introduction

405.2 Summary of Claims

405.3 Greater Weight of the Evidence

405.4 Clear and Convincing Evidence

405.5 Elements of Defamation

405.6 Issues on Plaintiff's Claim — Publication

405.7 Issues on Plaintiff's Claim — Falsity

405.8 Issues on Plaintiff's Claim — Statement was Defamatory

405.9 Legal Cause

405.10 Burden of Proof on Main Claim

405.11 Defense Issues — Qualified Privilege/Proof of Malice

405.12 Defense Issues — Truth and Good Motives

405.13 Burden of Proof on Defense Issues

405.14 Damages

INTRODUCTION FOR PRACTITIONERS

Perhaps more than other areas of the law, claims involving defamation are neither easily categorized nor applied. See, *e.g.*, 3 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 23:1 (April 2022 update) (citations omitted) (observing that "it's no surprise by now that many courts and commentators have complained that defamation law is a 'quagmire,' lacks 'clarity and certainty,' is 'overly confusing' and 'convoluted,' leaves courts 'hopelessly and irretrievably confused,' and 'has spawned a morass of case law in which consistency and harmony have long ago disappeared.'").

These difficulties arise from many sources. In addition to the various common law and statutory principles involved, such claims are also subject to overlapping state and federal constitutional constraints that limit a court's authority to impose liability. Further, the applicable standards in a given case depend on a variety of factors such as the identities of the claimant and defendant, the subject matter of the speech at issue, and the character of its publication. Further still, in light of material developments in technology and constitutional jurisprudence, the law of defamation has changed significantly over time, and will doubtless continue to evolve. And finally, important questions of law still remain undecided.

Against this backdrop, the committee has not attempted with these instructions to set forth the various permutations of circumstances under which each instruction might apply. Nor do these instructions address every issue or defense that may arise in a defamation action.

Rather, through these instructions, the committee has endeavored to aid practitioners by providing legally accurate substantive language for the most likely and settled claims and defenses. Where feasible, Notes on Use give guidance on when to use the instructions, but the committee has concluded that those determinations are best left to the parties and the trial court based upon the particular facts and circumstances of the case.

Finally, despite the historical distinction between "slander" and "libel," which distinguished between spoken and written defamation,

respectively, these instructions use the term “defamation” throughout, regardless of the medium of expression. This reflects the diminishing relevance of the method of communication, in favor of a unified standard of “publication.”

(Adopted October 29, 2025.)

405.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 405.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 405.1. See Model Instruction No. 1. Instruction 405.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 405.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including an explanation for the difference, such as where the court has directed a verdict on an issue.

2. "The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations." *Fla. R. Civ. P.* 1.470(b).

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla. R. Civ. P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge.

(Adopted October 29, 2025.)

405.2 SUMMARY OF CLAIMS

The claims [and defenses] in this case are as follows. (Claimant) **claims that** (defendant) **defamed [him] [her] [it] by [making] [publishing] [broadcasting] a false statement about (claimant) which caused (claimant) harm.** (Claimant) **claims (identify the alleged defamatory statement and its alleged defamatory meaning).**

(Defendant) **denies that claim [and also claims that** (describe any affirmative defenses)**].**

[(Claimant)**] [The parties] must prove [his] [her] [its] [all] claim[s] [and defenses] by [the greater weight of the evidence] [or] [clear and convincing evidence]. I will now define some of the terms you will use in deciding this case.**

NOTE ON USE FOR 405.2

The bracketed "clear and convincing" language should be given if the court has determined that the actual-malice standard applies to a claimant's claims. See *Nodar v. Galbreath*, 462 So. 2d 803, 806 (Fla. 1984); *Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1197-98 (11th Cir. 1999) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984)). The bracketed "greater weight of the evidence" language should be given if the negligence standard applies, or if the defendant has raised affirmative defenses. In some cases, it may be necessary to instruct the jury on both evidentiary burdens.

(Adopted October 29, 2025.)

405.3 GREATER WEIGHT OF THE EVIDENCE

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTES ON USE FOR 405.3

1. *Greater or lesser number of witnesses.* The committee recommends that no instruction be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. *Circumstantial evidence.* The committee has not drafted an instruction addressing circumstantial evidence and takes no position on whether such an instruction is needed. For criminal cases, see *Matter of Use by Trial Cts. of Standard Jury Instructions in Crim. Cases*, 431 So. 2d 594 (Fla. 1981).

(Adopted October 29, 2025, revised February 11, 2026.)

405.4 CLEAR AND CONVINCING EVIDENCE

[“Clear and convincing evidence” differs from the “greater weight of the evidence” in that it is more compelling and persuasive.] “Clear and convincing evidence” is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

NOTE ON USE FOR 405.4

Use the first bracketed sentence if there are issues or other claims in the case that invoke the greater weight of the evidence standard.

(Adopted October 29, 2025.)

405.5 ELEMENTS OF DEFAMATION

The issues for you to decide on (claimant's) **claim for defamation are:**

First, whether (defendant) **published a statement about** (claimant)**;**

Second, whether the statement was in some significant respect false and whether [(defendant) **was negligent in determining the statement's truth or falsity] [**(defendant) **either knew the statement was false or had serious doubts as to its truth];**

Third, whether the statement was defamatory; and, if so,

Fourth, whether the defamatory statement was a legal cause of [loss] [injury] [or] [damage] to (claimant)**.**

I will now discuss these issues in greater detail.

NOTE ON USE FOR 405.5

For the second element, the jury should be instructed on the negligence standard unless the court has determined that the actual-malice standard applies to claimant's claims. See *Nodar v. Galbreath*, 462 So. 2d 803, 806 (Fla. 1984); *Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1197-98 (11th Cir. 1999) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984)).

(Adopted October 29, 2025.)

405.6 ISSUES ON PLAINTIFF'S CLAIM — PUBLICATION

The [next] issue for you to decide on (claimant's) **claim against** (defendant) **is whether** (defendant) **published the statement. A statement is published when it is communicated to someone other than** (claimant) **or** (defendant)**.**

a. Issue whether statement was received/read/heard/understood:

In order to be communicated, a statement must be [read] [seen] [or] [heard] by a person other than (claimant) **or** (defendant)**, and that person must understand the statement's significance.**

b. Issue involving multiple publications:

A separate publication occurs each time (defendant) **communicates the same statement to someone other than** (claimant)**, except that a single communication [read] [seen] [or] [heard] by two or more people is only a single publication.**

NOTES ON USE FOR 405.6

1. This instruction addresses multiple issues involving the element of publication, not all of which will apply in every case. The parties should select only the subparagraphs applicable under the particular facts of the case. For more on the element of publication generally, see 19 Fla. Jur 2d DEFAMATION AND PRIVACY § 45, Publication of defamatory statements, generally (2023); RESTATEMENT (2D) OF TORTS § 577 (1977).

2. Instruction 405.6a should be given only in cases in which the parties dispute whether a challenged statement was actually received, or whether its significance was understood, by a third party. See *Am. Ideal Mgmt., Inc. v. Dale Vill., Inc.*, 567 So. 2d 497, 498-99 (Fla. 4th DCA 1990); *Lombardi v. Flaming Fountain*, Inc., 327 So. 2d 39, 40-41 (Fla. 2d DCA 1976); RESTATEMENT (2D) OF TORTS § 577 cmt. c.

3. Publication may be inferred from surrounding

circumstances and need not be proven by direct evidence, or with testimony from witnesses who heard the allegedly defamatory statements. *Am. Ideal Mgmt., Inc. v. Dale Vill., Inc.*, 567 So. 2d 497, 498-99 (Fla. 4th DCA 1990); *Lombardi v. Flaming Fountain*, Inc., 327 So. 2d 39, 40-41 (Fla. 2d DCA 1976). A special instruction addressing this issue may be appropriate.

4. Instruction 405.6b should be given only in cases where the parties dispute how many times a statement was published. See *Swedberg v. Goldfinger's S., Inc.*, 338 So. 3d 332, 335-36 (Fla. 3d DCA 2022); *Musto v. Bell S. Tel. Corp.*, 748 So. 2d 296, 297 (Fla. 4th DCA 1999) (citing RESTATEMENT (2D) OF TORTS § 577A cmt. a (1977)); see also *Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kupfer, P.A. v. Flanagan*, 629 So. 2d 113 (Fla. 1993).

5. For discussion on legal issues involving who or what constitutes a third party, see *Hoch v. Loren*, 273 So. 3d 56 (Fla. 4th DCA 2019) (affirming dismissal for lack of publication where attorneys sent their own clients a copy of a cease-and-desist letter addressed to opposing party); *Am. Airlines, Inc. v. Geddes*, 960 So. 2d 830, 833 (Fla. 3d DCA 2007) (observing that for corporate defendants, "the courts have held that statements made to corporate executive or managerial employees of that entity are, in effect, being made to the corporation itself, and thus lack the essential element of publication").

(Adopted October 29, 2025.)

405.7 ISSUES ON PLAINTIFF'S CLAIM — FALSITY

The [next] issue[s] for you to decide on (claimant's) **claim against** (defendant) **[is] [are] whether (defendant's) statement concerning** (claimant) **was in some significant respect a false statement of fact and, if so, whether [**(defendant) **was negligent in determining whether the statement was true or false] [at the time the statement was made,** (defendant) **either knew the statement was false or had serious doubts as to its truth]. You should consider the context in which the statement was made.**

a. Issue whether statement was false:

A statement is in some significant respect false if its substance or gist conveys a materially different meaning than the truth would have conveyed. In making this determination, you should disregard any minor inaccuracies that do not affect the substance of the statement.

b. Issue whether statement created false impression:

A statement that is literally true is in some significant respect a false statement of fact if it is conveyed in such a way as to create a false impression.

c. Issue whether statement was fact or opinion:

In order to be regarded as defamatory, a statement must be one of fact, not opinion. However, a statement [involving] [or] [phrased as] opinion is considered to be a statement of fact [if it is capable of being proved false] [or] [if it implies a knowledge of unstated facts that would support the opinion].

d(1). Issue whether defendant acted with negligence:

You must decide whether (defendant) **was negligent in determining whether the statement was true or false. A defendant is negligent if he or she does not use reasonable care to determine whether the statement is actually true or false.**

d(2). Issue whether defendant acted with actual malice:

You must decide whether clear and convincing evidence shows that, at the time the statement was made, (defendant) **either knew the statement was false or had serious doubts as to its truth.**

NOTES ON USE FOR 405.7

1. This instruction addresses multiple issues involving the element of falsity, not all of which will apply in every case. The parties should select only the subparagraphs applicable under the particular facts of the case. For more on the element of falsity generally, see *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098 (Fla. 2008); *Kieffer v. Atheists of Fla., Inc.*, 269 So. 3d 656 (Fla. 2d DCA 2019).

2. Instructions 405.7d(1) and 405.7d(2) are designed to be mutually exclusive. Instruction 405.7d(1) should be given when the court has determined that the negligence standard applies. See *Miami Herald Publ'g Co. v. Ane*, 423 So. 2d 376 (Fla. 3d DCA 1982), approved, *Miami Herald Publ'g Co. v. Ane*, 458 So. 2d 239 (Fla. 1984). Instruction 405.7d(2) avoids the term "actual malice" due to its connotations beyond its First Amendment meaning, but should be given instead when the court has determined that the actual malice standard applies. See *Nodar v. Galbreath*, 462 So. 2d 803, 806 (Fla. 1984); *Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1197-98 (11th Cir. 1999) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984)).

3. The determination of whether a statement is fact or opinion is generally a question of law for the court. See, *e.g.*, *Town of Sewall's Point v. Rhodes*, 852 So. 2d 949, 950 (Fla. 4th DCA 2003) ("Whether a statement is one of fact or opinion is a question of law . . . ."); see also *Zambrano v. Devanesan*, 484 So. 2d 603, 606 (Fla. 4th DCA 1986) ("The determination whether a statement is fact or opinion is a question of law for resolution by the court." (citing *From v. Tallahassee Democrat, Inc.*, 400 So. 2d 52 (Fla. 1st DCA 1981), *rev. denied*, 412 So. 2d 465 (Fla. 1982))). However, instruction 405.7c should be given in cases where the court determines that a challenged statement constitutes mixed opinion and is reasonably

capable of defamatory interpretation. See *LRX, Inc. v. Horizon Associates Joint Venture ex rel. Horizon-ANF, Inc.*, 842 So. 2d 881 (Fla. 4th DCA 2003) (Although "[s]tatements of pure opinion are not actionable under the First Amendment, 'Florida' law draws a distinction . . . between pure expressions of opinion, which are constitutionally protected, and mixed expressions of opinion, which are not."); see also *Johnson v. Clark*, 484 F. Supp. 2d 1242 (M.D. Fla. 2007), *aff'd*, 294 Fed. Appx. 502 (11th Cir. 2008) (Under Florida law, "[w]here the court finds that the statement in question is of mixed opinion and fact and reasonably capable of defamatory interpretation, then a jury issue is presented."). A special instruction may be needed in cases involving a dispute over whether a defendant was "stating actual facts" as opposed to "loose, figurative or hyperbolic language" or an "imaginative expression." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (citing *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46, 50 (1988); *Letter Carriers v. Austin*, 418 U. S. 264, 284-286 (1974)). For more on fact versus opinion, see *Fla. Med. Ctr., Inc. v. N.Y. Post Co., Inc.*, 568 So. 2d 454, 458 (Fla. 4th DCA 1990) (applying *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)).

4. Although it is well settled that the issue of whether the defendant acted with actual malice must be proven by clear and convincing evidence, the burden of proof to establish falsity and negligence is less clear. See *Levan v. Cap. Cities/ABC, Inc.*, 190 F.3d 1230, 1239 n.26 (11th Cir. 1999) (stating that "[n]either the Supreme Court nor this Court have expressly decided whether the plaintiff must prove falsity by clear and convincing evidence or simply a preponderance," but observing that "Florida's [1991] model jury instructions for libel . . . require simple preponderance"). Authorities addressing these issues generally mention clear and convincing evidence only when discussing actual malice, however, thereby implying the typical civil preponderance burden for the other determinations under this instruction. See, *e.g.*, *Nodar v. Galbreath*, 462 So. 2d 803, 806-07 (Fla. 1984) (mentioning the clear and convincing burden from *N.Y. Times v. Sullivan* with respect to actual malice and observing that in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) "the Supreme Court rejected the argument that the *N.Y. Times* rule must apply not only to public officials and public figures but also to private persons"). Accordingly, the committee assumes that the

greater-weight-of-the-evidence standard applies to determinations other than the question of actual malice.

(Adopted October 29, 2025.)

405.8 ISSUES ON PLAINTIFF'S CLAIM — STATEMENT WAS DEFAMATORY

A statement is defamatory if it tends to harm (claimant's) **reputation by lowering [him] [her] in the estimation of at least a substantial and respectable minority of the community. This includes exposing** (claimant) **to [hatred] [ridicule] [or] [contempt] or injuring** (claimant's) **[business] [reputation] [or] [occupation].**

NOTES ON USE FOR 405.8

1. If the statement is defamatory per se, this instruction is unnecessary.

2. *Types of disparagement.* "[A] defamatory statement is one that tends to harm the reputation of another by lowering him or her in the estimation of the community or, more broadly stated, one that exposes a plaintiff to hatred, ridicule, or contempt or injures his business or reputation or occupation." *Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1108–09 (Fla. 2008).

3. "Communications are often defamatory because they tend to expose another to hatred, ridicule or contempt. A defamatory communication may tend to disparage another by reflecting unfavorably upon his personal morality or integrity or it may consist of imputations which, while not affecting another's personal reputation, tend to discredit his financial standing in the community, and this is so whether or not the other is engaged in business or industry." RESTATEMENT (2D) OF TORTS § 559 cmt. b (1977)

4. *Applicable Community Standard.* "We find that the harm that stems from a defamatory statement as objectively interpreted by a 'substantial and respectable' minority of the community is entitled to protection. We therefore adopt comment e to section 559 of the RESTATEMENT as stating the appropriate 'community' standard for analyzing a defamation claim." *Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1115 (Fla. 2008).

(Adopted October 29, 2025.)

405.9 LEGAL CAUSE

Next, you must decide whether the statement was a legal cause of [loss] [injury] [or] [damages] to (claimant)**.**

a. *Legal cause generally:*

A [statement] [publication] is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the [statement] [publication], the [loss] [injury] [or] [damage] would not have occurred.

b. *Concurring cause:*

In order to be regarded as a legal cause of [loss] [injury] [or] [damage] a [statement] [publication] need not be the only cause. A [statement] [publication] may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the [statement] [publication] contributes substantially to producing such [loss] [injury] [or] [damage].

c. *Intervening cause:*

> *Do not use the bracketed first sentence if this instruction is preceded by the instruction on concurring cause.**

***[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], [a statement] [publication] need not be its only cause.] A [statement] [publication] may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the [statement] [publication] occurs if [such other cause was itself reasonably foreseeable and the [statement] [publication] contributes substantially to producing such [loss] [injury] [or] [damage]] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the [statement] [publication] and the [statement] [publication] contributes**

substantially to producing it].

NOTES ON USE FOR 405.9

1. Florida law distinguishes between defamation per se and defamation per quod. For the former, general damages are presumed, while for the latter, the claimant must allege and prove special damages. *Hoch v. Rissman, Weisberg, Barrett*, 742 So. 2d 451, 457 (Fla. 5th DCA 1999); see also *Richard v. Gray*, 62 So. 2d 597, 598 (Fla. 1953) (providing elements for defamation per se). Thus, instruction 405.5 may be unnecessary for defamation per se. See *Bobenhausen v. Cassat Ave. Mobile Homes, Inc.*, 344 So. 2d 279, 281 (Fla. 1st DCA 1977) ("Words which are actionable in themselves, or per se, necessarily import general damages and need not be pleaded or proved but are conclusively presumed to result."). Defamation per quod, however, does require proof of causation. *Harriss v. Metropolis Co.*, 160 So. 205, 207 (Fla. 1935) (holding that where "the publication as ordinarily understood will not naturally and necessarily cause injury, damages may be recovered upon proper allegations and proofs for such special injury as is the natural and proximate, though not necessary, consequence of the wrongful publication"); *Cape Publ'ns, Inc. v. Reakes*, 840 So. 2d 277, 278–79 (Fla. 5th DCA 2003) (reversing because the claimant failed to prove her lost wages and loss of reputation were proximately caused by the defamatory statement).

2. Subject to note 1, instruction 405.9a (legal cause generally) should be given in all cases.

3. Instructions 405.9b (concurring cause) and 405.9c (intervening cause) are not intended to be given in all cases, but rather should be given only in cases where the evidence supports the instruction.

4. Instruction 405.9b (concurring cause) does not set forth any additional standard for the jury to consider in determining whether a defamation was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his or her defamation by reason of some other cause concurring in time and contributing to the same damage.

5. Instruction 405.9c (intervening cause) embraces two situations in which a tort may be a legal cause notwithstanding the influence of an intervening cause: (1) when the damage was a reasonably foreseeable consequence of the tort although the other cause was not foreseeable, *Mozer v. Semenza*, 177 So. 2d 880 (Fla. 3d DCA 1965), and (2) when the intervention of the other cause was itself foreseeable, *Gibson v. Avis Rent-A-Car Sys., Inc.*, 386 So. 2d 520 (Fla. 1980).

6. The committee is unaware of any Florida appellate case expressly analyzing concurring cause in a defamation case. However, the RESTATEMENT incorporates the "substantial factor" language often seen in concurring cause cases. See RESTATEMENT (2D) OF TORTS § 622A (Am. L. Inst. 1977) ("Defamation is a legal cause of special harm to the person defamed if . . . it is a substantial factor in bringing about the harm . . . ."). A comment in the RESTATEMENT expressly acknowledges that two or more defamers may concurrently cause, and be liable, for harm to the claimant. *Id.* at cmt. b ("When two or more persons make defamatory statements to a third person, and each statement is found to have had a substantial influence upon his mind that has induced him to take some action causing special harm to the plaintiff, each of the defamers may be liable for the special harm."); see also *Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1103, 1105–15 (Fla. 2008) (relying on multiple sections of the RESTATEMENT (SECOND) OF TORTS, though not section 622A, to explain Florida defamation law, and expressly adopting comment e of section 559). Accordingly, the committee includes instruction 405.5b in the event a defamation case arises in Florida involving a concurring cause.

7. The committee is unaware of any Florida appellate case expressly analyzing intervening cause in a defamation case. However, at least one Florida case suggests that intervening cause may apply to defamation. *Funny Cide Ventures, LLC v. Miami Herald Publ'g Co.*, 955 So. 2d 1241, 1241–42 (Fla. 4th DCA 2007) (concluding "it was not legally foreseeable that the article would cause the jockey to over-ride the horse in [one race], sapping the horse of its strength, and resulting in a third-place finish in the [subsequent race]"). Non-Florida cases have applied an intervening cause analysis to defamation. See *NOCO Co. v. OJ Com., LLC*, 35 F.4th 475, 479–80

(6th Cir. 2022); *Wandersee v. BP Products N. Am., Inc.*, 263 S.W.3d 623, 626–28 (Mo. 2008). Accordingly, the committee includes instruction 405.5b in the event a defamation case arises in Florida involving intervening cause.

8. *"Probable" results.* The committee recommends that the jury not be instructed that the damage must be such as would have appeared "probable" to the actor or to a reasonably careful person at the time of the defamation. In cases involving an intervening cause, the term "reasonably foreseeable" is used in place of "probable." The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165 So. 2d 806, 810 (Fla. 1st DCA 1964); Prosser, TORTS 291 (3d ed.); 2 Harper & James, THE LAW OF TORTS 1137.

9. The term "substantially" is used throughout the instruction to describe the extent of contribution or influence defamation must have to be regarded as a legal cause. "Substantially" was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test of causation in relation to a defendant's conduct. *Loftin v. Wilson*, 67 So. 2d 185, 191 (Fla. 1953).

(Adopted October 29, 2025.)

405.10 BURDEN OF PROOF ON MAIN CLAIM

a. **[If the greater weight of the evidence does not support [one or more of]** (claimant's) **claim[s], your verdict should be for** (defendant) **[on [that] [those] claim[s]]. However, if the greater weight of the evidence supports [one or more of]** (claimant's) **claim[s], [then your verdict should be for** (claimant) **and against** (defendant)**] [then you will consider the defense[s] raised by** (defendant)**].]**

b. **[**(Claimant) **must prove the elements of [his] [her] [its] [all] claim[s] by the greater weight of the evidence, except for the second element—falsity—which, as I previously instructed you,** (claimant) **must prove by clear and convincing evidence. If** (claimant) **has not proved [one or more of] [his] [her] [its] claim[s], then your verdict should be for** (defendant) **[on [that] [those] claim[s]]. However, if** (claimant) **has proved [one or more of] [his] [her] [its] claim[s], [then your verdict should be for** (claimant) **and against** (defendant)**] [then you will consider the defense[s] raised by** (defendant)**].]**

NOTE ON USE FOR 405.10

Use only 405.10b if the court has determined that the actual-malice standard applies to a claim. Otherwise, use only 405.10a.

(Adopted October 29, 2025.)

405.11 DEFENSE ISSUES — QUALIFIED PRIVILEGE/PROOF OF MALICE

Next you must consider the defense of qualified privilege. A qualified privilege is a limited right for a person to make a statement that may be false and defamatory, when the person has a specific interest in the subject matter at issue and makes the statement to [an]other person[s] also having an interest in the subject matter of the statement.

a.(1) Qualified privilege applies as a matter of law:

The court instructs you that (defendant) **had a qualified privilege to make the allegedly false and defamatory statements regarding** (claimant) **because** (explain reason for qualified privilege)**. As a result,** (defendant) **is not liable for defamation unless** (defendant) **abused the privilege.**

a.(2) Qualified privilege is a factual issue:

(Defendant) **contends that it had a qualified privilege to make the statement[s] at issue in this case and is thus not liable for any false and defamatory statement[s]. Specifically,** (defendant) **claims that [he] [she] [it] had an interest in making the statement, and in communicating it to** (describe audience)**, because** (describe nature and grounds of privilege)**.** (Claimant) **disputes that** (defendant) **had a qualified privilege in this case, because** (describe claimant's position as to factual issue)**.**

In order for (defendant) **to establish that** (defendant) **had a qualified privilege,** (defendant) **must prove by the greater weight of the evidence** (describe material factual issue and how jury resolves it)**.**

If (defendant) **does not prove by the greater weight of the evidence that** (defendant) **had a qualified privilege, you should find for** (claimant) **on the issue of qualified privilege. If, however,** (defendant) **proves by the greater weight of the evidence that** (defendant) **had a qualified privilege, you must next consider whether** (claimant) **has proven by the greater weight of the**

evidence that (defendant) **abused the qualified privilege.**

b. Abuse of qualified privilege/express malice:

To establish that (defendant) **abused the privilege,** (claimant) **must prove by the greater weight of the evidence that** (defendant) **was primarily motivated in making the allegedly false and defamatory statement by a desire to cause injury to** (claimant)**.**

NOTES ON USE FOR 405.11

1. This instruction is to be used when a defendant has raised a qualified privilege, and the trial court has determined either that: a(1) the defendant is entitled to the privilege as a matter of law based on the undisputed record; or a(2) the defendant's entitlement to the privilege depends on disputed facts which must be decided by the jury. Instructions 405.11a(1) and a(2) are designed to be mutually exclusive. This instruction may also serve as a model for other circumstances involving privileges discussed below.

2. The existence of a qualified privilege is decided by the trial court as a matter of law "where the circumstances surrounding the communication are undisputed." *Cape Publ'n, Inc. v. Reakes*, 840 So. 2d 277, 280 (Fla. 5th DCA 2003), citing *Nodar v. Galbreath*, 463 So. 2d 803, 810 (Fla. 1984). However, where the circumstances are in dispute, the issue of whether the privilege attaches may be a question for the jury. Thus, there are two options for the first substantive portion of the instruction. The first option applies when the court has ruled that a qualified privilege applies as a matter of law, and the only issue for the jury is whether the claimant can establish that the defendant abused the privilege. The second option applies when the existence of the qualified privilege turns on disputed facts. In this latter situation, the instruction will be further drafted to identify the factual issues the jury must resolve. In either situation, the paragraph instructing the jury on abuse of the privilege follows.

3. The issue of whether the qualified privilege has been "abused" and thus overcome is an issue for the jury if there is evidence supporting "express malice." *Randolph v. Beer*, 695 So. 2d 401, 404 (Fla. 5th DCA 1997), citing *Nodar*, 462 So. 2d at 810. The

plaintiff bears the burden of proof of abuse of the privilege under the preponderance standard. *Id*.

4. This instruction may also be used as a model for any of the numerous statutory privileges against defamation that exist. Since statutory privileges have their own legal standards and burdens of proof, the instruction will need to be modified to conform to the statutory requirements.

5. This instruction may also be used as a model on the rare occasion that the existence of an absolute privilege cannot be resolved by the judge alone. Ordinarily, the existence of an absolute privilege is decided by the trial court as a matter of law. *Delmonico v. Traynor*, 116 So. 3d 1205, 1211 (Fla. 2013). However, where the circumstances necessary to determine entitlement to the privilege are in dispute, the court may need to submit the relevant factual issues to the jury. *AGM Inv., LLC, v. Bus. Law Grp., P.A.*, 219 So. 3d 920, 926-27 (Fla. 2d DCA 2017). Because of the case-specific nature of the factual issues that may arise, no general instruction is likely to adequately charge the jury. Instead, the committee recommends that the court provide a specific instruction regarding the contested facts necessary to determine entitlement to absolute immunity, similar to the second option above, but without the subsequent instruction on abuse of privilege.

6. It is not enough to establish that the defendant abused the privilege merely to prove that an allegedly false statement was made, that defendant used strong, angry, or intemperate words, or that defendant also felt some ill will towards claimant. *Nodar v. Galbreath*, 462 So. 2d 803, 811 (Fla. 1984); *Demby v. English*, 667 So. 2d 350, 354 (Fla. 1st DCA 1995). A special instruction addressing these issues may be appropriate.

(Adopted October 29, 2025.)

405.12 DEFENSE ISSUES — TRUTH AND GOOD MOTIVES

NOTES ON USE FOR 405.12

1. *Truth as an affirmative defense.* A claimant bringing a defamation action has the burden of proving a statement's falsity. See Instruction 405.7. For this reason, the committee does not propose an instruction stating that truth—the converse of falsity—is an affirmative defense for which the defendant would bear the burden of proof. See RESTATEMENT (2D) OF TORTS § 613 Comment j ("Recent decisions of the United States Supreme Court hold that under the Constitution a plaintiff must show fault on the part of the defendant regarding the truth or falsity of the defamatory communication . . . . Meeting this requirement has, as a practical matter, made it necessary for the plaintiff to allege and prove the falsity of the communication, and from a realistic standpoint, has placed the burden of proving falsity on the plaintiff."). The committee acknowledges that Florida courts have referred to truth as an affirmative defense. See, *e.g.*, *Healy v. Suntrust Serv. Corp.*, 569 So. 2d 458, 460 (Fla. 5th DCA 1990); *Glickman v. Potamkin*, 454 So. 2d 612, 613 (Fla. 3d DCA 1984); *Owner's Adjustment Bureau, Inc. v. Ott*, 402 So. 2d 466, 468 (Fla. 3d DCA 1981); *Miami Herald Publ'g Co. v. Brautigam*, 127 So. 2d 718, 723 (Fla. 3d DCA 1961); see also Art. I, § 4, Fla. Const.

2. *Good motive.* Florida's Constitution provides that "[i]n all . . . civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be . . . exonerated." Art. I, § 4, Fla. Const. Courts have interpreted this provision to mean that truth is not an absolute defense to defamation; instead, "truth is only a defense to defamation when the truth has been coupled with good motive." *Lipsig v. Ramlawi*, 760 So. 2d 170, 183 (Fla. 3d DCA 2000); see also *Fla. Pub. Co. v. Lee*, 80 So. 245, 246 (Fla. 1918). Courts have provided no clear guidance, however, on what qualifies as a "good motive" in the defamation context. Therefore, the committee does not propose a standard instruction on the defense of good motive. The committee notes the present uncertainty surrounding whether the Florida

Constitution's good-motive requirement is consistent with the federal First Amendment. See RESTATEMENT (2D) OF TORTS § 581A Comment a ("There have been rulings that a provision of this type is unconstitutional, because it is in violation of the First Amendment Requirements of freedom of speech and of the press and its validity is very dubious.").

(Adopted October 29, 2025.)

405.13 BURDEN OF PROOF ON DEFENSE ISSUES

If the greater weight of the evidence supports [one or more of] (defendant's) **defense[s], your verdict should be for** (defendant) **and against** (claimant)**. If, however, the greater weight of the evidence does not support** (defendant's) **defense[s], and does support** (claimant's) **claim, your verdict should be for** (claimant) **and against** (defendant)**.**

(Adopted October 29, 2025.)

405.14 DAMAGES

If you find for (defendant)**, you will not consider the matter of damages. But, if you find for** (claimant)**, you should award** (claimant) **an amount of money that the greater weight of the evidence shows will fairly and adequately compensate** (claimant) **for any [out-of-pocket economic loss] [impairment of the claimant's reputation] [personal humiliation] [mental anguish and suffering] [physical suffering] [injury to the plaintiff's credit standing] [loss of income] [**(insert any other elements of compensable actual damage of which there is sufficient evidence)**].**

NOTES ON USE FOR 405.14

1. Damages for defamation may include: (1) pecuniary loss, direct or indirect, or special damages; (2) damages for mental suffering; and (3) damages for injury to reputation. *Miami Herald Publ'n Co. v. Brown*, 66 So. 2d 679, 680-81 (Fla. 1953).

2. Punitive damages may be awarded where a "defendant maliciously publishes the libel with knowledge of its falsity and with deliberate intent to [harm] the plaintiff." *Rety v. Green*, 546 So. 2d 410, 420 (Fla. 3d DCA 1989). *F.S.* 770.02 limits a claimant's ability to collect punitive damages from a newspaper or broadcast station in certain circumstances when a retraction is published.

(Adopted October 29, 2025.)

406 MALICIOUS PROSECUTION

406.1 Introduction
406.2 Summary of Claims
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406.8 Issues on Claim
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406.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 406.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 406.1. See Model Instruction No. 1. Instruction 406.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 406.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including an explanation for the difference, such as where the court has directed a verdict on an issue.

2. "The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations." *Fla. R. Civ. P.* 1.470(b).

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla. R. Civ. P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge, as the judge reads the instructions aloud.

(Revised June 25, 2025.)

406.2 SUMMARY OF CLAIMS

The claims [and defenses] in this case are as follows. (Claimant) **claims that** (defendant) **maliciously and without probable cause [filed] [and] [continued]** (describe the claim or proceeding) **against [him] [her] [it] which later terminated in favor of** (claimant) **and which caused [him] [her] [it] harm.**

(Defendant) **denies that claim [and also claims that [he] [she] [it] was acting on the advice of [his] [her] [its] lawyer]. [Additionally** (describe any other affirmative defenses)**.]**

The parties must prove all claims [and defenses] by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

406.3 GREATER WEIGHT OF THE EVIDENCE

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTES ON USE FOR 406.3

1. *Greater or lesser number of witnesses.* The committee recommends that no instruction be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. *Circumstantial evidence.* The committee has not drafted an instruction addressing circumstantial evidence and takes no position on whether such an instruction is needed. For criminal cases, see *Matter of Use by Trial Cts. of Standard Jury Instructions in Crim. Cases*, 431 So. 2d 594 (Fla. 1981).

(Revised February 11, 2026.)

406.4 PROBABLE CAUSE

Probable cause means that at the time of [instituting] [or] [continuing] a [criminal] [civil] proceeding against another, the facts and circumstances known to [(defendant)**] [**(other person)**] were sufficiently strong to support a reasonable belief that** (claimant) **[had committed a criminal offense] [the [claim] [proceeding] was supported by existing facts].**

406.5 MALICE

One acts maliciously in [instituting] [continuing] a [criminal] [civil] proceeding against another if he or she does so for the primary purpose of injuring the other, or recklessly and without regard for whether the proceeding is justified, or for any primary purpose except [to bring an offender to justice] [to establish what he or she considers to be a meritorious claim]. In determining whether (defendant) **acted maliciously, you may consider all the circumstances at the time of the conduct complained of, including any lack of probable cause to [institute] [continue] the proceeding.**

406.6 INSTITUTING OR CONTINUING A PROCEEDING

One is regarded as having [instituted] [continued] a [criminal] [civil] proceeding against another if the proceeding resulted directly and in natural and continuous sequence from his or her actions, so that it reasonably can be said that, but for his or her actions, the proceeding would not have been [instituted] [continued]. [One is not regarded as having [instituted] [continued] a criminal proceeding against another if in good faith he or she made a full and fair disclosure of what he or she knew to the proper authorities and left the decision to [institute] [continue] the prosecution entirely to the judgment of the authorities.]

NOTE ON USE FOR 406.6

See *Kilburn v. Davenport*, 286 So. 2d 241 (Fla. 3d DCA 1973); *Zippy Mart, Inc. v. Mercer*, 244 So. 2d 522 (Fla. 1st DCA 1970).

406.7 LEGAL CAUSE

a. Legal cause generally:

The malicious [institution] [continuation] of a proceeding is a cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the malicious [institution] [continuation] of a proceeding, the [loss] [injury] [or] [damage] would not have occurred.

b. Concurring cause:

In order to be regarded as a legal cause of [loss] [injury] [or] [damage] the malicious [institution] [continuation] of such a proceeding need not be the only cause. The malicious [institution] [continuation] of a proceeding may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the malicious [institution] [continuation] of a proceeding contributes substantially to producing such [loss] [injury] [or] [damage].

c. Intervening cause:

*Do not use the bracketed first sentence if this instruction is preceded by the instruction on concurring cause.**

***[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], the malicious [institution] [continuation] of a proceeding need not be its only cause.] The malicious [institution] [continuation] of a proceeding may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the malicious [institution] [continuation] of a proceeding occurs if [such other cause was itself reasonably foreseeable and the malicious [institution] [continuation] of a proceeding contributes substantially to producing such [loss] [injury] [or] [damage]] [or] [the resulting**

[loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the malicious [institution] [continuation] of a proceeding and the malicious [institution] [continuation] of a proceeding contributes substantially to producing it].

NOTES ON USE FOR 406.7

1. Instruction 406.7a (legal cause generally) is to be given in all cases. Instruction 406.7b (concurring cause), to be given when the court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether the malicious prosecution was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his malicious prosecution by reason of some other cause concurring in time and contributing to the same damage. Instruction 406.7c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. The jury will properly consider instruction 406.7a not only in determining whether defendant's malicious prosecution is actionable but also in determining whether claimant's conduct contributed as a legal cause to claimant's damage, thus reducing recovery.

3. Instruction 406.7b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the occurrence or resulting injury. If there is an issue of aggravation of a preexisting condition or of subsequent injuries/multiple events, instruction 501.5a or b should be given as well. See *Hart v. Stern*, 824 So. 2d 927, 932–34 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So. 2d 833, 835 (Fla. 4th DCA 1992).

4. Instruction 406.7c (intervening cause) embraces two situations in which malicious prosecution may be a legal cause notwithstanding the influence of an intervening cause: (1) when the damage was a reasonably foreseeable consequence of the malicious prosecution although the other cause was not foreseeable, *Mozer v. Semenza*, 177 So. 2d 880 (Fla. 3d DCA 1965), and (2) when the intervention of the other cause was itself foreseeable, *Gibson v. Avis*

Rent-A-Car System, Inc., 386 So. 2d 520 (Fla. 1980).

5. *"Probable" results.* The committee recommends that the jury not be instructed that the damage must be such as would have appeared "probable" to the actor or to a reasonably careful person at the time of the malicious prosecution. In cases involving an intervening cause, the term "reasonably foreseeable" is used in place of "probable." The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165 So. 2d 806, 810 (Fla. 1st DCA 1964); Prosser, TORTS 291 (3d ed.); 2 Harper & James, THE LAW OF TORTS 1137.

6. The term "substantially" is used throughout the instruction to describe the extent of contribution or influence malicious prosecution must have in order to be regarded as a legal cause. "Substantially" was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test of causation not only in relation to defendant's conduct, *Loftin v. Wilson*, 67 So. 2d 185, 191 (Fla. 1953), but also in relation to a plaintiff's comparative negligence *Shayne v. Saunders*, 176 So. 495, 498 (Fla. 1937).

406.8 ISSUES ON CLAIM

The issues you must decide on (claimant's) **claim against** (defendant) **are whether** (defendant) **maliciously and without probable cause [instituted] [or] [continued] a [criminal] [civil] proceeding against** (claimant) **which later terminated in favor of** (claimant) **and, if so, whether that action was a legal cause of [loss] [injury] [or] [damage] to** (claimant)**.**

NOTE ON USE FOR 406.8

If a fact question exists concerning whether the prior proceeding terminated in favor of the claimant, an additional instruction on that issue will be necessary. See *Shidlowsky v. National Car Rental Systems, Inc.*, 344 So. 2d 903 (Fla. 3d DCA 1977); *Freedman v. Crabro Motors, Inc.*, 199 So. 2d 745 (Fla. 3d DCA 1967).

406.9 BURDEN OF PROOF ON CLAIM

If the greater weight of the evidence does not support (claimant's) **claim, your verdict should be for** (defendant)**.**

However, if the greater weight of the evidence supports (claimant's) **claim, [then your verdict should be for** (claimant) **and against** (defendant)**] [then you shall consider the defense raised by** (defendant)**].**

406.10 DEFENSE ISSUES

On the defense, the issues for you to decide are whether before [instituting] [continuing] the [criminal] [civil] proceeding complained of, (defendant) **in good faith sought the advice of a lawyer, gave the lawyer a full and fair statement of what he knew, and relied on the lawyer's advice in [instituting] [continuing] the proceeding.**

NOTE ON USE FOR 406.10

Advice of counsel becomes an issue only when raised by the defendant, who must prove the defense. See *Glass v. Parrish*, 51 So. 2d 717 (Fla. 1951). The lawyer's interest or prejudice may vitiate the defense. See RESTATEMENT (2D) OF TORTS §666, cmt.

406.11 BURDEN OF PROOF ON DEFENSE ISSUES

If the greater weight of the evidence supports the defense, your verdict should be for (defendant)**. However, if the greater weight of the evidence does not support the defense and does support** (claimant's) **claim, your verdict should be for** (claimant) **and against** (defendant)**.**

406.12 MALICIOUS PROSECUTION DAMAGES

If you find for (defendant)**, you will not consider the matter of damages. But, if you find for** (claimant)**, you should award** (claimant) **an amount of money that the greater weight of the evidence shows will fairly and adequately compensate** (claimant) **for such [loss] [injury] [or] [damage] as the greater weight of the evidence shows was caused by the [institution] [continuation] of the proceeding complained of.**

If you find for (claimant)**, you shall consider the following elements of damage:**

Proceed to Section 500 for applicable elements of damage, other appropriate damage instructions and instructions on punitive damages, if applicable. In addition to the elements listed in Section 500, the following is a proper element of damage in an action for malicious prosecution:

The reasonable expenses, including lawyers' fees, necessarily incurred by (claimant) **in the proceeding complained of.**

407 FALSE IMPRISONMENT

407.1 Introduction

407.2 Summary of Claims

407.3 Greater Weight of the Evidence

407.4 Intentional Restraint

407.5 Legal Cause

407.6 Issues on Claim

407.7 Burden of Proof on Claim

407.8 Defense Issues

407.9 Burden of Proof on Defense Issues

407.10 False Imprisonment Damages

407.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 407.1

1. When instructing the jury before taking evidence use instruction 202.1 in lieu of instruction 407.1. See Model Instruction No. 1. Instruction 407.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 407.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including an explanation for the difference, such as where the court has directed a verdict on an issue.

2. "The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations." *Fla. R. Civ. P.* 1.470(b).

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla. R. Civ. P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge, as the judge reads the instructions aloud.

(Revised June 25, 2025.)

407.2 SUMMARY OF CLAIMS

The claims [and defenses] in this case are as follows. (Claimant) **claims that** (defendant) **intentionally restrained [him] [her], under circumstances that were unreasonable and unwarranted and without legal authority, which caused [him] [her] harm.**

(Defendant) **denies that claim [and also claims that** (describe any affirmative defenses)**].**

The parties must prove all claims [and defenses] by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

407.3 GREATER WEIGHT OF THE EVIDENCE

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTES ON USE FOR 407.3

1. *Greater or lesser number of witnesses.* The committee recommends that no instruction be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. *Circumstantial evidence.* The committee has not drafted an instruction addressing circumstantial evidence and takes no position on whether such an instruction is needed. For criminal cases, see *Matter of Use by Trial Cts. of Standard Jury Instructions in Crim. Cases*, 431 So. 2d 594 (Fla. 1981).

(Revised February 11, 2026.)

407.4 INTENTIONAL RESTRAINT

"Intentional restraint" means that [(defendant) **restrained** (claimant) **with the purpose of causing the restraint] [**(defendant) **acted with knowledge that the** (claimant's) **restraint would, to a substantial certainty, result from** (defendant's) **acts].**

To be restrained means that (claimant) **was held against [his] [her] will and did not consent to the restraint. In other words, a person is restrained when [he] [she] [is not free] [does not reasonably believe [he] [she] is free], to leave the place to which [he] [she] had been confined. [To be restrained, a person must be aware of the restraint.]* However, a person is not "restrained" when there is a reasonable means of escape, which is apparent or known to the person.**

A restraint is without "lawful authority" if (defendant) **did not act under color of or claim of lawful authority.**

[A person who makes a mistake in reporting or identifying another person to law enforcement officers is not liable for causing the other person to be restrained, if the person making the mistaken report or identification acts in good faith and does not instigate, persuade, or request the officers to restrain the other person.]**

NOTES ON USE FOR 407.4

1. **Consciousness of restraint*. The bracketed language should be given if there is an issue whether plaintiff was aware of the restraint. RESTATEMENT (2D) OF TORTS §42.

2. **The bracketed language should be given if there is a factual issue of whether defendant's report to the police was an actionable cause of claimant's restraint. *Pokorny v. First Federal Savings & Loan Ass'n*, 382 So. 2d 678 (Fla. 1980).

3. Claimant is restrained if claimant reasonably believes he or she is, though claimant may in fact be free to leave. See RESTATEMENT §§41, 42. See *Gatto v. Publix Supermarkets, Inc.*, 387 So. 2d 377, 379–

80 (Fla. 3d DCA 1980). Though claimant's belief that claimant is completely restrained is unreasonable, restraint may nevertheless occur if claimant is peculiarly susceptible and defendant acts to exploit that susceptibility. See, by analogy, RESTATEMENT §27.

407.5 LEGAL CAUSE

a. Legal cause generally:

An unlawful and intentional restraint is a cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the unlawful and intentional restraint, the [loss] [injury] [or] [damage] would not have occurred.

b. Concurring cause:

In order to be regarded as a legal cause of [loss] [injury] [or] [damage] an unlawful and intentional restraint need not be the only cause. An unlawful and intentional restraint may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the unlawful and intentional restraint contributes substantially to producing such [loss] [injury] [or] [damage].

c. Intervening cause:

**Do not use the bracketed first sentence if this instruction is preceded by the instruction on concurring cause:*

***[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], the unlawful and intentional restraint need not be its only cause.] An unlawful and intentional restraint may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the unlawful and intentional restraint occurs if [such other cause was itself reasonably foreseeable and the unlawful and intentional restraint contributes substantially to producing such [loss] [injury] [or] [damage]] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the unlawful and intentional restraint and the unlawful and intentional restraint contributes substantially to producing it].**

NOTES ON USE FOR 407.5

1. Instruction 407.5a (legal cause generally) is to be given in all cases. Instruction 407.5b (concurring cause), to be given when the court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether the false imprisonment was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his or her false imprisonment by reason of some other cause concurring in time and contributing to the same damage. Instruction 407.5c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. The jury will properly consider instruction 407.5a not only in determining whether defendant's false imprisonment is actionable but also in determining whether claimant's conduct contributed as a legal cause to claimant's damage, thus reducing recovery.

3. Instruction 407.5b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the occurrence or resulting injury. If there is an issue of aggravation of a preexisting condition or of subsequent injuries/multiple events, instructions 501.5a or b should be given as well. See *Hart v. Stern*, 824 So. 2d 927, 929–32 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So. 2d 833, 834–35 (Fla. 4th DCA 1992).

4. Instruction 407.5c (intervening cause) embraces two situations in which false imprisonment may be a legal cause notwithstanding the influence of an intervening cause: (1) when the damage was a reasonably foreseeable consequence of the false imprisonment although the other cause was not foreseeable, *Mozer v. Semenza*, 177 So. 2d 880 (Fla. 3d DCA 1965), and (2) when the intervention of the other cause was itself foreseeable, *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So. 2d 520 (Fla. 1980).

5. *"Probable" results.* The committee recommends that the jury not be instructed that the damage must be such as would have appeared "probable" to the actor or to a reasonably careful person at the time of the false imprisonment. In cases involving an intervening

cause, the term "reasonably foreseeable" is used in place of "probable." The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165 So. 2d 806, 810 (Fla. 1st DCA 1964); Prosser, TORTS 291 (3d ed.); 2 Harper & James, THE LAW OF TORTS 1137.

6. The term "substantially" is used throughout the instruction to describe the extent of contribution or influence false imprisonment must have in order to be regarded as a legal cause. "Substantially" was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test of causation not only in relation to defendant's conduct, *Loftin v. Wilson*, 67 So. 2d 185, 191 (Fla. 1953), but also in relation to a plaintiff's comparative negligence, *Shayne v. Saunders*, 176 So. 495, 498 (Fla. 1937).

(Revised December 4, 2024; revised June 25, 2025.)

407.6 ISSUES ON CLAIM

The issues for you to decide on (claimant's) **claim against** (defendant) **are whether** (defendant)**, without legal authority, intentionally caused** (claimant) **to be restrained against [his] [her] will in a manner that was unreasonable and unwarranted under the circumstances, and, if so, whether that restraint was a legal cause of [loss] [injury] [or] [damage] to** (claimant)**.**

407.7 BURDEN OF PROOF ON CLAIM

If the greater weight of the evidence does not support (claimant's) **claim, your verdict should be for** (defendant)**.**

However, if the greater weight of the evidence supports (claimant's) **claim, [then your verdict should be for** (claimant) **and against** (defendant)**] [then you shall consider the defense[s] raised by** (defendant)**].**

407.8 DEFENSE ISSUES

On the [first] defense, the issue you must decide is whether [(defendant)**] [**(defendant's employee)**] had probable cause to believe that goods held for sale by** (defendant) **had been unlawfully taken by** (claimant) **and could be recovered by restraining** (claimant) **for a reasonable time and in a reasonable manner.**

"Probable cause" means that at the time of the [incident] [restraint] [arrest] the facts and circumstances known to (defendant) (other person) **were sufficiently strong to support a reasonable belief that** (claimant) **had committed a criminal offense.**

NOTES ON USE FOR 407.8

1. Probable cause is a complete defense to an allegation of false imprisonment. See, *e.g.*, *Wille v. Raymond*, 487 So. 2d 1211 (Fla. 4th DCA 1986). If other defenses are asserted which may not constitute a complete defense, instruction 407.8 should be re-worded accordingly.

2. *Arrest pursuant to warrant.* An arrest pursuant to warrant or other court order is privileged unless the instrument is void on its face. *Willingham v. City of Orlando*, 929 So. 2d 43, 48–49 (Fla. 5th DCA 2006); *Jackson v. Navarro*, 665 So. 2d 340, 341 (Fla. 4th DCA 1995). If claimant seeks to avoid the effect of a warrant or court order for his arrest, the issue will ordinarily be one of law, but if a jury question arises, an appropriate instruction should be given allocating the burden of proof to claimant.

3. *Arrest without warrant or court order.* The burden of pleading and proving probable cause or other justification for restraint made without warrant or court order is on defendant. *Rivers v. Dillard's Dep't Store, Inc.*, 698 So. 2d 1328, 1331 (Fla. 1st DCA 1997); *Rotte v. City of Jacksonville*, 509 So. 2d 1252, 1253 (Fla. 1st DCA 1987). Various statutes justify restraint under stated circumstances, *e.g.*, *F.S.* 812.015, 901.15, 901.151 (2006).

407.9 BURDEN OF PROOF ON DEFENSE ISSUES

If the greater weight of the evidence supports [one or more of] (defendant's) **defense[s], your verdict should be for** (defendant) **and against** (claimant)**. If, however, the greater weight of the evidence does not support** (defendant's) **defense[s], and does support** (claimant's) **claim, your verdict should be for** (claimant) **and against** (defendant)**.**

407.10 FALSE IMPRISONMENT DAMAGES

If you find for (defendant)**, you will not consider the matter of damages. But, if you find for** (claimant)**, you should award** (claimant) **an amount of money that the greater weight of the evidence shows will fairly and adequately compensate** (claimant) **for the [loss] [injury] [or] [damage] as the greater weight of the evidence shows was caused by the conduct complained of.**

If you find for (claimant)**, you shall consider the following elements of damages:**

Elements may be adapted from instruction 406.12 Malicious Prosecution Damages.

If you find for (claimant) **but find that no [loss] [injury] [or] [damage] has been proved, you should award** (claimant) **nominal damages. Nominal damages are damages of an inconsequential amount which are awarded when a wrong has been done but no actual damage is proved.**

See instructions 503.1 and 503.2 for punitive damages.

408 TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIPS

408.1 Introduction

408.2 Summary of Claims or Contentions

408.3 Greater Weight of the Evidence

408.4 Legal Cause

408.5 Issues on Plaintiff's Claim — Interference with Contract not Terminable at Will

408.55 Interference with Contract Not Terminable at Will — Civil Conspiracy

408.6 Issues on Plaintiff's Claim — Interference with Business Relationship or with Contract Terminable at Will

408.65 Civil Conspiracy — Issues on Plaintiff's Claim — Interference with Business Relations or with Contract Terminable at Will

408.7 Affirmative Defense — Competition

408.8 Affirmative Defense — Financial Interest

408.9 Unjustified Conduct — Malice

408.10 Burden of Proof on Defense Issues

408.11 Tortious Interference Damages

408.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 408.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 408.1. See Model Instruction No. 1. Instruction 408.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 408.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including an explanation for the difference, such as where the court has directed a verdict on an issue.

2. "The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations." *Fla. R. Civ. P.* 1.470(b).

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla. R. Civ. P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge, as the judge reads the instructions aloud.

(Revised June 25, 2025.)

408.2 SUMMARY OF CLAIMS OR CONTENTIONS

The claims [and defenses] in this case are as follows. (Claimant) **claims that** (defendant) **intentionally and unjustifiably interfered with** (claimant's) **[contract] [or] [business relations] with** (person or entity) **which caused harm to** (claimant)**.**

(Defendant) **denies that claim [and also claims that** (describe any affirmative defenses)**].**

The parties must prove all claims [and defenses] by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

(Revised November 22, 2017; February 17, 2022.)

408.3 GREATER WEIGHT OF THE EVIDENCE

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTES ON USE FOR 408.3

1. *Greater or lesser number of witnesses.* The committee recommends that no instruction be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. *Circumstantial evidence.* The committee has not drafted an instruction addressing circumstantial evidence and takes no position on whether such an instruction is needed. For criminal cases, see *Matter of Use by Trial Cts. of Standard Jury Instructions in Crim. Cases*, 431 So. 2d 594 (Fla. 1981).

(Revised February 11, 2026.)

408.4 LEGAL CAUSE

a. Legal cause generally:

Interference with [a contract] [a business relationship] is a cause of [loss] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [or] [damage], so that it can reasonably be said that, but for the interference with [a contract] [a business relationship], the [loss] [or] [damage] would not have occurred.

b. Concurring cause:

In order to be regarded as a legal cause of [loss] [or] [damage] interference with [a contract] [a business relationship] need not be the only cause. Interference with [a contract] [a business relationship] may be a legal cause of [loss] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause], if the interference with [a contract] [a business relationship] contributes substantially to producing such [loss] [or] [damage].

NOTES ON USE FOR 408.4

1. Instruction 408.4a (legal cause generally) is to be given in all cases.

2. Instruction 408.4b (concurring cause) is not intended to be given in all cases, but rather should be given only in cases where the evidence supports the instruction. It does not set forth any additional standard for the jury to consider in determining whether the tortious interference with a business or contractual relationship was a legal cause of damage, but only negates the idea that a defendant is excused from the consequence of his or her tortious interference with a business or contractual relationship because of some other cause concurring in time and directly contributing to the same damages or loss.

3. The case law supporting intervening cause in the prior version of this instruction was based on negligence law, not

intentional tort law. There is no reported Florida case applying intervening cause in the context of intentional interference. Pending further development of the law, the committee has removed from this section the intervening cause instruction. An intervening cause instruction is still located at instruction 401.12.

4. The term "substantially" is used throughout the instruction to describe the extent of contribution or influence tortious interference must have to be regarded as a legal cause. "Substantially" was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test of causation in relation to defendant's conduct. *Loftin v. Wilson*, 67 So. 2d 185, 191 (Fla. 1953).

(Revised February 17, 2022.)

408.5 ISSUES ON PLAINTIFF'S CLAIM — INTERFERENCE WITH CONTRACT NOT TERMINABLE AT WILL

The issues for you to decide on (claimant's) **claim against** (defendant) **are whether** (defendant) **intentionally and unjustifiably interfered with a contract between** (claimant) **and** (person or entity)**; and, if so, whether such interference was a legal cause of [loss] [or] [damage] to** (claimant)**.**

To be liable for interfering with the contractual relationship between (claimant) **and** (person or entity)**,** (defendant) **must have acted intentionally to interfere with the contractual relationship. A person interferes with a contract between two [or more] other persons if he or she induces or otherwise causes one of them to breach or refuse to perform the contract. Therefore,** (defendant) **must have known of the existence of the contractual relationship, and [he] [she] [it] must have either intended to induce or otherwise cause the breach of the contractual relationship or acted knowing that [his] [her] [its] actions were likely to cause that result.**

(Defendant) **must have also acted unjustifiably.** (Claimant) **must prove that** (defendant) **acted unjustifiably because** (defendant) **[violated a statute]; [committed a tort]; or [committed other improper acts].**

A person who interferes with another's contractual relationship using ordinary business methods of competition does not interfere improperly. But one who uses [physical violence] [misrepresentations] [illegal conduct] [threats of illegal conduct] [or] [(identify other improper conduct)**] has no privilege to use those methods, and interference using such methods is improper.**

If the greater weight of the evidence does not support (claimant's) **claim, then your verdict should be for** (defendant)**. However, if the greater weight of the evidence supports** (claimant's) **claim, [then your verdict should be for** (claimant) **and against** (defendant)**] [then you shall consider the defense[s] raised by** (defendant)**].**

NOTES ON USE FOR 408.5

1. Instruction 408.5 is for cases involving a contract not terminable at will. If there are factual disputes as to the existence or the non-terminable nature of a contract, an instruction submitting those preliminary issues must precede instruction 408.5 and it should be modeled on instruction 416.1 *et seq.* of the Standard Jury Instructions in Contract & Business Cases. If one or more of these preliminary issues has been tried but the court determines it as a matter of law, the court should give a preemptive instruction. An example of a preemptive charge can be found at instruction 401.13.

2. Instruction 408.5 applies to cases where the issue to be determined is whether the defendant has intentionally interfered with a contract not terminable at will. In most such cases, there is no "justification" or "privilege." Therefore, if the interference is "intentional," it is likewise "improper." However, in certain relatively rare factual situations, interference with a contract not terminable at will may be justified or privileged and, therefore, proper even though intentional, see, *e.g.*, RESTATEMENT (2D) OF TORTS §§770 ("Actor Responsible for Welfare of Another"), 772 ("Advice as Proper or Improper Interference"), 773 ("Asserting Bona Fide Claim"), 774 ("Agreement Illegal or Contrary to Public Policy"). See generally, *id.* §767; W. Prosser, *Law of Torts*, §§129, 942–44 (4th ed. 1971). In such cases, instruction 408.5 should be modified. See also the affirmative defense instructions 408.7 and 408.8.

3. For a discussion of "unjustifiably," see *GNB, Inc. v. United Danco Batteries, Inc.*, 627 So. 2d 492, 494 (Fla. 2d DCA 1993) (Altenbernd, J., dissenting). The majority opinion in *GNB* stated that "the dissent's explanation of the applicable law [was] entirely correct," while disagreeing with the dissent's view of the evidence and its conclusion that appellant was entitled to a directed verdict. *Id.* at 493.

4. Ill will, malice, or fraud is not an essential element of the claimant's claim where there is an intentional interference with a contract right or business relationship. *McDonald v. McGowan*, 402 So. 2d 1197, 1201 (Fla. 5th DCA 1981); *Ethyl Corp. v. Balter*, 386 So. 2d 1220, 1225 (Fla. 3d DCA 1980) ("[I]t is irrelevant whether the person who takes authorized steps to protect his own interests does

so while also harboring some personal malice or ill-will towards the plaintiff that is, in this context, that Ethyl's employees, while attempting to protect its economic situation, also may have happened to dislike Balter personally.")

5. The two most common bases for interference claimed to be "proper" or "justified" are the defendant's competitive purposes or financial interest in the business of the third person whose relationship with claimant was interrupted. See RESTATEMENT (SECOND) OF TORTS §§768, 769. The committee has therefore included in instructions 408.7 and 408.8 the substance of the issues to be considered in those situations. The committee has not attempted to include the substance of any other issues on this point, *e.g.*, *id.*, §767, which may control other cases or a First Amendment privilege. In such cases, instructions like 408.7 and 408.8 should be modified accordingly.

(Revised February 17, 2022.)

408.55 INTERFERENCE WITH CONTRACT NOT TERMINABLE AT WILL — CIVIL CONSPIRACY

[On (claimant's) **claim for civil conspiracy to tortiously interfere with a contract not terminable at will, you must decide the claim separately for [each defendant] [**(list defendants at issue in this claim)**].]**

The issues on [this claim] [(claimant's) **claim for civil conspiracy to interfere with a contract not terminable at will] are:**

First, [as to] [each defendant] [(list defendants at issue in this claim)**] whether [each of them] [**(defendant)**] entered an agreement with [another] [others] [each other] to interfere with a contract not terminable at will between** (claimant) **and** (person or entity)**;**

Second, whether (defendant) **[another] [others] [each other] — acting in furtherance of the agreement — intentionally and unjustifiably interfered with a contract between** (claimant) **and [**(person)**] [**(entity)**]. To be liable for interfering with the contractual relationship between** (claimant) **and [**(person)**] [**(entity)**],** (defendant) **[another] [others] [each other] must have acted intentionally to interfere with the contractual relationship. A person interferes with a contract between two [or more] other persons if he or she induces or otherwise causes one of them to breach or refuse to perform the contract. Therefore,** (defendant) **[another] [others] [each other] must have known of the existence of the contractual relationship, and [he] [she] [it] must have either intended to induce or otherwise cause the breach of the contractual relationship or acted knowing that [his] [her] [its] actions were likely to cause that result.**

(Defendant) **[another] [others] [each other] must have also acted unjustifiably.** (Claimant) **must prove that** (defendant) **[another] [others] [each other] acted unjustifiably because** (defendant) **[another] [others] [each other] [violated a statute] [committed a tort] [or] [committed other improper acts]. A person**

who interferes with another's contractual relationship using ordinary business methods of competition does not interfere improperly. But one who uses [physical violence] [misrepresentations] [illegal conduct] [threats of illegal conduct] [or] [(identify other improper conduct)**] has no privilege to use those methods, and interference using such methods is improper; and**

Third, whether the tortious interference was a legal cause of [loss] [or] [damage] to (claimant)**.**

If the greater weight of the evidence does not support (claimant's) **claim, then your verdict should be for** (defendant)**. However, if the greater weight of the evidence supports** (claimant's) **claim, [then your verdict should be for** (claimant) **and against** (defendant)**] [then you shall consider the defense[s] raised by** (defendant)**].**

NOTES ON USE FOR 408.55

1. This instruction incorporates relevant language from the standard instruction on tortious interference with a contract not terminable at will (408.5). Please see the notes on that instruction. They are likewise applicable here but are not repeated.

2. "A civil conspiracy claim requires: (1) an agreement between two or more parties; (2) to do an unlawful act or to do a lawful act by unlawful means; (3) the doing of some overt act in pursuance of the conspiracy; and (4) damage to the plaintiff as a result of the acts done under the conspiracy." *Phillip Morris USA, Inc. v. Russo*, 175 So. 3d 681, n.9 (Fla. 2015). See also *Londono v. Turkey Creek, Inc.*, 609 So. 2d 14, 19 (Fla. 1992) (recognizing claim for civil conspiracy to interfere with contract).

3. Although parties to a conspiracy may be held liable under proper circumstances for the acts of a co-conspirator made in furtherance of a conspiracy, the plaintiff must establish as to each defendant that that defendant entered into the scheme. See, *e.g.*, *Charles v. Fla. Foreclosure Placement Ctr., LLC*, 988 So. 2d 1157, 1160 (Fla. 3d DCA 2008) ("Each coconspirator need not act to further a conspiracy; each 'need only know of the scheme and assist in it in

some way to be held responsible for all of the acts of his coconspirators.'"); see also *Phelan v. Lawhon*, 229 So. 3d 853, 857–59 (Fla. 3d DCA 2017) (concluding that allegations were sufficient to show that 12 of 14 defendants had joined conspiracy, but insufficient to show that the remaining 2 non-resident defendants joined the conspiracy and were subject to Florida jurisdiction).

4. Because the allegations concerning a conspiracy claim may include innumerable permutations, involving both named defendants and unnamed alleged co-conspirators, the court and the parties will have to adapt the instruction and verdict form as appropriate for each case. Depending on the circumstances, the court might also consider giving a separate conspiracy instruction as to each defendant.

5. The first paragraph should only be used in multiple defendant cases.

(Adopted November 5, 2025.
revised July 6, 2026.)

408.6 ISSUES ON PLAINTIFF'S CLAIM — INTERFERENCE WITH BUSINESS RELATIONS OR WITH CONTRACT TERMINABLE AT WILL

The issues for you to decide on (claimant's) **claim against** (defendant) **are whether** (defendant) **intentionally and unjustifiably interfered with business relations between** (claimant) **and** (person or entity)**; and if so, whether such interference was the legal cause of [loss] [or] [damage] to** (claimant)**.**

To be liable for interfering with the [contractual relationship] [business relationship] [prospective business relationship] between (claimant) **and** (person or entity)**,** (defendant) **must have acted intentionally to interfere with the [contractual relationship] [business relationship] [prospective business relationship]. A person interferes with a [contractual relationship] [business relationship] [prospective business relationship] between two [or more] other persons if [he] [she] [it] induces or otherwise causes one of them to [breach the contract] [terminate the relationship] [not form the relationship]. Therefore,** (defendant) **must have known of the existence of the [contractual relationship] [business relationship] [prospective business relationship], and [he] [she] [it] must have either intended to cause the breach of the relationship or acted knowing that [his] [her] [its] actions were likely to cause that result.**

(Claimant) **does not have to prove that [he] [she] [it] had an enforceable contract with** (person or entity)**, if [he] [she] [it] can prove that** (person or entity) **would have [complied with] [entered into] the [contractual relationship] [business relationship] [prospective business relationship] if** (defendant) **had not improperly interfered.**

(Defendant) **must have also acted unjustifiably.** (Claimant) **must prove that** (defendant) **acted unjustifiably because defendant [violated a statute] [committed a tort] [or] [committed other improper acts].**

A person who interferes with another's business relations using ordinary business methods of competition does not

interfere improperly. But one who uses [physical violence] [misrepresentations] [illegal conduct] [threats of illegal conduct] [or] [(identify other improper conduct)**] has no privilege to use those methods, and interference using such methods is improper.**

If the greater weight of the evidence does not support (claimant's) **claim, then your verdict should be for** (defendant)**. However, if the greater weight of the evidence supports** (claimant's) **claim, [then your verdict should be for** (claimant) **and against** (defendant)**] [then you shall consider the defense[s] raised by** (defendant)**].**

NOTES ON USE FOR 408.6

1. Interference with identifiable customers must be proved. See *Ferguson Transportation, Inc. v. North American Van Lines, Inc.*, 687 So. 2d 821 (Fla. 1996); *Insurance Field Services, Inc. v. White and White Inspection and Audit Service, Inc.*, 384 So. 2d 303 (Fla. 5th DCA 1980).

2. A business relationship or prospective business relationship does not need to be evidenced by an enforceable contract to be the subject of improper interference. *Charles Wallace Co. v. Alternative Copier Concepts, Inc.*, 583 So. 2d 396, 397 (Fla. 2d DCA 1991) ("The business relationship does not have to be the product of an enforceable contract. Instead, an action for intentional interference with a business relationship or expectancy will lie if the parties' understanding would have been completed if the defendant had not interfered.")

3. Ill will, malice, or fraud is not an essential element of the claimant's claim where there is an intentional interference with a contract right or business relationship. *McDonald v. McGowan*, 402 So. 2d 1197, 1201 (Fla. 5th DCA 1981); *Ethyl Corp. v. Balter*, 386 So. 2d 1220, 1225 (Fla. 3d DCA 1980) ("[I[t is irrelevant whether the person who takes authorized steps to protect his own interests does so while also harboring some personal malice or ill-will towards the claimant that is, in this context, that Ethyl's employees, while attempting to protect its economic situation, also may have happened to dislike Balter personally.").

4. The two most common bases for interference claimed to be "proper" or "justified" are the defendant's competitive purposes or his financial interest in the business of the third person whose relationship with claimant was interrupted. See RESTATEMENT (2D) OF TORTS §§768, 769. The committee has therefore included in instruction 408.6 the substance of the issues to be considered in those situations. The committee has not attempted to include the substance of any other issues on this point, *e.g.*, *id.* §767, which may control other cases or a First Amendment privilege. In such cases, instructions like 408.7 and 408.8 should be modified accordingly.

5. For a discussion of "unjustifiably," see *GNB, Inc. v. United Danco Batteries, Inc.*, 627 So. 2d 492, 494 (Fla. 2d DCA 1993) (Altenbernd, J. dissenting). The majority opinion in *GNB* stated that "the dissent's explanation of the applicable law [was] entirely correct," while disagreeing with the dissent's view of the evidence and its conclusion that appellant was entitled to a directed verdict. *Id.* at 493.

6. "[T]ortious interference with a contract and tortious interference with a business relationship are basically the same cause of action. The only material difference appears to be that in one there is a contract and in the other there is only a business relationship." *Smith v. Ocean State Bank*, 335 So. 2d 641, 642 (Fla. 1st DCA 1976) (quoted in *St. Johns River Water Mgmt. Dist. v. Fernberg Geological Services, Inc.*, 784 So. 2d 500, 504 n. 4 (Fla. 5th DCA 2001)).

(Revised February 17, 2022.)

408.65 CIVIL CONSPIRACY — ISSUES ON PLAINTIFF'S CLAIM — INTERFERENCE WITH BUSINESS RELATIONS OR WITH CONTRACT TERMINABLE AT WILL

[On (claimant's) **claim for civil conspiracy to tortiously interfere with [business relations] [contract terminable at will], you must decide the claim separately for [each defendant] [**(list defendants at issue in this claim)**].]**

The issues on [this claim] [(claimant's) **claim for civil conspiracy to interfere with [business relations] [contract terminable at will] are:**

First, [as to] [each defendant] [(list defendants at issue in this claim)**] whether [each of them] [**(defendant)**] entered into an agreement with [another] [others] [each other] to interfere with [business relations] [contract terminable at will] between** (claimant) **and** (person or entity)**;**

Second, whether (defendant) **[another] [others] [each other] — in furtherance of the agreement — intentionally interfered with a [contractual relationship] [business relationship] [prospective business relationship] between** (claimant) **and** (person)**. A person interferes with a [contractual relationship] [business relationship] [prospective business relationship] between two [or more] other persons if [he] [she] [it] induces or otherwise causes one of them to [breach the contract] [terminate the relationship] [not form the relationship]. Therefore,** (defendant) **[another] [others] [each other] must have known of the existence of the [contractual relationship] [business relationship] [prospective business relationship], and [he] [she] [it] must have either intended to cause the breach of the relationship or acted knowing that [his] [her] [its] actions were likely to cause that result.**

(Claimant) **does not have to prove that [he] [she] [it] had an enforceable contract with** (person or entity)**, if [he] [she] [it] can prove that** (person or entity) **would have [complied with] [entered into] the [contractual relationship] [business relationship] [prospective business relationship] if** (defendant) **[another] [others] [each other] had not improperly interfered;**

Third, (defendant) **[another] [others] [each other] must have also acted unjustifiably.** (Claimant) **must prove that** (defendant) **[another] [others] [each other] acted unjustifiably because defendant [violated a statute] [committed a tort] [or] [committed other improper acts]. A person who interferes with another's business relations using ordinary business methods of competition does not interfere improperly. But one who uses [physical violence] [misrepresentations] [illegal conduct] [threats of illegal conduct] [or] [**(identify other improper conduct)**] has no privilege to use those methods, and interference using such methods is improper; and**

Fourth, whether the tortious interference was a legal cause of [loss] [or] [damage] to (claimant)**.**

If the greater weight of the evidence does not support (claimant's) **claim, then your verdict should be for** (defendant)**. However, if the greater weight of the evidence supports** (claimant's) **claim, [then your verdict should be for** (claimant) **and against** (defendant)**] [then you shall consider the defense[s] raised by** (defendant)**].**

NOTES ON USE FOR 408.65

1. This instruction incorporates relevant language from the standard instruction on tortious interference with a business relationship or contract terminable at will (408.6). Please see the notes on that instruction. They are likewise applicable here but are not repeated.

2. "A civil conspiracy claim requires: (1) an agreement between two or more parties; (2) to do an unlawful act or to do a lawful act by unlawful means; (3) the doing of some overt act in pursuance of the conspiracy; and (4) damage to the plaintiff as a result of the acts done under the conspiracy." *Phillip Morris USA, Inc. v. Russo*, 175 So. 3d 681, 686 n.9 (Fla. 2015). See also *Londono v. Turkey Creek, Inc.*, 609 So. 2d 14, 19 (Fla. 1992) (recognizing claim for civil conspiracy to interfere with contract); *Am. Diversified Ins. Servs., Inc. v. Union Fid. Life Ins. Co.*, 439 So. 2d 904 (Fla. 2d DCA 1983) (recognizing claim for civil conspiracy to interfere with business

relationship).

3. Although parties to a conspiracy may be held liable under proper circumstances for the acts of a co-conspirator made in furtherance of a conspiracy, the plaintiff must establish as to each defendant that that defendant entered into the scheme. See *Charles v. Florida Foreclosure Placement Ctr.*, LLC, 988 So. 2d 1157, 1160 (Fla. 3d DCA 2008) ("Each coconspirator need not act to further a conspiracy; each 'need only know of the scheme and assist in it in some way to be held responsible for all of the acts of his coconspirators.'"); see also *Phelan v. Lawhon*, 229 So. 3d 853, 857–59 (Fla. 3d DCA 2017) (concluding that allegations were sufficient to show that 12 of 14 defendants had joined conspiracy, but insufficient to show that the remaining 2 non-resident defendants joined the conspiracy and were subject to Florida jurisdiction).

4. Because the allegations concerning a conspiracy claim may include innumerable permutations, involving both named defendants and unnamed alleged co-conspirators, the court and the parties will have to adapt the instruction and verdict form as appropriate for each case. Depending on the circumstances, the court might also consider giving a separate conspiracy instruction as to each defendant.

5. The bracketed introductory paragraph should only be used in cases with multiple defendants.

(Adopted November 5, 2025,
revised July 6, 2026.)

408.7 AFFIRMATIVE DEFENSE — COMPETITION

(Defendant) **has asserted that [his] [her] [its] conduct was justified as lawful competition. If you find that [**(defendant's) **conduct related to competition between** (defendant) **and** (claimant)**[,]] [and] [**(defendant's) **conduct was motivated, at least in part, by such competition[,]] [and] [**(defendant) **did not use improper means to compete[,]] [and] [**(defendant's) **action did not [create] [continue] an unlawful restraint of trade[,]] then** (defendant's) **conduct was justified.**

NOTES ON USE FOR 408.7

1. This instruction may be given when the alleged interference is directed at a contract terminable at will or a business relation. See *Perez v. Rivera*, 534 So. 2d 914, 916 (Fla. 3d DCA 1988) ("If the defendant can prove that the interference was lawful competition—a privilege which the courts recognize when a contract is terminable at will—the defendant will not be found to have committed the tort of wrongful business interference."); see also *Greenberg v. Mount Sinai Med. Ctr. of Greater Miami, Inc.*, 629 So. 2d 252, 255 (Fla. 3d DCA 1993) ("[W]hen a contract is terminable at will . . . . a competitor has a privilege of interference in order to acquire the business for himself. . . . If a competitor proves that the interference was lawful competition he will not be found to have committed the tort."); cf. *Wackenhut Corp. v. Maimone*, 389 So. 2d 656, 658 (Fla. 4th DCA 1980) ("Competition for business is not per se an actionable interference even though it is intentional.").

2. To defend using the competition privilege, a defendant must prove four distinct elements: (a) the relation concerns a matter involved in the competition between the defendant and the claimant; (b) the defendant does not employ an improper or wrongful means; (c) the defendant's action does not create or continue an unlawful restraint of trade; and (d) the defendant's purpose is at least in part to advance the defendant's interest in competing with the claimant. *Weisman v. Southern Wine & Spirits of America, Inc.*, 297 So. 3d 646, 650 (Fla. 4th DCA 2020) (quoting RESTATEMENT (2D) OF TORTS § 768); accord *Int'l Sales & Serv., Inc. v. Austral Insulated Products, Inc.*, 262 F.3d 1152, 1159 (11th Cir. 2001). Whether the jury needs to be

instructed on each of these four elements will depend on the circumstances of each case. In some cases, the court—either at the summary judgment or directed verdict stage—may determine as a matter of law that one or more of the elements has (or has not) been satisfied. If so, then the jury need not be instructed on that particular element. For these reasons, the committee has placed each of the four elements in brackets.

3. This instruction, by itself, may not be sufficient when the defense of competition is tried. Specifically, the trial court may need to instruct the jury further on the meaning of the elements of the defense. For example, the jury may need to be instructed on what is and is not an "improper" means; the court may want to consult the non-exhaustive list of improper means (physical violence, misrepresentations, illegal conduct, and threats of illegal conduct) found in instruction 408.6. As another example, the court may need to consult authorities outside of these instructions to fashion a proper jury instruction on what is and is not an "unlawful restraint on trade."

(Adopted February 17, 2022.)

408.8 AFFIRMATIVE DEFENSE — FINANCIAL INTEREST

(Defendant) **has asserted that [his] [her] [its] conduct was justified because it occurred during the course of [his] [her] [its] efforts to protect [his] [her] [its] own financial interest in the [contract] [business relationship] with (claimant). If you find that** (defendant's) **conduct was motivated, at least in part, by [his] [her] [its] own financial interest in the [contract] [business relationship], [and that** (defendant) **did not use improper means to protect its financial interest], then** (defendant's) **conduct was justified.**

NOTE ON USE FOR 408.8

To defend based on the privilege to protect one's own financial and contractual interests requires that the defendant show improper means were not employed. *Weisman v. S. Wine & Spirits of Am., Inc.*, 297 So. 3d 646, 651 (Fla. 4th DCA 2020). See *Security Title Guarantee Corp. of Baltimore v. McDill Columbus Corp.*, 543 So. 2d 852, 855 (Fla. 2d DCA 1989) ("The unchallengeable controlling principle is that 'so long as improper means are not employed, activities taken to safeguard or promote one's own financial . . . interests are entirely nonactionable.'" (quoting *Ethyl Corp. v. Balter*, 386 So. 2d 1220, 1225 (Fla. 3d DCA 1980)); *Genet Co. v. Anheuser Busch, Inc.*, 498 So. 2d 683 (Fla. 3d DCA 1986) ("[T]here can be no claim where the action complained of is undertaken to safeguard or promote one's financial or economic interest."); see also *Babson Bros. Co. v. Allison*, 337 So. 2d 848, 850 (Fla. 1st DCA 1976) (discussing W. Prosser, LAW OF TORTS §129, 944–45 (4th ed. 1971)); *Peacock v. General Motors Acceptance Corp.*, 432 So. 2d 142, 144 (Fla. 1st DCA 1983) ("GMAC's privilege to protect its contractual interests is not absolute but is instead conditioned upon its employing means that are not improper.").

(Adopted February 17, 2022.)

408.9 UNJUSTIFIED CONDUCT — MALICE

If you find that (defendant's) **conduct was justified because** (defendant) **acted to protect or advance [his] [her] [its] own [competitive] [or] [financial] interest, then it is immaterial that** (defendant) **may also have received a personal benefit in interfering with** (claimant's) **relationship with** (person or entity)**. If you find, however, that** (defendant's) **conduct was not directed to protecting or advancing** (defendant's) **[competitive] [or] [financial] interest but was directed solely to harm** (claimant)**, even if it also incidentally furthered [his] [her] [its] economic interests, then** (defendant's) **conduct was not justified.**

NOTES ON USE FOR 408.9

1. A defendant's privilege to interfere is not absolute. The defendant is divested of the privilege when the defendant "acts solely with ulterior purposes" and the advice to terminate is not in the best interest of the third party with whom the plaintiff has a business or contractual relationship. *O.E. Smith's Sons, Inc. v. George*, 545 So. 2d 298 (Fla. 1st DCA 1989); see *McCurdy v. Collis.*, 508 So. 2d 380 (Fla. 1st DCA 1987) ("A qualified privilege to interfere is not negated by concomitant evidence of malice. It is only when malice is the *sole* basis for interference that it will be actionable."); *Ethyl Corp. v. Balter*, 386 So. 2d 1220, 1225-26 (Fla. 3rd DCA 1980) ("[S]ince . . . Ethyl acted in the lawful protection of its legitimate interests in receiving the money it was owed and not 'solely' out of malice, the personal feelings its employees may have had about Balter make no difference at all."); *Heavener, Ogier Services, Inc. v. R.W. Florida Region, Inc.*, 418 So. 2d 1074, 1077 (Fla. 5th DCA 1982) ("However, there is an exception to this exception – referring to the financial interest privilege – even if the contract is terminable at will, the interferer's actions are tortious and actionable if the motive is purely malicious and not coupled with any legitimate competitive economic interest."). A defendant is not a stranger to a business relationship, and thus cannot be held liable for tortious interference, when it has a supervisory interest in how the relationship is conducted or a potential financial interest in how a contract is performed. *Palm Beach Cty. Health Care Dist. v. Pro. Med. Educ., Inc.*, 13 So. 3d 1090, 1094 (Fla. 4th DCA. 2009).

2. This instruction should be given when there is evidence that the interference was directed solely to harm the claimant.

(Adopted February 17, 2022.)

408.10 BURDEN OF PROOF ON DEFENSE ISSUES

If the greater weight of the evidence supports the defense, your verdict should be for (defendant)**. However, if the greater weight of the evidence does not support the defense and does support** (claimant's) **claim, your verdict should be for** (claimant) **and against** (defendant)**.**

(Adopted February 17, 2022.)

408.11 TORTIOUS INTERFERENCE DAMAGES

If you find for (defendant)**, you will not consider the matter of damages. But, if you find for** (claimant)**, you should award** (claimant) **an amount of money that the greater weight of the evidence shows will fairly and adequately compensate** (claimant) **for such [loss] [or] [damage] as the greater weight of the evidence shows was caused by the** (defendant's) **interference with the [contractual relationship] [business relation].**

If you find for (claimant)**, you shall consider the following elements of damage:**

Proceed to Section 500 of these instructions and the Contract and Business Jury Instructions for applicable elements of damage, other appropriate damage instructions, and instructions on punitive damages, if applicable.

NOTE ON USE FOR 408.11

1. The Supreme Court of Florida stated that the claimant in *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812 (Fla. 1984), was entitled to the damages "reasonably flowing" from the defendant's interference with the claimant's existing business relationships. *Id.* at 815. Florida caselaw, however, does not delineate the types of damages that are recoverable for tortious interference claims.

2. The committee takes no position on the types of recoverable damages for tortious interference claims. One view is expressed by the RESTATEMENT (2D) OF TORTS § 774A. It provides for recovery of:

(a) the pecuniary loss of the benefits of the contract or the prospective relation;

(b) consequential losses for which the interference is a legal cause; and

(c) actual harm to reputation, if it is reasonably to be expected to result from the interference.

Moreover, subsection 774A(d) explains that the action for interference with contract is one in tort and damages are not based on contract rules, *i.e.*, it is not required that the loss incurred be one within the contemplation of the parties to the contract itself at the time it was made. The claimant can also recover for consequential harms, provided they were legally caused by the defendant's interference.

3. A problem with damages in the context of intentional interference claims is whether they can be proved with a reasonable degree of certainty. See general discussion in RESTATEMENT (2D) OF TORTS § 912, especially comments *d* and *f*. Florida has significant case law on the claimant's burden of proof on damages. See, *e.g.*, *Ethan Allen*, 647 So. 2d at 812; *Insurance Field Services, Inc. v. White and White Inspections and Audit Services, Inc.*, 384 So. 2d 303 (Fla. 5th DCA 1980); *Ferguson Transportation, Inc. v. North American Van Lines, Inc.*, 687 So. 2d 821 (Fla. 1996).

(Adopted February 17, 2022.)

409 MISREPRESENTATION

409.1 Introduction

409.2 Summary of Claims

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409.12 Burden of Proof on Defense Issues

409.13 Damages

409.135 Damages — Cases Applying Section 9, Chapter 2023-15

409.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 409.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 409.1. See Model Instruction No. 1. Instruction 409.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 409.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including an explanation for the difference, such as where the court has directed a verdict on an issue.

2. "The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations." *Fla. R. Civ. P.* 1.470(b).

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla. R. Civ. P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge, as the judge reads the instructions aloud.

(Revised June 25, 2025.)

409.2 SUMMARY OF CLAIMS

The claims [and defenses] in this case are as follows. (Claimant) **claims that** (defendant) **[fraudulently] [and] [or] [negligently] misrepresented that** (describe alleged misrepresentation) **[and] [or] [negligently supplied false information for** (describe purpose of alleged false information)**] which caused [him] [her] [it] harm.**

(Defendant) **denies that claim [and also claims that** (claimant) **was [himself] [herself] [itself] negligent in** (describe the alleged comparative negligence) **which caused [his] [her] [its] harm]. [Additionally** (describe any other affirmative defenses)**.]**

The parties must prove all claims [and defenses] by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

409.3 GREATER WEIGHT OF THE EVIDENCE

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTES ON USE FOR 409.3

1. *Greater or lesser number of witnesses.* The committee recommends that no instruction be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. *Circumstantial evidence.* The committee has not drafted an instruction addressing circumstantial evidence and takes no position on whether such an instruction is needed. For criminal cases, see *Matter of Use by Trial Cts. of Standard Jury Instructions in Crim. Cases*, 431 So. 2d 594 (Fla. 1981).

(Revised February 11, 2026.)

409.4 NEGLIGENCE

Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

409.5 MATERIAL FACT

A material fact is one that is of such importance that (claimant) **would not have [entered into the transaction] [acted], but for the false statement.**

NOTES ON USE FOR 409.5

1. With respect to common-law fraud and negligent misrepresentation, Florida law uses the subjective, but-for test stated in this instruction. See, *e.g.*, *Ribak v. Centex Real Estate Corp.*, 702 So. 2d 1316, 1317 (Fla. 4th DCA 1997) ("Under Florida law, a fact is material if, but for the misrepresentation, the aggrieved party would not have entered into the contract."); *Atlantic Nat. Bank of Fla. v. Vest*, 480 So. 2d 1328, 1332 (Fla. 2d DCA 1985) (same).

2. This instruction may not be appropriate in cases involving other misrepresentation claims under Florida law that bear similarities to claims for common-law fraud and negligent misrepresentation but that call for materiality to be evaluated under an objective, reasonable-person standard. See, *e.g.*, *J.P. Morgan Sec's., LLC v. Geveran Invests. Ltd.*, 224 So. 3d 316, 324 (Fla. 5th DCA 2017) (holding that in a misrepresentation claim under the Florida Securities and Investor Protection Act, "materiality must be based on . . . a reasonable investor looking at the total mix of information"); *Moustafa v. Omega Ins. Co.*, 201 So. 3d 710, 714 (Fla. 4th DCA 2016) (holding that a misrepresentation or omission is material for purposes of an insurer's right to rescind under *F.S.* 627.409(1) "if it does not enable a reasonable insurer to adequately estimate the nature of the risk") (internal quotation and citation omitted).

(Revised March 2, 2023.)

409.6 LEGAL CAUSE

a. Legal cause generally:

Reliance on the [false statement] [or] [false information] is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the reliance, the [loss] [injury] [or] [damage] would not have occurred.

b. Concurring cause:

In order to be regarded as a legal cause of [loss] [injury] [or] [damage] reliance on the [false statement] [or] [false information] need not be the only cause. Reliance may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the reliance contributes substantially to producing such [loss] [injury] [or] [damage].

c. Intervening cause:

**Do not use the bracketed first sentence if this instruction is preceded by the instruction on concurring cause:*

***[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], reliance on the [false statement] [or] [false information] need not be its only cause.] Reliance may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the reliance occurs if [such other cause was itself reasonably foreseeable and the reliance contributes substantially to producing such [loss] [injury] [or] [damage]] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the reliance and the reliance contributes substantially to producing it].**

NOTES ON USE FOR 409.6

1. Instruction 409.6a (legal cause generally) is to be given in all cases. Instruction 409.6b (concurring cause), to be given when the court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether a reliance was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his or her misrepresentation by reason of some other cause concurring in time and contributing to the same damage. Instruction 409.6c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. The jury will properly consider instruction 409.6a not only in determining whether defendant's misrepresentation is actionable but also in determining whether claimant's conduct (aside from reliance as defined by instructions 409.7, 409.8, or 409.9, as applicable) contributed as a legal cause to claimant's damage, thus reducing recovery.

3. Instruction 409.6b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the occurrence or resulting injury.

4. Instruction 409.6c (intervening cause) embraces two situations in which reliance on a misrepresentation may be a legal cause notwithstanding the influence of an intervening cause: (1) when the damage was a reasonably foreseeable consequence of the misrepresentation although the other cause was not foreseeable, *Mozer v. Semenza*, 177 So. 2d 880 (Fla. 3d DCA 1965), and (2) when the intervention of the other cause was itself foreseeable, *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So. 2d 520 (Fla. 1980).

5. *"Probable" results.* The committee recommends that the jury not be instructed that the damage must be such as would have appeared "probable" to the actor or to a reasonably careful person at the time of the misrepresentation. In cases involving an intervening cause, the term "reasonably foreseeable" is used in place of "probable." The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165 So. 2d 806, 810 (Fla. 1st DCA 1964); Prosser, TORTS 291 (3d ed.); 2 Harper & James, THE LAW OF TORTS 1137.

6. The term "substantially" is used throughout the instruction to describe the extent of contribution or influence a misrepresentation must have in order to be regarded as a legal cause. "Substantially" was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test of causation not only in relation to defendant's negligence, *Loftin v. Wilson*, 67 So. 2d 185, 191 (Fla. 1953), but also in relation to plaintiff's comparative negligence, *Shayne v. Saunders*, 176 So. 495, 498 (Fla. 1937).

(Revised October 29, 2025.)

409.7 ISSUES ON PLAINTIFF'S CLAIM — FRAUDULENT MISREPRESENTATION

The issues for you to decide on (claimant's) **claim for fraudulent misrepresentation are:**

First, whether (defendant) **made a false statement concerning a material fact;**

Second, whether (defendant) **knew the statement was false when [he] [she] [it] made it or made the statement knowing [he] [she] [it] did not know whether it was true or false;**

Third, whether (defendant) **intended that another would rely on the false statement;**

Fourth, whether (claimant) **relied on the false statement; and, if so,**

Fifth, whether the reliance on the false statement was a legal cause of [loss] [injury] [or] [damage] to (claimant)**.**

On this claim for fraudulent misrepresentation, (claimant) **may rely on a false statement, even though its falsity could have been discovered if** (claimant) **had made an investigation. However,** (claimant) **may not rely on a false statement if [he] [she] [it] knew it was false or its falsity was obvious to [him] [her] [it].**

NOTES ON USE FOR 409.7

1. It appears that Florida recognizes two separate theories of recovery for damage occurring as a result of misrepresentation. One basis of recovery is for fraud and the other is for negligent misrepresentation. The elements of those two theories are set forth in *First Interstate Development Corp. v. Ablanedo*, 511 So. 2d 536 (Fla. 1987); *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985); *Lance v. Wade*, 457 So. 2d 1008 (Fla. 1984); *Wallerstein v. Hospital Corp. of America*, 573 So. 2d 9 (Fla. 4th DCA 1990); *Atlantic National Bank v. Vest*, 480 So. 2d 1328 (Fla. 2d DCA 1985).

2. One or more issues in instruction 409.7 may need to be omitted and the issues renumbered if there is no question of fact for determination by the jury. A preemptive instruction on omitted issues should be given only if required by events during the trial.

3. The recipient of a fraudulent misrepresentation is justified in relying upon its truth, even when an investigation might have revealed its falsity, unless he or she knows the representation to be false or its falsity is obvious to him or her. *Besett v. Basnett*, 389 So. 2d 995 (Fla. 1980).

4. There must be actual damage for recovery in a fraud action. Fraud that does not result in damage is not actionable. *Casey v. Welch*, 50 So. 2d 124 (Fla. 1951); *Stokes v. Victory Land Co.*, 128 So. 408 (Fla. 1930); *Pryor v. Oak Ridge Development Corp.*, 119 So. 326 (1928); *Wheeler v. Baars*, 15 So. 584 (Fla. 1894); *National Aircraft Services, Inc. v. Aeroserv International, Inc.*, 544 So. 2d 1063 (Fla. 3d DCA 1989); *National Equipment Rental, Ltd. v. Little Italy Restaurant & Delicatessen, Inc.*, 362 So. 2d 338 (Fla. 4th DCA 1978). The damage attributable to the fraud must be separate from the damages flowing from a breach of contract. *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So. 2d 180 (Fla. 1987); *National Aircraft Services, Inc. v. Aeroserv International, Inc.*, 544 So. 2d 1063 (Fla. 3d DCA 1989); *John Brown Automation, Inc. v. Nobles*, 537 So. 2d 614 (Fla. 2d DCA 1988); *Rolls v. Bliss & Nyitray, Inc.*, 408 So. 2d 229 (Fla. 3d DCA 1981), *dism.* 415 So. 2d 1359 (Fla. 1982).

(Revised July 13, 2023; revised June 19, 2024.)

409.75 CIVIL CONSPIRACY — ISSUES ON PLAINTIFF'S CLAIM — FRAUDULENT MISREPRESENTATION

[On (claimant's) **claim for civil conspiracy to commit fraudulent misrepresentation, you must decide the claim separately for [each defendant] [**(list defendants at issue in this claim)**].]**

The issues on [this claim] [(claimant's) **claim for civil conspiracy to commit fraudulent misrepresentation] are:**

First, [as to] [each defendant] [(list defendants at issue in this claim)**] whether [each of them] [**(defendant)**] entered into an agreement with [another] [others] [each other] to commit fraudulent misrepresentation;**

Second, whether a party to [that] [each defendant's] agreement made a false statement of material fact in furtherance of that agreement;

Third, whether the party who made the misrepresentation knew that the statement in furtherance of [the] [each defendant's] agreement was false when [he] [she] [it] made it or made the statement knowing that [he] [she] [it] did not know whether it was true or false;

Fourth, whether the party who made the misrepresentation intended that another would rely on the false statement;

Fifth, whether (claimant) **relied on the false statement made in furtherance of [the] [each defendant's] agreement, and if so;**

Sixth, whether the reliance on the false statement made in furtherance of [the] [each defendant's] agreement was a legal cause of [loss] [injury] [or] [damage] to (claimant).

On this claim for conspiracy to commit fraudulent misrepresentation, (claimant) **may rely on a false statement, even**

though its falsity could have been discovered if (claimant) **had made an investigation. However,** (claimant) **may not rely on a false statement if [he] [she] [it] knew it was false or its falsity was obvious to [him] [her] [it].**

If the greater weight of the evidence does not support (claimant's) **claim, then your verdict should be for** (defendant)**. However, if the greater weight of the evidence supports** (claimant's) **claim, [then your verdict should be for** (claimant) **and against** (defendant)**] [then you shall consider the defense[s] raised by** (defendant)**].**

NOTES ON USE FOR 409.75

1. Although parties to a conspiracy may be held liable under proper circumstances for the acts of a co-conspirator made in furtherance of a conspiracy, the plaintiff must establish as to each defendant that that defendant entered into the scheme. See *Charles v. Fla. Foreclosure Placement Ctr., LLC*, 988 So. 2d 1157, 1160 (Fla. 3d DCA 2008) ("Each coconspirator need not act to further a conspiracy; each 'need only know of the scheme and assist in it in some way to be held responsible for all of the acts of his coconspirators.'"); see also *Phelan v. Lawhon*, 229 So. 3d 853, 857–59 (Fla. 3d DCA 2017) (concluding that allegations were sufficient to show that 12 of 14 defendants had joined conspiracy, but insufficient to show that the remaining 2 non-resident defendants joined the conspiracy and were subject to Florida jurisdiction).

2. Because the allegations concerning a conspiracy claim may include innumerable permutations, involving both named defendants and unnamed alleged co-conspirators, the court and the parties will have to adapt the instruction and verdict form as appropriate for each case. Depending on the circumstances, the court might also consider giving a separate conspiracy instruction as to each defendant.

3. The bracketed introductory paragraph should only be used in cases with multiple defendants.

4. "A civil conspiracy claim requires: (1) an agreement between two or more parties; (2) to do an unlawful act or to do a

lawful act by unlawful means; (3) the doing of some overt act in pursuance of the conspiracy; and (4) damage to the plaintiff as a result of the acts done under the conspiracy." *Phillip Morris USA, Inc. v. Russo*, 175 So. 3d 681, 686 n.9 (Fla. 2015). Because in the vast majority of cases involving a claim for civil conspiracy to commit fraudulent misrepresentation, the fraudulent misrepresentation will satisfy the element of an overt act in pursuance of the conspiracy, the Committee has opted not to include a separate "overt act" element in the standard instruction. An "overt act" is "an outward act, however innocent in itself, done in furtherance of a conspiracy." Black's Law Dictionary (11th ed. 2019).

(Adopted November 5, 2025,
revised July 6, 2026.)

409.8 ISSUES ON PLAINTIFF'S CLAIM — NEGLIGENT MISREPRESENTATION

The [next] issues for you to decide on (claimant's) **claim for negligent misrepresentation are:**

First, whether (defendant) **made a statement concerning a material fact that [he] [she] [it] believed to be true but which was in fact false;**

Second, whether (defendant) **was negligent in making the statement because [he] [she] [it] should have known the statement was false;**

Third, whether in making the statement, (defendant) **intended [or expected] that another would rely on the statement;**

Fourth, whether (claimant) **justifiably relied on the false statement; and, if so,**

Fifth, whether the justifiable reliance on the false statement was a legal cause of [loss] [injury] [or] [damage] to (claimant)**.**

NOTES ON USE FOR 409.8

1. It appears that Florida recognizes two separate theories of recovery for damage occurring as a result of misrepresentation. One basis of recovery is for fraud and the other is for negligent misrepresentation. The elements of those two theories are set forth in *First Interstate Development Corp. v. Ablanedo*, 511 So. 2d 536 (Fla. 1987); *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985); *Lance v. Wade*, 457 So. 2d 1008 (Fla. 1984); *Wallerstein v. Hospital Corp. of America*, 573 So. 2d 9 (Fla. 4th DCA 1990); *Atlantic National Bank v. Vest*, 480 So. 2d 1328 (Fla. 2d DCA 1985).

2. The committee takes no position as to whether there are separate and distinct causes of action for negligent misrepresentation under RESTATEMENT (SECOND) OF TORTS §552 and false information negligently supplied under the common law. See *Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334 (Fla. 1997).

3. One or more issues in instruction 409.8 may need to be omitted and the issues renumbered if there is no question of fact for determination by the jury. A preemptive instruction on omitted issues should be given only if required by events during the trial.

(Revised July 13, 2023; revised June 19, 2024.)

409.9 ISSUES ON PLAINTIFF'S CLAIM — FALSE INFORMATION NEGLIGENTLY SUPPLIED FOR THE GUIDANCE OF OTHERS

The [next] issues for you to decide on (claimant's) **claim for false information negligently supplied for the guidance of others are:**

First, whether (defendant) **supplied false information to** (claimant) **in the course of** (defendant's) **[business] [profession] [employment] [or] [in any transaction in which** (defendant) **had an economic interest];**

Second, whether (defendant) **was negligent in [obtaining] [or] [communicating] the false information;**

Third, whether (claimant) **was a person for whose benefit and guidance** (defendant) **intended to supply the false information for use in** (claimant's) **[business transaction] [**(describe specific transaction)**];**

Fourth, whether (defendant) **intended the false information to influence** (claimant) **in this business transaction;**

Fifth, whether (claimant) **justifiably relied on the false information; and, if so,**

Sixth, whether the justifiable reliance on the false information was a legal cause of [loss] [injury] [or] [damage] to (claimant)**.**

NOTES ON USE FOR 409.9

1. One or more issues in instruction 409.9 may need to be omitted and the issues renumbered if there is no question of fact for determination by the jury. For example, when there is a public duty under RESTATEMENT (SECOND) OF TORTS §552(3), the third issue may not require jury determination. A preemptive instruction on omitted issues should be given only if required by events during the trial.

2. This instruction sets forth the essence of a RESTATEMENT (SECOND) OF TORTS §552 claim without incorporating some of the RESTATEMENT'S more complex language. There may be factual circumstances in a specific §552 case that are not covered by these standard instructions. For example, these instructions may require modification if false information was passed on to the plaintiff by a "recipient." Comment (b) to §552 suggests that this section applies to an opinion given upon facts equally well known to both the supplier and the recipient. The committee takes no position upon the application of this section to opinions under Florida law. If the instruction is used in the case of an opinion, it may require modification.

3. The committee takes no position as to whether there are separate and distinct causes of action for negligent misrepresentation under RESTATEMENT §552 and false information negligently supplied under the common law. See *Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334 (Fla. 1997).

(Revised July 13, 2023; revised June 19, 2024.)

409.10 BURDEN OF PROOF ON MAIN CLAIM

If the greater weight of the evidence does not support [one or more of] (claimant's) **claim[s], your verdict should be for** (defendant) **[on [that] [those] claim[s]].**

[However, if the greater weight of the evidence supports [one or more of] (claimant's) **claim[s], then your verdict should be for** (claimant) **and against** (defendant) **[on [that] [those] claim[s]].]**

NOTE ON USE FOR 409.10

Use the second paragraph if there are no defense issues. If there are defense issues, omit the second paragraph and go to instruction 409.11.

(Revised November 22, 2017.)

409.11 DEFENSE ISSUES

If, however, the greater weight of the evidence supports [one or more of] (claimant's) **claim[s] [against [one] [or] [both] [more] of the defendants], then you shall consider the defense[s] raised by** (defendant)**.**

On the [first] defense, the issues for you to decide are whether (claimant) **was negligent in relying on** (defendant's) **statement; and, if so, whether such negligence was a contributing legal cause of any [loss] [injury] [or] [damage] sustained by** (claimant)**.**

NOTES ON USE FOR 409.11

1. In *Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334 (Fla. 1997), the Supreme Court held that the doctrine of comparative negligence, as codified in *F.S.* 768.81, applied to an action for negligent misrepresentation as set forth in the RESTATEMENT (2D) OF TORTS §552, which requires proof of justifiable reliance.

2. In *Gilchrist Timber Co.*, the Court further noted that while the RESTATEMENT discusses the issue in terms of contributory negligence in §552A, a majority of the states that have adopted the comparative negligence doctrine and considered the issue agree that comparative negligence principles apply to cases involving negligent misrepresentation. See *Gilchrist Timber Co.*, 696 So. 2d at 337. The committee recognizes that a logical tension could exist within a verdict determining that the claimant's reliance was justifiable, but that the claimant was also comparatively negligent (*e.g.*, in relying on the statement by failing to conduct an adequate investigation). The committee also recognizes that justifiable reliance may involve a subjective standard distinct from the objective standard used in defining reasonable care. RESTATEMENT §545A, cmt. B ("Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases.") Pending further development of the law, the committee reserves the question of the relationship, if any, between justifiable reliance and comparative negligence.

409.12 BURDEN OF PROOF ON DEFENSE ISSUES

If the greater weight of the evidence does not support (defendant's) **defense[s] and the greater weight of the evidence supports [one] [or] [more of]** (claimant's) **claim[s], then your verdict should be for** (claimant) **in the total amount of [his] [her] [its] damages.**

However, if the greater weight of the evidence shows that both (claimant) **and [**(defendant)**] [one or more of the defendants] were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by** (claimant)**, you should determine what percentage of the total negligence of [both] [all] parties to this action you apportion to each of them.**

(Revised February 1, 2018.)

409.13 DAMAGES

If you find for (defendant)**, you will not consider the matter of damages. But, if you find for** (claimant)**, you should award** (claimant) **an amount of money that the greater weight of the evidence shows will fairly and adequately compensate** (claimant) **for** (describe appropriate elements of those damages incurred by claimant)**.**

NOTES ON USE FOR 409.13

1. RESTATEMENT (2D) OF TORTS §552B describes the damages recoverable for negligently supplying false information for the guidance of others. The elements of recoverable damage under instruction 409.9 should be written with reference to that section.

2. In fraud cases where punitive damages are at issue, *First Interstate Development Corp. v. Ablanedo*, 511 So. 2d 536 (Fla. 1987), see instructions 503.1 and 503.2.

409.135 DAMAGES — CASES APPLYING SECTION 9, CHAPTER 2023-15

If you find for (defendant)**, [or if you have assigned greater than 50% of any [negligence] [fault] to** (claimant)**], you will not consider the matter of damages. But, if you find for** (claimant)**, [and if you have assigned 50% or less of any [negligence] [fault] to** (claimant)**,] you should award** (claimant) **an amount of money that the greater weight of the evidence shows will fairly and adequately compensate** (claimant) **for** (describe appropriate elements of those damages incurred by claimant)**.**

NOTES ON USE FOR 409.135

1. RESTATEMENT (SECOND) OF TORTS §552B describes the damages recoverable for negligently supplying false information for the guidance of others. The elements of recoverable damage under instruction 409.9 should be written with reference to that section.

2. In fraud cases where punitive damages are at issue, *First Interstate Development Corp. v. Ablanedo*, 511 So. 2d 536 (Fla. 1987), see instructions 503.1 and 503.2.

3. This instruction should be used in cases to which section 9, Chapter 2023-15, Laws of Florida, applies. This law, also commonly known as section 9, HB 837, is codified at *F.S.* 768.81(6).

4. Section 9, Chapter 2023-15, Laws of Florida ("HB 837") changed Florida civil tort actions from a pure comparative fault to modified comparative fault where the plaintiff will be barred from recovery if found to be more than 50% at fault. *Hoffman v. Jones*, 280 So. 2d 431 (1973) (Florida Supreme Court adopted the doctrine of comparative fault and replaced the doctrine of contributory negligence; a plaintiff's percentage of fault reduced his damages in proportion to his fault). There are a number of cases in which the Florida Supreme Court approved instructions telling the jury that a finding of contributory negligence barred a plaintiff's recovery. See *Medina v. McAllister*, 202 So. 2d 755, 759 (Fla. 1967); *Martin v. Stone*, 51 So. 2d 33, 35 (Fla. 1951); *Boston v. Shelton*, 13 So. 2d 453, 455 (Fla. 1943); *Turner v. Seegar*, 10 So. 2d 320, 321 (Fla. 1942); *Greiper*

v. Coburn, 190 So. 902, 904 (Fla. 1939).

(Adopted June 19, 2024.)

410 OUTRAGEOUS CONDUCT CAUSING SEVERE EMOTIONAL DISTRESS

410.1 Introduction

410.2 Summary of Claims

410.3 Greater Weight of the Evidence

410.4 Extreme and Outrageous Conduct

410.5 Severe Emotional Distress

410.6 Legal Cause

410.7 Issues on Claim

410.8 Burden of Proof on Claim

NOTE ON USE

The tort of "intentional infliction of emotional distress" is recognized in Florida. *Metropolitan Life Insurance Co. v. McCarson*, 467 So. 2d 277 (Fla. 1985). The boundaries of this tort, particularly when the claimant is a third party affected by conduct occurring between the defendant and another person, are not clearly defined. *Id.*; *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991); *M. M. v. M. P. S.*, 556 So. 2d 1140 (Fla. 3d DCA 1989); *Ford Motor Credit Co. v. Sheehan*, 373 So. 2d 956 (Fla. 1st DCA 1979); RESTATEMENT (2D) OF TORTS, §46.

410.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 410.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 410.1. See Model Instruction No. 1. Instruction 410.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 410.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including an explanation for the difference, such as when the court has directed a verdict on an issue.

2. "The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations." *Fla. R. Civ. P.* 1.470(b).

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla. R. Civ. P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge, as the judge reads the instructions aloud.

(Revised June 25, 2025.)

410.2 SUMMARY OF CLAIMS

The claims [and defenses] in this case are as follows. (Claimant) **claims that** (defendant) **acted extremely and outrageously in** (describe alleged conduct) **which caused [him] [her] severe emotional distress.**

(Defendant) **denies that claim [and also claims that** (describe any affirmative defenses)**].**

The parties must prove all claims [and defenses] by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

410.3 GREATER WEIGHT OF THE EVIDENCE

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTES ON USE FOR 410.3

1. *Greater or lesser number of witnesses.* The committee recommends that no instruction be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. *Circumstantial evidence.* The committee has not drafted an instruction addressing circumstantial evidence and takes no position on whether such an instruction is needed. For criminal cases, see *Matter of Use by Trial Cts. of Standard Jury Instructions in Crim. Cases*, 431 So. 2d 594 (Fla. 1981).

(Revised February 11, 2026.)

410.4 EXTREME AND OUTRAGEOUS CONDUCT

Extreme and outrageous conduct is behavior, which, under the circumstances, goes beyond all possible bounds of decency and is regarded as shocking, atrocious, and utterly intolerable in a civilized community.

410.5 SEVERE EMOTIONAL DISTRESS

Emotional distress is severe when it is of such intensity or duration that no ordinary person should be expected to endure it.

NOTE ON USE FOR 410.5

A special instruction may be warranted when the evidence shows the defendant knew of the claimant's heightened susceptibility to emotional distress.

410.6 LEGAL CAUSE

a. Legal cause generally:

Extreme and outrageous conduct is a legal cause of severe emotional distress if it directly and in natural and continuous sequence produces or contributes substantially to producing such severe emotional distress, so that it can reasonably be said that, but for the extreme and outrageous conduct, the severe emotional distress would not have occurred.

b. Concurring cause:

In order to be regarded as a legal cause of severe emotional distress extreme and outrageous conduct need not be the only cause. Extreme and outrageous conduct may be a legal cause of severe emotional distress even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the extreme and outrageous conduct contributes substantially to producing such severe emotional distress.

c. Intervening cause:

*Do not use the bracketed first sentence if this instruction is preceded by the instruction on concurring cause:**

***[In order to be regarded as a legal cause of severe emotional distress, extreme and outrageous conduct need not be its only cause.] Extreme and outrageous conduct may also be a legal cause of severe emotional distress even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the extreme and outrageous conduct occurs if [such other cause was itself reasonably foreseeable and the extreme and outrageous conduct contributes substantially to producing such severe emotional distress] [or] [the resulting severe emotional distress was a reasonably foreseeable consequence of the extreme and outrageous conduct and the extreme and outrageous conduct contributes substantially to producing it].**

NOTES ON USE FOR 410.6

1. Instruction 410.6a (legal cause generally) is to be given in all cases. Instruction 410.6b (concurring cause), to be given when the court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether outrageous conduct was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his outrageous conduct by reason of some other cause concurring in time and contributing to the same damage. Instruction 410.6c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. The jury will properly consider instruction 410.6a not only in determining whether defendant's outrageous conduct is actionable but also in determining whether claimant's conduct contributed as a legal cause to claimant's damage, thus reducing recovery.

3. Instruction 410.6b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the occurrence or resulting injury. If there is an issue of aggravation of a preexisting condition or of subsequent injuries/multiple events, instruction 501.5a or b should be given as well. See *Hart v. Stern*, 824 So. 2d 927, 929–32 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So. 2d 833, 834–35 (Fla. 4th DCA 1992).

4. Instruction 410.6c (intervening cause) embraces two situations in which outrageous conduct may be a legal cause notwithstanding the influence of an intervening cause: (1) when the damage was a reasonably foreseeable consequence of the outrageous conduct although the other cause was not foreseeable, *Mozer v. Semenza*, 177 So. 2d 880 (Fla. 3d DCA 1965), and (2) when the intervention of the other cause was itself foreseeable, *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So. 2d 520 (Fla. 1980).

5. *"Probable" results.* The committee recommends that the jury not be instructed that the damage must be such as would have appeared "probable" to the actor or to a reasonably careful person at the time of the outrageous conduct. In cases involving an intervening

cause, the term "reasonably foreseeable" is used in place of "probable." The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165 So. 2d 806, 810 (Fla. 1st DCA 1964); Prosser, TORTS 291 (3d ed.); 2 Harper & James, THE LAW OF TORTS 1137.

6. The term "substantially" is used throughout the instruction to describe the extent of contribution or influence outrageous conduct must have in order to be regarded as a legal cause. "Substantially" was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test of causation not only in relation to defendant's negligence, *Loftin v. Wilson*, 67 So. 2d 185, 191 (Fla. 1953), but also in relation to plaintiff's comparative negligence, *Shayne v. Saunders*, 176 So. 495, 498 (Fla. 1937).

(Revised December 4, 2024.)

410.7 ISSUES ON CLAIM

The issues for you to decide on (claimant's) **claim are:**

whether (defendant) **engaged in extreme and outrageous conduct; and acted with the intent to cause severe emotional distress or with reckless disregard of the high probability of causing severe emotional distress; and, if so**

whether that extreme and outrageous conduct was a legal cause of severe emotional distress to (claimant)**.**

410.8 BURDEN OF PROOF ON CLAIM

If the greater weight of the evidence does not support (claimant's) **claim, your verdict should be for** (defendant)**.**

However, if the greater weight of the evidence supports (claimant's) **claim, [then your verdict should be for** (claimant) **and against** (defendant)**] [then you shall consider the defense raised by** (defendant)**].**

[If the greater weight of the evidence supports the defense, your verdict should be for (defendant)**. However, if the greater weight of the evidence does not support the defense, your verdict should be for** (claimant) **and against** (defendant)**.]**

NOTES ON USE FOR 410.8

1. The RESTATEMENT (2D) OF TORTS and case law discuss the defense of "privilege." See *Metropolitan Life Insurance Co. v. McCarson*, 429 So. 2d 1287 (Fla. 4th DCA 1983); *Baker v. Florida National Bank*, 559 So. 2d 284 (Fla. 4th DCA 1990); RESTATEMENT §46, cmt. g. In addition to banks and insurers, merchants have asserted the defense. In *Southland Corp. v. Bartsch*, 522 So. 2d 1053, 1056 (Fla. 5th DCA 1988), the court held that a convenience store manager's conduct (having a six-year-old child arrested for stealing gum) was no more than an assertion of the store's rights in a legally permissible way, and was privileged "as a matter of law." In *Canto v. J. B. Ivey & Co.*, 595 So. 2d 1025, 1028 (Fla. 1st DCA 1992), two children were detained by a merchant who suspected them of shoplifting; citing *McCarson* and the RESTATEMENT (2D) OF TORTS, the court found "no evidence in the record suggesting that the conduct of either employee even approached the limits of this privilege." See also *Mallock v. S. Mem'l Park, Inc.*, 561 So. 2d 330 (Fla. 3d DCA 1990).

Pending further development of Florida law, the committee has not submitted a standard instruction concerning any defense.

2. For damage instructions go to instruction 501.1 *et seq*.

411 CIVIL THEFT

411.1 Introduction
411.2 Summary of Claims
411.3 Clear and Convincing Evidence
411.4 Legal Cause
411.5 Issues on Claim
411.6 Burden of Proof on Claim
411.7 Civil Theft Damages

411.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 411.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 411.1. See Model Instruction No. 1. Instruction 411.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 411.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including an explanation for the difference, such as where the court has directed a verdict on an issue.

2. "The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations." *Fla. R. Civ. P.* 1.470(b).

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla. R. Civ. P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge, as the judge reads the instructions aloud.

(Revised June 25, 2025.)

411.2 SUMMARY OF CLAIMS

The claim in this case is that (defendant) **unlawfully [obtained] [or] [used]** (claimant's) **property which caused [him] [her] [it] harm.**

(Defendant) **denies that claim.**

The (claimant) **must prove [his] [her] [its] claim by the clear and convincing evidence. I will now define some of the terms you will use in deciding this case.**

411.3 CLEAR AND CONVINCING EVIDENCE

[“Clear and convincing evidence” differs from the “greater weight of the evidence” in that it is more compelling and persuasive.] “Clear and convincing evidence” is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction without hesitation about the matter in issue.

NOTE ON USE FOR 411.3

Use the first bracketed sentence if there are other claims in the case that invoke the greater weight of the evidence standard.

411.4 LEGAL CAUSE

a. Legal cause generally:

A party's conduct is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the conduct, the [loss] [injury] [or] [damage] would not have occurred.

b. Concurring cause:

In order to be regarded as a legal cause of [loss] [injury] [or] [damage] a party's conduct need not be the only cause. A party's conduct may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the conduct contributes substantially to producing such [loss] [injury] [or] [damage].

c. Intervening cause:

*Do not use the bracketed first sentence if this instruction is preceded by the instruction on concurring cause:**

***[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], a party's conduct need not be its only cause.] A party's conduct may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the party's conduct occurs if [such other cause was itself reasonably foreseeable and the party's conduct contributes substantially to producing such [loss] [injury] [or] [damage]] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the party's conduct and the party's conduct contributes substantially to producing it].**

NOTES ON USE FOR 411.4

1. Instruction 411.4a (legal cause generally) is to be given in

all cases. Instruction 411.4b (concurring cause), to be given when the court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether conduct was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his conduct by reason of some other cause concurring in time and contributing to the same damage. Instruction 411.4c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. The jury will properly consider instruction 411.4a not only in determining whether defendant's conduct is actionable but also in determining whether claimant's conduct contributed as a legal cause to claimant's damage, thus reducing recovery.

3. Instruction 411.4b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the occurrence or resulting injury. If there is an issue of aggravation of a preexisting condition or of subsequent injuries/multiple events, instruction 501.5a or b should be given as well. See *Hart v. Stern*, 824 So. 2d 927, 929–32 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So. 2d 833, 834–35 (Fla. 4th DCA 1992).

4. Instruction 411.4c (intervening cause) embraces two situations in which conduct may be a legal cause notwithstanding the influence of an intervening cause: (1) when the damage was a reasonably foreseeable consequence of the conduct although the other cause was not foreseeable, *Mozer v. Semenza*, 177 So. 2d 880 (Fla. 3d DCA 1965), and (2) when the intervention of the other cause was itself foreseeable, *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So. 2d 520 (Fla. 1980).

5. *"Probable" results.* The committee recommends that the jury not be instructed that the damage must be such as would have appeared "probable" to the actor or to a reasonably careful person at the time of the outrageous conduct. In cases involving an intervening cause, the term "reasonably foreseeable" is used in place of "probable." The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165 So. 2d 806, 810 (Fla. 1st DCA 1964); Prosser, TORTS 291 (3d ed.); 2 Harper & James, THE LAW OF TORTS 1137.

6. The term "substantially" is used throughout the instruction to describe the extent of contribution or influence outrageous conduct must have in order to be regarded as a legal cause. "Substantially" was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test of causation not only in relation to defendant's negligence, *Loftin v. Wilson*, 67 So. 2d 185, 191 (Fla. 1953), but also in relation to plaintiff's comparative negligence, *Shayne v. Saunders*, 176 So. 495, 498 (Fla. 1937).

(Revised December 4, 2024.)

411.5 ISSUES ON CLAIM

The issues for you to decide on (claimant's) **claim are:**

a. Violation of F.S. 812.014 (Theft):

whether (defendant) **obtained or used [or attempted to obtain or use] the property of** (claimant) **with criminal intent; that is, with the intent**

[to deprive (claimant)**, either temporarily or permanently, of a [superior]* right to the property or a benefit from it] [or] [to appropriate, either temporarily or permanently, the property to the use of any person not entitled to it]; and, if so,**

**The bracketed word "superior" should be used when there is evidence that the defendant took the property pursuant to a claim of right.*

whether (defendant's) **actions were a legal cause of [loss] [injury] or [damage] to** (claimant)**.**

NOTE ON USE FOR 411.5(a)

Cliff Berry, Inc. v. State, 116 So. 3d 394 (Fla. 3d DCA 2012), details good faith defense in a criminal case. See also, *Fla. Std. Jury Instr. (Crim)* 14.1.

b. Violation of F.S. 812.016 (Possession of altered property):

whether (defendant) **was in the business of buying and selling property and in possession of property which [he] [she] knew, or should have known, had identifying features which had been removed or altered without the consent of the manufacturer; and, if so,**

whether (defendant's) **actions were a legal cause of [loss] [injury] [or] [damage] to** (claimant)**.**

c. Violation of F.S. 812.019 (Dealing in stolen property):

whether (defendant) **[trafficked] [attempted to traffic] in property and knew or should have known the property was stolen; and, if so,**

whether (defendant's) **actions were a legal cause of [loss] [injury] or [damage] to** (claimant)**.**

To "traffic" means to: (1) sell or otherwise dispose of property or, (2) obtain property with the intent to sell or otherwise dispose of it.

NOTE ON USE FOR 411.5

The committee does not recommend a separate jury instruction for *F.S.* 812.019(2), (organizing) because trafficking is an element of *F.S.* 812.019(2). If the need arises, the court should fashion a modified instruction for *F.S.* 812.019(2).

(Revised November 19, 2022.)

411.6 BURDEN OF PROOF ON CLAIM

If clear and convincing evidence does not support (claimant's) **claim, your verdict should be for** (defendant)**. However, if clear and convincing evidence supports** (claimant's) **claim, then your verdict should be for** (claimant) **and against** (defendant)**.**

411.7 CIVIL THEFT DAMAGES

If you find for (defendant) **you will not consider the matter of damages. But if you find for** (claimant)**, you should award** (claimant) **an amount of money, if any, that the clear and convincing evidence shows are the actual damages sustained by** (claimant)**.***

**The court should describe the appropriate elements of any case specific damages.*

NOTES ON USE FOR 411.7

1. In requiring that the amount of damages be established by clear and convincing evidence, the committee has given effect to *Starr Tyme, Inc. v. Cohen*, 659 So. 2d 1064 (Fla. 1995), and *Haddad v. Cura*, 674 So. 2d 168 (Fla. 3d DCA 1996), because they are the only decisions addressing the issue.

2. Under the provisions of *F.S.* 772.11, plaintiff may recover, upon proper proof, three times the actual damages sustained, or a minimum of $200.00, and reasonable attorney's fees. The jury should be directed to determine the actual damages and the court should apply the statutory formula after verdict. *McArthur Dairy, Inc. v. Original Kielbs, Inc.*, 481 So. 2d 535 (Fla. 3d DCA 1986). The court should make the determination as to the amount of attorney's fees and interest to be assessed and included in any judgment. *Mid-Continent Casualty. Co. v. Giuliano*, 166 So. 2d 443 (Fla. 1964).

412 CONTRIBUTION AMONG TORTFEASORS

412.1 Contribution Sought by Cross-Claims Between Defendant Tortfeasors in Injured Party's Original Action

412.2 Contribution Sought by Third Party Claim in Injured Party's Original Action

412.3 Introduction for Independent Contribution Claim

412.4 Summary of Claims

412.5 Greater Weight of the Evidence

412.6 Negligence

412.7 Legal Cause

412.8 Issues on Claim and Burden of Proof

412.9 Defense Issue

NOTES ON USE

1. A claim for contribution can be presented as a cross-claim in an injured party's case or as an independent action. These instructions cover both types of claims. Instruction 412.1 deals with cross-claims in an injured party's case and instruction 412.2 deals with third-party claims in an injured party's action. These instructions are in proper form for use in negligence actions. If contribution is found to be appropriate in tort actions other than for negligence (but see the title to Ch. 75-198, Laws of Fla.), the instructions should be revised as necessary.

2. The instructions for an independent action for contribution begin with instruction 412.3.

3. Whether the contribution claim is a cross-claim, a third party action or an independent claim, it should be submitted to the jury with a form of special verdict by which the jury determines the relative degrees of fault of the defendants and any third party (see, for example, Model Instruction No. 6).

412.1 CONTRIBUTION SOUGHT BY CROSS-CLAIMS BETWEEN DEFENDANT TORTFEASORS IN INJURED PARTY'S ORIGINAL ACTION

This instruction should follow 501.9 or 502.8, Liability of Multiple Tortfeasors.

Even though any damages you award (claimant) **must be found in a single amount against the defendant or defendants whom you find to be liable to** (claimant)**, if the greater weight of the evidence shows that more than one defendant was negligent and that their negligence contributed as a legal cause of injury and damage to** (claimant)**, you should determine by your verdict what percentage of the total negligence of [both] [all] defendants** (name them) **was caused by each.**

NOTE ON USE FOR 412.1

Model Instruction No. 6 illustrates the use of this instruction.

412.2 CONTRIBUTION SOUGHT BY THIRD-PARTY CLAIM IN INJURED PARTY'S ORIGINAL ACTION

This instruction follows the conventional instructions on plaintiff's claim.

There is an additional claim that you must also decide. (Third party claimant) **seeks to recover from** (third party defendant) **part of any money which** (third party claimant) **may be called on by a judgment in this action to pay to** (claimant)**. If you find for** (defendant and third party claimant) **on** (claimant's) **claim, you need not consider this additional claim by** (third party claimant) **against** (third party defendant)**. But, if you find for** (claimant) **on [his] [her] [its] claim for damages against** (defendant and third party claimant)**, you must also decide the following additional issues on the claim by** (third party claimant) **against** (third party defendant)**.**

The issues on that claim are whether (third party defendant) **as well as** (defendant and third party claimant) **were negligent and, if so, whether such negligence contributed as a legal cause of injury and damage to** (claimant)**. If the greater weight of the evidence does not support the claim of** (third party claimant) **against** (third party defendant)**, your verdict on that claim will be for** (third party defendant)**. However, if the greater weight of the evidence does support the claim of** (third party claimant) **against** (third party defendant)**, your verdict on that claim should be for** (third party claimant) **and you should determine by your verdict what percentage of the total negligence of [both] [all] defendants** (name them) **was caused by each. The court will then determine the amount that** (third party claimant) **should recover from** (third party defendant) **in the event** (third party claimant) **is required to pay a judgment in favor of** (claimant)**.**

412.3 INTRODUCTION FOR INDEPENDENT CONTRIBUTION CLAIM

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 412.3

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 412.3. See Model Instruction No. 1. Instruction 412.3 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 412.3 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including an explanation for the difference, such as where the court has directed a verdict on an issue.

2. "The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations." *Fla. R. Civ. P.* 1.470(b).

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla. R. Civ. P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge, as the judge reads the instructions aloud.

(Revised June 25, 2025.)

412.4 SUMMARY OF CLAIMS

The claims [and defenses] in this case are as follows. (Claimant) **seeks to recover from** (defendant) **[part of] the sum of money that [he] [she] [it] paid to [settle the claim] [satisfy the judgment] of** (name) **resulting from** (identify injury or incident giving rise to claim)**.** (Claimant) **claims that** (defendant) **was [partly] negligent** (describe alleged negligence) **which caused harm to** (original claimant)**.**

(Defendant) **denies that claim [and also claims that** (describe any affirmative defenses)**].**

The parties must prove all claims [and defenses] by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

412.5 GREATER WEIGHT OF THE EVIDENCE

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTES ON USE FOR 412.5

1. *Greater or lesser number of witnesses.* The committee recommends that no instruction be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. *Circumstantial evidence.* The committee has not drafted an instruction addressing circumstantial evidence and takes no position on whether such an instruction is needed. For criminal cases, see *Matter of Use by Trial Cts. of Standard Jury Instructions in Crim. Cases*, 431 So. 2d 594 (Fla. 1981).

(Revised February 11, 2026.)

412.6 NEGLIGENCE

Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

412.7 LEGAL CAUSE

a. Legal cause generally:

Negligence is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the negligence, the [loss] [injury] [or] [damage] would not have occurred.

b. Concurring cause:

In order to be regarded as a legal cause of [loss] [injury] [or] [damage] negligence need not be the only cause. Negligence may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the negligence contributes substantially to producing such [loss] [injury] [or] [damage].

c. Intervening cause:

*Do not use the bracketed first sentence if this instruction is preceded by the instruction on concurring cause:**

***[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], negligence need not be its only cause.] Negligence may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the negligence occurs if [such other cause was itself reasonably foreseeable and the negligence contributes substantially to producing such [loss] [injury] [or] [damage]] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the negligence and the negligence contributes substantially to producing it].**

NOTES ON USE FOR 412.7

1. Instruction 412.7a (legal cause generally) is to be given in all cases. Instruction 412.7b (concurring cause), to be given when the

court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether negligence was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his negligence by reason of some other cause concurring in time and contributing to the same damage. Instruction 412.7c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. The jury will properly consider instruction 412.7a not only in determining whether defendant's negligence is actionable but also in determining whether claimant's negligence contributed as a legal cause to claimant's damage, thus reducing recovery.

3. Instruction 412.7b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the occurrence or resulting injury. If there is an issue of aggravation of a preexisting condition or of subsequent injuries/multiple events, instruction 501.5a or b should be given as well. See *Hart v. Stern*, 824 So. 2d 927, 929–32 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So. 2d 833, 834–35 (Fla. 4th DCA 1992).

4. Instruction 412.7c (intervening cause) embraces two situations in which negligence may be a legal cause notwithstanding the influence of an intervening cause: (1) when the damage was a reasonably foreseeable consequence of the negligence although the other cause was not foreseeable, *Mozer v. Semenza*, 177 So. 2d 880 (Fla. 3d DCA 1965), and (2) when the intervention of the other cause was itself foreseeable, *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So. 2d 520 (Fla. 1980).

5. *"Probable" results.* The committee recommends that the jury not be instructed that the damage must be such as would have appeared "probable" to the actor or to a reasonably careful person at the time of the negligence. In cases involving an intervening cause, the term "reasonably foreseeable" is used in place of "probable." The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165 So. 2d 806, 810 (Fla. 1st DCA 1964); Prosser, TORTS 291 (3d ed.); 2 Harper & James, THE LAW OF TORTS 1137.

6. The term "substantially" is used throughout the instruction to describe the extent of contribution or influence negligence must have in order to be regarded as a legal cause. "Substantially" was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test of causation not only in relation to defendant's negligence, *Loftin v. Wilson*, 67 So. 2d 185, 191 (Fla. 1953), but also in relation to plaintiff's comparative negligence, *Shayne v. Saunders*, 176 So. 495, 498 (Fla. 1937).

(Revised December 4, 2024.)

412.8 ISSUES ON CLAIM AND BURDEN OF PROOF

The issues for you to decide on (claimant's) **claim are whether** (defendant or person for whose negligence defendant is responsible) **was negligent in** (describe negligence) **and, if so, whether such negligence was a legal cause of injury and damage to** (name)**.**

If the greater weight of the evidence does not support the claim of (claimant) **[against a particular defendant], your verdict should be for [that] defendant.**

[However, if the greater weight of the evidence supports the claim of (claimant) **you should also determine whether the amount of money paid by** (claimant) **to** (name) **was reasonable under all the circumstances shown by the evidence. If the greater weight of the evidence shows that the amount of money paid by** (claimant) **to** (name) **in settlement did not exceed a reasonable amount under all the circumstances, you should so find by your verdict. However, if the amount of money paid by** (claimant) **to** (name) **exceeded a reasonable amount, you should determine the amount which would have been reasonable under all the circumstances for** (claimant) **to pay** (name) **in settlement. The court will then determine the amount that** (claimant) **will recover from** (defendant)**.]**

[You should also determine by your verdict what percentage of the total negligence of [both] [all] parties to this action (name them) **you apportion to each of them. The court will then determine the amount of** (claimant's) **recovery.]**

NOTES ON USE FOR 412.8

1. Use the first two paragraphs in all cases. Use the first bracketed paragraph if there is an issue about the reasonableness of the amount paid in settlement. This instruction assumes that the burden of proving reasonableness — that the settlement paid the injured party was, under the circumstances, reasonable — is on the claimant.

2. If there is an issue about the reasonableness of the amount paid, use the applicable provisions of section 501 or 502 to describe the available elements of damage. See Model Instruction No. 5.

(Revised February 1, 2018.)

412.9 DEFENSE ISSUE

If, however, the greater weight of the evidence supports (claimant's) **claim, then you shall consider the defense raised by** (defendant)**. The issue for you to decide on that defense is whether** (claimant) **intentionally, willfully, wantonly or with reckless indifference to the rights of others caused or contributed to causing the injury of** (name)**.**

If the greater weight of the evidence supports that defense, then your verdict should be for (defendant)**. If, however, the greater weight of the evidence does not support that defense and does support** (claimant's) **claim, your verdict should be for** (claimant) **and you should determine by your verdict what percentage of the total negligence of** (name the parties other than the injured plaintiff) **you apportion to each of them.**

(Revised February 1, 2018.)

413 CLAIM FOR PERSONAL INJURY PROTECTION INSURANCE (PIP) BENEFITS (MEDICAL BENEFITS ONLY)

413.1 Introduction

413.2 Summary of Claims or Contentions

413.3 Greater Weight of the Evidence

413.4 Issues on Claim

413.5 Burden of Proof on Claim

413.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 413.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 413.1. See Model Instruction No. 1. Instruction 413.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 413.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including an explanation for the difference, such as where the court has directed a verdict on an issue.

2. "The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations." *Fla. R. Civ. P.* 1.470(b).

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla. R. Civ. P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge, as the judge reads the instructions aloud.

(Revised June 25, 2025.)

413.2 SUMMARY OF CLAIMS OR CONTENTIONS

The claims [and defenses] in this case are as follows. (Claimant) **claims that** (defendant) **is obligated to pay for certain medical expenses** (describe medical expenses)**.**

(Defendant) **denies that claim [and also claims that** (claimant) **was** (describe any affirmative defenses)**].**

The parties must prove all claims [and defenses] by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

413.3 GREATER WEIGHT OF THE EVIDENCE

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTES ON USE FOR 413.3

1. *Greater or lesser number of witnesses.* The committee recommends that no instruction be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. *Circumstantial evidence.* The committee has not drafted an instruction addressing circumstantial evidence and takes no position on whether such an instruction is needed. For criminal cases, see *Matter of Use by Trial Cts. of Standard Jury Instructions in Crim. Cases*, 431 So. 2d 594 (Fla. 1981).

(Revised February 11, 2026.)

413.4 ISSUES ON CLAIM

a. Issues generally:

(Plaintiff) **seeks personal injury benefits from** (defendant) **for [a medical service] [medical services].** (Plaintiff) **is entitled to [recover benefits] [receive payment] if the service[s] [is] [are] related to the accident, the service[s] [is] [are] medically necessary, and the charge[s] for the service[s] [is] [are] reasonable.**

(Give the following preemptive instruction only where rulings or stipulations have altered the number of issues to be proven.)

In this case, there is no dispute that [the service[s] [is] [are] related to the accident] [and] [that the service[s] [is] [are] medically necessary] [and] [that the charge[s] [is] [are] reasonable], but there is dispute over [whether the service[s] [is] [are] related to the accident] [and] [whether the service[s]]is] [are] medically necessary] [and] [whether the charge[s] for the service[s] [is] [are] reasonable].

(Give the following instruction in all cases. Alter numbering where required due to rulings or stipulations.)

Therefore, on this claim for personal injury benefits, you must decide the following:

The first issue is whether the service is related to the automobile accident of (date)**. If you decide that a service is not related to the accident, you should not award damages for that service. If you decide that one or more services are related to the accident, you must then decide a second issue.**

The second issue is whether the service is medically necessary. If you decide that a service was not medically necessary, you should not award damages for that service. If you decide that one or more services are medically necessary, you must then decide a third issue.

The third issue is whether the charge is reasonable. If you

find the charge for a service or services reasonable, you should award that amount as damages. If you find the charge for a service or services is not reasonable, you should award an amount that the greater weight of the evidence shows is reasonable.

In determining [these] [this] issue[s], you should apply the following definition[s]:

(Give applicable definitions below.)

b. Services:

The term "services" includes, but is not limited to, treatment, diagnostic studies, and supplies provided by the medical provider to the insured.

c. Medically Necessary:

"Medically necessary" refers to a medical service or supply that a prudent physician would provide for the purpose of preventing, diagnosing, or treating an illness, injury, disease, or symptom in a manner that is:

(1) In accordance with generally accepted standards of medical practice;

(2) Clinically appropriate in terms of type, frequency, extent, site, and duration; and,

(3) Not primarily for the convenience of the patient, physician, or other health care provider.

d. Reasonable Charge:

In deciding whether the amount of a charge is reasonable, you may consider evidence of:

(1) usual and customary charges and payments accepted by the provider involved in the dispute;

(2) reimbursement levels in the community;

(3) reimbursement levels in various federal and state medical fee schedules applicable to automobile coverages; and

(4) any other evidence relevant to the reasonableness of the charges.

You may not, however, award an amount that exceeds the amount the provider customarily charges for like services or supplies.

NOTES ON USE FOR 413.4

1. This instruction assumes that the jury will be asked to decide the total amount of medical charges. It is anticipated that the judge will adjust this award in entering judgment to account for any payments previously made by the insurer, as well as for the effect of the 80% limitation in *F.S.* 627.736(1)(a), and any deductible.

2. The definition of "medically necessary" is based on *F.S.* 736.732(2) (2003). The committee has added the option of a "prudent health care provider" to this definition in anticipation that the phrase, "prudent physician," as described in the statute could sometimes be inadequate. This statutory definition is somewhat complex. It is possible that the parties could agree upon a plainer and simpler definition.

3. The statutory description of what constitutes a reasonable amount may require a supplemental instruction for fee-capped diagnostic testing services as described in *F.S.* 627.736(5)(b) (2003).

4. No definition of "related" is provided in this instruction. Causation can be a complex issue in a PIP case. Generally, to invoke this insurance coverage a bodily injury must "arise out of the ownership, maintenance, or use of a motor vehicle." See *F.S.* 768.736(1) (2003); *Lumbermens Mutual Casualty Co. v. Castagna*, 368 So. 2d 348 (Fla. 1979). The medical treatment covered by the insurance policy is the treatment that is related to the bodily injury arising out of the ownership, maintenance, or use of the motor

vehicle. The committee has been advised that most practitioners prefer to use the term, "related," as a simple method to explain causation to the jury. The committee does not therefore intend for an instruction similar to *F.S.* 401.12 to be given in a PIP case as an explanation of causation.

413.5 BURDEN OF PROOF ON CLAIM

If the greater weight of the evidence does not support the claim of (plaintiff)**, then your verdict should be for** (defendant)**.**

However if the greater weight of the evidence does support (plaintiff's) **claim, then your verdict should be for** (plaintiff) **and against** (defendant) **and you should award** (plaintiff) **an amount of money that the greater weight of the evidence shows will fairly and adequately compensate [him] [her] [it] for the medical [benefits] [services] that are related to the accident, were medically necessary, and the charge[s] for which are reasonable.**

(Give when defenses to the claim have been raised.)

If, however, the greater weight of the evidence does support the claim of (plaintiff)**, then you shall consider the defense[s] raised by** (defendant)**. On the defense, the issue[s] for you to decide [is] [are]** (describe defense)**.**

If the greater weight of the evidence supports the (defendant's) **defense[s], your verdict should be for the** (defendant) **and against** (plaintiff)**. But if the greater weight of the evidence does not support** (defendant's) **defense[s] and the greater weight of the evidence supports** (plaintiff's) **claim, then your verdict should be for** (plaintiff) **and against** (defendant) **and you should award** (plaintiff) **an amount of money that the greater weight of the evidence shows will fairly and adequately compensate [him] [her] [it] for to the medical [benefits] [services] that are related to the accident, were medically necessary, and the charge[s] for which are reasonable.**

(Proceed to sections 600 and 700 for closing instructions.)

414 INTENTIONAL TORT AS AN EXCEPTION TO EXCLUSIVE REMEDY OF WORKERS' COMPENSATION

414.1 Introduction

414.2 Summary of Claims

414.3 Clear and Convincing Evidence

414.4 Legal Cause

414.5 Issues on Claim

414.6 Burden of Proof

414.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 414.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 414.1. See Model Instruction No. 1. Instruction 414.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 414.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including an explanation for the difference, such as where the court has directed a verdict on an issue.

2. "The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations." *Fla. R. Civ. P.* 1.470(b).

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla. R. Civ. P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge, as the judge reads the instructions aloud.

(Revised June 25, 2025.)

414.2 SUMMARY OF CLAIMS

The claims [and defenses] in this case are as follows. (Claimant) **claims that** (defendant) **caused [him] [her] harm by** (describe alleged intentional tort)**.**

(Defendant) **denies that claim [and also claims that** (describe any alleged affirmative defenses)**].**

[The parties] [(Claimant)**] must prove [his] [her] [their] claims by the clear and convincing evidence. I will now define some of the terms you will use in deciding this case.**

NOTE ON USE FOR 414.2

The committee takes no position on the burden of proof that will be applicable to affirmative defenses. If the court determines that the burden of proof for any affirmative defense is the "greater weight of the evidence," the instruction should be modified and instruction 401.3 should also be given.

414.3 CLEAR AND CONVINCING EVIDENCE

[“Clear and convincing evidence” differs from the “greater weight of the evidence” in that it is more compelling and persuasive.] “Clear and convincing evidence” is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

NOTE ON USE FOR 414.3

Use the first bracketed sentence if there are issues or other claims in the case that invoke the greater weight of the evidence standard.

414.4 LEGAL CAUSE

a. Legal cause generally:

A party's conduct is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the conduct, the [loss] [injury] [or] [damage] would not have occurred.

b. Concurring cause:

In order to be regarded as a legal cause of [loss] [injury] [or] [damage] the conduct need not be the only cause. A party's conduct may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with some other cause if the conduct contributes substantially to producing such [loss] [injury] [or] [damage].

c. Intervening cause:

*Do not use the bracketed first sentence if this charge is preceded by the charge on concurring cause:**

***[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], a party's conduct need not be its only cause.] A party's conduct may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the party's conduct occurs if such other cause was itself reasonably foreseeable and the party's conduct contributes substantially to producing such [loss] [injury] [or] [damage] [or] [the resulting [loss] [injury] [or] [damage]] was a reasonably foreseeable consequence of the party's conduct and the party's conduct contributes substantially to producing it.**

NOTES ON USE FOR 414.4

1. Instruction 414.4a (legal cause generally) is to be given in

all cases. Instruction 414.4b (concurring cause), to be given when the court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether conduct was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his or her conduct by reason of some other cause concurring in time and contributing to the same damage. Instruction 414.4c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. The jury will properly consider instruction 414.4a not only in determining whether defendant's conduct is actionable but also in determining whether claimant's conduct contributed as a legal cause to claimant's damage, thus reducing recovery.

3. Instruction 414.4b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the occurrence or resulting injury. If there is an issue of aggravation of a preexisting condition or of subsequent injuries/multiple events, instruction 501.2h(1) or (2) should be given as well. See *Hart v. Stern*, 824 So. 2d 927, 929–32 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So. 2d 833, 834–35 (Fla. 4th DCA 1992).

4. Instruction 414.4c (intervening cause) embraces two situations in which conduct may be a legal cause notwithstanding the influence of an intervening cause: (1) when the damage was a reasonably foreseeable consequence of the conduct although the other cause was not foreseeable, *Mozer v. Semenza*, 177 So. 2d 880 (Fla. 3d DCA 1965), and (2) when the intervention of the other cause was itself foreseeable, *Ellingson v. Willis*, 170 So. 2d 311 (Fla. 1st DCA 1964).

5. *"Probable" results.* The committee recommends that the jury not be charged that the damage must be such as would have appeared "probable" to the actor or to a reasonably careful person at the time of the outrageous conduct. In cases involving an intervening cause, the term "reasonably foreseeable" is used in place of "probable." The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165 So. 2d 806, 810 (Fla. 1st DCA 1964); Prosser,

TORTS (3d ed.) 291; 2 Harper & James, THE LAW OF TORTS 1137.

6. The term "substantially" is used throughout the charge to describe the extent of contribution or influence outrageous conduct must have in order to be regarded as a legal cause. "Substantially" was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test of causation not only in relation to defendant's negligence, *Loftin v. Wilson*, 67 So. 2d 185, 191 (Fla. 1953), but also in relation to plaintiff's comparative negligence, *Shayne v. Saunders*, 129 Fla. 355, 176 So. 495, 498 (1937).

(Revised December 4, 2024.)

414.5 ISSUES ON CLAIM

The issues you must decide on (claimant's) **claim against** (defendant) **are whether:**

1. (Defendant) **deliberately intended to injure** (claimant)**, or**

2. **whether** (defendant)

   (a) **engaged in conduct that** (defendant) **knew, based upon [prior similar accidents] [or] [explicit warnings specifically identifying a known danger], was virtually certain to result in death or injury to** (claimant)**; and**

   (b) (claimant) **was not aware of the risk because the danger was not apparent; and**

   (c) (defendant) **deliberately concealed or misrepresented the danger so as to prevent** (claimant) **from exercising an informed judgment;**

and, if so, whether that conduct was a legal cause of [loss] [injury] [or] [damage] to (claimant)**.**

NOTE ON USE FOR 414.5

This instruction applies to causes of action accruing on or after October 1, 2003. See *F.S.* 440.11 (2003) (codifying intentional tort exception to workers' compensation immunity and modifying standard announced in *Turner v. PCR Inc.*, 754 So. 2d 683 (Fla. 2000)); see also *Travelers Indemnity Co. v. PCR, Inc.*, 889 So. 2d 779, n.5 (Fla. 2004) (discussing legislature's codification of intentional tort exception and new, heightened virtual certainty standard).

414.6 BURDEN OF PROOF

If the clear and convincing evidence does not support [one or more of] (claimant's) **claim[s], your verdict should be for** (defendant(s)) **[on [that] [those] claim(s)].**

However, if the clear and convincing evidence supports [one or more of] (claimant's) **claim[s], then your verdict should be for** (claimant) **and against** (defendant) **[on [that] [those] claim(s)].**

[If, however, the clear and convincing evidence supports [(claimant's) **claim] [one of more of** (claimant's) **claims], then you shall consider the defense[s] raised by** (defendant)**.]**

415 UNLAWFUL RETALIATION UNDER FLORIDA'S PRIVATE SECTOR WHISTLEBLOWER ACT

415.1 Introduction

415.2 Summary of Claims and Defenses

415.3 Greater Weight of the Evidence

415.4 Retaliation

415.5 Preliminary Issue – Adverse Employment Action

415.6 Burden of Proof on Preliminary Issue

415.7 Protected Activity

415.8 Legal Cause – Retaliation

415.9 Legal Cause – Damage

415.10 Issues on Plaintiff's Claim

415.11 Burden of Proof on Claim

415.12 Unlawful Retaliation Damages

415.13 Defense Issue on Damages (Mitigation-Discharge)

415.14 Reduction of Damages to Present Value

NOTE ON USE FOR 415

The instructions in this section are based upon *F.S.* 448.101–105 (Florida's private-sector whistleblower provisions). As to the right to trial by jury, see *Fox v. City of Pompano Beach*, 984 So. 2d 664 (Fla. 4th DCA 2008), and *O'Neal v. Fla. A & M University*, 989 So. 2d 6 (Fla. 1st DCA 2008) (right to jury trial pursuant to the Whistleblower Act, *F.S.* 112.3187-31895); *Rodriguez v. Casson-Mark Corp.*, 2008 WL 2949520 (M.D. Fla. July 28, 2008) (right to jury trial pursuant to the private-sector whistleblower's provisions, *F.S.* 448.101-105).

(Revised September 16, 2026.)

415.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 415.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 415.1. See Model Instruction 1. Instruction 415.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 415.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including an explanation for the difference, such as where the court has directed a verdict on an issue.

2. "The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations." *Fla. R. Civ. P.* 1.470(b).

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla. R. Civ. P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge, as the judge reads the instructions aloud.

(Revised June 25, 2025.)

415.2 SUMMARY OF CLAIMS AND DEFENSES

The claim[s] in this case [is] [are] as follows: (Claimant) **claims that** (defendant) **retaliated against [him] [her] by** (describe defendant's alleged action) **because** (claimant) **engaged in protected activity by** (describe activity which claimant alleges caused retaliatory action)**, and that the** (describe defendant's alleged action) **caused [him] [her] damage.**

(Defendant) **denies that claim [and also claims that] [**(claimant) **failed to reduce [his] [her] damages by seeking other similar employment] [and] [**(describe any other affirmative defense)**].**

[(Claimant)**] [The parties] must prove [his] [her] [all] claim(s) [and defenses] by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.**

(Revised June 30, 2021.)

415.3 GREATER WEIGHT OF THE EVIDENCE

Greater weight of the evidence means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTES ON USE FOR 415.3

1. *Greater or lesser number of witnesses.* The committee recommends that no charge be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. *Circumstantial evidence*. The committee has not drafted an instruction addressing circumstantial evidence and takes no position on whether such an instruction is needed. For criminal cases, see *Matter of Use by Trial Cts. of Standard Jury Instructions in Crim. Cases*, 431 So. 2d 594 (Fla. 1981).

(Revised February 11, 2026.)

415.4 RETALIATION

Retaliation means [discharging] [or] [demoting] [or] [suspending] [or] [taking [other] adverse employment action against] an employee because the employee engaged in [a] protected activit[y] [ies].

NOTES ON USE FOR 415.4

1. While the statute, *F.S.* 448.102, uses the term "retaliatory personnel action," the definition of that term contained in *F.S.* 448.101(5) encompasses the term "adverse employment action," which the committee has elected to use because it is plain English and more commonly used in Florida and federal case law.

2. The definition of retaliation is derived from *F.S.* 448.101(5) and *F.S.* 448.102, Florida and federal case law interpreting *F.S.* 448.101, and other similar Florida and federal employment law statutes, such as Title VII of the Civil Rights Act of 1964, as amended.

3. In cases where a different adverse employment action is alleged in addition to, or instead of, discharge, demotion, or suspension, or where the parties do not agree that an alleged action constitutes an adverse employment action, then use Instruction 415.5, below.

(Revised November 22, 2017; revised June 30, 2021.)

415.5 PRELIMINARY ISSUE — ADVERSE EMPLOYMENT ACTION

On (claimant's) **claim there is a preliminary issue for you to decide. That issue is whether** (describe the alleged conduct) **was an adverse employment action.**

An adverse employment action is any action taken by the employer against the employee that amounts to a serious and material change in the employee's terms and conditions of employment.

NOTES ON USE 415.5

1. Use instruction 415.5 when plaintiff claims that the defendant took an adverse employment action other than discharge, demotion, or suspension and the defendant disputes that such action constitutes an adverse employment action.

2. Florida and federal courts have determined that an adverse employment action requires a serious and material change in the employee's terms and conditions of employment. *Davis v. Town of Lake Park* 245 F.3d 1232 (11th Cir. 2001) (to prove adverse employment action in a case under Title VII, an employee must show a serious and material change in the terms and conditions of employment), *overruled on other ground by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). Courts have found that certain actions besides discharge, demotion, and suspension may constitute an adverse employment action under *F.S.* 448.101 and other similar federal and state employment law statutes. *See*, *e.g.*, *Finch v. Morgan Stanley & Co. LC*, 2016 WL 4248248 (S.D. Fla. August 10, 2016) (denial of leave time may constitute an adverse employment action under Section 448.101); *Miami-Dade County v. Eghbal*, 54 So. 3d 525 (Fla. 3d DCA 2011) (denial of promotion is adverse employment action under Florida Civil Rights Act); *Hill v. Branch Banking and Trust Co.*, 264 F. Supp. 3d 1247 (N.D. Ala. 2017) (negative performance valuations are only adverse employment actions under Title VII when a link can be shown between the review and an alteration of the terms of employment); *Brown v. Snow*, 440 F.3d 1259 (11th Cir. 2006) (a lower score on a performance evaluation, by itself, is not actionable

unless the plaintiff can establish that the lower score led to a more tangible form of adverse action, such as ineligibility for promotional opportunities).

(Adopted June 30, 2021.)

415.6 BURDEN OF PROOF ON PRELIMINARY ISSUE

If the great weight of the evidence does not support (claimant's) **claim on this issue, that** (describe alleged conduct) **was an adverse employment action, then [your verdict on the claim of** (claimant)**] *[your decision on this issue] should be for** (defendant)**.**

However, if the greater weight of the evidence supports the claim of (claimant) **on this issue, that** (describe the alleged conduct) **was an adverse employment action, your decision on this issue should be for** (claimant)**. You shall then decide the other issues on** (claimant's) **claim.**

NOTE ON USE FOR 415.6

1. Give instruction 415.6 if instructing the jury on the preliminary issue from instruction 415.5.

2. Give the second bracketed portion of the charge in the first paragraph when plaintiff claims defendant imposed adverse employment action in addition to discharge, suspension, or demotion.

(Adopted June 30, 2021.)

415.7 PROTECTED ACTIVITY

Protected activity is:

[disclosing] [or] [threatening to disclose] to (appropriate governmental agency)**, under oath, in writing, an activity, policy or practice of** (defendant) **that violated** (describe law, rule or regulation)**] [or]**

[providing information to] [or] [testifying before] (appropriate governmental agency, person or entity)**, which was conducting an [investigation,] [hearing] [or] [inquiry] into an alleged violation of** (describe law, rule or regulation) **by** (defendant)**] [or]**

[objecting to (defendant's) **activity, policy, or practice that violated** (describe law, rule, or regulation)**] [or] [refusing to participate in** (defendant's) **activity, policy or practice that violated** (describe law, rule, or regulation)**] [or] [would have violated]** (describe law, rule or regulation)**, had** (plaintiff) **participated].**

NOTES ON USE FOR 415.7

1. The bracketed language is derived from *F.S.* 448.102(1), (2) and (3).

2. There is a split of authority on the issue of whether, under *F.S.* 448.102(3), a claimant must prove an actual violation of a law, rule, or regulation as opposed to a reasonable, good faith belief that a violation has occurred. Compare *Aery v. Wallace Lincoln-Mercury, LLC*, 118 So. 3d 904 (Fla. 4th DCA 2013) (holding employee need only have a good faith, objectively reasonable belief that the employer's actions that he objected to were illegal) with *Kearns v. Farmer Acquisition Co.*, 157 So. 3d 458 (Fla. 2nd DCA 2015) (holding employee was required to prove he objected to an actual violation of law or refusal to participate in activity that would have been an actual violation of law).

[Editor's Note: See *Gessner v. S. Co.,* SC2024-1835 (Fla. May 28, 2026) (agreeing with *Kearns* and disapproving *Aery*).]

(Revised November 22, 2017;
June 30, 2021.)

415.8 LEGAL CAUSE — RETALIATION

Protected activity is a legal cause of [discharge] [suspension] [demotion] [or] [(describe adverse employment action)**] if the [discharge] suspension] [demotion] [or] [**(describe other adverse employment action)**] was taken against** (claimant) **because** (claimant) **engaged in protected activity.**

To determine that (defendant) (describe adverse employment action) (claimant) **because of** (claimant's) (describe protected activity)**, you must decide that** (defendant) **would not have** (describe adverse employment action) (claimant) **if** (claimant) **had not** (describe protected activity)**.**

NOTES ON USE FOR 415.8

1. This instruction is based on *F.S.* 448.102 and 448.103(c) and case law. *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013) (holding that because Title VII's retaliation provision was established when the employer took an adverse employment action "because" the employee engaged in protected activity mandated a "but for" causation standard); *Palm Beach County Sch. Bd. v. Wright*, 217 So. 3d 163 (Fla. 4th DCA 2017) (en banc) (applying *Nassar* in rejecting the "wholly unrelated" causation standard and applying Title VII's "but for" causation standard to Florida Civil Rights Act claim, because the Florida statute was patterned after the federal statute); *Village of Tequesta v. Luscavich*, 240 So. 3d 733 (Fla. 4th DCA 2018) (applying *Nassar* and *Wright* to hold that a Florida Civil Rights Act retaliation claim was subject to the "but for" causation standard); *Sierminski v. Transouth Financial Corp.*, 216 F.3d 945 (11th Cir. 2000) (Title VII retaliation analysis applied to claim arising under Florida's private-sector whistle-blower provisions).

2. Florida courts have followed federal case law construing the retaliation provisions in Title VII when deciding cases under the Florida whistle-blower statutes and the Florida Civil Rights Act, because those Florida statutes were patterned after Title VII. *Rice-Lamar v. City of Ft. Lauderdale*, 853 So. 2d 1125 (Fla. 4th DCA 2003) (Title VII retaliation analysis applied to claim arising under Florida's

Public Sector Whistle-blower Act); *Carter v. Health Mgmt. Assoc.*, 989 So. 2d 1258 (Fla. 2d DCA 2008) (Florida courts apply federal case law interpreting Title VII to claims under the Florida Civil Rights Act).

3. The court may need to give additional instructions that further explain the employee's burden of proof as against the employer's defenses. See*, e.g.*, *City of Hollywood v. Hogan*, 986 So. 2d 634 (Fla. 4th DCA 2008) (relying upon federal case law interpreting Title VII, holding that employer may fire employee for good reason, bad reason, reason based on erroneous facts, or for no reason at all, as long as its action is not for discriminatory reason); *Department of Corrections v. Chandler*, 582 So. 2d 1184 (Fla. 1st DCA 1991) (same).

(Revised June 30, 2021.)

415.9 LEGAL CAUSE — DAMAGE

Retaliation is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such damage, so that it can reasonably be said that, but for the [discharge] [suspension] [demotion] [or] [(describe adverse employment action)**], the [loss] [injury] [or] [damage] would not have occurred.**

(Revised June 30, 2021.)

415.10 ISSUES ON PLAINTIFF'S CLAIM

The law prohibits an employer from retaliating against an employee for engaging in protected activity.

The [next] issue(s) you must decide on the claim of (claimant) **against** (defendant) **[is] [are] whether** (defendant) **retaliated against** (claimant) **by [discharging] [suspending] [demoting] [him] [her] [or] [**(describe defendant's alleged action)**] because** (claimant) **engaged in protected activity and, if so, whether the retaliation was a legal cause of [loss] [injury] or [damage] to** (claimant)**.**

NOTE ON USE FOR 415.10

If there are issues concerning vicarious liability that require a preemptive instruction or jury resolution, see (and modify, as necessary) instructions 401.13, 401.14, and 401.17.

(Revised November 22, 2017; June 30, 2021.)

415.11 BURDEN OF PROOF ON CLAIM

If the greater weight of the evidence does not support the claim of (claimant) **then your verdict should be for** (defendant)**.**

However, if the greater weight of the evidence supports the claim of (claimant)**, [then your verdict should be for** (claimant) **and against** (defendant)**] [then you shall consider the defense[s] raised by** (defendant)**].**

[If the greater weight of the evidence supports the defense, your verdict should be for (defendant)**. However, if the greater weight of the evidence does not support the defense, your verdict should be for** (claimant) **and against** (defendant)**.]**

415.12 UNLAWFUL RETALIATION DAMAGES

If you find for (defendant)**, you will not consider the matter of damages. But if you find for** (claimant)**, you should award** (claimant) **an amount of money that the greater weight of the evidence shows will fairly and adequately compensate [him] [her] for such damage, including any such damage as** (claimant) **is reasonably certain to incur in the future. You shall consider the following elements:**

[any] [the difference between] lost wages and benefits to the date of trial [and what (claimant) **earned during that time].**

[any wages and benefits to be lost in the future.]

(other compensatory damages allowable at law.)

[any emotional pain and mental anguish experienced in the past or to be experienced in the future. There is no exact standard for measuring such damages. The amount should be fair and just in the light of the evidence.]

NOTES ON USE FOR 415.12

1. As to whether future lost wages, (*i.e.*, "front pay") are awardable in a jury trial pursuant to *F.S.* 448.103(2), see *U.S. E.E.O.C. v. W & O, Inc.*, 213 F.3d 600, 619 (11th Cir. 2000) (front pay is equitable remedy in Title VII case and is not decided by jury); *O'Neal v. Fla. A&M Univ.*, 989 So. 2d 6 (Fla. 1st DCA 2008) (under Florida's Whistle-blower Act, front pay is equitable relief).

2. As to whether emotional damages are awardable in a jury trial pursuant to *F.S.* 448.103(2), see *McIntyre v. Delhaize America, Inc.*, 2009 WL 161708 (M.D. Fla. January 22, 2009) and *Wood v. Cellco P'ship.*, 2007 WL 917300 (M.D. Fla. March 23, 2007) (damages for emotional distress recoverable in whistle-blower action pursuant to *F.S.* 448.103); *Scott v. Otis Elevator Co.*, 572 So. 2d 902 (Fla. 1990) (damages for emotional distress recoverable in retaliatory discharge action pursuant to provision of workers' compensation act, *F.S.*

440.205).

(Revised November 22, 2017.)

415.13 DEFENSE ISSUE ON DAMAGES (MITIGATION — DISCHARGE)

As a defense to (claimant's) **damages claim for retaliatory discharge,** (defendant) **claims that** (claimant) **could have reduced [his] [her] damages by making a reasonable effort to [seek] [retain] comparable employment. Comparable employment means alternative employment similar to** (claimant's) **former job in the nature of the work, responsibilities and skills required.** (Claimant) **need not accept employment that is unsuitable or demeaning when compared with** (claimant's) **former job.**

If the greater weight of the evidence supports (defendant's) **claim that there was comparable employment available to** (claimant) **and that** (claimant) **failed to make a reasonable effort to [seek] [keep] such employment, then you should reduce any damages you award to** (claimant) **by the amount that** (claimant) **could have earned from the comparable employment.**

If however, the greater weight of the evidence does not support (defendant's) **claim that there was comparable employment available to** (claimant) **and that** (claimant) **failed to make a reasonable effort to [seek] [retain] that employment, then your verdict should be for** (claimant) **in the total amount of [his] [her] damages for lost wages and benefits.**

NOTES ON USE FOR 415.13

1. This instruction does not use the term "duty to mitigate" because this is more accurately an application of the doctrine of avoidable consequences and "duty" implies a mandatory obligation. See *System Components Corp. v. Fla. Dep't of Transp.*, 14 So. 3d 967, 982 (Fla. 2009).

2. As to plaintiff's "duty to mitigate" damages in cases involving wrongful discharge, see *Zayre Corp. v. Creech*, 497 So. 2d 706, 708 (Fla. 4th DCA 1986); *Juvenile Diabetes Research Foundation v. Rierman*, 370 So. 2d 33, 36 (Fla. 3d DCA 1979); *Punkar v. King Plastic Corp.*, 290 So. 2d 505, 508 (Fla. 2d DCA 1974).

415.14 REDUCTION OF DAMAGES TO PRESENT VALUE

Any amount of damages which you allow for wages and benefits to be lost in the future should be reduced to its present money value, and only the present money value of those future economic damages should be included in your verdict.

The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate (claimant) **for these losses as they are actually experienced in future years.**

NOTES ON USE FOR 415.14

1. Designing a standard instruction for reduction of damages to present value is complicated by the fact that there are several different methods used by economists and courts to arrive at a present value determination. See, *e.g.*, *Delta Air Lines, Inc. v. Ageloff*, 552 So. 2d 1089 (Fla. 1989) and *Renuart Lumber Yards v. Levine*, 49 So. 2d 97 (Fla. 1950) (using approach similar to calculation of cost of annuity); *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), and *Loftin v. Wilson*, 67 So. 2d 185 (Fla. 1953) (lost stream of income approach); *Beaulieu v. Elliott*, 434 P. 2d 665 (Alaska 1967) (total offset method); *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982) and *Seaboard Coast Line R.R. Co. v. Garrison*, 336 So. 2d 423 (Fla. 2d DCA 1976) (discussing real interest rate discount method and inflation/market rate discount methods); and *Bould v. Touchette*, 349 So. 2d 1181 (Fla. 1977) (even without evidence, juries may consider effects of inflation).

2. Until the Florida Supreme Court or the legislature adopts one approach to the exclusion of other methods of calculating present money value, the committee assumes that the present value of future economic damages is a finding to be made by the jury on the evidence; or, if the parties offer no evidence to control the finding, that the jury will properly resort to its own common knowledge as guided by instruction 415.14 and by argument. See *Seaboard Coast Line R.R. Co. v. Burdi*, 427 So. 2d 1048 (Fla. 3d DCA 1983).

417 UNLAWFUL EMPLOYMENT DISCRIMINATION UNDER FLORIDA CIVIL RIGHTS ACT OF 1992

417.1 Introduction

417.2 Summary of Claims and Defenses

417.3 Greater Weight of the Evidence

417.4 Discrimination

417.5 Harassment

417.6 Retaliation

417.7 Issues on Plaintiff's Claim

417.8 Legal Cause

417.9 Burden of Proof on Claim

417.10 Affirmative Defense—Employer's Reasonable Efforts to Prevent Harassment

417.11 Unlawful Discrimination Damages

417.12 Affirmative Defenses

417.13 Legal Cause — Damage

417.14 Reduction of Damages to Present Value

NOTE ON USE

The instructions in this section are based upon the Florida Civil Rights Act of 1992 (FCRA), which makes it unlawful for an employer to discriminate based upon race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status. *F.S.* 760.10. The instructions are based on both Florida law and, where appropriate, federal cases. Florida courts look to federal case law construing Title VII. See *Speaks v. City of Lakeland*, 315 F. Supp.2d 1217, 1223 n14 (M.D. Fla. 2004) (citing *Byrd v. Richardson–Greenshields Securities, Inc.*, 552 So. 2d 1099, 1102 (Fla. 1989); *Fla. Dep't of Cmty. Affairs v. Bryant*, 586 So. 2d 1205 (Fla. 1st DCA 1991); *Resley v. Ritz–Carlton Hotel Co.*, 989 F. Supp. 1442, 1446–47 (M.D. Fla.1997); see also *Hinton v. Supervision Intern., Inc.*, 942 So. 2d 986 (Fla. 5th DCA

2006); *Castleberry v. Edward M. Chadbourne, Inc.*, 810 So. 2d 1028, 1030 n.3 (Fla. 1st DCA 2002) ("[FCRA] is patterned after Title VII, and therefore federal case law regarding Title VII is applicable.").

(Revised June 17, 2026.)

417.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning, and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 417.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 417.1. See Model Instruction 1. Instruction 417.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 417.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including an explanation for the difference, such as when the court has directed a verdict on an issue.

2. "The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations." *Fla. R. Civ. P.* 1.470(b).

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla. R. Civ. P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge, as the judge reads the instructions aloud.

(Adopted April 7, 2017, revised June 25, 2025.)

417.2 SUMMARY OF CLAIMS AND DEFENSES

The claim[s] [and defenses] in this case [is] [are] as follows:

[(Claimant) **[first] claims that** (defendant) **discriminated against [him] [her] by [discharging] [failing to hire] [**(describe discriminatory treatment)**] [him] [her] because of [his] [her] [race] [color] [religion] [sex] [pregnancy] [national origin] [age] [handicap] [marital status], and that the** (describe discriminatory treatment) **caused [him] [her] damage.]**

[(Claimant) **[also] claims that [he] [she] was subject to harassment because of [his] [her] [race] [color] [religion] [sex] [pregnancy] [national origin] [age] [handicap] [marital status], [that the employer failed to stop the harassment,] and that the harassment caused [him] [her] damage.]**

[(Claimant) **[also] claims that** (defendant) **retaliated against [him] [her] by [discharging] [suspending] [demoting] [**(describe alleged retaliatory treatment)**] [him] [her] because [he] [she] [reasonably opposed [unlawful discrimination] [an unlawful employment practice]] [or] [filed a charge of discrimination] [**(describe other participation)**], and that the** (describe retaliatory treatment) **caused [him] [her] damage.]**

(Defendant) **denies [that] [those] claim(s) [and also claims that** (describe any affirmative defenses)**].**

[(Claimant)**] [The parties] must prove [his] [her] [their] claim(s) by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.**

NOTE ON USE FOR 417.2

This instruction is designed to introduce the types of claims brought under the Florida Civil Rights Act, whether disparate treatment, harassment, or retaliation. Parties will select only those introductory paragraphs for the claims that will be submitted to the jury.

(Adopted April 6, 2017, revised December 4, 2024, revised June 17, 2026.)

417.3 GREATER WEIGHT OF THE EVIDENCE

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTES ON USE FOR 417.3

1. *Greater or lesser number of witnesses.* The committee recommends that no charge be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. *Circumstantial evidence.* The committee has not drafted an instruction addressing circumstantial evidence and takes no position on whether such an instruction is needed. For criminal cases, see *Matter of Use by Trial Cts. of Standard Jury Instructions in Crim. Cases*, 431 So. 2d 594 (Fla. 1981).

3. *"Preponderance of evidence"* and *"burden of proof."* The committee recommends that no charge be given using these terms, which are considered not helpful to a jury and not necessary in a charge that otherwise defines "greater weight of the evidence" and instructs the jury on the consequences of its determining that the greater weight of the evidence supports or does not support the claim or defense of a party.

(Adopted April 6, 2017, revised February 11, 2026.)

417.4 DISCRIMINATION — DISPARATE TREATMENT

To "discriminate" means to treat an [employee] [applicant] differently with regard to compensation, terms, conditions, or privileges of employment because of the [employee's] [applicant's] [race] [color] [religion] [sex] [pregnancy] [national origin] [age] [handicap] [marital status].

NOTES ON USE FOR 417.4

1. This instruction is for disparate treatment claims, as opposed to hostile environment, pattern and practice, or disparate impact claims. See, *e.g.*, *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263 (11th Cir. 2000) (explaining differences among disparate treatment, pattern and practice, and disparate impact claims of discrimination).

2. This instruction is based upon *F.S.* 760.10(1), which makes it an unlawful employment practice for an employer "(a) [t]o discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment" or "(b) [t]o limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee" when those employment practices taken are "because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status." This instruction can be modified to reflect the particular type of discriminatory treatment at issue.

(Adopted April 6, 2017.)

417.5 HARASSMENT

a. Sexual Harassment — Tangible Employment Action — Quid Pro Quo:

NOTE ON USE FOR 417.5a.

Florida appellate courts have recognized under the Florida Civil Rights Act of 1992 ("FCRA") sexual harassment claims involving an employer's taking adverse employment action (such as discharge or demotion) against an employee for the employee's refusal of demands to engage in a romantic or sexual relationship. See *Branch-McKenzie v. Broward Cnty. Sch. Bd.*, 254 So. 3d 1007, 1012 (Fla. 4th DCA 2018) (referring to such a claim as a "quid pro quo" claim); *Blizzard v. Appliance Direct, Inc.*, 16 So. 3d 922, 926 (Fla. 5th DCA 2009) (referring to this claim as a "tangible employment action" claim). Such claims were historically labelled as "quid pro quo" claims under federal law and were a separate and distinct type of claim from "hostile environment" claims. *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1564 (11th Cir. 1987) (defining quid pro quo claim and establishing elements). However, in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998), the U.S. Supreme Court reclassified sexual harassment claims based on whether or not they resulted in a "tangible employment action." Thus, after *Ellerth* and *Faragher*, quid pro quo claims in which an adverse employment action was taken became "tangible employment action" claims. After *Ellerth* and *Faragher*, to avoid confusion, federal courts do not generally use the term "quid pro quo." See *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1311 (11th Cir. 2001). Florida courts have used both terms subsequent to *Ellerth* and *Faragher*, apparently as equivalents. Pending further development in the law, the committee offers no standard instruction, leaving it up to the parties to propose instructions on a case-by-case basis.

b. Harassment — No Tangible Action — Hostile Work Environment:

(Claimant) **[also] claims that [his] [her] [supervisor] [and] [or] [[a] coworker[s]] harassed [him] [her] because of [his] [her] [race] [color] [religion] [sex] [pregnancy] [national origin] [age] [handicap]**

[marital status] and that the harassment created a hostile work environment. (Defendant) **denies** (claimant's) **claims [and [asserts that** (describe the defendant's defense)**].**

To succeed on this claim, (claimant) **must prove each of the following facts by the greater weight of the evidence:**

First, (claimant) **is a member of a protected class on account of [his] [her] [race] [color] [religion] [sex] [pregnancy] [national origin] [age] [handicap] [marital status]; [the parties have stipulated that** (claimant) **is a member of [that] [those] protected class[es]];**

Second, (claimant) **was subjected to unwelcome harassment, such as [sexual advances] [requests for sexual favors] [other conduct of a sexual nature] [abusive or demeaning actions or comments];**

Third, the harassment was based on (claimant's) (insert protected class(es))**;**

Fourth, the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment;

For the harassment to be sufficiently severe or pervasive that it altered the terms and conditions of (claimant's) **employment, [he] [she] must establish [he] [she] believed the offensive acts or statements were severe or pervasive, and must also establish that a reasonable person would have found them to be severe or pervasive.**

To decide whether the harassment in this case was so severe or pervasive that it altered the terms or conditions of (claimant's) **employment, you should consider all the circumstances, including how often the discriminatory conduct occurred; its severity; whether it was physically threatening or humiliating; and whether it unreasonably interfered with** (claimant's) **work performance.**

For cases involving only coworkers, not supervisors:

[Finally, in addition to the previous elements, (claimant) **must prove that** (defendant) **knew or should have known of the harassment, and failed to take prompt remedial action.]**

NOTES ON USE FOR 417.5b.

1. This instruction is for use in cases involving a hostile work environment that does not also include a tangible adverse employment action. The instruction is designed to be used either for harassment of a sexual nature, or harassment by hostile or abusive conduct towards someone because of his or her protected class. The instruction is designed to be used either for harassment by supervisory employees or by coworkers. In the latter case, the instruction should include all five elements of the claim. In the case of harassment by a direct supervisor, the fifth element is not included in the prima facie case. See *Grogan v. Heritage NH, LLC*, 126 So. 3d 262, 264 (Fla. 3d DCA 2010). Instead, the defendant may attempt to establish the defense established in *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

2. Although harassment cases usually involve harassing conduct by fellow employees, courts have recognized that employers have a duty to protect employees from third parties, such as customers, as well. *Beckford v. Dep't of Corr.*, 605 F.3d 951, 957–58 (11th Cir. 2010). In such a case, the instruction should be modified appropriately, using the same standards for third parties as coworkers. *Id.* at 960–61.

3. The prima facie case is drawn from Florida appellate decisions. See *Branch-McKenzie v. Broward Cnty. Sch. Bd.*, 254 So. 3d 1007, 1012 (Fla. 4th DCA 2018); *Blizzard v. Appliance Direct, Inc.*, 16 So. 3d 922, 927 (Fla. 5th DCA 2009); *Grogan v. Heritage NH, LLC*, 126 So. 3d 262, 264 (Fla. 3d DCA 2010).

4. The issue in the first element of whether the claimant is a member of a protected class is usually not disputed or will be resolved as a matter of law. The instruction should be modified to advise the jury that the question of protected class is not disputed, or if the issue needs to be submitted to the jury, the instruction for the first element should be modified to clarify the nature of the factual dispute.

5. No Florida cases have yet addressed a definition or test for whether harassment is "unwelcome." But see *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) ("The correct inquiry is whether [plaintiff] indicated by her conduct that the alleged sexual advances were unwelcome," not whether her participation in sexual relations was "voluntary" in the sense that she was not forced to participate against her will.). *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982) ("In order to constitute harassment, th[e] conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive.").

6. The claimant must establish both objective and subjective components of severe or pervasive harassment. *Maldonado v. Publix Supermarkets*, 939 So. 2d 290, 294 (Fla. 4th DCA 2006); see also *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993).

7. If the severity or pervasiveness of harassment is a factual issue in the case, the court may consider adding interpretative language in the instruction. See, *e.g.*, *Fla. Dep't of Child. & Fams. v. Shapiro*, 68 So. 3d 298, 304 (Fla. 4th DCA 2011) ("[O]ffhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"); and *Shapiro*, 68 So. 3d at 304 (although the comments were discriminatory and offensive to the plaintiff, they did not establish that the workplace was "permeated with 'discriminatory intimidation, ridicule, and insult.'") (citing *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21 (1993) and *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986). See also *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) ("ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation" do not create discriminatory "conditions of employment."); *Maldonado v. Publix Supermarkets*, 939 So. 2d 290, 296–97 (Fla. 4th DCA 2006) (citing *Oncale* and holding that civil rights laws are not intended to be a "general civility code," and that "common sense" and "sensitivity to social context" would guide courts in recognizing the difference between "simple teasing" and "severely hostile or abusive" conduct), and *Id.* at 297 ("courts and juries must not mistake ordinary socializing in the workplace, including sexual flirtation, for

discriminatory conditions of employment."); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (Severe or pervasiveness test will filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.").

8. The second half of the optional element of the prima facie case applicable to coworker-only harassment is variously formulated in Florida cases as "failed to intervene;" "failed to take remedial action;" and "took insufficient remedial action." *Maldonado v. Publix Supermarkets*, 939 So. 2d 290, 294 (Fla. 4th DCA 2006) ("insufficient remedial action"); *Grogan v. Heritage NH, LLC*, 126 So. 3d 262, 264 (Fla. 3d DCA 2010) ("failed to intervene"); *Castleberry v. Edward M. Chadbourne, Inc.*, 810 So. 2d 1028 (Fla. 1st DCA 2002) ("failed to take remedial action").

9. An additional instruction may be necessary if the claimant brings, as part of the harassment claim, a claim of constructive discharge. See *Richardson v. Rec. Vehicle Park Mgmt., LLC*, 330 So. 3d 104, 106–07 (Fla. 1st DCA 2021); *Webb v. Fla. Health Care Mgmt. Corp.*, 804 So. 2d 422, 424 (Fla. 4th DCA 2001).

(Adopted December 4, 2024, renumbered and revised June 17, 2026.)

417.6 RETALIATION

a. Retaliation Generally:

An employer retaliates against [an employee] [a job applicant] when the employer [discharges] [demotes] [fails to hire] [denies a promotion to] [(describe other adverse action)**] [takes an adverse [employment] action against] [the employee] [the job applicant] because that person [has opposed [an] [unlawful discrimination] [an unlawful employment practice] by the employer] [or] [has filed a charge of discrimination] [or] [has testified, assisted, or participated in any manner in an investigation, proceeding, or hearing to remedy unlawful discrimination].**

NOTES ON USE FOR 417.6a.

1. This instruction is based upon *F.S.* 760.10(7), which makes it an unlawful employment practice for an employer or other covered entity "to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section." This instruction can be modified to reflect the particular type of retaliatory treatment at issue. The instruction uses the language "unlawful discrimination" as easier to understand in place of the statutory language of "an unlawful employment practice," but the latter language should be used if it better fits the facts of the case.

2. Florida law follows federal law in holding that adverse actions are not limited to employment actions against the claimant but can be other adverse actions that are retaliatory. See *Gates v. Gadsden Cnty. Sch. Bd.*, 45 So. 3d 39, 41 (Fla. 1st DCA 2010) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997)); see also *Donovan v. Broward Cnty. Bd. of Comm'rs*, 974 So. 2d 458,460 (Fla. 4th DCA 2008) (employer's policy of terminating internal informal discrimination complaint resolution upon filing of a charge of discrimination was retaliatory within the meaning of the FCRA) (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 54 (2006)). If

the claim is based on a non-employment action, the word "employment" in the phrase [takes an adverse [employment] action against] in the substantive paragraph will not be included.

3. This instruction permits the court to select appropriate options for the nature of the claimant (employee or job applicant), the type of adverse employment action(s) at issue, and the protected activity(ies) at issue.

4. In most cases, there is no dispute as to whether the employment action at issue (such as a discharge, failure to hire, or failure to promote) is materially "adverse." In some cases, however, there may be a dispute as to whether the allegedly retaliatory employment action is sufficiently material to constitute an "adverse employment action." The option [takes an adverse [employment] action against] in the substantive instruction, derived from *Burlington Northern*, should be used only if such a dispute exists in the case. In this situation, instruction 417.6b. should be given immediately after this one. By contrast, if the adverse employment action is one that is not specifically listed above but which has been agreed or determined to have been materially adverse, then the adverse action will be specified in [(describe other adverse action)] with the use of the materiality instruction.

(Adopted December 4, 2024, renumbered and revised June 17, 2026.)

b. Retaliation — Materially Adverse Action:

For purposes of (claimant's) **retaliation claim [only], an action taken by the employer is an adverse [employment] action if it is likely to dissuade a reasonable [employee] [job applicant] from [opposing [an] unlawful [discrimination] [employment practice] by the employer] [or] [filing a charge of discrimination] [or] [testifying, assisting or participating in an investigation, proceeding, or hearing to remedy unlawful discrimination].**

NOTES ON USE 417.6b.

1. Use instruction 417.6b. when plaintiff claims that the defendant took an adverse employment action other than, or in addition to, a discharge, demotion, or suspension, or when the plaintiff contends the defendant took an action outside of the workplace that was retaliatory, and the defendant contests the sufficiency of that the action to support a retaliation claim.

2. This instruction is based on *Burlington Northern & Santa Fe Railway Co. v. White*, 548 US 53, 68 (2006), in which the Court explained that the anti-retaliation provision prohibits more than just ultimate employment actions while also noting that "it is important to separate significant from trivial harms." The Court held that the action must be materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination' " *Id.* (citations omitted); see also *Id.* at 70 ("this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.") Florida courts have adopted the *Burlington Northern* standard. See *Donovan v. Broward Cnty. Bd. of Comm'rs*, 974 So. 2d 458, 460 (Fla. 4th DCA 2008) (employer's policy of terminating internal informal discrimination complaint resolution upon filing of a charge of discrimination was a retaliatory "adverse action" within the meaning of the Florida Civil Rights Act of 1992).

(Adopted December 4, 2024; revised and renumbered June 17, 2026.)

c. Retaliation — Reasonableness:

[For opposition to an alleged unlawful [discriminatory action] [employment practice] of defendant to be a protected activity, (claimant's) **belief that defendant's action is [unlawful discrimination] [an unlawful employment practice] must be reasonable. It is not necessary that the action be proven to be unlawful, but** (claimant's) **honest belief that the action was unlawful is not sufficient by itself.** (Claimant) **must also show that a reasonable person in this situation would have believed the action was [unlawful discrimination] [an unlawful employment**

practice].

[For opposition to an alleged unlawful [discriminatory action] [employment practice] of defendant to be a protected activity, (claimant's) **action(s) in opposition must also be reasonable under the circumstances. In determining whether** (claimant's) **manner of opposition was reasonable, you should balance the need to protect employees asserting their rights under the law to be free from unlawful [discrimination] [employment practices], with the employer's need for loyalty, cooperation and a generally productive work environment].**

NOTES ON USE 417.6c.

1. Use instruction 417.6c. when claimant brings an opposition clause claim and the defendant contends either that the claimant's opposition was not based on a reasonable belief that the employer's alleged action was unlawful, or that the claimant's actions in opposition were not reasonable under the circumstances, and the court concludes the issue cannot be resolved as a matter of law.

2. The first paragraph of the instruction is based on *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001), *Butler v. Ala. Dep't of Transp.*, 536 F.3d 1209, 1213 (11th Cir. 2008), and *Tipton v. Canadian Imperial Bank of Com.*, 872 F.2d 1491, 1494 (11th Cir. 1989). See also *Carter v. Health Mgmt. Svcs.*, 989 So. 2d 1258 (Fla. 2d DCA 2008), *Hinton v. Supervision Int'l., Inc.*, 942 So. 2d 986 (Fla. 5th DCA 2006).

3. The second paragraph of the instruction is based on a line of cases including *Rollins v. State of Fla. Dep't of Law Enforcement*, 868 F.2d 397, 401 (11th Cir. 1989) ("This court has repeatedly recognized that some otherwise protected conduct may be so disruptive or inappropriate as to fall outside the statute's protection. We have held that to qualify for the protection of the statute, the manner in which an employee expresses her opposition to an allegedly discriminatory employment practice must be reasonable. This determination of reasonableness is made on a case by case basis by balancing the purpose of the statute and the need to protect individuals asserting their rights thereunder against an employer's

legitimate demands for loyalty, cooperation and a generally productive work environment.") (internal citations and quotations omitted).

4. The issues of whether, and under what circumstances, a participation claim is subject to the reasonableness test is unsettled. Traditionally, participation such as filing a charge or testifying in a proceeding has been considered absolutely protected by the majority of courts. See, *e.g.*, P*ettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969). However, some courts have held participation unprotected where there was direct evidence of bad faith. See, *e.g.*, *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 890 (7th Cir. 2004). See also *Carter*, 989 So. 2d at 1264–65; *Hinton*, 942 So. 2d at 990 (discussing the issue).

(Adopted December 4, 2024; renumbered and revised June 17, 2026.)

417.7 ISSUES ON PLAINTIFF'S CLAIM

The issues you must decide on the claim of (claimant) **against** (defendant) **are:**

a. Discrimination:

Whether (defendant) **discriminated against** (claimant) **by [discharging] [failing to hire] [**(describe other discriminatory treatment alleged)**] [him] [her] because of [his] [her] [race] [color] [religion] [sex] [pregnancy] [national origin] [age] [handicap] [marital status] and, if so, whether the [discharge] [failure to hire] [**(describe other discriminatory treatment)**] was a legal cause of [loss] [injury] or [damage] to** (claimant)**.**

b. Harassment:

Whether (claimant) **was harassed due to [his] [her] [race] [color] [religion] [sex] [pregnancy] [national origin] [age] [handicap] [marital status], [whether the defendant failed to take prompt remedial action to prevent such harassment,] and if so, whether the harassment was a legal cause of [loss] [injury] [or] [damage] to** (claimant)**.**

c. Retaliation:

Whether (defendant) **retaliated against** (claimant) **by [discharging] [suspending] [demoting] [**(describe other retaliatory treatment alleged)**] [him] [her] because of [his] [her] [opposition to alleged discriminatory actions] [or] [filing a charge of discrimination] [**(describe other participatory activity)**], [the claimant's opposition was reasonable], and, if so, whether the [discharge] [suspension] [demotion] [**(describe other alleged retaliatory treatment)**] was a legal cause of [loss] [injury] [or] [damage] to** (claimant)**.**

NOTE ON USE FOR 417.7

This instruction is based upon *F.S.* 760.10(1).

(Revised December 4, 2024, revised June 17, 2026.)

417.8 LEGAL CAUSE

a. Discrimination:

(Claimant's) **[race] [color] [religion] [sex] [pregnancy] [national origin] [age] [handicap] [marital status] is the legal cause of** (defendant's) **decision to [discharge] [fail to hire] [**(describe discriminatory treatment)**]** (claimant) **if** (defendant) **made the decision because of** (claimant's) **[race] [color] [religion] [sex] [pregnancy] [national origin] [age] [handicap] [marital status].**

(If necessary, clarify the causation standard further.)

NOTES ON USE FOR 417.8a.

1. This instruction uses "because of," the causation language in *F.S.* 760.10(1). The committee takes no position on whether additional clarification is needed. We note that "because of" in employment statutes has been interpreted to mean numerous types of causation. See generally, "Gross Disunity," 114 Penn. State L. Rev. 857 (2010) ("because of" can mean at least four different types of causation). Courts have focused on three possible meanings: "sole," "but for," and "motivating factor." If an additional instruction is needed, it may vary depending on which protected factor is involved, as explained below.

2. *Race, color, religion, sex, national origin.* No Florida appellate court has stated which causation standard should be used for a Florida Civil Rights Act of 1992 ("FCRA") discrimination claim based on one of the five factors enumerated in Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"). Florida courts have endorsed the general rule that, because the FCRA was patterned after Title VII, the Florida statute should be given the same construction as the federal courts give the federal act. See, *e.g.*, *Carsillo v. City of Lake Worth*, 995 So. 2d 1118, 1119 (Fla. 4th DCA 2008). In 1991, Congress added the "motivating factor" causation standard to Title VII and added a "same decision" defense limiting damages. The Florida legislature never amended the FCRA to add the "motivating factor" causation standard and the "same decision" defense limiting damages.

3. *Pregnancy*. Title VII does not include "pregnancy" as a specifically enumerated factor. However, Title VII, as amended by the Pregnancy Discrimination Act, defines "[t]he terms 'because of sex' or 'on the basis of sex'" to include "because of or on the basis of pregnancy, childbirth, or related medical conditions[.]" 42 U.S.C. § 2000e(k). "Under Title VII, a plaintiff may prevail on a [pregnancy discrimination] claim by showing that her pregnancy 'was a motivating factor' for an employment decision." *Holland v. Gee*, 677 F.3d 1047, 1055 (11th Cir. 2012) (citing 42 U.S.C. § 2000e-2(m)); *Torres-Skair v. Medco Health Solutions, Inc.*, 595 Fed. Appx. 847, 852 (11th Cir. 2014) (same).

The Florida Legislature amended the FCRA to include pregnancy as a specifically enumerated factor, effective July 1, 2015. *F.S.* 760.10; Laws 2015, c. 2015-68, § 6. Prior to that amendment, the Florida Supreme Court held that the FCRA's prescription against discrimination because of "sex" includes discrimination based on pregnancy. *Delva v. Cont'l Grp., Inc.*, 137 So. 3d 371, 375 (Fla. 2014). No Florida appellate court has stated which causation standard should be used for an FCRA discrimination claim based on pregnancy. However, the "motivating factor" causation standard has been utilized in pregnancy discrimination claims brought concurrently under the FCRA and Title VII. See, *e.g.*, *Gee*, 677 F.3d at 1054–1055, 1058–1059, 1062–1063 (noting that decisions construing Title VII guide the analysis of the plaintiff-employee's pregnancy discrimination claim under the FCRA); *Torres-Skair*, 595 Fed. Appx. at 852–853.

4. *Age.* Courts have held that decisions construing the federal Age Discrimination in Employment Act (ADEA) apply to the FCRA's age discrimination provision. See, *e.g.*, *Fla. State Univ. v. Sondel*, 685 So. 2d 923 (Fla. 1st DCA 1996). The U.S. Supreme Court interpreted the ADEA to require "but for" causation. *Gross v. FFL Fin. Servs.*, Inc., 557 U.S. 167, 176 (2009).

5. *Handicap.* Courts have held that decisions construing the federal Americans with Disabilities Act (ADA) apply to FCRA's handicap discrimination provision. See, *e.g.*, *Byrd v. BT Foods, Inc.*, 26 So. 3d 600 (Fla. 4th DCA 2010). There is a split among the federal

circuits as to whether the ADA requires "motivating factor" or "but for" causation. Compare *Pinkerton v. Spellings*, 529 F.3d 513, 519 (5th Cir. 2008) ("motivating factor"), with *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 322 (6th Cir. 2012) ("but for").

6. *Marital Status.* Marital status discrimination cases decided under the FCRA do not provide clear guidance on the causation standard to be applied. See *Sanders v. Mayor's Jewelers, Inc.*, 942 F. Supp. 571 (S.D. Fla. 1996) (holding that complaint alleging "discriminatory intent" or marital status "as motivating factor" was sufficient to state a claim); *Nat'l Indus., Inc. v. Comm'n on Human Relations*, 527 So. 2d 894 (Fla. 5th DCA 1988) (holding that, because no record of the hearing was provided, the agency could not reject the hearing officer's finding that marital status was not "a motivating factor" and that no "discriminatory intent" was present).

The Florida Supreme Court has held that the term "marital status," as used in the FCRA section prohibiting discrimination based on marital status, "means the state of being married, single, divorced, widowed or separated, and does not include the specific identity or actions of an individual's spouse." *Donato v. American Tel. & Tel. Co.*, 767 So. 2d 1146, 1154–1155 (Fla. 2000).

7. The committee takes no position as to whether a trial court should instruct on a permissive inference of pretext, that is, the employer's stated reason for the adverse employment action was not the real reason but was given to hide a discriminatory reason. No Florida appellate decision has addressed the issue in a trial context. At least one Florida appellate decision has employed the pretext consideration in the context of a summary judgment motion. See generally *Feizi v. Dep't of Mgmt. Servs.*, 988 So. 2d 1192 (Fla. 1st DCA 2008) (reversing summary judgment where evidence was susceptible to a reasonable inference that the explanation offered by the defendant for eliminating plaintiff's job was pretextual). There is disagreement among the federal circuits as to whether a pretext instruction is required in employment discrimination cases under Title VII. See *Ratliff v. City of Gainesville*, 256 F.3d 355 (5th Cir. 2001) (error not to give pretext inference instruction), with *Palmer v. Bd. of Regents*, 208 F.3d 969 (11th Cir. 2000) (no error in refusing to

instruct jury that it could infer discrimination if it believed plaintiff's prima facie case and disbelieved defendant's reason for adverse employment action).

8. *Cat's Paw.* There is an additional theory of causation in federal discrimination cases referred to as the "cat's paw." This theory recognizes that, in certain situations, a biased supervisor's discriminatory animus may be the cause of the adverse employment action even though the actual decision-maker did not possess that discriminatory animus. See *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011); *Fla. Dep't of Children & Families v. Shapiro*, 68 So. 3d 298, 306 (Fla. 4th DCA 2011). If the cat's paw theory of causation applies, additional instructions may be necessary. See, *e.g.*, Eleventh Circuit Pattern Jury Instruction 4.5.

9. *Same Actor Inference.* The law recognizes a permissible inference that discriminatory animus was not the cause of an adverse employment action when the person who hired the claimant is the same person who made the decision to take the adverse employment action. See *Brown Distributing Co. of West Palm Beach v. Marcell*, 890 So. 2d 1227, 1232 (Fla. 4th DCA 2005); see also *Williams v. Vitro Servs. Corp.*, 144 F.3d 1438, 1442–43 (11th Cir. 1998). A Florida appellate court has held it is reversible error to refuse to give an instruction on the "same actor" inference when it has been requested and applies to the circumstances of the case. See, *e.g.*, *Brown Distributing Co.*, 890 So. 2d at 1232. Additional instructions may thus be necessary based on the circumstances of a particular case.

b. Harassment:

(Claimant's) **[race] [color] [religion] [sex] [pregnancy] [national origin] [age] [handicap] [marital status] is the legal cause of any severe and pervasive harassment, as defined above, if the harassment occurred because of [his] [her] [race] [color] [religion] [sex] [pregnancy] [national origin] [age] [handicap] [marital status].**

NOTE ON USE FOR 417.8b.

This instruction uses "because of," the causation language in *F.S.* 760.10(1). The committee takes no position on whether additional

clarification is needed. We note that "because of" in employment statutes has been interpreted to mean numerous types of causation. See generally, "Gross Disunity," 114 Penn. State L. Rev. 857 (2010) ("because of" can mean at least four different types of causation). Courts have focused on three possible meanings: "sole," "but for," and "motivating factor."

c. Retaliation:

To determine that (defendant) **[discharged] [suspended] [demoted] [or] [**(describe other alleged adverse action)**]** (claimant) **as retaliation for [his] [her] (describe protected activity), you must decide that** (defendant) **would not have [discharged] [suspended] [demoted] [or] [**(describe other alleged adverse action)**]** (claimant) **if [he] [she] had not** (describe protected activity)**.**

NOTES ON USE FOR 417.8c.

1. This instruction is based on *F.S.* 760.07 and case law. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013) (Title VII's retaliation provision requires "but for" causation that employer took adverse employment action "because" employee engaged in protected activity), *Palm Beach Cnty. Sch. Bd. v. Wright*, 217 So. 3d 163 (Fla. 4th DCA 2017) (en banc) (Title VII's "but for" causation standard applies to Florida Civil Rights Act of 1992 claim, because the Florida statute was patterned after the federal statute, applying *Nassar* and rejecting the "wholly unrelated" causation standard), and *Vill. of Tequesta v. Luscavich*, 240 So. 3d 733 (Fla. 4th DCA 2018) (Florida Civil Rights Act of 1992 retaliation claim was subject to "but for" causation standard, applying *Nassar* and *Wright*).

2. The statute prohibits taking adverse action because an individual "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section." *F.S.* 760.07.

3. The court may need to give additional instructions on the employee's burden of proof with respect to the employer's defenses. See, *e.g.*, *City of Hollywood v. Hogan*, 986 So. 2d 634 (Fla. 4th DCA 2008) (employer may fire employee for good reason, bad reason,

reason based on erroneous facts, or for no reason at all, as long as action is not for discriminatory reason, relying upon federal Title VII cases); *Dep't of Corr. v. Chandler*, 582 So. 2d 1183 (Fla. 1st DCA 1991) (same).

(Adopted December 4, 2024; renumbered and revised June 17, 2026.)

417.9 BURDEN OF PROOF ON CLAIM

If the greater weight of the evidence does not support the claim of (claimant)**, then your verdict should be for** (defendant)**.**

However, if the greater weight of the evidence supports the claim of (claimant)**, [then your verdict should be for** (claimant) **and against** (defendant)**] [then you shall consider the defense[s] raised by** (defendant)**].**

[If the greater weight of the evidence supports the defense, your verdict should be for (defendant)**. However, if the greater weight of the evidence does not support the defense, your verdict should be for** (claimant) **and against** (defendant)**.]**

(Adopted April 6, 2017,
renumbered June 17, 2026.)

417.10 AFFIRMATIVE DEFENSE — EMPLOYER'S REASONABLE EFFORTS TO PREVENT HARASSMENT

If you find that (claimant) **has shown by the greater weight of the evidence that [his] [her] supervisor harassed [him] [her] because of** (claimant's) **[race] [color] [religion] [sex] [pregnancy] [national origin] [age] [handicap] [marital status] and that the harassment altered the terms and conditions of [his] [her] employment, then you must consider the** (defendant's) **defense as to this claim.**

To succeed on the defense against (claimant)**,** (defendant) **must prove each of the following by the greater weight of the evidence:**

First, (defendant) **exercised reasonable care to prevent and correct promptly any unlawful harassing behavior on the basis of [race] [color] [religion] [sex] [pregnancy] [national origin] [age] [handicap] [marital status]; and**

Second, (claimant) **unreasonably failed to take advantage of any preventative or corrective opportunities provided by** (defendant) **or to avoid harm otherwise.**

If you find that (defendant) **has proven this defense by the greater weight of the evidence, your verdict is for the** (defendant) **on this claim; but if you do not find that** (defendant) **has proven this defense by the greater weight of the evidence, your verdict is for the** (claimant) **on this claim.**

NOTE ON USE FOR 417.10.

This instruction is for use when the claimant has raised a claim of hostile environment harassment by a supervisor that does not involve a tangible employment action. *Natson v. Eckerd Corp., Inc.*, 885 So. 2d 945, 947–48 (Fla. 4th DCA 2004), citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998). The employer bears the burden of proof on the defense. The defense often involves promulgation of a policy prohibiting harassment and providing a method of reporting the harassment to the employer.

(Adopted June 17, 2026.)

417.11 UNLAWFUL DISCRIMINATION, HARASSMENT, OR RETALIATION DAMAGES

If you find for (defendant)**, you will not consider the matter of damages. But if you find for** (claimant)**, you should award** (claimant) **an amount of money that the greater weight of the evidence shows will fairly and adequately compensate [him] [her] for such damage, including any such damage as** (claimant) **is reasonably certain to incur in the future. You shall consider the following elements of damages:**

[any] [the difference between] lost wages and benefits to the date of trial [and what (claimant) **earned during that time].**

[any mental anguish] [loss of dignity] and [(describe other intangible injuries)**] experienced in the past or to be experienced in the future. There is no exact standard for measuring such damages. The amount should be fair and just in the light of the evidence.**

NOTES ON USE FOR 417.11

1. *Lost wages and benefits.* The court may issue an order "providing affirmative relief from the effects of the discriminatory practice, including back pay." *F.S.* 760.11(5). Under Florida law, back pay is a legal remedy decided by the jury, and front pay is an equitable remedy that does not include a right to jury determination. *O'Neal v. Fla. A&M Univ.*, 989 So. 2d 6 (Fla. 1st DCA 2008) (decided under Florida's Whistle-blower's Act). Some federal courts submit front pay issues to the jury for an advisory verdict. See, *e.g.*, *Wilson v. S & L Acquisition Co., L.P.*, 940 F.2d 1429, 1438 (11th Cir. 1991); *Hudson v. Chertoff*, 473 F. Supp. 2d 1279 (S.D. Fla. 2007); *Hill v. Xerox Corp.*, 998 F. Supp. 1378, 1385 n. 9 (N.D. Fla. 1998); *Quitto v. Bay Colony Golf Club, Inc.*, 2007 WL 4098847, *1–2 (M.D. Fla. 2007). The Committee takes no position on instructing the jury to determine front pay or on the use of an advisory verdict.

2. *Compensatory Damages.* The court may award "compensatory damages, including, but not limited to, damages for mental anguish, loss of dignity, and other intangible injuries…." *F.S.*

760.11(5). Examples of "other intangible injuries" for which damages have been awarded under the FCRA include "emotional distress," *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340, 1348–49 (11th Cir. 2000); "emotional injury," *City of Hollywood v. Hogan*, 986 So. 2d 634, 649–50 (4th DCA 2008); "humiliation and embarrassment," *Melluzzo v. Pub. Advoc.*, 2006 WL 5159197, at *3 (M.D. Fla. 2006); "pain and suffering" and "loss of capacity for enjoyment of life experienced in the past or to be experienced in the future," *Moses v. K-Mart Corp.*, 905 F. Supp. 1054, 1060 n.7 (S.D. Fla. 1995), *aff'd* 119 F.3d 10 (11th Cir. 1997). In a harassment case where there has been no tangible employment action taken against the claimant, a claimant may still recover such damages as compensation for the impact of the harassment. See, *e.g.*, *Sornia v. El Centro Elementary Sch. Dist.*, 285 Fed.Appx. 337 (9th Cir. 2008) and *Harris v. L & L Wings, Inc.*, 132 F.3d 978 (4th Cir. 1997).

3. *Punitive Damages.* This instruction does not include punitive damages. Pending further development of the law, the committee takes no position as to whether the Florida standard or the heightened federal standard for holding an employer vicariously liable for punitive damages for the conduct of its employee should apply. See *Speedway SuperAmerica, LLC v. DuPont*, 933 So. 2d 75 (Fla. 5th DCA 2006) (certifying the question of whether the state or federal standard applies), review dismissed 955 So. 2d 533 (Fla. 2007). The court may award punitive damages not to exceed $100,000. *F.S.* 760.11(5).

"Under Florida law, the purpose of punitive damages is not to further compensate the plaintiff, but to punish the defendant for its wrongful conduct and to deter similar misconduct by it and other actors in the future." *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 486 (Fla. 1999). However, "it is not clear what the standard is for punitive damages awarded under section 760.10," *DuPont*, 933 So. 2d at 89, and the committee takes no position as to the standard for determining whether punitive damages are warranted. The FCRA, unlike Title VII, "simply provides that punitive damages may be awarded," without any express requirement as to what action is appropriate for punitive damage. *Id.* at 89–90.

Some federal courts have applied Title VII's punitive damages standard to claims for punitive damages under the FCRA. See, *e.g.*, *Hipp v. Liberty Nat. Life Ins. Co.*, 65 F. Supp. 2d 1314 (M.D. Fla. 1999), *aff'd in part*, *rev'd in part on other grounds* 252 F.3d 1208 (11th Cir. 2001). "To recover punitive damages under Title VII, a plaintiff must prove that defendant has 'engaged in discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.'" *Richardson v. Tricom Pictures & Productions, Inc.*, 334 F. Supp. 2d 1303, 1319 (S.D. Fla. 2004) (quoting 42 U.S.C. § 1981a(b)(1)). "Malice or reckless indifference is shown when the employer knowingly violates federal law…." *Id.* at 1319–1320 (citing *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535, 119 S. Ct. 2118, 144 L. Ed. 2d 494 (1999)). "[A]n employer must at least discriminate in the face of a perceived risk that its actions will violate federal law." *Kolstad*, 527 U.S. at 535; *Richardson*, 334 F. Supp. 2d at 1320.

(Adopted April 6, 2017, revised December 4, 2024, revised and renumbered June 17, 2026.)

417.12 AFFIRMATIVE DEFENSE — DAMAGES

a. Failure to Mitigate Lost Wages:

[As a defense to (claimant's) **damages claim for lost wages and benefits,** (defendant) **claims that** (claimant) **could have reduced [his] [her] damages by making a reasonable effort to [seek] [retain] comparable employment. Comparable employment means alternative employment similar to [his] [her] former job in the nature of the work, responsibilities and skills required.** (Claimant) **need not accept employment that is unsuitable or demeaning when compared with [his] [her] former job.**

If the greater weight of the evidence supports (defendant's) **claim that there was comparable employment available to** (claimant) **and that [he] [she] failed to make a reasonable effort to [seek] [retain] such employment, then you should reduce any lost wages and benefits you award to [he] [she] by the amount that** (claimant) **could have earned from the comparable employment.**

If, however, the greater weight of the evidence does not support (defendant's) **claim that there was comparable employment available to** (claimant) **and that [he] [she] failed to make a reasonable effort to [seek] [retain] that employment, then your verdict should be for** (claimant) **in the total amount of [his] [her] damages for lost wages and benefits.]**

NOTES ON USE FOR 417.12a.

1. This instruction is given only if the defendant raised the affirmative defense of failure to mitigate in a discharge or failure to hire case.

2. As to plaintiff's "duty to mitigate" damages in cases involving wrongful discharge, see generally *Zayre Corp. v. Creech*, 497 So. 2d 706, 708 (Fla. 4th DCA 1986); *Juv. Diabetes Rsch. Found. v. Rierman*, 370 So. 2d 33, 36 (Fla. 3d DCA 1979); *Punkar v. King Plastic Corp.*, 290 So. 2d 505, 508 (Fla. 2d DCA 1974). This instruction does not use the term "duty to mitigate" because this is more accurately an application of the doctrine of avoidable consequences. See *System*

Components Corp. v. Fla. Dep't of Transp., 14 So. 3d 967, 982 (Fla. 2009).

3. *Failure to Mitigate Lost Wages.* With respect to the defendant's burden on this defense, federal courts have held that if the defendant proves the claimant did not make a reasonable effort to seek out comparable employment, the defendant has met its burden on this defense without the need to prove that comparable employment was available to the claimant. See *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1527–28 (11th Cir. 1991); accord *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 54 (2d Cir. 1998); *Sellers v. Delgado Cmty. College*, 839 F.2d 1132, 1139 (5th Cir. 1988); *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1319 (D.C. Cir. 1972) (quoting *Am. Bottling Co.*, 116 NLRB 1303, 1307 (1956)). No Florida appellate court has addressed this issue. The committee takes no position on this issue, pending further development in Florida law.

b. After-Acquired Evidence:

As a defense to (claimant's) **damages claim for** (defendant's) **decision to [discharge] [fail to hire] [**(describe discriminatory treatment)**]** (claimant)**,** (defendant) **claims that** (claimant) **engaged in wrongdoing or misconduct during [his] [her] [employment] [job application process], which was of such severity that if then known by** (defendant) **would have resulted in [his] [her] [discharge] [failure to be hired] [**(describe discriminatory treatment)**].**

If the greater weight of the evidence supports (defendant's) **claim that** (claimant) **engaged in wrongdoing or misconduct that** (defendant) **did not discover until after it [discharged] [failed to hire] [**(describe discriminatory treatment)**]** (claimant)**, you should reduce any damages for lost wages and benefits that you award to** (claimant) **and calculate the total amount of [his] [her] damages for lost wages and benefits from date of unlawful [discharge] [failure to hire] [**(describe discriminatory treatment)**] to the date** (defendant) **discovered the wrongdoing or misconduct.**

(Claimant's) **wrongful conduct must have been of such severity that [he] [she] in fact would have been [discharged] [not hired] [**(describe discriminatory treatment)**] on those grounds alone**

if (defendant) **had known of it at the time of the [discharge] [failure to hire] [**(describe discriminatory treatment)**].**

If, however, the greater weight of the evidence does not support (defendant's) **claim that** (claimant) **engaged in wrongdoing or misconduct that was discovered after the [discharge] [failure to hire] [**(describe discriminatory treatment)**], then your verdict should be for** (claimant) **in the total amount of [his] [her] damages for lost wages and benefits.**

NOTES ON USE FOR 417.12b.

1. The doctrine of after-acquired evidence was established by the Supreme Court in *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 115 S. Ct. 879, 130 L. Ed. 2d 852 (1995), a case that arose under the ADEA. The after-acquired evidence defense also applies to claims under the FCRA. See *Brown Distrib. Co. of W. Palm Beach v. Marcell*, 890 So. 2d 1227 (Fla. 4th DCA 2005) (finding that the trial court erred by not giving the defendant-employer's proposed jury instruction on after-acquired evidence, which was "a fair reading of the holding in *McKennon* and therefore appropriate as it accurately states the law and is necessary for the jury to properly resolve the issues of the case"); *Torres v. TPUSA, Inc.*, No. 2:08–cv–618–FtM–29DNF, 2009 WL 764466, at *1–2 (M.D. Fla., March 19, 2009) (holding that the doctrine of after-acquired evidence can be a valid defense to a plaintiff's claims of damages for violations of the FCRA); *Neal v. Manpower Intern., Inc.*, No. 3:00–CV–277/LAC, 2001 WL 1923127, at *14 (N.D. Fla., Sept. 17, 2001) (applying the after-acquired evidence defense to claims under the FCRA).

2. The after-acquired evidence doctrine is a defense only to a claimant's damages claim; it has no bearing on liability. After-acquired evidence should not be used to determine liability because "[t]he employer could not have been motivated by the knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason." *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360, 115 S. Ct. 879, 130 L. Ed. 2d 852 (1995). See also *Crapp v. City of Miami Beach*, 242 F.3d 1017, 1021 (11th Cir. 2001).

3. *Misconduct in job application process.* The Eleventh Circuit

has held "that the after-acquired evidence rule announced in *McKennon* applies to cases in which the after-acquired evidence concerns the employee's misrepresentations in a job application or resume, as well as cases in which the after-acquired evidence relates to employee wrongdoing during employment." *Wallace v. Dunn Const. Co., Inc.*, 62 F.3d 374, 379 (11th Cir. 1995). See also *Neal*, 2001 WL 1923127, at *14 (applying the after-acquired evidence defense where the plaintiff intentionally falsified her employment application); *Yeary v. Florida Dep't of Corrections*, No. 95-0583-CIV-J-21-C, 1997 WL 284648, at *3 (M.D. Fla., May 13, 1997) (the after acquired evidence "doctrine is equally applicable to instances of misrepresentations and omissions by the employee in his or her job application").

4. *Reinstatement and front pay.* Where the after-acquired evidence defense would reduce a claimant's damages for lost wages and benefits, "neither reinstatement nor front pay is an appropriate remedy." *McKennon*, 513 U.S. at 362–363. See also *Kovelesky v. First Data Corp.*, 534 Fed. Appx. 811, 814 (11th Cir. 2013); *Wallace*, 62 F.3d at 380.

5. *Compensatory damages.* After-acquired evidence does not reduce or preclude an award of compensatory damages even where such evidence reduces or precludes back pay and reinstatement. *Crapp*, 242 F.3d at 1021 (holding that the court's decision to deny the plaintiff "backpay for a discriminatory termination and yet award him compensatory damages for that termination" was appropriate and consistent with *McKennon*). "Resolution of the [problem of after-acquired evidence] must give proper recognition to the fact that [unlawful discrimination] has occurred which must be deterred and compensated without undue infringement upon the employer's rights and prerogatives." *McKennon*, 513 U.S. at 362.

(Adopted April 6, 2017, revised and renumbered June 17, 2026.)

417.13 LEGAL CAUSE — DAMAGE

The [discharge] [failure to hire] [demotion] [suspension] [harassment] [(describe other discriminatory or retaliatory treatment alleged)**] is the legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such damage, so that it can reasonably be said that, but for the [discharge] [failure to hire] [harassment] [**(describe other discriminatory or retaliatory treatment)**], the [loss] [injury] [or] [damage] would not have occurred.**

NOTE ON USE FOR 417.13

This instruction is based upon *F.S.* 760.10(1).

(Adopted April 6, 2017, revised December 4, 2024; renumbered and revised June 17, 2026.)

417.14 REDUCTION OF DAMAGES TO PRESENT VALUE

Any amount of damages that you allow for wages and benefits to be lost in the future should be reduced to its present money value and only the present money value of those future economic damages should be included in your verdict.

The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate (claimant) **for these losses as they are actually experienced in future years.**

NOTES ON USE FOR 417.14

1. Front pay is an equitable remedy that does not include a right to jury determination. If the judge presents the issue to a jury with the other damages in 417.11, then this instruction should be given.

2. Designing a standard instruction for reduction of damages to present value is complicated by the fact that there are several different methods used by economists and courts to arrive at a present value determination. Cf. *e.g.*, *Delta Air Lines, Inc. v. Ageloff*, 552 So. 2d 1089 (Fla. 1989); *Bould v. Touchette*, 349 So. 2d 1181 (Fla. 1977) (even without evidence, juries may consider effects of inflation); *Loftin v. Wilson*, 67 So. 2d 185 (Fla. 1953) (lost stream of income approach); *Renuart Lumber Yards v. Levine*, 49 So. 2d 97 (Fla. 1950) (using approach similar to calculation of cost of annuity); *Seaboard Coast Line R.R. Co. v. Garrison*, 336 So. 2d 423 (Fla. 2d DCA 1976) (discussing real interest rate discount method and inflation/market rate discount methods); see also *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983); *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982); *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967) (total offset method).

3. Until the Florida Supreme Court or the legislature adopts one approach to the exclusion of other methods of calculating present money value, the committee assumes that the present value of future economic damages is a finding to be made by the jury on the evidence; or, if the parties offer no evidence to control the finding, that

the jury will properly resort to its own common knowledge and by argument. See *Seaboard Coast Line R.R. Co. v. Burdi*, 427 So. 2d 1048 (Fla. 3d DCA 1983).

(Adopted April 6, 2017, revised and renumbered June 17, 2026.)

418 UNLAWFUL RETALIATION UNDER FLORIDA'S PUBLIC SECTOR WHISTLE-BLOWER ACT

418.1 Introduction

418.2 Summary of Claims and Defenses

418.3 Greater Weight of the Evidence

418.4 Retaliation

418.5 Preliminary Issue - Adverse Employment Action

418.6 Burden of Proof on Preliminary Issue

418.7 Protected Activity

418.8 Legal Cause – Retaliation

418.9 Legal Cause – Damage

418.10 Issues on Plaintiff's Claim

418.11 Burden of Proof on Claim

418.12 Defense Issue-Adverse Employment Action Based on Other Grounds

418.13 Unlawful Retaliation Damages

418.14 Defense Issue on Damages (Mitigation – Discharge)

418.15 Reduction of Damages to Present Value

NOTE ON USE FOR 418

The instructions in this section are based upon *F.S.* 112.3187-112.31895 (Florida's public-sector whistle-blower provisions). As to the right to trial by jury, see *Fox v. City of Pompano Beach*, 984 So. 2d

664 (Fla. 4th DCA 2008) and *O'Neal v. Fla. A&M Univ.*, 989 So. 2d 6 (Fla. 1st DCA 2008).

418.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 418.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 418.1. *See* Model Instruction 1. Instruction 418.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 418.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including an explanation for the difference, such as where the court has directed a verdict on an issue.

2. "The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations." *Fla. R. Civ. P.* 1.470(b).

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla. R. Civ. P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge, as the judge reads the instructions aloud.

(Adopted June 30, 2021;
revised June 25, 2025.)

418.2 SUMMARY OF CLAIMS AND DEFENSES

The claim[s] in this case [is] [are] as follows: (claimant) **claims that** (defendant) **retaliated against [him] [her] by** (describe defendant's alleged action) **for** (claimant) (describe activity that claimant alleges caused defendant's alleged action)**, and that** (describe defendant's alleged action) **caused [him] [her] damage.**

(Defendant) **denies that claim [and also claims that] [**(claimant) **failed to reduce [his] [her] damages by seeking other similar employment] [and] [**(describe any other affirmative defense)**].**

[(Claimant)**] [The parties] must prove [his] [her] [all] claim(s) [and defenses] by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.**

(Adopted June 30, 2021.)

418.3 GREATER WEIGHT OF THE EVIDENCE

Greater weight of the evidence means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTES ON USE FOR 418.3

1. *Greater or lesser number of witnesses.* The committee recommends that no charge be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. *Circumstantial evidence.* The committee has not drafted an instruction addressing circumstantial evidence and takes no position on whether such an instruction is needed. For criminal cases, see *Matter of Use by Trial Cts. of Standard Jury Instructions in Crim. Cases*, 431 So. 2d 594 (Fla. 1981).

(Adopted June 30, 2021,
revised February 11, 2026.)

418.4 RETALIATION

Retaliation means [discharging] [suspending] [demoting] [transferring] [withholding of bonuses from] [reducing salary or benefits of] [or] [taking [other] adverse employment action against] an employee for engaging in [a] protected activit[y] [ies].

NOTES ON USE FOR 418.4

1. The definition of retaliation is derived from *F.S.* 112.3187(3)(c) and (4)(a) and case law. See, *e.g.*, *Amador v. Fla. Bd. of Regents ex rel. Fla. Int'l Univ.*, 830 So. 2d 120, 123 (Fla. 3d DCA 2002), *review denied*, 845 So. 2d 887 (2003).

2. This instruction applies to a claim under *F.S.* 112.3187(4)(a) by an employee against an agency, which could be the employee's employer or an independent contractor. However, if the claimant's claim is brought as a "person" and not as an employee, under *F.S.* 112.3187(4)(b), then substituting "person" for "employee" or other modification to the instruction may be appropriate.

3. In cases where a different adverse employment action is alleged in addition to, or instead of, discharge, suspension, demotion, transfer, withholding of a bonus, or reduction of salary or benefits, or where the parties do not agree that the alleged action constitutes an adverse employment action, then use Instruction 418.5, below.

(Adopted June 30, 2021.)

418.5 PRELIMINARY ISSUE — ADVERSE EMPLOYMENT ACTION

On (claimant's) **claim there is a preliminary issue for you to decide. That issue is whether** (describe defendant's alleged action) **was an adverse employment action.**

An adverse employment action is any action taken by (defendant) **against** (claimant) **that amounts to a serious and material change in** (claimant's) **terms and conditions of employment.**

NOTES ON USE 418.5

1. Use this instruction in cases alleging adverse employment actions other than, or in addition to, discharge, suspension, demotion, transfer, withholding of a bonus, or reduction of salary or benefits, or where the parties do not agree that the challenged "other adverse employment action" taken by the employer constitutes an adverse employment action.

2. Florida and federal courts have determined that an adverse employment action requires a serious and material change in the employee's terms and conditions of employment. *Davis v. Town of Lake Park*, 245 F.3d 1232 (11th Cir. 2001) (to prove adverse employment action in a case under Title VII, an employee must show a serious and material change in the terms and conditions of employment), *overruled on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). Courts have found that certain actions besides discharge, demotion, and suspension may constitute adverse employment actions under *F.S.* 448.101 and other similar federal and state employment law statutes. See, *e.g.*, *Finch v. Morgan Stanley & Co. LLC*, No. 15-81323-CIV, 2016 WL 4248248 (S.D. Fla. Aug. 10, 2016) (denial of leave time may constitute an adverse employment action under section 448.101); *Miami-Dade Cnty. v. Eghbal*, 54 So. 3d 525 (Fla. 3d DCA 2011) (denial of promotion is adverse employment action under Florida Civil Rights Act); *Hill v. Branch Banking & Trust Co.*, 264 F. Supp. 3d 1247 (N.D. Ala. 2017) (negative performance evaluations may be adverse employment actions under Title VII if a link is shown between the review and

alteration of the terms of employment); *Brown v. Snow*, 440 F.3d 1259 (11th Cir. 2006) (a lower score on a performance evaluation by itself is not actionable, but it may be so if the plaintiff can establish that the lower score led to a more tangible form of adverse action, such as denial of promotions).

(Adopted June 30, 2021.)

418.6 BURDEN OF PROOF ON PRELIMINARY ISSUE

If the greater weight of the evidence does not support (claimant's) **claim on this issue, that** (describe defendant's alleged action) **was an adverse employment action, then [your verdict on the claim of** (claimant)**] *[your decision on this issue] should be for** (defendant)**.**

However, if the greater weight of the evidence supports the claim of (claimant) **on this issue, that** (describe defendant's alleged action) **was an adverse employment action, your decision on this issue should be for** (claimant)**. You shall then decide the other issues on** (claimant's) **claim.**

NOTES ON USE FOR 418.6

1. Give instruction 418.6 if instructing the jury on the preliminary issue from instruction 415.5.

2. When plaintiff claims defendant imposed discharge, suspension, or demotion in addition to other adverse employment action, give the second bracketed portion of the charge in the first paragraph.

(Adopted June 30, 2021.)

418.7 PROTECTED ACTIVITY

Protected activity is:

[a written] disclosure to (appropriate governmental agency, official, and/or person) **of any violation or suspected violation of** (describe law, rule, or regulation) **committed by an employee or agent of** (defendant) **which creates and presents a substantial and specific danger to the public's health, safety, or welfare] [or] [a written] disclosure to** (appropriate governmental agency, official, and/or person) **of any act or suspected act of [gross mismanagement] [malfeasance] [misfeasance] [gross waste of public funds] [gross neglect of duty] [or] [Medicaid fraud or abuse] committed by an employee or agent of** (defendant)**] [or]**

[refusing to participate in imposing or administering an adverse employment action against another employee for engaging in protected activity protected by law] [or]

[being requested to participate in an investigation, hearing, or other inquiry conducted by any agency or federal government entity] [or]

[initiating a complaint through the whistle-blower's hotline or the hotline of the Medicaid Fraud Control Unit of the Department of Legal Affairs.]

NOTES ON USE FOR 418.7

1. The bracketed language is derived from *F.S.* 112.3187(2), (5), and (7). *Rustowicz v. N. Broward Hosp. Dist.*, 174 So. 3d 414 (Fla. 4th DCA 2015).

2. A disclosure is protected if the claimant had a "good faith, reasonable belief that the employer engaged in unlawful employment practices." *Castro v. School Bd. of Manatee Cnty. Fla.*, 903 F. Supp. 2d 1290, 1302 (M.D. Fla. 2012) (quotation omitted). *See also F.S.* 112.3187(5).

3. *F.S.* 112.3187(3)(e) defines "gross mismanagement" as "a

continuous pattern of managerial abuses, wrongful or arbitrary and capricious actions, or fraudulent or criminal conduct which may have a substantial adverse economic impact." In some cases the court may find it appropriate to instruct the jury on this or other definitions set forth in *F.S.* 112.3187(3).

4. Florida courts have construed "misfeasance" as "the improper doing of an act which a person might lawfully do," and have construed "malfeasance" as "the doing of an act which a person ought not do at all." *Irven v. Dep't of Health & Rehab. Servs.*, 790 So. 2d 403, 407 n.3 (Fla. 2001); *King v. Fla.*, 650 F. Supp. 2d 1157, 1164 n.2 (N.D. Fla. 2009); *Rosa v. Dep't of Child. & Fams.*, 915 So. 2d 210, 211-212 (Fla. 1st DCA 2005). "Misfeasance" includes "negligent acts committed by an employee of an agency." *Rosa*, 915 So. 2d at 212.

5. Whether a protected disclosure must be in writing is determined by *F.S.* 112.3187(7) and case law interpreting the act. *Shaw v. Town of Lake Clarke Shores*, 174 So. 3d 444 (Fla. 4th DCA 2015) (the act protects employees who make protected disclosures in a written and signed complaint); *Walker v. Fla. Dep't of Veterans' Affairs*, 925 So. 2d 1149 (Fla. 4th DCA 2006) (same); *cf. Rustowicz v. N. Broward Hosp. Dist.*, 174 So. 3d 414 (Fla. 4th DCA 2015) (written complaint not required for protection of an employee who participated in an investigation); *Burden v. City of Opa Locka*, No. 11-22018-CIV, 2012 U.S. Dist. LEXIS 144903 (S.D. Fla. Oct. 7, 2012) (same). Whether a protected disclosure must be in writing may be a question of law, a question of fact, or a mixed question of law and fact. If there is a question of fact on this issue, then additional instructions may be needed.

6. *F.S.* 112.3187(6) and (7) identify to whom the disclosure must be made, as well as identifying persons entitled to protection under the act. Whether a protected disclosure was made to the proper person or entity may be a question of law, a question of fact, or a mixed question of law and fact. If there is a question of fact on this issue, then additional instructions may be needed.

(Adopted June 30, 2021.)

418.8 LEGAL CAUSE — RETALIATION

Protected activity is a legal cause of [discharge] [suspension] [demotion] [transfer] [withholding of bonuses] [reduction in salary or benefits] [or] [(describe other alleged adverse employment action)**] if** (defendant) **[discharged] [suspended] [demoted] [transferred] [withheld bonuses] [reduced salary or benefits] [or] [**(describe other alleged adverse employment action)**]** (claimant) **for** (claimant's) **protected activity.**

To determine that (defendant) **[discharged] [suspended] [demoted] [transferred] [withheld bonuses] [reduced salary or benefits] [or] [**(describe other alleged adverse employment action)**]** (claimant) **because of** (claimant's) (describe protected activity)**, you must decide that** (defendant) **would not have [discharged] [suspended] [demoted] [transferred] [withheld bonuses] [reduced salary or benefits] [or] [**(describe other alleged adverse employment action)**]** (claimant) **if** (claimant) **had not** (describe protected activity)**.**

NOTES ON USE FOR 418.8

1. The bracketed language is derived from *F.S.* 112.3187(3)(c), (4)(a), and (4)(b) and case law.

2. On the issue of causation, Florida courts have followed federal decisions construing provisions in Title VII that make it unlawful for an employer to retaliate against an employee because the employee made a charge against the employer or opposed an employer's unlawful practice. See *Rice-Lamar v. City of Ft. Lauderdale*, 853 So. 2d 1125 (Fla. 4th DCA 2003) (Title VII retaliation analysis applied to claim arising under Florida's Whistle-blower Act); *Carter v. Health Mgmt. Assoc.*, 989 So. 2d 1258 (Fla. 2d DCA 2008) (Florida courts apply federal case law interpreting Title VII to claims under the Florida Civil Rights Act); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013) (Title VII's retaliation provision requires "but for" causation that employer took adverse employment action "because" employee engaged in protected activity); *Palm Beach County Sch. Bd. v. Wright*, 217 So. 3d 163 (Fla. 4th DCA 2017) (en banc) (applying *Nassar* to Florida Civil Rights Act claim, rejecting the "wholly unrelated" causation standard, because the Florida statute was

patterned after the federal statute); *Vill. of Tequesta v. Luscavich*, 240 So. 3d 733 (Fla. 4th DCA 2018) (applying *Nassar* and *Wright* to hold that a Florida Civil Rights Act retaliation claim was subject to the "but for" causation standard); *Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945 (11th Cir. 2000) (Title VII retaliation analysis applied to claim arising under Florida's private-sector whistle-blower provisions).

3. The instruction's use of the term "for" mirrors the statutory language. *F.S.* 112.3187(4); *Hernandez v. State*, 4 So. 3d 642, 666 (Fla. 2009) (a jury instruction is proper where it "mirrors the language of the statute"); *Bohannon v. Thomas*, 592 So. 2d 1246, 1248 (Fla. 4th DCA 1992) ("Generally, jury instructions which track statutory language are not erroneous.").

4. The court may need to give additional instructions on the employee's burden of proof with respect to the employer's defenses. See, *e.g.*, *City of Hollywood v. Hogan*, 986 So. 2d 634 (Fla. 4th DCA 2008) (relying upon federal case law interpreting Title VII, holding that an employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason); *Dep't of Corr. v. Chandler*, 582 So. 2d 1184 (Fla. 1st DCA 1991) (same).

(Adopted June 30, 2021.)

418.9 LEGAL CAUSE — DAMAGE

Retaliation is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the [discharge] [suspension] [demotion] [transfer] [withholding of bonuses] [reduction in salary or benefits] [or] [(describe defendant's alleged action)**], the [loss] [injury] [or] [damage] would not have occurred.**

(Adopted June 30, 2021.)

418.10 ISSUES ON PLAINTIFF'S CLAIM

The law prohibits an employer from retaliating against an employee for engaging in protected activity.

The [next] issue(s) you must decide on the claim of (claimant) **against** (defendant) **[is] [are] whether** (defendant) **retaliated against** (claimant) **by [discharging] [suspending] [demoting] [transferring] [withholding bonuses from] [reducing the salary or benefits of] [him] [her] [or] [**(describe defendant's alleged action)**] for** (claimant's) **protected activity and, if so, whether the [discharge] [suspension] [demotion] [transfer] [withholding of bonuses] [reduction in salary or benefits] [or] [**(describe defendant's other alleged action)**] was a legal cause of [loss] [injury] [or] [damage] to** (claimant)**.**

NOTES ON USE FOR 418.10

1. If there are issues concerning vicarious liability that require a preemptive instruction or jury resolution, see (and modify, as necessary) instructions 401.13, 401.14, and 401.17.

2. This instruction applies to a claim under *F.S.* 112.3187(4)(a) by an employee against an agency, which could be the employee's employer or an independent contractor. However, if the claimant's claim is brought as a "person" and not as an employee, under *F.S.* 112.3187(4)(b), then substituting "person" for "employee" or other modification to the instruction may be appropriate.

(Adopted June 30, 2021.)

418.11 BURDEN OF PROOF ON CLAIM

If the greater weight of the evidence does not support the claim of (claimant) **then your verdict should be for** (defendant)**.**

However, if the greater weight of the evidence supports the claim of (claimant)**, [then your verdict should be for** (claimant) **and against** (defendant)**] [then you shall consider the defense[s] raised by** (defendant)**].**

[If the greater weight of the evidence supports the defense, your verdict should be for (defendant)**. However, if the greater weight of the evidence does not support the defense, your verdict should be for** (claimant) **and against** (defendant)**.]**

(Adopted June 30, 2021.)

418.12 DEFENSE ISSUE – ADVERSE EMPLOYMENT ACTION BASED ON OTHER GROUNDS

As a defense to (claimant's) **claim that** (defendant) **retaliated against** (claimant) **for engaging in protected activity,** (defendant) **claims that [he] [she] [it] would have taken the** (describe defendant's action) **against** (claimant) **on other grounds even if** (claimant) **had not engaged in any protected activity.**

If the greater weight of the evidence supports (defendant's) **claim that the** (describe defendant's action) **was not for** (claimant's) **protected activity, then your verdict should be for** (defendant)**.**

NOTE ON USE FOR 418.12

F.S. 112.3187(10) provides for this affirmative defense to any action brought under that section.

(Adopted June 30, 2021.)

418.13 UNLAWFUL RETALIATION DAMAGES

If you find for (defendant)**, you will not consider the matter of damages. But if you find for** (claimant)**, you should award** (claimant) **an amount of money that the greater weight of the evidence shows will fairly and adequately compensate [him] [her] for such damage, including any such damage as** (claimant) **is reasonably certain to incur in the future. You shall consider the following elements:**

[any] [the difference between] lost wages and benefits to the date of trial [and what (claimant) **earned during that time] [and]**

[any emotional pain and mental anguish experienced in the past or to be experienced in the future. There is no exact standard for measuring such damages. The amount should be fair and just in the light of the evidence.]

NOTES ON USE FOR 418.13

1. *F.S.* 112.3187(9) may entitle plaintiff to other remedies as relief on a successful claim, such as reinstatement, future lost wages or front pay, and injunctive relief; however, such relief is generally viewed as equitable relief decided by the court and not the jury. *O'Neal v. Fla. A&M Univ.*, 989 So. 2d 6, 11-12 (Fla. 1st DCA 2008) (under Florida's Public Whistle-blower Act, front pay is equitable relief); see *also E.E.O.C.* v. *W&O, Inc.*, 213 F.3d 600, 619 (11th Cir. 2000) (front pay is an equitable remedy in a Title VII case and is not decided by jury).

2. As to whether noneconomic damages are awardable in a jury trial pursuant to *F.S.* 112.3187, see *Iglesias* v. *City of Hialeah*, 305 So. 3d 20 (Fla. 3d DCA 2019).

(Adopted June 30, 2021.)

418.14 DEFENSE ISSUE ON DAMAGES (MITIGATION – DISCHARGE)

As a defense to (claimant's) **damages claim for retaliatory discharge,** (defendant) **claims that** (claimant) **could have reduced [his] [her] damages by making a reasonable effort to [seek] [retain] comparable employment. Comparable employment means alternative employment similar to** (claimant's) **former job in the nature of the work, responsibilities, and skills required.** (Claimant) **need not accept employment that is unsuitable or demeaning when compared with** (claimant's) **former job.**

If the greater weight of the evidence supports (defendant's) **claim that there was comparable employment available to** (claimant) **and that** (claimant) **failed to make a reasonable effort to [seek] [keep] such employment, then you should reduce any damages you award to** (claimant) **by the amount that** (claimant) **could have earned from the comparable employment.**

If, however, the greater weight of the evidence does not support (defendant's) **claim that there was comparable employment available to** (claimant) **and that** (claimant) **failed to make a reasonable effort to [seek] [retain] that employment, then your verdict should be for** (claimant) **in the total amount of [his] [her] damages for lost wages and benefits.**

NOTES ON USE FOR 418.14

1. This instruction does not use the term "duty to mitigate" because this is more accurately an application of the doctrine of avoidable consequences and "duty" implies a mandatory obligation. See *System Components Corp. v. Fla. Dep't of Transp.*, 14 So. 3d 967, 982 (Fla. 2009).

2. As to plaintiff's "duty to mitigate" damages in cases involving wrongful discharge, see *Zayre Corp. v. Creech*, 497 So. 2d 706, 708 (Fla. 4th DCA 1986); *Juv. Diabetes Rsch. Found. v. Rievman*, 370 So. 2d 33, 36 (Fla. 3d DCA 1979); *Punkar v. King Plastic Corp.*, 290 So. 2d 505, 508 (Fla. 2d DCA 1974).

(Adopted June 30, 2021.)

418.15 REDUCTION OF DAMAGES TO PRESENT VALUE

Any amount of damages which you allow for wages and benefits to be lost in the future should be reduced to its present money value, and only the present money value of those future economic damages should be included in your verdict.

The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate (claimant) **for these losses as they are actually experienced in future years.**

NOTES ON USE FOR 418.15

1. Designing a standard instruction for reduction of damages to present value is complicated by the fact that there are several different methods used by economists and courts to arrive at a present value determination. See, *e.g.*, *Delta Air Lines, Inc. v. Ageloff*, 552 So. 2d 1089 (Fla. 1989), and *Renuart Lumber Yards v. Levine*, 49 So. 2d 97 (Fla. 1950) (using approach similar to calculation of cost of annuity); *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), and *Loftin v. Wilson*, 67 So. 2d 185 (Fla. 1953) (lost stream of income approach); *Beaulieu v. Elliott*, 434 P. 2d 665 (Alaska 1967) (total offset method); *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982), and *Seaboard Coast Line R.R. Co. v. Garrison*, 336 So. 2d 423 (Fla. 2d DCA 1976) (discussing real interest rate discount method and inflation/market rate discount methods); and *Bould v. Touchette*, 349 So. 2d 1181 (Fla. 1977) (even without evidence, juries may consider effects of inflation).

2. Until the Florida Supreme Court or the Legislature adopts one approach to the exclusion of other methods of calculating present money value, the committee assumes that the present value of future economic damages is a finding to be made by the jury on the evidence; or, if the parties offer no evidence to control the finding, that the jury will properly resort to its own common knowledge as guided by instruction 418.14 and by argument. See *Seaboard Coast Line R.R. Co.* v. *Burdi*, 427 So. 2d 1048 (Fla. 3d DCA 1983).

(Adopted June 30, 2021.)

420 NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

420.1 Introduction

420.2 Summary of Claims

420.3 Greater Weight of the Evidence

420.4 Negligence

420.5 Legal Cause

420.6 Issues on Plaintiff's Claim

420.7 Burden of Proof on Main Claim

420.8 Defense Issues

420.0 Burden of Proof on Defense Issues

NOTE ON USE

The tort of "negligent infliction of emotional distress" is recognized in Florida. *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985); *Zell v. Meek*, 665 So. 2d 1048 (Fla. 1995). The boundaries of this cause of action, the persons who may recover, and the relationships that form the basis of recovery will be established by the courts of this state on a case-by-case basis. *Champion*, 478 So. 2d at 21–22 (Alderman, J., concurring specially). These instructions should not be given if the plaintiff suffered an impact of any type. See generally *Willis v. Gami Golden Glades, LLC*, 967 So. 2d 846, 850 (Fla. 2007). The essence of impact is that the "outside force or substance, no matter how large or small, visible or invisible, and no matter that the effects are not immediately deleterious, touch or enter into the plaintiff's body." *Id.* If there was an impact, the jury instructions given would be governed by the principles for the type of tort involved and the resulting damages.

420.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 420.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 420.1. See Model Instruction No. 1. Instruction 420.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 420.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including an explanation for the difference, such as when the court has directed a verdict on an issue.

2. *Fla. R. Civ. P.* 1.470(b) authorizes instructing the jury during trial or before or after final argument. The timing of instructions is within the sound discretion of the trial judge, to be determined on a case-by-case basis, but the committee strongly recommends instructing the jury before final argument.

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla. R. Civ. P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge, as the judge reads the instructions aloud.

(Revised November 19, 2021.)

420.2 SUMMARY OF CLAIMS

The claims in this case are as follows. (Claimant) **claims that** (defendant) **was negligent in** (describe alleged negligence) **which inflicted emotional distress on** (claimant)**.**

(Defendant) **denies that claim [and also claims that** (describe any affirmative defenses)**].**

[The parties] [(claimant)**] must prove [his] [her] [their] claim[s] by the greater weight of the evidence. I will now define some of the terms you will use in deciding the case.**

(Revised November 19, 2021.)

420.3 GREATER WEIGHT OF THE EVIDENCE

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTES ON USE FOR 420.3

1. *Greater or lesser number of witnesses.* The committee recommends that no charge be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. *Circumstantial evidence.* The committee has not drafted an instruction addressing circumstantial evidence and takes no position on whether such an instruction is needed. For criminal cases, see *Matter of Use by Trial Cts. of Standard Jury Instructions in Crim. Cases*, 431 So. 2d 594 (Fla. 1981).

(Revised February 11, 2026.)

420.4 NEGLIGENCE

Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

420.5 LEGAL CAUSE

a. Legal cause generally:

Negligence is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the conduct, the [loss] [injury] [or] [damage] would not have occurred.

b. Concurring cause:

In order to be regarded as a legal cause of [loss] [injury] [or] [damage] negligence need not be the only cause. Negligence may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the negligence contributes substantially to producing such [loss] [injury] [or] [damage].

c. Intervening cause:

*Do not use the bracketed first sentence if this instruction is preceded by the instruction on concurring cause:**

***[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], negligence need not be its only cause.] Negligence may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the negligence occurs if [such other cause was itself reasonably foreseeable and the negligence contributes substantially to producing such [loss] [injury] [or] [damage]] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the negligence and the negligence contributes substantially to producing it].**

NOTES ON USE FOR 420.5

1. Instruction 420.5a (legal cause generally) is to be given in all cases. Instruction 420.5b (concurring cause), to be given when the court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether negligence was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his or her negligence by reason of some other cause concurring in time and contributing to the same damage. Instruction 420.5c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. The jury will properly consider instruction 420.5a not only in determining whether defendant's negligence is actionable but also in determining whether claimant's negligence contributed as a legal cause to claimant's damage, thus reducing recovery.

3. Instruction 420.5b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the occurrence or resulting injury. If there is an issue of aggravation of a preexisting condition or of subsequent injuries/multiple events, instructions 501.5a or 501.5b should be given as well. See *Hart v. Stern*, 824 So. 2d 927, 929–32 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So. 2d 833, 834–35 (Fla. 4th DCA 1992).

4. Instruction 420.5c (intervening cause) embraces two situations in which negligence may be a legal cause notwithstanding the influence of an intervening cause: (1) when the damage was a reasonably foreseeable consequence of the negligence although the other cause was not foreseeable, *Mozer v. Semenza*, 177 So. 2d 880 (Fla. 3d DCA 1965), and (2) when the intervention of the other cause was itself foreseeable, *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So. 2d 520 (Fla. 1980).

5. *"Probable" results.* The committee recommends that the jury not be instructed that the damage must be such as would have appeared "probable" to the actor or to a reasonably careful person at the time of the negligence. In cases involving an intervening cause, the term "reasonably foreseeable" is used in place of "probable." The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165

So. 2d 806, 810 (Fla. 1st DCA 1964); Prosser, TORTS 291 (3d ed.); 2 Harper & James, THE LAW OF TORTS, 1137.

6. The term "substantially" is used throughout the instruction to describe the extent of contribution or influence negligence must have in order to be regarded as a legal cause. "Substantially" was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test of causation not only in relation to defendant's negligence, *Loftin v. Wilson*, 67 So. 2d 185, 191 (Fla. 1953), but also in relation to plaintiff's comparative negligence, *Shayne v. Saunders*, 176 So. 495, 498 (Fla. 1937).

(Revised December 4, 2024.)

420.6 ISSUES ON PLAINTIFF'S CLAIM

The issues you must decide on (claimant's) **claim against** (defendant) **are whether:**

a. (defendant) **was negligent in** (describe alleged negligence)**, and if so, whether the negligence was a legal cause of injury to** (name of injured/deceased)**;**

b. (claimant) **was involved in some way in the incident that resulted in the injury to** (name of injured/deceased)**;**

c. (claimant) **had a close personal relationship to** (name of injured/deceased)**;**

d. (claimant) **suffered a physical [injury] [condition] [impairment]; and**

e. (claimant's) **physical [injury] [condition] [impairment] resulted from the emotional distress that arose from** (claimant's) **involvement in the incident.**

You may find (claimant) **was involved in some way in the incident if** (claimant) **saw or heard some or all of the events making up the entire incident, including the immediate aftermath of the incident.**

NOTES ON USE FOR 420.6

1. The elements of negligent infliction of emotional distress are found in *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985) and *Zell v. Meek*, 665 So. 2d 1048 (Fla. 1995).

2. "The requirement that the physically injured person be directly involved in the event causing the original injury must also be scrutinized on a case-by-case basis. Proximity to the accident in time and space does not necessarily mean only direct and immediate sight or hearing at the scene of the accident. Rather, there may be recovery in instances where there is a direct perception of some of the events making up the entire accident, including the immediate aftermath of

the accident. This would include but not be limited to the factual situation found in *McLoughlin* [*v. O'Brian*, [1982] 2 All E.R. 298 (Eng.H.L.1982)]." *Zell v. Meek*, 665 So. 2d 1048, 1052–53 (Fla. 1995) quoting *Champion v. Gray*, 478 So. 2d 17, 22 (Alderman, J. concurring) (Fla. 1985).

3. The element of a physical injury is also unnecessary for claims from ingesting contaminated food or drink, where a psychotherapist breaches the statutory duty of confidentiality and privacy, an entity discloses the results of a person's HIV test in violation of Florida Statutes, intentional torts resulting predominantly in emotional damages, freestanding torts such as wrongful birth or negligent stillbirth, and any case where the tortfeasor's negligence may be characterized as willful and wanton. See *Florida Dep't of Corrections v. Abril*, 969 So. 2d 201 (Fla. 2007); *Rowell v. Holt*, 850 So. 2d 474 (Fla. 2003); *Gracey v. Eaker*, 837 So. 2d 348 (Fla. 2002); *Hagen v. Coca Cola Bottling Co.*, 804 So. 2d 1234 (Fla. 2001); *Tanner v. Hartog*, 696 So. 2d 705 (Fla. 1997), *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992); and *Brady v. SCI Funeral Services of Florida, Inc.*, 948 So. 2d 976 (Fla. 1st DCA 2007).

4. There is no requirement that a party have a legal relationship with the injured or deceased person in order to bring a claim for negligent infliction of emotional distress. *Watters v. Walgreen Co.*, 967 So. 2d 930 (Fla. 1st DCA 2007). Whether a particular relationship qualifies as a "close personal relationship" will depend on the facts of the particular case, and "is typically a question of fact." *Id.* at 932 (citing *Zell v. Meek*, 665 So. 2d 1048 (Fla. 1995)).

5. Examples of physical injuries resulting from emotional distress can be found in *Zell v. Meek*, 665 So. 2d 1084 (Fla. 1995) (stomach pains, esophageal blockage, fibromyalgia, irritable bowel, and muscle tightness) and *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985) (death).

(Revised November 19, 2021.)

420.7 BURDEN OF PROOF ON MAIN CLAIM

If the greater weight of the evidence does not support (claimant's) **claim, your verdict should be for** (defendant)**.**

However, if the greater weight of the evidence supports (claimant's) **claim, [then your verdict should be for** (claimant) **and against** (defendant)**] [then you shall consider the defense raised by** (defendant)**].**

(Revised November 19, 2021.)

420.8 DEFENSE ISSUES

On the defense, the issue for you to decide is:

Apportionment of fault:

> **Whether** (identify additional person(s) or entit(y)(ies)) **[was] [were] also [negligent] [at fault] [responsible] in** (describe alleged negligence, fault, or responsibility)**; and if so, whether that [negligence] [fault] [responsibility] was a contributing legal cause of [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made)**.**

NOTES ON USE FOR 420.8

1. See *F.S.* 768.81 (2020); *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993). In most cases, use of the term "negligence" will be appropriate. If another type of fault is at issue, it may be necessary to modify the instruction and the verdict form accordingly.

2. For fault to be apportioned among multiple tortfeasors, the tortfeasors must be joint tortfeasors. See *Grobman v. Posey*, 863 So. 2d 1230, 1234 (Fla. 4th DCA 2003). Joint tortfeasors are those "who act together in committing wrong, or whose acts if independent of each other, united in causing single injury." *Letzter v. Cephas*, 792 So. 2d 481, 486 (Fla. 4th DCA 2001) (internal quotations omitted). For some examples as to whether apportionment is appropriate, see, *Specialty Hosp.-Gainesville, Inc. v. Barth*, 277 So. 3d 201, 215 (Fla. 1st DCA 2019) (apportionment is not appropriate where the defendant and the third party are successive tortfeasors); *Grobman v. Posey*, 863 So. 2d 1230, 1236 (Fla. 4th DCA 2003) (apportionment is not appropriate where liability between the defendant and the third party is derivative); *Suarez v. Gonzalez*, 820 So. 2d 342, 344 (Fla. 4th DCA 2002) (apportionment is not appropriate between a defendant and a third party where the defendant hired the third party to perform a nondelegable duty). Apportionment of fault does not apply to "any action based upon an intentional tort …." § 768.81(4), Fla. Stat. (2020).

(Adopted November 19, 2021.)

420.9 BURDEN OF PROOF ON DEFENSE ISSUES

If the greater weight of the evidence does not support (defendant's) **defense and the greater weight of the evidence does support** (claimant's) **claim, then [your verdict should be for** (claimant) **in the total amount of [his] [her] damages] *[you should decide and write on the verdict form what percentage of the total negligence of [both] [all] defendants you apportion to each defendant whose negligence you find was a legal cause of loss, injury, or damage to** (claimant)**].**

**Use second bracketed alternative above when there is more than on defendant.*

If, however, the greater weight of the evidence shows that [(defendant)**] and** (identify additional person(s) or entit(y)(ies)) **were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by** (claimant)**, you should decide and write on the verdict form what percentage of the total negligence of [**(defendant)**] and** (identify additional person(s) or entit(y)(ies)) **you apportion to each of them.**

(Adopted November 19, 2021.)

423 EMINENT DOMAIN

423.1 Introduction

423.2 Summary of Claims

423.3 Greater Weight of the Evidence

423.4 Controlling Date for Valuation

423.5 Fair Market Value — Highest and Best Use

423.6 Severance Damages

423.7 Use of Property Taken as an Element of Severance Damages

423.8 Special Damages

423.9 Miscellaneous

423.10 View by Jury

423.11 Multiple Parcels

423.12 Closing Instruction

NOTES ON USE

The following jury instructions are designed to cover most eminent domain proceedings. Because each piece of land and each taking are unique, there will undoubtedly be factual situations in which these instructions must be modified, expanded, or supplemented. For example, no attempt has been made to cover topics such as trade fixtures, condemnation blight, special-use properties, the taking of easements, or costs to cure.

Throughout the following jury instructions, the parties are identified as “condemnor,” “owner,” or “business owner.” However, there may be a preference not to use such titles and to refer to parties by name in light of the particular facts or circumstances. Same is left

to the discretion of the court and the advocacy of the parties.

There may be factual disputes for which additional instructions may be needed. For example, instruction 423.8(b) on business damages assumes that there is no dispute about the entitlement to business damages. If there is a factual issue regarding whether the business qualifies for business damages, a special instruction should be fashioned to enable a jury to make that factual determination.

In addition, given the unique nature of eminent domain proceedings and their focus on damages, the committee recommends modifying closing instruction 700 as set forth in instruction 423.12.

(Adopted October 29, 2025.)

423.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 423.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 423.1. See Model Instruction No. 1. Instruction 423.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 423.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including an explanation for the difference, such as where the court has directed a verdict on an issue.

2. "The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations." *Fla. R. Civ. P.* 1.470(b).

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla. R. Civ. P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge, as the judge reads the instructions aloud.

(Adopted October 29, 2025.)

423.2 SUMMARY OF CLAIMS

This case is about eminent domain, which means the power of the (condemnor) **to take property for a public purpose while paying full compensation to** (owner) **for the property taken. The method by which the power of eminent domain is exercised is called "condemnation." The terms "condemnation" and "eminent domain" are sometimes used interchangeably.**

By your verdict you will decide the disputed issues of fact, which in this case concern the amount to be paid to (owner) **for the property taken in this proceeding, and, if appropriate, any damages to remaining property, as well as certain special damages.**

The issue of whether the property should be taken is not a matter to be decided by you.

I have already determined that (condemnor) **may condemn the property involved in this action. The only question for you to decide is how much money** (owner) **should be paid.**

The Florida Constitution provides that the owner of property taken has a right to "full compensation." Full compensation includes the fair market value of the property being taken plus whatever damages result to the owner's remaining land because of the taking.

Full compensation requires the owner to be put in as good a position financially as the owner would have been if the property had not been taken.

Your duty is to decide the amount of money to be paid to (owner) (business owner) **as full compensation [and business damages].**

NOTE ON USE FOR 423.2

The parenthetical, business owner, should only be used if the business damages instruction, 423.8b. is given. See *U.S. v. Fuller*, 409

U.S. 488, 93 S.Ct. 801, 35 L.Ed.2d 16 (1973); *Olson v. U.S.*, 292 U.S. 246, 54 S.Ct. 704, 78 L.Ed. 1236 (1934); *Behm v. Div. of Admin., Dep't of Transp.*, 383 So. 2d 216 (Fla. 1980); *Jacksonville Expressway Auth. v. Henry G. Du Pree Co.*, 108 So. 2d 289 (Fla. 1959); *Fla. Dep't of Transp. v Mallard's Cove, LLP*, 159 So. 3d 927 (Fla. 2d DCA 2015).

(Adopted October 29, 2025.)

423.3 GREATER WEIGHT OF THE EVIDENCE

You must determine the amount of compensation to be paid to (owner) (business owner) **based on the greater weight of the evidence.**

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTES ON USE FOR 423.3

1. The parenthetical, business owner, should only be used if the business damages instruction, 423.8b. is given.

2. *Greater or lesser number of witnesses.* The committee recommends that no instruction be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

3. *Circumstantial evidence.* The committee has not drafted an instruction addressing circumstantial evidence and takes no position on whether such an instruction is needed. For criminal cases, see *Matter of Use by Trial Cts. of Standard Jury Instructions in Crim. Cases*, 431 So. 2d 594 (Fla. 1981).

(Adopted October 29, 2025;
revised February 11, 2026.)

423.4 CONTROLLING DATE FOR VALUATION

You should determine full compensation as of (date)**, which is the date** (condemnor) **acquired the property.**

NOTES ON USE FOR 423.4

1. In a quick-taking proceeding under *F.S.* Chapter 74, the date of the condemnor's initial deposit is the controlling date for valuation as it is the date on which the property legally vests in the condemnor while, simultaneously, the constitutional entitlement to full compensation vests in the owner. See *F.S.* 74.061.

2. By contrast, in a slow-taking proceeding under *F.S.* Chapter 73, the controlling date for valuation is the date of trial because the property has not yet legally vested in the condemnor. See *F.S.* 73.071(2).

(Adopted October 29, 2025.)

423.5 FAIR MARKET VALUE — HIGHEST AND BEST USE

The constitutional requirement of full compensation means (owner) **must be paid completely for the whole loss resulting from the taking. In most cases, it will be necessary and sufficient to full compensation that the award constitutes the fair market value of the property. Although fair market value is a reliable standard in determining the amount of full compensation to be paid to** (owner)**, it is not the only standard. It is merely a tool to assist you in determining what is full compensation as guaranteed by the Florida Constitution. [You [will hear] [have heard] witnesses testify concerning values of property involving different methods of appraisal and mathematical computations.] In determining full compensation, all facts and circumstances that bear a reasonable relationship to** (owner's) **loss must be taken into account.**

Fair market value is the price that a seller willing, but not compelled, to sell and a buyer willing, but not compelled, to buy would agree on in fair negotiations with knowledge of all the facts. In making your determination, you should take into account all factors that might fairly be considered and be reasonably given substantial weight in the bargaining between the seller and the buyer.

You may also consider the market value of other comparable property as of the date of the valuation and all other factors tending to increase or reduce the value of the property that a prudent seller and buyer would consider in negotiating a voluntary sale and purchase of the property taken.

The property should be valued according to its highest and best use. The phrase "highest and most profitable use for which the property is reasonably adaptable and needed, or is likely to be needed, in the foreseeable future.

NOTE ON USE FOR 423.5

See *Fla. Power & Light Co. v. Jennings*, 518 So. 2d 895 (Fla.

1987); *Fla. Dep't of Transp. v. Nalven*, 455 So. 2d 301 (Fla. 1984); *Behm v. Div. of Admin., Dep't. of Transp.*, 383 So. 2d 216 (Fla. 1980); *Dade Cnty. v. General Waterworks Corp.*, 267 So. 2d 633 (Fla. 1972); *Jacksonville Expressway Auth. v. Henry G. Du Pree Co.*, 108 So. 2d 289 (Fla. 1959).

(Adopted October 29, 2025.)

423.6 SEVERANCE DAMAGES

In determining the amount of full compensation that should be awarded to (owner)**, you must take into consideration the value of the property actually taken from** (owner) **and the damage, if any, to** (owner's) **remaining property caused by the taking.**

Damages to the remaining property of an owner are known as severance damages and may consist of the following:

a. **Reduction in value because of the reduced size or shape of the remaining property.**

b. **Reduction in value because of the use to which** (condemnor) **intends to put the property actually taken.**

c. **Reduction in value caused by the change of grade between** (owner's) **remaining property and the property actually taken.**

d. **Reduction in value because of a loss of access. Ease and facility of access to and from the property constitutes valuable property rights.** (Owner) **must be fully compensated for a destruction or substantial diminution of this access.**

NOTE ON USE FOR 423.6

This instruction is to be used only in partial takings cases. Use only the specific subparagraph(s) that apply based on the evidence. This is not an exhaustive list of sources of severance damages. An additional instruction may be appropriate, such as, "Reduction in value because of (insert appropriate instruction for other applicable sources for severance damages)." See *Div. of Admin., State Dep't of Transp. v. Capital Plaza, Inc.*, 397 So. 2d 682 (Fla. 1981); *State Dep't of Transp. v. Stubbs*, 285 So. 2d 1 (Fla. 1973); *Benerofe v. State Road Dep't*, 217 So. 2d 838 (Fla. 1969); *Fla. State Turnpike Auth. v. Anhoco Corp.*, 116 So. 2d 8 (Fla. 1959); *Div. of Admin., Fla. Dep't of Transp. v. Ness Trailer Park, Inc.*, 489 So. 2d 1172 (Fla. 4th DCA 1986); *Div. of*

Admin., State Dep't of Transp. v. Jirik, 471 So. 2d 549 (Fla. 3d DCA 1985), approved 498 So. 2d 1253; *Pinellas Cnty. v. Austin*, 323 So. 2d 6 (Fla. 2d DCA 1975); *Boney v. State, Dep't of Transp.*, 250 So. 2d 650 (Fla. 1st DCA 1971); *State Road Dep't of Fla. v. McCaffrey*, 229 So. 2d 668 (Fla. 2d DCA 1969).

(Adopted October 29, 2025.)

423.7 USE OF PROPERTY TAKEN AS AN ELEMENT OF SEVERANCE DAMAGES

If you find from the evidence that (condemnor) **has committed itself to a particular use for the property taken, you may consider that use in determining whether there are any damages to** (owner's) **remaining property.**

[On the other hand, if you find that (condemnor) **has not committed itself to a particular use for the property taken, you may consider all uses to which the property may be reasonably put by** (condemnor)**. You may assume the worst possible effect on the remainder of the property that the full extent of the legal rights acquired would imply.]**

NOTES ON USE FOR 423.7

1. This instruction should be given immediately following instruction 423.6b, if that instruction is given.

2. See *Trailer Ranch, Inc. v. City of Pompano Beach*, 500 So. 2d 503 (Fla. 1986) (easement) and *Belvedere Dev. Corp. v. Dep't. of Transp., Div. of Admin.*, 476 So. 2d 649 (Fla. 1985) (binding construction plans) for cases in which the condemnor has committed itself to a particular use for the property taken.

3. The second paragraph should be used only when the condemnor fails to submit plans or binding testimony. *Cent. & S. Fla. Flood Control Dist. v. Wye River Farms, Inc.*, 297 So. 2d 323 (Fla. 4th DCA 1974), citing *State Road Dep't of Fla. v. Southland, Inc.*, 117 So. 2d 512 (Fla. 1st DCA 1960).

(Adopted October 29, 2025.)

423.8 SPECIAL DAMAGES

You also should consider the following categor[y][ies] of damages if established by the greater weight of the evidence:

a. Moving costs:

(Owner) **is to be paid the reasonable value of the expenses necessary to move** (owner's property) **from the property taken to a new location.**

NOTE ON USE FOR 423.8a.

The appropriate instruction(s) for special damages should be used as warranted by the evidence. See *Behm v. Div. of Admin., Dep't of Transp.*, 383 So. 2d 216 (Fla. 1980); *Fla. E. Coast Ry. Co. v. Martin Cnty.*, 171 So. 2d 873 (Fla. 1965); *Jacksonville Expressway Auth. v. Henry G. Du Pree Co.*, 108 So. 2d 289 (Fla. 1959).

b. Business damages under F.S. 73.071(3)(b):

(Business owner) **is entitled to be paid for the business loss, if any, to the business located on the remaining property if this loss is caused by the denial of the use of the property taken. You should determine the probable damages to the business that the denial of the use of the property taken may reasonably cause.**

The award for business damages is a separate item from both the value of the land taken and severance damages to the remaining property.

Business damages are often lost profits attributable to the lost profit-making capacity of the business caused by the taking. However, business damages may also include the depreciating effect that the taking will have on the gross income, goodwill, or going concern value of the business.

NOTE ON USE FOR 423.8b.

The appropriate instruction(s) for special damages should be

used as warranted by the evidence. See *System Components Corp. v. Fla. Dep't of Transp.*, 14 So. 3d 967 (Fla. 2009); *Murray v. Dep't of Transp.*, 687 So. 2d 825 (Fla. 1997); *Weaver Oil Co. v. City of Tallahassee*, 647 So. 2d 819 (Fla. 1994); *Fla. Dep't of Transp. v. Manoli*, 645 So. 2d 1093 (Fla. 4th DCA 1994); *Howard Johnson Co. v. Div. of Admin., Fla. Dep't of Transp.*, 450 So. 2d 328 (Fla. 4th DCA 1984); *Matthews v. Div. of Admin., State, Dep't of Transp.*, 324 So. 2d 664 (Fla. 4th DCA 1976). The practitioner should also note that when claiming business damages, there is no statutory requirement that a business relocate. However, in the event that "a qualified partial taking destroys a business at its prior location, and the land/business owner chooses to relocate, the resulting business damages must be measured by the probable financial impact reasonably suffered as a result of the taking. Therefore, these business damages must be determined in light of the true economic realities of the given case." *System Components Corp. v. Fla. Dep't of Transp.*, 14 So. 3d 967, 985 (Fla. 2009). Thus, if a business relocates under these circumstances, the practitioner may want to amend the above jury instruction, as need be, to reflect this ruling.

(Adopted October 29, 2025.)

423.9 MISCELLANEOUS

a. Threat of condemnation:

If you find from the evidence that the fair market value of the property taken in this case decreased because of the prospect of condemnation, you should disregard that decrease and base your award on the value of the property as it would be at the time of taking without the threat of condemnation. In other words, the full compensation that is due (owner) **for the taking of** (owner's) **property should be the value of the property as it would have been at the time of the taking uninfluenced by the fact that it was to be taken in this proceeding.**

NOTE ON USE FOR 423.9a.

See *Dep't of Transp. v. Nalven*, 455 So. 2d 301 (Fla. 1984); *Dade Cnty. v. Still*, 377 So. 2d 689 (Fla. 1979); *State Road Dep't v. Chicone*, 158 So. 2d 753 (Fla. 1963); *Langston v. City of Miami Beach*, 242 So. 2d 481 (Fla. 3d DCA 1971).

b. Enhancement:

If you find from the evidence that (owner's) **remaining property has suffered a severance damage because of the taking, you may consider whether the remaining property will be enhanced in value by a special and direct benefit caused by the proposed project.**

Before evidence of enhancement can be offset against severance damages, (condemnor) **must prove that the increase in value resulted directly and peculiarly to** (owner's) **remaining property and not just to the land in the neighborhood generally or to the public as a whole.**

General benefits resulting to (owner) **in common with the public cannot be offset, nor may you offset any enhancement in value against the value of the property taken. This is because** (owner) **must be compensated for the property taken regardless of any benefit to the remaining property.**

NOTE ON USE FOR 423.9b.

See *Mainer v. Canal Auth. of State*, 467 So. 2d 989 (Fla. 1985); *Dep't of Transp. of Fla. v. Nalven*, 455 So. 2d 301 (Fla. 1984); *Daniels v. State Road Dep't*, 170 So. 2d 846 (Fla. 1964); *325 W. Adams St., Ltd. v. City of Jacksonville*, 863 So. 2d 380 (Fla. 1st DCA 2003).

c. Increase or decrease in value due to the scope of the project:

NOTE ON USE FOR 423.9c.

Because application of the law may vary on a case-by-case basis, the committee does not propose a standard instruction regarding an increase or decrease in value due to the scope of the project. Compare *Dep't of Transp. of Fla. v. Nalven*, 455 So. 2d 301 (Fla. 1984); *Anderson v. State Road Dep't*, 204 So. 2d 899 (Fla. 1st DCA 1968); *Sunday v. Louisville & N. R. Co.*, 62 Fla. 395, 57 So. 351 (1912); with F.S. 73.071(5).

d. Reasonable probability of land use regulation (zoning) change:

If you find that there is a reasonable probability that the existing [land use] [zoning] regulations would have been modified or changed within a reasonable time if the property had not been condemned and that the market value of the property as of the date of the taking would have been increased by the reasonable probability of a change in those [land use] [zoning] regulations, you may consider other uses of the property not permitted by existing [land use] [zoning] regulations in determining the fair market value of the property involved.

In making that determination, you should presume that the officials in charge of changing the [land use] [zoning] regulations would have fairly and properly performed their duties and would have reached their decision on this issue solely on the merits of the issue without any other considerations.

NOTE ON USE FOR 423.9d.

See *Broward Cnty. v. Patel*, 641 So. 2d 40 (Fla. 1994); *Bd. of*

Comm'rs of State Institutions v. Tallahassee Bank & Trust Co., 116 So. 2d 762 (Fla. 1959); *Hillsborough Cnty. Aviation Auth. v. Taller & Cooper, Inc.*, 245 So. 2d 100 (Fla. 2d DCA 1971); *Swift & Co. v. Hous. Auth. of Plant City*, 106 So. 2d 616 (Fla. 2d DCA 1958); *Bd. of Comm'rs of State Institutions v. Tallahassee Bank & Trust Co.*, 100 So. 2d 67 (Fla. 1st DCA 1958).

(Adopted October 29, 2025.)

423.10 VIEW BY JURY

You [will be] [have been] permitted to view the propert[y][ies] involved in this case under the supervision of the court.

[Transportation will be provided.]

[You must not visit or view the propert[y][ies] that are the subject of this case unless and until I direct you to do so.]

The purpose of this view [is] [was] to help you understand and apply the evidence to the propert[y][ies] in question. You are not to make your own appraisal or form opinions unsupported by the evidence.

NOTE ON USE FOR 423.10

F.S. 73.071(6) authorizes a jury view on demand of any party or by court order.

(Adopted October 29, 2025.)

423.11 MULTIPLE PARCELS

This trial involves several parcels of land owned by several owners named in this action. These parcels of land have been combined in this action for the purpose of trial, for convenience, and to save time and expense. Each parcel, however, is to be considered separate from the other and each constitutes a separate trial as to each individual parcel and owner.

(Adopted October 29, 2025.)

423.12 CLOSING INSTRUCTION

Members of the jury, you have now heard all the evidence, my instructions on the law that you must apply in reaching your verdict and the closing arguments of the attorneys. You will shortly retire to the jury room to decide this case. [Before you do so, I have a few last instructions for you.]

During deliberations, jurors must communicate about the case only with one another and only when all jurors are present in the jury room. You will have in the jury room all of the evidence that was received during the trial. In reaching your decision, do not do any research on your own or as a group. Do not use dictionaries, the Internet, artificial intelligence, or any other reference materials. Do not investigate the case or conduct any experiments. Do not visit the property involved in this case on your own or look at maps or pictures of the property on the Internet. If you happen to pass by the property, do not stop or investigate. All jurors must see or hear the same evidence at the same time. Do not read, listen to, or watch any news accounts of this trial.

You are not to communicate with any person outside the jury about this case. Until you have reached a verdict, you must not talk about this case in person or through the telephone, writing, or electronic communication, such as social media, e-mail, text message, or any other means. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. These communications rules apply until I discharge you at the end of the case.

If you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the bailiff.

Any notes you have taken during the trial may be taken to the jury room for use during your discussions. Your notes are simply an aid to your own memory, and neither your notes nor those of any other juror are binding or conclusive. Your notes are not a substitute for your own memory or that of other jurors.

Instead, your verdict must result from the collective memory and judgment of all jurors based on the evidence and testimony presented during the trial.

At the conclusion of the trial, the bailiff will collect your notes, which will be immediately destroyed. No one will ever read your notes.

In reaching your verdict, do not let bias, sympathy, prejudice, public opinion, or any other sentiment for or against any party influence your decision. Your verdict must be based on the evidence that has been received and the law on which I have instructed you.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way and you should not guess what I think your verdict should be from something I may have said or done. You should not think that I prefer one verdict over another. Therefore, in reaching your verdict, you should not consider anything that I have said or done, except for my specific instructions to you.

Pay careful attention to all the instructions that I gave you, for that is the law that you must follow. You will have a copy of my instructions with you when you go to the jury room to deliberate. All the instructions are important, and you must consider all of them together. There are no other laws that apply to this case, and even if you do not agree with these laws, you must use them in reaching your decision in this case.

When you go to the jury room, the first thing you should do is choose a presiding juror to act as a foreperson during your deliberations. The foreperson should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change

your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

Your verdict must be unanimous; that is, your verdict must be agreed to by each of you. Your verdict must be based on a careful consideration of all the evidence and the instructions I have given you and may not be less than the lowest value nor more than the highest value testified to by any witness in this proceeding.

A form of verdict has been prepared for your use. It contains the legal description of [the] [each] parcel of land and a blank for the amount of compensation for [the] [each] parcel. The law requires that the legal description be included in your verdict. The description is not to concern you, because the description of the property is not a disputed issue in the trial. You only have to fill in the amount of compensation that expresses the verdict you desire to return.

[I will give you a verdict form with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form carefully. You must consider each question separately. Please answer the questions in the order they appear. After you answer a question, the form tells you what to do next. I will now read the form to you: (read form of verdict).]

When you have reached your decision, the foreperson must fill in the amounts awarded in the blanks on this verdict form provided. Your foreperson must then write the date and sign the verdict form at the bottom and return it to the courtroom.

If any of you need to communicate with me for any reason, write me a note and give it to the bailiff. In your note, do not disclose any vote or split.

You may now retire to decide your verdict.

NOTE ON USE FOR 423.12

This instruction is patterned after instruction 700 with modifications to address the issues in eminent domain proceedings.

(Adopted October 29, 2025.)

451 FIDUCIARY DUTY

451.1 Introduction

451.2 Summary of Claims or Contentions

451.3 Greater Weight of the Evidence

451.4 Existence of Fiduciary Duty Disputed

451.45 Breach of Fiduciary Duty — Civil Conspiracy

451.5 Breach of Fiduciary Duty

451.6 Legal Cause

451.7 Preemptive Charges

451.8 Preliminary Issue — Vicarious Liability

451.9 Burden of Proof on Preliminary Issues

451.10 Issues on Main Claim

451.11 Burden of Proof on Main Claim

451.12 Defense Issues

451.13 Burden of Proof on Defense Issues

451.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) **different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.**

NOTES ON USE FOR 451.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 451.1. See Model Instruction No. 1. Instruction 451.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 451.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including an explanation for the difference, such as where the court has directed a verdict on an issue.

2. Florida Rule of Civil Procedure 1.470(b) authorizes instructing the jury during trial or before or after final argument. The timing of instructions is within the sound discretion of the trial judge, to be determined on a case-by-case basis, but the committee strongly recommends instructing the jury before final argument.

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla.R.Civ.P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge, as the judge reads the instructions aloud.

(Adopted December 20, 2018
(260 So. 3d 965.))

451.2 SUMMARY OF CLAIMS OR CONTENTIONS

The claims [and defenses] in this case are as follows. (Claimant) **claims that** (defendant) **owed a fiduciary duty to [him][her], that** (defendant) **failed to protect** (claimant's) **[financial interests] [property interests] [secrets] [confidences] [private information] [used such information to the detriment of claimant], and that this [failure] [use] caused harm to** (claimant)**.**

(Defendant) **denies that claim [and also claims that** (describe any affirmative defenses)**].**

The parties must prove all claims [and defenses] by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

(Adopted December 20, 2018
(260 So. 3d 965.))

451.3 GREATER WEIGHT OF THE EVIDENCE

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTES ON USE FOR 451.3

1. *Greater or lesser number of witnesses.* The committee recommends that no instruction be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. *Circumstantial evidence.* The committee recommends that no instruction generally be given distinguishing circumstantial from direct evidence. See *Nielsen v. City of Sarasota*, 117 So. 2d 731 (Fla. 1960).

(Adopted December 20, 2018
(260 So. 3d 965.))

451.4 EXISTENCE OF FIDUCIARY DUTY DISPUTED

(Claimant) **claims that** (defendant) **owed a fiduciary duty to [him] [her] [it].**

To prove a fiduciary duty existed, (claimant) **must prove the following:**

A relationship existed between (claimant) **and** (defendant) **in which** (claimant) **put [his] [her] [its] trust in** (defendant) **to protect** (claimant's) **[financial or property interests] [secrets] [confidences] [private information] and** (defendant) **accepted that trust.**

NOTES ON USE FOR 451.4

1. This instruction should not be read if the defendant admits the existence of a common law or statutory fiduciary duty. If the defendant admits the existence of such a duty, the preemptive charge at instruction 451.7a should be given instead.

2. These instructions address cases in which a breach of fiduciary duty creates a jury issue. *But see King Mountain Condominium Ass'n v. Gundlach*, 425 So. 2d 569 (Fla. 4th DCA 1982) (holding that a plaintiff seeking purely equitable relief for breach of fiduciary duty is not entitled to a jury trial).

3. The committee recognizes that claims for breach of fiduciary duty may arise in different circumstances in addition to those listed above. *See Doe v. Evans*, 814 So. 2d 370 (Fla. 2002).

SOURCES AND AUTHORITIES

1. The Florida Supreme Court has characterized a fiduciary relationship in the following manner:

> The relation and duties involved need not be legal; they may be moral, social, domestic or personal. If a relation of trust and confidence exists between the parties (that is to say, where confidence is reposed by one party and trust accepted by the other, or where confidence has been acquired and

abused), that is sufficient as a predicate for relief. The origin of the confidence is immaterial.

Doe v. Evans, 814 So. 2d 370, 374 (Fla. 2002) (quoting *Quinn v. Phipps*, 93 Fla. 805, 113 So. 419, 421 (Fla. 1927)).

2. "A fiduciary relationship may be implied by law, and such relationships are 'premised upon the specific factual situation surrounding the transaction and the relationship of the parties.'" *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002) (quoting *Capital Bank v. MVB, Inc.*, 644 So. 2d 515, 518 (Fla. 3d DCA 1994)).

(Adopted December 20, 2018
(260 So. 3d 965.))

451.45 BREACH OF FIDUCIARY DUTY — CIVIL CONSPIRACY

[On (claimant's) **claim for civil conspiracy to commit breach of fiduciary duty, you must decide the claim separately for [each defendant] [**(list defendants at issue in this claim)**].]**

The issues on [this claim] [(claimant's) **claim for civil conspiracy to commit breach of fiduciary duty] are:**

[First, whether a fiduciary relationship existed between (claimant) **and [**(defendant)**] [another] [others] [each other]. To prove a fiduciary relationship existed between** (claimant) **and [**(defendant)**] [another] [others] [each other],** (claimant) **must prove that** (claimant) **put [his] [her] [its] trust in [**(defendant)**] [another] [others] [each other] to protect** (claimant's) **[financial or property interests] [secrets] [confidences] [private information] and [**(defendant)**] [another] [others] [each other] accepted that trust;]***

** This instruction should be given unless preemptive instruction regarding existence of fiduciary duty is given and there is no longer a question regarding the existence of a fiduciary duty.*

Second, [as to] [each defendant] [(list defendants at issue in this claim)**] whether [each of them] [**(defendant)**] entered an agreement with [another] [others] [each other] to cause a breach of the fiduciary duty between** (claimant) **and [**(defendant)**] [another] [others] [each other];**

Third, whether [(defendant)**] [another] [others] [each other] breached a fiduciary duty to [**(claimant)**] [another] [others] [each other] in furtherance of the agreement. A breach of a fiduciary duty occurs when [**(defendant)**] [another] [others] [each other] failed to act [with the utmost good faith, fairness, and honesty] [with the highest and finest loyalty] and:**

a. **failed to protect** (claimant's) **financial or property interests; or**

b. **failed to protect** (claimant's) **[secrets] [confidences] [private information]; or**

c. used such information to the detriment of (claimant)**;**

Fourth, whether the breach of fiduciary duty was a legal cause of [loss] [injury] [or] [damage] to (claimant)**.**

If the greater weight of the evidence does not support (claimant's) **claim, then your verdict should be for** (defendant)**. However, if the greater weight of the evidence supports** (claimant's) **claim, [then your verdict should be for** (claimant) **and against** (defendant)**] [then you shall consider the defense[s] raised by** (defendant)**].**

NOTES ON USE FOR 451.45

1. "A civil conspiracy claim requires: (1) an agreement between two or more parties; (2) to do an unlawful act or to do a lawful act by unlawful means; (3) the doing of some overt act in pursuance of the conspiracy; and (4) damage to the plaintiff as a result of the acts done under the conspiracy." *Phillip Morris USA, Inc. v. Russo*, 175 So. 3d 681, 686 n.9 (Fla. 2015). See also *Logan v. Morgan, Lewis & Bockius LLP*, 350 So. 3d 404, 412 (Fla. 2d DCA 2022) (recognizing claim for civil conspiracy to breach a fiduciary duty); *Blatt v. Green, Rose, Kahn & Piotrkowski*, 456 So. 2d 949, 951 (Fla. 3d DCA 1984) (same).

2. Although parties to a conspiracy may be held liable under proper circumstances for the acts of a co-conspirator made in furtherance of a conspiracy, the plaintiff must establish as to each defendant that that defendant entered into the scheme. See *Charles v. Florida Foreclosure Placement Ctr., LLC*, 988 So. 2d 1157, 1160 (Fla. 3d DCA 2008) ("Each coconspirator need not act to further a conspiracy; each 'need only know of the scheme and assist in it in some way to be held responsible for all of the acts of his coconspirators.'"); see also *Phelan v. Lawhon*, 229 So. 3d 853, 857–59 (Fla. 3d DCA 2017) (concluding that allegations were sufficient to show that 12 of 14 defendants had joined conspiracy, but insufficient to show that the remaining 2 non-resident defendants joined the conspiracy and were subject to Florida jurisdiction).

3. Because the allegations concerning a conspiracy claim may include innumerable permutations, involving both named defendants and unnamed alleged co-conspirators, the court and the parties will have to adapt the instruction and verdict form as appropriate for each case. Depending on the circumstances, the court might also consider giving a separate conspiracy instruction as to each defendant.

4. The first paragraph should only be used in multiple defendant cases.

5. These instructions have been prepared to cover many of the circumstances under which fiduciary duties have been held to arise. Courts have described the standard for a fiduciary's duty as being "the finest and highest loyalty," *Donahue v. Davis*, 68 So. 2d 163 (Fla. 1953), and "utmost good faith, fairness and honesty," *Gossett v. St. Paul Fire and Marine Insurance Co.*, 427 So. 2d 386, 387 (Fla. 4th DCA 1983). The choice of the particular standard or standards will depend on the circumstances that give rise to the fiduciary duty. Other standards not listed in this instruction may apply.

6. A breach of fiduciary duty can be negligent or intentional. *Palafrugell Holdings, Inc. v. Cassel*, 825 So. 2d 937, 939 n.1 (Fla. 3d DCA 2001).

(Adopted November 5, 2025,
revised July 6, 2026.)

451.5 BREACH OF FIDUCIARY DUTY

(Claimant) **claims that** (defendant) **breached a fiduciary duty [he] [she] [it] owed to** (claimant) **and was damaged as a result.**

You must decide whether (defendant) **breached a fiduciary duty to** (claimant) **and whether the breach was a legal cause of damages.**

A breach of a fiduciary duty occurs when (defendant) **failed to act [with the utmost good faith, fairness, and honesty] [with the highest and finest loyalty] and:**

a. failed to protect (claimant's) **financial or property interests; or**

b. failed to protect (claimant's) **[secrets] [confidences] [private information]; or**

c. used such information to the detriment of (claimant)

and breach of the fiduciary duty is a legal cause of damage to (claimant)**.**

NOTES ON USE FOR 451.5

1. These instructions have been prepared to cover many of the circumstances under which fiduciary duties have been held to arise. Courts have described the standard for a fiduciary's duty as being "the finest and highest loyalty," *Donahue v. Davis*, 68 So. 2d 163 (Fla. 1953), and "utmost good faith, fairness and honesty," *Gossett v. St. Paul Fire and Marine Insurance Co.*, 427 So. 2d 386, 387 (Fla. 4th DCA 1983). The choice of the particular standard or standards will depend on the circumstances that give rise to the fiduciary duty. Other standards not listed in this instruction may apply.

2. A breach of fiduciary duty can be negligent or intentional. *Palafrugell Holdings, Inc. v. Cassel*, 825 So. 2d 937, 939 n.1 (Fla. 3d DCA 2001).

3. As the facts dictate, appropriate defense instructions may be necessary.

4. In the appropriate case, the court should consider whether to give instructions on concurring or intervening cause.

(Adopted December 20, 2018
(260 So. 3d 965.))

451.6 LEGAL CAUSE

a. Legal cause generally:

Breach of a fiduciary duty is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the breach of fiduciary duty, the [loss] [injury] [or] [damage] would not have occurred.

b. Concurring cause:

In order to be regarded as a legal cause of [loss] [injury] [or] [damage] a breach of the fiduciary duty need not be the only cause. A breach of a fiduciary duty may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the breach of fiduciary duty contributes substantially to producing such [loss] [injury] [or] [damage].

c. Intervening cause:

*Do not use the bracketed first sentence if this instruction is preceded by the instruction on concurring cause:**

***[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], breach of fiduciary duty need not be its only cause.] Breach of fiduciary duty may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the breach of fiduciary duty occurs if [such other cause was itself reasonably foreseeable and the breach of fiduciary duty contributes substantially to producing such [loss] [injury] [or] [damage]] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the breach of**

fiduciary duty and the breach of fiduciary duty contributes substantially to producing it].

(Adopted December 20, 2018
(260 So. 3d 965.))

451.7 PREEMPTIVE CHARGES

The court has determined and now instructs you that:

a. Existence of a fiduciary duty:

A relationship existed between (claimant) **and** (defendant) **in which** (claimant) **put [his] [her] [its] trust in** (defendant) **to protect** (claimant's) **[financial or property interests] [secrets] [confidences] [private information] and** (defendant) **accepted that trust.**

(Skip to instructions on breach of fiduciary duty (451.5), legal cause (451.6), and damages (section 500).)

NOTES ON USE FOR 451.7a

1. This preemptive charge should be given only when the defendant admits or stipulates, or the court has ruled as matter of law, that a common law or statutory fiduciary duty exists between the claimant and the defendant. Otherwise, instruction 451.4 should be given.

2. The Committee takes no position on whether all the types of damages specified in section 500 are awardable for a breach of fiduciary duty claim.

b. Existence of a fiduciary duty if a conspiracy is alleged:

A relationship existed between (claimant) **and [**(defendant)**] [[another] [others] [each other]] in which** (claimant) **put [his] [her] [its] trust in [**(defendant)**] [[another] [others] [each other]] to protect** (claimant's) **[financial or property interests] [secrets] [confidences] [private information] and [**(defendant)**] [[another] [others] [each other]] accepted that trust.**

(Skip to instructions on breach of fiduciary duty—civil conspiracy (451.45), legal cause (451.6), and damages (section 500).)

NOTE ON USE FOR 451.7b

This preemptive charge should be given only when the claimant has alleged a conspiracy to breach a fiduciary duty, and the defendant admits or stipulates, or the court has ruled as matter of law, that a common law or statutory fiduciary duty exists between the claimant and either the defendant or an alleged co-conspirator.

c. Directed verdict on liability:

(Defendant) **breached a fiduciary duty and that breach was a legal cause of [loss] [injury] [or] [damage] to** (claimant)**.** (Claimant) **is therefore entitled to recover from** (defendant) **for the [loss] [injury] [or] [damage] as is shown by the greater weight of the evidence to have thus been caused by** (defendant)**.**

(Skip to instructions on damages (section 500).)

NOTE ON USE FOR 451.7c

This charge should be given only when the defendant admits or stipulates, or the court has ruled a matter of law, that the defendant has breached a fiduciary duty and that breach is a legal cause of damages to the plaintiff. Otherwise, instructions 451.5 and 451.6 should be given.

(Adopted December 20, 2018 (260 So. 3d 965); revised November 5, 2025.)

451.8 PRELIMINARY ISSUE — VICARIOUS LIABILITY

NOTE ON USE FOR 451.8

At this time, the Committee does not propose a standard instruction on preliminary issues in a breach of fiduciary duty case. A special instruction on vicarious liability may be considered. See *Testa v. S. Escrow & Title, LLC*, 36 So. 3d 713, 715 (Fla. 1st DCA 2010) (noting the possibility of pleading a claim for vicarious liability for breach of fiduciary duty).

(Adopted December 20, 2018
(260 So. 3d 965.))

451.9 BURDEN OF PROOF ON PRELIMINARY ISSUES

If the greater weight of the evidence does not support (claimant's) **claim on [this issue] [these issues], that** (describe preliminary issue)**, then your verdict on the claim of** (claimant) ***[because of the claimed breach of fiduciary duty by** (name)**] should be for** (defendant)**.**

If, however, the greater weight of the evidence supports (claimant's) **claim on [this issue] [these issues], that** (describe preliminary issue)**, then you shall consider the other issues on** (claimant's) **claim.**

NOTES ON USE FOR 451.9

1. Give instruction 451.9 if instructing the jury on any preliminary issues.

2. If there are multiple defendants, this instruction will have to be modified to account for the issues related to each defendant.

3. *There is no need to give that portion of the charge contained within brackets unless the claimant makes multiple claims involving other defendants. In such a case it is necessary to distinguish this claim from claims against other defendants.

(Adopted December 20, 2018
(260 So. 3d 965.))

451.10 ISSUES ON MAIN CLAIM

The [next] issues you must decide on (claimant's) **claim against** (defendant) **are:**

a. Breach of fiduciary duty:

whether (defendant) **breached a fiduciary duty by** (describe conduct in question)**, and, if so, whether that breach was a legal cause of [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made)**.**

b. Breach of fiduciary duty by multiple defendants:

whether (defendant) **or** (defendant) **breached a fiduciary duty or whether both breached a fiduciary duty in** (describe alleged breach of fiduciary duty) **and, if so, whether that breach was a legal cause of [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made)**.**

NOTE ON USE FOR 451.10

"The elements of a claim for breach of fiduciary duty are: the existence of a fiduciary duty, and the breach of that duty such that it is the proximate cause of the plaintiff's damages." *Gracey v. Eaker*, 837 So. 2d 348, 353 (Fla. 2002).

(Adopted December 20, 2018
(260 So. 3d 965.))

451.11 BURDEN OF PROOF ON MAIN CLAIM

If the greater weight of the evidence does not support [one or more of] (claimant's) **claim[s], your verdict should be for** (defendant) **[on [that] [those] claim[s]].**

[However, if the greater weight of the evidence supports [one or more of] (claimant's) **claim[s], then your verdict should be for** (claimant) **and against** (defendant) **[on [that] [those] claim[s]].]**

NOTES ON USE FOR 451.11

1. Use the first paragraph in all cases. If there is an affirmative defense to the claim that is the subject of the charge, do not use the bracketed paragraph; instead, use instruction 451.12.

2. The Committee takes no position on whether a comparative negligence instruction would be appropriate.

(Adopted December 20, 2018 (260 So. 3d 965.))

451.12 DEFENSE ISSUES

If, however, the greater weight of the evidence supports [(claimant's) **claim] [one or more of** (claimant's) **claims], then you shall consider the defense(s) raised by** (defendant)**.**

On the [first]* defense, the issue(s) for you to decide [is] [are]:

[Insert any special instructions on defense issues]

NOTE ON USE FOR 451.12

At this time, the Committee does not propose standard instructions on any particular defenses that may be raised.

(Adopted December 20, 2018
(260 So. 3d 965.))

451.13 BURDEN OF PROOF ON DEFENSE ISSUES

If the greater weight of the evidence does not support (defendant's) **defense[s] of** (describe defense) **and the greater weight of the evidence supports** (claimant's) **claim, then [your verdict should be for** (claimant) **in the total amount of [his] [her] damages].**

NOTES ON USE FOR 451.13

1. *Preemptive charges on defense issues.* If a preemptive charge for claimant is appropriate on a defense issue, an instruction in the form of 451.7 should be given immediately following instruction 451.11. If a preemptive charge for defendant is required on some aspect of a defense, a preemptive charge announcing the ruling should be given immediately after framing the applicable defense issue.

2. *Charges on issues raised by replies to affirmative defenses.* Plaintiff bears the burden of proof on issues raised by any replies to affirmative defenses, and instruction 451.13 should be modified as appropriate for those issues.

(Adopted December 20, 2018
(260 So. 3d 965.))

451.14 MODEL FORM OF VERDICT FOR BREACH OF FIDUCIARY DUTY

We, the jury, return the following verdict:

1. Did a relationship exist between (claimant) **and** (defendant) **in which** (claimant) **put [his] [her] [its] trust in** (defendant) **to protect** (claimant's) **[financial or property interests] [secrets] [confidences] [private information] and** (defendant) **accepted that trust?**

YES NO

If your answer to question 1 is YES, proceed to question 2. If your answer to question 1 is NO, your verdict is for (defendant) **on this claim, and you should not proceed further except to date and sign this verdict form and return it to the courtroom.**

2. Did (defendant) **breach a fiduciary duty owed to** (claimant) **that was a legal cause of damage to** (claimant)**?**

YES NO

If your answer to question 2 is YES, your verdict is for (claimant) **on this claim, and you should proceed to question 3. If your answer to question 2 is NO, your verdict is for** (defendant) **on this claim, and you should not proceed further except to date and sign this verdict form and return it to the courtroom.**

3. What is the total amount of damage sustained by (claimant)**? $ _____.**

SO SAY WE ALL, this _____ day of _____, 2_____.

_____

FOREPERSON

NOTE ON USE FOR FORM 451.14

1. Question 1 should be given only if necessary. If there is no dispute as to existence of the fiduciary duty, question 1 should not be given.

(Adopted August 29, 2019 (277 So. 3d 1007.))

452 TRESPASS—REAL PROPERTY

452.1 Introduction

452.2 Summary of Claims

452.3 Greater Weight of the Evidence

452.4 Issues on Plaintiff's Claim

452.5 Legal Cause

452.6 Burden of Proof on Claim

452.7 Defense Issues

452.8 Burden of Proof on Defense Issues

452.9 Trespass Damages

(Adopted June 25, 2025.)

452.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 452.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 452.1. See Model Instruction No. 1. Instruction 452.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 452.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including an explanation for the difference, such as where the court has directed a verdict on an issue.

2. "The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations." *Fla. R. Civ. P.* 1.470(b).

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla. R. Civ. P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge, as the judge reads the instructions aloud.

(Adopted June 25, 2025.)

452.2 SUMMARY OF CLAIMS

The claims [and defenses] in this case are as follows. (Claimant) **claims that** (defendant) **trespassed on real property that** (claimant) **[owned] [legally possessed].**

(Defendant) **denies that claim [and also claims that** (describe any affirmative defenses)**].**

[(Claimant)**] [The parties] must prove [his] [her] [their] [its] claims by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.**

NOTE ON USE FOR 452.2

The committee takes no position as to whether causes of action for trespass to a person or a conveyance continue to exist. *Cf. F.S.* 810.08.

(Adopted June 25, 2025.)

452.3 GREATER WEIGHT OF THE EVIDENCE

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTES ON USE FOR 452.3

1. *Greater or lesser number of witnesses*. The committee recommends that no instruction be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. *Circumstantial evidence*. The committee recommends that no instruction generally be given distinguishing circumstantial from direct evidence. See *Nielsen v. City of Sarasota*, 117 So. 2d 731 (Fla. 1960).

(Adopted June 25, 2025.)

452.4 ISSUES ON PLAINTIFF'S CLAIM

The issues for you to decide on (claimant's) **claim for trespass are:**

First, whether (claimant) **[owned] [had lawful possession of] the real property upon which** (claimant) **maintains that** (defendant) **trespassed; and**

Second, whether (defendant)**, without consent or authorization, intentionally [[entered] [used] that real property]] [remained on that property after any consent or authorization had been revoked] [caused a physical object to enter that real property] [caused a physical object to remain on that property after any consent or authorization had been revoked].**

NOTES ON USE FOR 452.4

1. Civil trespass to real property occurs when there is an injury to or use of the land of another by one having no right or authority. See, *e.g.*, *Gunning v. Equestleader.com, Inc.*, 253 So. 3d 646, 648 (Fla. 2d DCA 2017); *Winselmann v. Reynolds*, 690 So. 2d 1325, 1327 (Fla. 3d DCA 1997) (citing *Brown v. Solary*, 19 So. 161, 164 (Fla. 1896)). Stated another way, "[t]respass is an unauthorized entry onto another's property." *Pearson v. Ford Motor Co.*, 694 So. 2d 61, 69 (Fla. 1st DCA 1997); see also *Harris v. Baden*, 17 So. 2d 608, 612 (Fla. 1944) ("At the common law, every entry upon another's land, except by consent, was deemed a trespass for which satisfaction would lie.").

2. Implied consent may be found on the basis of custom, usage or conduct. *Groh v. Hasencamp*, 407 So. 2d 949, 951 (Fla. 3d DCA 1981); *Florida Pub. Co. v. Fletcher*, 340 So. 2d 914, 916 (Fla. 1976) ("The law is well settled in Florida and elsewhere that there is no unlawful trespass when peaceable entry is made, without objection, under common custom and usage.").

3. "These instructions do not apply to actions for "trespass on the case." *Leonard v. Nat Harrison Assoc., Inc.*,122 So. 2d 432 (Fla. 2d DCA 1960).

(Adopted June 25, 2025.)

452.5 LEGAL CAUSE

a. Legal cause generally:

A trespass is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the trespass, the [loss] [injury] [or] [damage] would not have occurred.

b. Concurring cause:

In order to be regarded as a legal cause of [loss] [injury] [or] [damage] a trespass need not be the only cause. A trespass may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the trespass contributes substantially to producing such [loss] [injury] [or] [damage].

c. Intervening cause:

**Do not use the bracketed first sentence if this instruction is preceded by the instruction on concurring cause:*

***[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], a trespass need not be its only cause.] A trespass may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the trespass occurs if [such other cause was itself reasonably foreseeable and the trespass contributes substantially to producing such [loss] [injury] [or] [damage]] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the trespass and the trespass contributes substantially to producing it].**

NOTES ON USE FOR 452.5

1. Instruction 452.5a (legal cause generally) is to be given in all cases in which damages other than nominal damages are sought. Instruction 452.5b (concurring cause), to be given when the court

considers it necessary, does not set forth any additional standard for the jury to consider in determining whether a trespass was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his or her trespass by reason of some other cause concurring in time and contributing to the same damage. Instruction 452.5c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. While legal cause of damage is not an element of the tort, it is necessary to instruct on legal cause when the claimant seeks more than nominal damages. For trespass cases discussing legal cause, see *SDI Quarry v. Gateway Estates Park Condo. Ass'n*, 249 So. 3d 1287 (Fla. 1st DCA 2018); *CSX Transp. Co. v. Pasco Cnty.*, 660 So. 2d 757 (Fla. 2d DCA 1995).

3. This instruction is substantially similar to instruction 401.12.

(Adopted June 25, 2025.)

452.6 BURDEN OF PROOF ON CLAIM

If the greater weight of the evidence does not support (claimant's) **claim, your verdict should be for** (defendant)**.**

However, if the greater weight of the evidence supports (claimant's) **claim, [then your verdict should be for** (claimant) **and against** (defendant)**] [then you shall consider the defense[s] raised by** (defendant)**].**

(Adopted June 25, 2025.)

452.7 DEFENSE ISSUES

If, however, the greater weight of the evidence supports (claimant's) **claim then you shall consider the defense[s] raised by** (defendant)**.**

On the [first] defense, the issue[s] for you to decide [is] [are]:

a. *Entry Under License, Privilege, or Other Claim of Right*:

Whether (defendant) **had a [license] [privilege] [legal right] to [use] [enter onto]** (claimant's) **property.**

b. *Necessity*:

Whether (defendant's) **[use] [entry onto]** (claimant's) **property occurred during an emergency situation, was reasonably necessary to prevent serious harm, and was done in a reasonable time and in a reasonable manner.**

NOTES ON USE FOR 452.7

1. *Consent as an affirmative defense*. A claimant bringing a trespass action has the burden of proving that defendant's actions were done without consent or authorization. See Instruction 452.4. For this reason, the committee does not propose an instruction stating that consent is an affirmative defense for which the defendant would bear the burden of proof. The committee acknowledges that Florida courts have referred to consent as an affirmative defense and have deemed it waived if not raised as an affirmative defense. See, *e.g.*, *Hattaway v. Florida Power & Light Co.*, 133 So. 2d 101 (Fla. 2d DCA 1961); *Wyman v. Robbins*, 513 So. 2d 230 (Fla. 1st DCA 1987).

2. A claim of ownership, even if legally defective, may justify an otherwise unlawful trespass. *Gunning v. Equestleader.com, Inc.*, 253 So. 3d 646 (Fla. 2d DCA 2017)

3. In certain instances, the law authorizes individuals to enter onto the real property of another to carry out their duties. For example, *F.S.* 472.029 authorizes surveyors and mappers or their subordinates to enter onto lands of third parties "when necessary to

make surveys and maps or locate or set monuments . . .” In addition, “law enforcement personnel have a right, under appropriate circumstances, to enter upon private property.” *Guin v. City of Riviera Beach*, 388 So. 2d 604, 606 (Fla. 4th DCA 1980).

4. Common law or statutory way of necessity may give rise to an affirmative defense of legal right to use or enter onto the property of another. See *Parham v. Reddick*, 537 So. 2d 132 (Fla. 1st DCA 1988); *Fla. Power & Light v. Scudder*, 350 So. 2d 106 (Fla. 2d DCA 1977). See *F.S.* 704.01(2) for further guidance regarding “way of necessity.”

5. Further instruction may be appropriate on the license, privilege, or legal right being asserted.

(Adopted June 25, 2025.)

452.8 BURDEN OF PROOF ON DEFENSE ISSUES

If the greater weight of the evidence supports the defense, your verdict should be for (defendant)**. However, if the greater weight of the evidence does not support the defense and does support** (claimant's) **claim, your verdict should be for** (claimant) **and against** (defendant)**.**

(Adopted June 25, 2025.)

452.9 TRESPASS DAMAGES

a. Compensatory damages:

If you find for (defendant)**, you will not consider the matter of damages. But, if you find for** (claimant)**, you should award** (claimant) **an amount of money that the greater weight of the evidence shows will fairly and adequately compensate** (claimant) **for** (describe appropriate elements of those damages claimed by claimant)**.**

b. Nominal damages:

[If you find for (claimant) **but find that no [loss] [injury] [or] [damage] has been proved, you should award** (claimant) **nominal damages. Nominal damages are damages of an inconsequential amount which are awarded when a wrong has been done but no actual damage is proved.]**

NOTES ON USE FOR 452.9

1. A plaintiff is entitled to, at a minimum, an award of nominal damages upon establishing a trespass. *Daniel v. Morris*, 181 So. 3d 1195 (Fla. 5th DCA 2015); *Stockman v. Duke*, 578 So. 2d 831, 833 (Fla. 2d DCA 1991).

2. Generally, the proper measure of damages in an action for trespass to real property is the difference in the value of the real property trespassed upon before and after the trespass is committed. *Stockman v. Duke*, 578 So. 2d 831, 832 (Fla. 2d DCA 1991) (allowing recovery of cost to remove debris left on trespassed property by defendant); *Kirchoff v. Moulder Bros., Inc.*, 391 So. 2d 347, 349 (Fla. 5th DCA 1980). If this measure of damages proves inadequate, losses personal to the owner may also be recovered. *Stockman* at 832.

3. As to a lessee of real property, the proper measure of damages for trespass includes the lessee's loss of use and enjoyment of the land. See *Gunning v. Equestleader.com, Inc.*, 25 So. 3d 646 (Fla. 2d DCA 2017); *Coddington v. Staab*, 716 So. 2d 850, (Fla. 4th DCA 1998).

4. Damages for trespass may be measured by the reasonable rental value of the property where trespass has occurred and trespasser has refused to remove itself after notification. *Kish v. McDonald's Corp.*, 564 So. 2d 1177, 1180 (Fla. 4th DCA 1990).

5. For cases in which the court considered the appropriateness of punitive damages for a trespass, see *Manheimer v. Fla. Power & Light Co.*, No. 3D22-1534, 48 Fla. L. Weekly D1495 (Fla. 3d DCA Aug. 2, 2023); *Kish v. McDonald's Corp.*, 564 So. 2d 1177 (Fla. 4th DCA 1990); *Fla. Power & Light Co. v. Walker*, 440 So. 2d 659 (Fla. 1st DCA 1983).

6. For cases in which the court considered whether a trespass may constitute a continuing tort for purposes of determining damages, see *Suarez v. City of Tampa*, 987 So. 2d 681, 685-686 (Fla. 2d DCA 2008); *SDI Quarry v. Gateway Estate Park Condo. Ass'n*, 249 So. 3d 1287, 1291-1292 (Fla. 1st DCA 2018).

(Adopted June 25, 2025.)

SECTION 500 DAMAGES

A. COMPENSATORY DAMAGES

1. Personal Injury and Property Damages

501.1 Personal Injury and Property Damages: Introduction

501.15 Personal Injury and Property Damages: Introduction — Cases Applying Section 9, Chapter 2023-15

501.2 Personal Injury and Property Damages: Elements

501.3 Motor Vehicle No-Fault Instruction

501.35 Motor Vehicle No-Fault Instruction — Cases Applying Section 9, Chapter 2023-15

501.4 Comparative Negligence, Non-Party Fault and Multiple Defendants

501.5 Other Contributing Causes of Damages

501.6 Mortality Tables

501.7 Reduction of Damages to Present Value

501.8 Collateral Source Rule

501.9 Liability of Multiple Tortfeasors

2. Wrongful Death Damages

502.1 Wrongful Death Damages: Introduction

502.15 Wrongful Death Damages: Introduction — Cases Applying Section 9, Chapter 2023-15

502.2 Wrongful Death Damages: Elements for Estate and Survivors

502.3 Wrongful Death Damages of Estate and Survivors: Separate Awards for Estate and

Survivors

502.4 Wrongful Death Damages: Elements when There Are No Survivors

502.5 Comparative Negligence, Non-Party Fault, and Multiple Defendants

502.6 Mortality Tables

502.7 Reduction of Damages to Present Value

502.8 Liability of Multiple Tortfeasors

B. Punitive Damages

Note on Use for Punitive Damages Charges

503.1 Punitive Damages — Bifurcated Procedure

503.2 Punitive Damages — Non-Bifurcated Procedure

A. Compensatory Damages

1. Personal Injury and Property Damages

501.1 PERSONAL INJURY AND PROPERTY DAMAGES: INTRODUCTION

a. When directed verdict is given on liability:

You should award (claimant) **an amount of money that the greater weight of the evidence shows will fairly and adequately compensate [him] [her] for [his] [her] [loss] [injury] [or] [damage], including any damage** (claimant) **is reasonably certain to [incur] [experience] in the future. You shall consider the following elements:**

b. All other cases:

If your verdict is for (defendant)**, you will not consider the matter of damages. But if the greater weight of the evidence supports** (claimant's) **claim, you should determine and write on the verdict form, in dollars, the total amount of [loss] [injury] [or] [damage] which the greater weight of the evidence shows will fairly and adequately compensate [him] [her] for [his] [her] [loss] [injury] [or] [damage], including any damages that** (claimant) **is reasonably certain to incur or experience in the future. You shall consider the following elements:**

NOTE ON USE FOR 501.1

If there is an issue of limitation on damages because of *F.S.* 627.737(2), use instruction 501.3 instead of instruction 501.1 and 501.2. If there is a comparative fault or *Fabre* issue, use the applicable parts of instruction 501.4 following either instruction 501.2 or 501.3. See *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993). If there are issues involving other contributing causes of damage, use instruction 501.5. To complete the instructions for Personal Injury and Property damages, use the applicable parts of instructions 501.6–501.9.

501.15 PERSONAL INJURY AND PROPERTY DAMAGES: INTRODUCTION — CASES APPLYING SECTION 9, CHAPTER 2023-15

a. When directed verdict is given on the claimant's cause of action and there is no issue of comparative negligence by the claimant:

You should award (claimant) **an amount of money that the greater weight of the evidence shows will fairly and adequately compensate [him] [her] for [his] [her] [loss] [injury] [or] [damage], including any damage** (claimant) **is reasonably certain to [incur] [experience] in the future. You shall consider the following elements:**

b. All other cases:

[If your verdict is for (defendant)(s))] **[or] [[If] [if] you have assigned greater than 50% of any [negligence] [fault] to** (claimant)**], you will not consider the matter of damages. But [if the greater weight of the evidence supports** (claimant's) **claim,] [and] [if you have assigned 50% or less of any [negligence] [fault] to** (claimant)**], you should determine and write on the verdict form, in dollars, the total amount of [loss] [injury] [or] [damage] which the greater weight of the evidence shows will fairly and adequately compensate [him] [her] for [his] [her] [loss] [injury] [or] [damage], including any damages that** (claimant) **is reasonably certain to incur or experience in the future. You shall consider the following elements:**

NOTES ON USE FOR 501.15

1. If there is an issue of limitation on damages because of *F.S.* 627.737(2), use instruction 501.3 instead of instruction 501.1 and 501.2. If there is a comparative fault or *Fabre* issue, use the applicable parts of instruction 501.4 following either instruction 501.2 or 501.3. See *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993). If there are issues involving other contributing causes of damage, use instruction 501.5. To complete the instructions for Personal Injury and Property damages, use the applicable parts of instructions 501.6–501.9.

2. This instruction should be used in cases to which section 9, Chapter 2023-15, Laws of Florida, applies. This law, also commonly known as section 9, HB 837, is codified at *F.S.* 768.81(6).

3. Section 9, Chapter 2023-15, Laws of Florida ("HB 837") changed Florida civil tort actions from a pure comparative fault to modified comparative fault where the plaintiff will be barred from recovery if found to be more than 50% at fault. *Hoffman v. Jones*, 280 So. 2d 431 (1973) (Florida Supreme Court adopted the doctrine of comparative fault and replaced the doctrine of contributory negligence; a plaintiff's percentage of fault reduced his damages in proportion to his fault). There are a number of cases in which the Florida Supreme Court approved instructions telling the jury that a finding of contributory negligence barred a plaintiff's recovery. See *Medina v. McAllister*, 202 So. 2d 755, 759 (Fla. 1967); *Martin v. Stone*, 51 So. 2d 33, 35 (Fla. 1951); *Boston v. Shelton*, 13 So. 2d 453, 455 (Fla. 1943); *Turner v. Seegar*, 10 So. 2d 320, 321 (Fla. 1942); *Greiper v. Coburn*, 190 So. 902, 904 (Fla. 1939).

(Adopted June 19, 2024.)

501.2 PERSONAL INJURY AND PROPERTY DAMAGES — ELEMENTS

a. Injury, pain, disability, disfigurement, loss of capacity for enjoyment of life:

Any bodily injury sustained by (name) **and any resulting pain and suffering [disability or physical impairment] [disfigurement] [mental anguish] [inconvenience] [or] [loss of capacity for the enjoyment of life] experienced in the past [or to be experienced in the future]. There is no exact standard for measuring such damage. The amount should be fair and just in the light of the evidence.**

b. Medical expenses:

Care and treatment of claimant:

> **The reasonable [value] [or] [expense] of [hospitalization and] medical [and nursing] care and treatment necessarily or reasonably obtained by** (claimant) **in the past [or to be so obtained in the future].**

Care and treatment of minor claimant after reaching majority:

> **The reasonable [value] [or] [expense] of [hospitalization and] medical [and nursing] care and treatment necessarily or reasonably to be obtained by** (minor claimant) **after [he] [she] reaches the age of** (legal age)**.**

NOTE ON USE FOR 501.2b

The committee has reviewed new law *F.S.* 768.0427(4) and determined that a change to the instruction is not necessary at this time, subject to experience with application of the law. See *F.S.* 768.0427(4) (Section 6, Chapter 2023-015, Laws of Florida, commonly known as section 6, HB837).

c. Lost earnings, lost time, lost earning capacity:

When lost earnings or lost working time shown:

[Any earnings] [Any working time] lost in the past [and any loss of ability to earn money in the future].

When earnings or lost working time not shown:

Any loss of ability to earn money sustained in the past [and any such loss in the future].

d. Spouse's loss of consortium and services:

On the claim brought by (spouse)**, you should award** (spouse) **an amount of money which the greater weight of the evidence shows will fairly and adequately compensate** (spouse) **for any loss by reason of [his wife's] [her husband's] injury, of [his] [her] services, comfort, society and attentions in the past [and in the future] caused by the incident in question.**

e. Parental damages for care and treatment of claimant's minor child; parental loss of child's services, earnings, earning capacity:

On the claim[s] of (parent(s))**, you should award** (parent(s)) **an amount of money, which the greater weight of the evidence shows will fairly and adequately compensate** (parent(s)) **for damages caused by the incident in question. You shall consider the following element[s] of damage:**

The reasonable [value] [or] [expense] of [hospitalization and] medical [and nursing] care and treatment necessarily or reasonably obtained by (parent(s)) **for [his] [her] [their] child,** (name)**, in the past [or to be so obtained in the future until** (name) **reaches the age of** (legal age)**].**

[Any loss by (parent(s)) **by reason of [his] [her] [their] child's injury, of the [services] [earnings] [or] [earning ability] of [his] [her] [their] child in the past [and in the future until the child reaches the age of** (legal age)**].]**

[Any economic loss sustained by (parent(s)) **[including] [any earnings lost in the past] [and] [any loss of ability to earn money in the future] reasonably resulting from the need to care or provide for the child because of the child's injury [until** (name) **reaches the age of** (legal age)**].]**

f. Parental loss of filial consortium as a result of significant injury resulting in child's permanent disability:

In addition, if the greater weight of the evidence shows that (claimant child) **sustained a significant injury resulting in** (claimant child's) **permanent total disability, you shall consider the following element of damage:**

Any loss by (parent(s))**, by reason of that injury, of their child's companionship, society, love, affection, and solace in the past [and in the future until the child reaches the age of** (legal age)**].**

If the greater weight of the evidence does not support (parent(s)'s) **claim that their child sustained a significant injury resulting in permanent total disability, your verdict should be for** (defendant(s)) **on this element of damage.**

NOTES ON USE FOR 501.2f

1. The committee believes that *United States v. Dempsey*, 635 So. 2d 961 (Fla. 1994), which recognizes a parental right of recovery for loss of filial consortium, does not eliminate the common law right to recover for loss of the child's services or earnings. The common law also allows recovery for a parent's loss of earnings or other economic loss reasonably resulting from the need to care for an injured child. *Wilkie v. Roberts*, 91 Fla. 1064, 109 So. 225 (Fla. 1926).

2. This instruction does not address the issue of a child with extraordinary income-producing abilities prior to the injury. See *Dempsey*, 635 So. 2d at 965.

3. A loss of filial consortium claim may require separate interrogatories on the verdict form on the issues of whether the child

sustained a significant injury resulting in permanent total disability, and the amount of damages on such a claim.

g. Unmarried dependent's claim for loss of parental consortium:

In addition, if the greater weight of the evidence shows that (claimant parent) **sustained a significant injury resulting in** (claimant parent's) **permanent total disability, you shall consider the following element of damage:**

Any loss by reason of (claimant parent's) **injury of** (claimant parent's) **services, comfort, companionship and society in the past and in the future.**

If the greater weight of the evidence does not support the claim that (claimant parent(s)'s) **sustained a significant injury resulting in permanent total disability, your verdict should be for** (defendant(s)) **on this element of damage.**

NOTES ON USE FOR 501.2g

1. If issues arise as to the child's marital status, parentage, or dependency, this instruction should be modified.

2. *F.S.* 768.0415 does not define "significant permanent injury," "dependent" or "permanent total disability." Therefore, the instructions do not attempt to define the terms.

3. *F.S.* 768.0415 refers only to "negligence." The committee takes no position as to whether the statute is limited to negligence cases or the definition of "negligence" in this statutory context. For example, see *F.S.* 768.81(4)(a) defining "negligence cases."

4. Pending further development of the law, the committee takes no position as to whether there may be elements of damage not specifically enumerated in the statute.

5. The duration of future damages for which the child may recover is unclear. Pending further development of the law, the committee takes no position as to whether the statute limits recovery

of future damages to the life of the parent or the duration of the claimant's dependency.

h. Property damage:

Any damage to [his] [her] [its] (identify automobile or other personal property)**. The measure of such damage is:**

> **[the difference between the value of the** (name property) **immediately before** (incident complained of) **and its value immediately afterward.]**
>
> **[the reasonable cost of repair, if it was practicable to repair the** (name property)**, with due allowance for any difference between its value immediately before the** (incident complained of) **and its value after repair.]**

You shall also take into consideration any loss to (claimant) **[for towing or storage charges and] by being deprived of the use of [his] [her] [its]** (name property) **during the period reasonably required for its [replacement] [repair].**

NOTE ON USE FOR 501.2h

Concerning damages for loss of use, see *Meakin v. Dreier*, 209 So. 2d 252 (Fla. 2d DCA 1968). Concerning prejudgment interest, contrast *Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transportation & Manufacturing, Co.*, 27 Fla. 1, 27 Fla. 157, 9 So. 661 (Fla. 1891), and *McCoy v. Rudd*, 367 So. 2d 1080 (Fla. 1st DCA 1979).

(Revised January 24, 2024.)

501.3 MOTOR VEHICLE NO-FAULT INSTRUCTION

If your verdict is for (defendant)(s))**, you will not consider the matter of damages. But if the greater weight of the evidence supports** (claimant's) **claim, you should determine and write on the verdict form, in dollars, the total amount of money that the greater weight of the evidence shows will fairly and adequately compensate** (claimant) **for the following elements of damage [to the extent that they have not been paid and are not payable by personal injury protection benefits], including damage that** (claimant) **is reasonably certain to incur in the future:**

a. Medical expenses:

Care and treatment of claimant:

The reasonable [value] [or] [expense] of [hospitalization and] medical [and nursing] care and treatment necessarily or reasonably obtained by (claimant) **in the past [or to be so obtained in the future].**

Care and treatment of minor claimant after reaching majority:

The reasonable [value] [or] [expense] of [hospitalization and] medical [and nursing] care and treatment necessarily or reasonably to be obtained by (minor claimant) **after [he] [she] reaches the age of** (legal age)**.**

b. Lost earnings, lost time, lost earning capacity:

When lost earnings or lost working time shown:

[Any earnings] [Any working time] lost in the past [and any loss of ability to earn money in the future].

When earnings or lost working time not shown:

Any of loss ability to earn money sustained in the past [and any such loss in the future].

c. Property damage:

Any damage to [his] [her] [its] (identify automobile or other personal property)**. The measure of such damage is:**

[the difference between the value of the (name property) **immediately before** (incident complained of) **and its value immediately afterward.]**

[the reasonable cost of repair, if it was practicable to repair the (name property)**, with due allowance for any difference between its value immediately before the** (incident complained of) **and its value after repair.]**

You shall also take into consideration any loss to (claimant) **[for towing or storage charges and] by being deprived of the use of [his] [her] [its]** (name property) **during the period reasonably required for its [replacement] [repair].**

NOTE ON USE FOR 501.3c

Concerning damages for loss of use, see *Meakin v. Dreier*, 209 So. 2d 252 (Fla. 2d DCA 1968). Concerning prejudgment interest, contrast *Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transportation & Manufacturing, Co.*, 27 Fla. 1, 27 Fla. 157, 9 So. 661 (Fla. 1891), and *McCoy v. Rudd*, 367 So. 2d 1080 (Fla. 1st DCA 1979).

You must next decide whether (claimant's) **[injury] [or] [disease], resulting from the incident in this case, is permanent. An [injury] [or] [disease] is permanent if it, in whole or in part, consists of:**

[(1) a significant and permanent loss of an important bodily function;] [or]

[(2) a significant and permanent scarring or disfigurement;] [or]

[(3) an injury that the evidence shows is permanent to a reasonable degree of medical probability].

If the greater weight of the evidence does not establish that

(claimant's) **injury is permanent, then your verdict is complete. If, however, the greater weight of the evidence shows that** (claimant's) **[injury] [or] [disease] is permanent, you should also award damages for [this] [these] additional element[s] of damage:**

d. Injury, pain, disability, disfigurement, loss of capacity for enjoyment of life:

Any bodily injury sustained by (name) **and any resulting pain and suffering [disability or physical impairment] [disfigurement] [mental anguish] [inconvenience] [or] [loss of capacity for the enjoyment of life] experienced in the past [or to be experienced in the future]. There is no exact standard for measuring such damage. The amount should be fair and just in the light of the evidence.**

e. Spouse's loss of consortium and services:

On the claim brought by (spouse)**, you should award** (spouse) **an amount of money which the greater weight of the evidence shows will fairly and adequately compensate** (spouse) **for any loss by reason of [his wife's] [her husband's] injury, of [his] [her] services, comfort, society and attentions in the past [and in the future] caused by the incident in question.**

NOTES ON USE FOR 501.3

1. See *F.S.* 627.737(2) (1991). Use of the threshold instruction will in most cases require the use of an interrogatory verdict form.

2. If there is proof that a claimant will incur future damages that are not excluded from recovery by *F.S.* 627.737 (1991), such as where claimant at trial is not at maximum medical improvement and will have a limited period of future lost income or medical expenses, it will be necessary to add the following language after the word "question": "including any such damage as (claimant) is reasonably certain to [incur] [experience] in the future."

3. The committee has placed this instruction in the damages section because the statute sets a threshold to the recovery of non-

economic damages only. If claimant does not establish permanency, claimant may still be entitled to recover economic damages that exceed personal injury protection benefits. See *F.S.* 627.737(2) (1991); *Auto-Owners Insurance Co. v. Tompkins*, 651 So. 2d 89 (Fla. 1995). Therefore, negligence will still be an issue for the jury to decide where there are recoverable economic damages even in cases where no permanency is found. If, however, there are no recoverable damages or such damages are not submitted to the jury, then the court may wish to modify the instruction. For example, the court may instruct the jury: "If the greater weight of the evidence does not support the claim on the issue of permanency, then your verdict should be for the defendant."

4. *F.S.* 627.737(2) (1991) does not define "permanent injury within a reasonable degree of medical probability" that is established by expert testimony. *Morey v. Harper*, 541 So. 2d 1285 (Fla. 1st DCA 1989); *Fay v. Mincey*, 454 So. 2d 587 (Fla. 2d DCA 1984); *Horowitz v. American Motorist Insurance Co.*, 343 So. 2d 1305 (Fla. 2d DCA 1977); see *Bohannon v. Thomas*, 592 So. 2d 1246 (Fla. 4th DCA 1992); *City of Tampa v. Long*, 638 So. 2d 35 (Fla. 1994). Therefore, the instructions do not attempt to define the terms and leave their explanation to the testimony of the experts and argument of counsel. See *Rivero v. Mansfield*, 584 So. 2d 1012 (Fla. 3d DCA 1991), *quashed in part, approved in part*, 620 So. 2d 987; see *Philon v. Reid*, 602 So. 2d 648 (Fla. 2d DCA 1992). But see *Weygant v. Fort Myers Lincoln Mercury, Inc.*, 640 So. 2d 1092 (Fla. 1994).

501.35 MOTOR VEHICLE NO-FAULT INSTRUCTION — CASES APPLYING SECTION 9, CHAPTER 2023-15

[If your verdict is for (defendant)(s))**] [or] [[If] [if] you have assigned greater than 50% of any [negligence] [fault] to** (claimant)**], you will not consider the matter of damages. But [if the greater weight of the evidence supports** (claimant's) **claim] [and] [if you have assigned 50% or less of any [negligence] [fault] to** (claimant)**], you should determine and write on the verdict form, in dollars, the total amount of money that the greater weight of the evidence shows will fairly and adequately compensate** (claimant) **for the following elements of damage [to the extent that they have not been paid and are not payable by personal injury protection benefits], including damage that** (claimant) **is reasonably certain to incur in the future:**

a. Medical expenses:

Care and treatment of claimant:

The reasonable [value] [or] [expense] of [hospitalization and] medical [and nursing] care and treatment necessarily or reasonably obtained by (claimant) **in the past [or to be so obtained in the future].**

Care and treatment of minor claimant after reaching majority:

The reasonable [value] [or] [expense] of [hospitalization and] medical [and nursing] care and treatment necessarily or reasonably to be obtained by (minor claimant) **after [he] [she] reaches the age of** (legal age)**.**

b. Lost earnings, lost time, lost earning capacity:

When lost earnings or lost working time shown:

[Any earnings] [Any working time] lost in the past [and any loss of ability to earn money in the future].

When earnings or lost working time not shown:

Any of loss ability to earn money sustained in the past [and any such loss in the future].

c. Property damage:

Any damage to [his] [her] [its] (identify automobile or other personal property)**. The measure of such damage is:**

[the difference between the value of the (name property) **immediately before** (incident complained of) **and its value immediately afterward.]**

[the reasonable cost of repair, if it was practicable to repair the (name property)**, with due allowance for any difference between its value immediately before the** (incident complained of) **and its value after repair.]**

You shall also take into consideration any loss to (claimant) **[for towing or storage charges and] by being deprived of the use of [his] [her] [its]** (name property) **during the period reasonably required for its [replacement] [repair].**

NOTE ON USE FOR 501.35c

Concerning damages for loss of use, see *Meakin v. Dreier*, 209 So. 2d 252 (Fla. 2d DCA 1968). Concerning prejudgment interest, contrast *Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transportation & Manufacturing, Co.*, 27 Fla. 1, 27 Fla. 157, 9 So. 661 (Fla. 1891), and *McCoy v. Rudd*, 367 So. 2d 1080 (Fla. 1st DCA 1979).

You must next decide whether (claimant's) **[injury] [or] [disease], resulting from the incident in this case, is permanent. An [injury] [or] [disease] is permanent if it, in whole or in part, consists of:**

[(1) a significant and permanent loss of an important bodily function;] [or]

[(2) a significant and permanent scarring or disfigurement;] [or]

[(3) an injury that the evidence shows is permanent to a reasonable degree of medical probability].

If the greater weight of the evidence does not establish that (claimant's) **injury is permanent, then your verdict is complete. If, however, the greater weight of the evidence shows that** (claimant's) **[injury] [or] [disease] is permanent, you should also award damages for [this] [these] additional element[s] of damage:**

d. Injury, pain, disability, disfigurement, loss of capacity for enjoyment of life:

Any bodily injury sustained by (name) **and any resulting pain and suffering [disability or physical impairment] [disfigurement] [mental anguish] [inconvenience] [or] [loss of capacity for the enjoyment of life] experienced in the past [or to be experienced in the future]. There is no exact standard for measuring such damage. The amount should be fair and just in the light of the evidence.**

e. Spouse's loss of consortium and services:

On the claim brought by (spouse)**, you should award** (spouse) **an amount of money which the greater weight of the evidence shows will fairly and adequately compensate** (spouse) **for any loss by reason of [his wife's] [her husband's] injury, of [his] [her] services, comfort, society and attentions in the past [and in the future] caused by the incident in question.**

NOTES ON USE FOR 501.35

1. See *F.S.* 627.737(2) (1991). Use of the threshold instruction will in most cases require the use of an interrogatory verdict form.

2. If there is proof that a claimant will incur future damages that are not excluded from recovery by *F.S.* 627.737 (1991), such as where claimant at trial is not at maximum medical improvement and will have a limited period of future lost income or medical expenses, it will be necessary to add the following language after the word "question": "including any such damage as (claimant) is reasonably

certain to [incur] [experience] in the future."

3. The committee has placed this instruction in the damages section because the statute sets a threshold to the recovery of non-economic damages only. If claimant does not establish permanency, claimant may still be entitled to recover economic damages that exceed personal injury protection benefits. See *F.S.* 627.737(2) (1991); *Auto-Owners Insurance Co. v. Tompkins*, 651 So. 2d 89 (Fla. 1995). Therefore, negligence will still be an issue for the jury to decide where there are recoverable economic damages even in cases where no permanency is found. If, however, there are no recoverable damages or such damages are not submitted to the jury, then the court may wish to modify the instruction. For example, the court may instruct the jury: "If the greater weight of the evidence does not support the claim on the issue of permanency, then your verdict should be for the defendant."

4. *F.S.* 627.737(2) (1991) does not define "permanent injury within a reasonable degree of medical probability" that is established by expert testimony. *Morey v. Harper*, 541 So. 2d 1285 (Fla. 1st DCA 1989); *Fay v. Mincey*, 454 So. 2d 587 (Fla. 2d DCA 1984); *Horowitz v. American Motorist Insurance Co.*, 343 So. 2d 1305 (Fla. 2d DCA 1977); see *Bohannon v. Thomas*, 592 So. 2d 1246 (Fla. 4th DCA 1992); *City of Tampa v. Long*, 638 So.2d 35 (Fla. 1994). Therefore, the instructions do not attempt to define the terms and leave their explanation to the testimony of the experts and argument of counsel. See *Rivero v. Mansfield*, 584 So. 2d 1012 (Fla. 3d DCA 1991), *quashed in part, approved in part*, 620 So. 2d 987; see *Philon v. Reid*, 602 So. 2d 648 (Fla. 2d DCA 1992). But see *Weygant v. Fort Myers Lincoln Mercury, Inc.*, 640 So. 2d 1092 (Fla. 1994).

5. This instruction should be used in cases to which section 9, Chapter 2023-15, Laws of Florida, applies. This law, also commonly known as section 9, HB 837, is codified at *F.S.* 768.81(6).

6. Section 9, Chapter 2023-15, Laws of Florida ("HB 837") changed Florida civil tort actions from a pure comparative fault to modified comparative fault where the plaintiff will be barred from recovery if found to be more than 50% at fault. *Hoffman v. Jones*, 280 So. 2d 431 (1973) (Florida Supreme Court adopted the doctrine of

comparative fault and replaced the doctrine of contributory negligence; a plaintiff's percentage of fault reduced his damages in proportion to his fault). There are a number of cases in which the Florida Supreme Court approved instructions telling the jury that a finding of contributory negligence barred a plaintiff's recovery. See *Medina v. McAllister*, 202 So. 2d 755, 759 (Fla. 1967); *Martin v. Stone*, 51 So. 2d 33, 35 (Fla. 1951); *Boston v. Shelton*, 13 So. 2d 453, 455 (Fla. 1943); *Turner v. Seegar*, 10 So. 2d 320, 321 (Fla. 1942); *Greiper v. Coburn*, 190 So. 902, 904 (Fla. 1939).

(Adopted June 19, 2024.)

501.4 COMPARATIVE NEGLIGENCE, NON-PARTY FAULT AND MULTIPLE DEFENDANTS

In determining the total amount of damages, you should not make any reduction because of the negligence, if any, of (claimant) or (defendant(s))**. The court in entering judgment will make any appropriate reduction(s).**

When a Fabre issue is involved:

In determining the total amount of damages, you should [also] not make any reduction because of the [negligence] [fault], if any, of (identify any additional person or entity who will be on verdict form)**. The court in entering judgment will make any appropriate reductions.**

NOTE ON USE FOR 501.4

When the jury is instructed to apportion fault, and a Fabre issue is involved, see *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993), and *Nash v. Wells Fargo Services, Inc.*, 678 So. 2d 1262 (Fla. 1996). The second paragraph of this instruction should be used to inform the jury of the appropriate procedure, so that the jury does not make inappropriate adjustments to its verdict. There is support for giving a special instruction explaining to the jury the impact and effect of an *F.S.* 768.81 apportionment of liability in such cases. See *Slawson v. Fast Food Enterprises*, 671 So. 2d 255, 260 (Fla. 4th DCA 1996); *Seminole Gulf Railway, Limited Partnership v. Fassnacht*, 635 So. 2d 142, 144 (Fla. 2d DCA 1994) (Altenbernd, J., concurring in part and dissenting in part). Pending further development in the law, the committee takes no position on this issue.

(Revised February 1, 2018; January 23, 2020 (288 So. 3d 1093).)

501.5 OTHER CONTRIBUTING CAUSES OF DAMAGES

a. Aggravation or activation of disease or defect:

If you find that the (defendant(s)) **caused a bodily injury, and that the injury resulted in [an aggravation of an existing disease or physical defect] [or] [activation of a latent disease or physical defect], you should attempt to decide what portion of** (claimant's) **condition resulted from the [aggravation] [or] [activation]. If you can make that determination, then you should award only those damages resulting from the [aggravation] [or] [activation]. However, if you cannot make that determination, or if it cannot be said that the condition would have existed apart from the injury, then you should award damages for the entire condition suffered by** (claimant)**.**

NOTE ON USE FOR 501.5a

This instruction is intended for use in situations in which a preexisting physical condition is aggravated by the injury, or the injury activates a latent condition. See *C. F. Hamblen, Inc. v. Owens*, 172 So. 694 (Fla. 1937). When Instruction 501.5a is given, Instruction 401.12b (Concurring cause) is necessary. See *Hart v. Stern*, 824 So. 2d 927, 932–34 (Fla. 5th DCA 2002); *Auster v. Gertrude & Philip Strax Breast Cancer Detection Institute, Inc.*, 649 So. 2d 883, 887 (Fla. 4th DCA 1995).

b. Subsequent injuries/multiple events:

You have heard that (claimant) **may have been injured in two events. If you decide that** (claimant) **was injured by** (defendant) **and was later injured by another event, then you should try to separate the damages caused by the two events and award** (claimant) **money only for those damages caused by** (defendant)**. However, if you cannot separate some or all of the damages, you must award** (claimant) **any damages that you cannot separate as if they were all caused by** (defendant)**.**

NOTES ON USE FOR 501.5b

1. Instruction 501.5b addresses the situation occurring in *Gross v. Lyons*, 763 So. 2d 276 (Fla. 2000). It is not intended to address other situations. For example, see *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977), and *Eli Witt Cigar & Tobacco Co. v. Matatics*, 55 So. 2d 549 (Fla. 1951). The committee recognizes that the instruction may be inadequate in situations other than the situation in *Gross*.

2. The committee takes no position on whether the subsequent event is limited to a tortious event, or may be a nontortious event.

c. Subsequent injuries caused by medical treatment:

If you find that (defendant(s)) **caused [loss] [injury] [or] [damage] to** (claimant), then (defendant(s)) **[is] [are] also responsible for any additional [loss] [injury] [or] [damage] caused by medical care or treatment reasonably obtained by** (claimant).

NOTE ON USE FOR 501.5c

This instruction is intended for use in cases involving additional injury caused by subsequent medical treatment. See, e.g., *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977); *Pedro v. Baber*, 83 So. 3d 912 (Fla. 2d DCA 2012); *Tucker v. Korpita*, 77 So. 3d 716, 720 (Fla. 4th DCA 2011); *Nason v. Shafranski*, 33 So. 3d 117 (Fla. 4th DCA 2010); *Dungan v. Ford*, 632 So. 2d 159 (Fla. 1st DCA 1994).

(Revised April 21, 2016.)

501.6 MORTALITY TABLES

If the greater weight of the evidence shows that (claimant) **has been permanently injured, you may consider [his] [her] life expectancy. The mortality tables received in evidence may be considered in determining how long** (claimant) **may be expected to live. Mortality tables are not binding on you but may be considered together with other evidence in the case bearing on** (claimant's) **health, age and physical condition, before and after the injury, in determining the probable length of [his] [her] life.**

501.7 REDUCTION OF DAMAGES TO PRESENT VALUE

Any amount of damages which you allow for [future medical expenses], [loss of ability to earn money in the future], [or] [(describe any other future economic loss which is subject to reduction to present value)**] should be reduced to its present money value and only the present money value of these future economic damages should be included in your verdict.**

The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate (claimant) **for these losses as they are actually experienced in future years.**

NOTES ON USE FOR 501.7

1. Designing a standard instruction for reduction of damages to present value is complicated by the fact that there are several different methods used by economists and courts to arrive at a present-value determination. See, for example, *Delta Air Lines, Inc. v. Ageloff*, 552 So. 2d 1089 (Fla. 1989), and *Renuart Lumber Yards v. Levine*, 49 So. 2d 97 (Fla. 1950) (using approach similar to calculation of cost of annuity); *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), and *Loftin v. Wilson*, 67 So. 2d 185 (Fla. 1953) (lost stream of income approach); *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967) (total offset method); *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982), and *Seaboard Coast Line Railroad v. Garrison*, 336 So. 2d 423 (Fla. 2d DCA 1976) (discussing real interest rate discount method and inflation/market rate discount methods); and *Bould v. Touchette*, 349 So. 2d 1181 (Fla. 1977) (even without evidence, juries may consider the effects of inflation).

2. Until the Florida Supreme Court or the legislature adopts one approach to the exclusion of other methods of calculating present money value, the committee assumes that the present value of future economic damages is a finding to be made by the jury on the evidence; or, if the parties offer no evidence to control that finding, that the jury properly resorts to its own common knowledge as guided by instruction 501.7 and by argument. See *Seaboard Coast Line*

Railroad v. Burdi, 427 So. 2d 1048 (Fla. 3d DCA 1983).

3. This instruction conflicts with *F.S.* 768.77(2)(a)2. And should not be given in medical malpractice cases when a party has requested that future damages be paid in periodic payments.

(Revised April 21, 2016.)

501.8 COLLATERAL SOURCE RULE

a. Tort actions generally:

You should not reduce the amount of compensation to which (claimant) **is otherwise entitled on account of [wages] [medical insurance payments] [or other benefits** (specify)**] which the evidence shows** (claimant) **received from [his] [her] [employer] [insurance company] [or some other source]. The court will reduce as necessary the amount of compensation to which** (claimant) **is entitled on account of any such payments.**

b. Actions accruing before October 1, 1993, arising out of ownership, operation, use or maintenance of a motor vehicle:

In this case, you should reduce the amount of compensation to which (claimant) **is otherwise entitled on account of [wages] [disability benefits] [medical insurance benefits] [or other benefits** (specify)**] which the evidence shows** (claimant) **received from [his] [her] [employer] [insurance company] [or some other source].**

c. Actions accruing on or after October 1, 1993, arising out of ownership, operation, use, or maintenance of a motor vehicle:

Some expenses claimed as damages by (claimant) **may have been paid [or are payable] by personal injury protection insurance. You should not award** (claimant) **any damages for [earnings lost in the past] [or] [past medical expenses] that have been paid [or that are payable] by personal injury protection insurance. ["Payable" expenses are expenses that have been incurred and will be paid by personal injury protection insurance.]**

NOTES ON USE FOR 501.8

1. If improper evidence of collateral benefits is inadvertently admitted or if, in the circumstances of the case, the payment of collateral benefits is inferred, instruction 501.8, the conventional collateral source instruction, should be given immediately following mention in the instruction of the particular element of damage to

which the collateral source instruction is properly applicable. See *Greyhound Corp. v. Ford*, 157 So. 2d 427 (Fla. 2d DCA 1963); *Paradis v. Thomas*, 150 So. 2d 457 (Fla. 2d DCA 1963). See *F.S.* 768.76, 1986 supplement, concerning particular collateral source deductions by the court.

2. Instruction 501.8b, not instruction 501.8a, should be given in all actions for personal injury or wrongful death accruing before October 1, 1993, arising out of the ownership, operation, use, or maintenance of a motor vehicle. Instruction 501.8b is derived from *F.S.* 627.7372 (1987), which was repealed for causes of action accruing on or after October 1, 1993. Ch. 93-245, §3, Laws of Fla. That statute specified which benefits are defined as collateral sources and which are specifically excluded from the definition.

3. In most cases, the parties will agree that PIP setoffs are to be applied by the court post-trial. Absent such an agreement, in all actions for personal injury or wrongful death accruing on or after October 1, 1993, arising out of the ownership, operation, use, or maintenance of a motor vehicle, in which evidence is presented that personal injury protection benefits have been paid or are payable, instruction 501.8c should be given. See *F.S.* 627.736(3); *Caruso v. Baumle*, 880 So. 2d 540 (Fla. 2004). The bracketed language that constitutes the last sentence of the first paragraph of instruction 501.8c should be given only when personal injury protection benefits are payable for incurred expenses that have not yet been processed or paid by the personal injury protection insurer at the time of trial. See *Rollins v. Pizzarelli*, 761 So. 2d 294 (Fla. 2000). It appears that "payable" personal injury protection benefits do not include benefits for incurred expenses that have been submitted to, but contested by, the PIP insurer at the time of trial, or in situations where the PIP insurer is insolvent at the time of trial. Compare *Rollins*, 761 So. 2d at 299–300. Pending further development of the law, however, the committee takes no position as to whether the bracketed last sentence of instruction 501.8c should be given in such circumstance.

501.9 LIABILITY OF MULTIPLE TORTFEASORS

a. Comparative negligence cases (special verdicts):

Even if you decide that [both] [more than one] of the defendant[s] were negligent, you should determine [(claimant's)**] [each claimant's] damages in a single total amount, and write that amount, in dollars, on the verdict form.**

b. Cases not requiring special verdicts:

If you find for (claimant) **against [both] [more than one] of the defendant[s], you should assess** (claimant's) **damages in a single amount against [both defendants] [the defendants whom you find to be liable to** (claimant)**].**

502 WRONGFUL DEATH DAMAGES

502.1 WRONGFUL DEATH DAMAGES: INTRODUCTION

a. When directed verdict is given on liability:

You should award (decedent's) **personal representative an amount of money that the greater weight of the evidence shows will fairly and adequately compensate** (decedent's) **estate and** (decedent's) **survivors for their damages, including any damages that the estate and the survivors are reasonably certain to incur or experience in the future.**

b. All other cases:

If your verdict is for (defendant)**, you will not consider the matter of damages. But if the greater weight of the evidence supports** (personal representative's) **claim, you should determine and write on the verdict form, in dollars, the total amount of [loss] [injury] [or] [damage] which the greater weight of the evidence shows the estate of** (decedent) **and [his] [her] survivors sustained as a result of [his] [her] injury and death, including any damages that the estate and the survivors are reasonably certain to incur or experience in the future.**

NOTES ON USE FOR 502.1

1. For Wrongful Death damage instructions, use the applicable parts of instructions 502.1 – 502.4. If there is a comparative fault or *Fabre* issue, after giving instructions on the elements of damages, use instruction 502.5. See *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993). The note on use following instruction 502.5 provides more explanation of comparative fault and *Fabre* issues. To complete the instructions for Wrongful Death damages, use the applicable parts of instructions 502.6 – 502.8.

2. Model Instruction No. 2 illustrates the application of instructions 502.3 and 502.4 on wrongful death damages.

502.15 WRONGFUL DEATH DAMAGES: INTRODUCTION — CASES APPLYING SECTION 9, CHAPTER 2023-15

a. When directed verdict is given on the claimant's cause of action and there is no issue of comparative negligence by the decedent or survivor:

You should award (decedent's) **personal representative an amount of money that the greater weight of the evidence shows will fairly and adequately compensate** (decedent's) **estate and** (decedent's) **survivors for their damages, including any damages that the estate and the survivors are reasonably certain to incur or experience in the future.**

b. All other cases:

[If your verdict is for (defendant(s))**] [or] [[If] [if] you have assigned greater than 50% of any [negligence] [fault] to [**(decedent)**] [or] [**(survivor(s))**], you will not consider the matter of damages. But [if the greater weight of the evidence supports** (personal representative's) **claim] [and] [if you have assigned 50% or less of any [negligence] [fault] to [**(decedent)**] [or] [**(survivor(s))**] for [his] [or] [her] own harm, you should determine and write on the verdict form, in dollars, the total amount of [loss] [injury] [or] [damage] which the greater weight of the evidence shows the estate of** (decedent) **and [his] [her] survivors sustained as a result of [his] [her] injury and death, including any damages that the estate and the survivors are reasonably certain to incur or experience in the future.**

NOTES ON USE FOR 502.15

1. For Wrongful Death damage instructions, use the applicable parts of instructions 502.1–502.4. If there is a comparative fault or *Fabre* issue, after giving instructions on the elements of damages, use instruction 502.5. See *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993). The note on use following instruction 502.5 provides more explanation of comparative fault and *Fabre* issues. To complete the instructions for Wrongful Death damages, use the applicable parts of instructions 502.6–502.8.

2. Model Instruction No. 2 illustrates the application of instructions 502.3 and 502.4 on wrongful death damages.

3. This instruction should be used in cases to which section 9, Chapter 2023-15, Laws of Florida, applies. This law, also commonly known as section 9, HB 837, is codified at *F.S.* 768.81(6).

4. The committee takes no position on whether or how *F.S.* 768.81(6) interacts with the language in *F.S.* 768.20 that "[a] defense that would bar or reduce a survivor's recovery if she or he were the plaintiff may be asserted against the survivor, but shall not affect the recovery of any other survivor." The court will have to address the interaction of these provisions if the case is one to which section 9, Chapter 2023-15, Laws of Florida, applies, and where one or more of the decedent's survivors are listed on the verdict form as parties to whom fault can be attributed under a comparative fault or Fabre theory.

5. Section 9, Chapter 2023-15, Laws of Florida ("HB 837") changed Florida civil tort actions from a pure comparative fault to modified comparative fault where the plaintiff will be barred from recovery if found to be more than 50% at fault. *Hoffman v. Jones*, 280 So. 2d 431 (1973) (Florida Supreme Court adopted the doctrine of comparative fault and replaced the doctrine of contributory negligence; a plaintiff's percentage of fault reduced his damages in proportion to his fault). There are a number of cases in which the Florida Supreme Court approved instructions telling the jury that a finding of contributory negligence barred a plaintiff's recovery. See *Medina v. McAllister*, 202 So. 2d 755, 759 (Fla. 1967); *Martin v. Stone*, 51 So. 2d 33, 35 (Fla. 1951); *Boston v. Shelton*, 13 So. 2d 453, 455 (Fla. 1943); *Turner v. Seegar*, 10 So. 2d 320, 321 (Fla. 1942); *Greiper v. Coburn,* 190 So. 902, 904 (Fla. 1939).

(Adopted June 19, 2024.)

502.2 WRONGFUL DEATH DAMAGES: ELEMENTS FOR ESTATE AND SURVIVORS

ELEMENTS FOR ESTATE:

In determining the damages recoverable on behalf of (decedent's) **estate, you shall consider the following elements:**

a. Lost earnings:

The estate's loss of earnings of (decedent) **from the date of injury to the date of death, [less any amount of monetary support you determine a survivor lost during that period].**

b. Lost accumulations:

The estate's loss of net accumulations: "Net accumulations" is the part of (decedent's) **net income [from salary or business] after taxes, including pension benefits [but excluding income from investments continuing beyond death], which** (decedent)**, after paying [his] [her] personal expenses and monies for the support of [his] [her] survivors, would have left as part of [his] [her] estate if [he] [she] had lived [his] [her] normal life expectancy.**

NOTE ON USE FOR 502.2b

The estate may recover lost accumulations when the sole survivor is a parent without a cause of action in his or her own right, as well as when survivors include a spouse or lineal descendant. *F.S.* 768.21(6)(a) (1985); *Vildibill v. Johnson*, 492 So. 2d 1047 (Fla. 1986). The committee expresses no opinion concerning whether "net accumulations" include income ending at death which is not derived from salary or business. See *F.S.* 768.18(5) (1985); *Delta Airlines, Inc. v. Ageloff*, 552 So. 2d 1089 (Fla. 1989); *Wilcox v. Leverock*, 548 So. 2d 1116 (Fla. 1989).

c. Medical or funeral expenses:

Medical or funeral expenses due to (decedent's) **injury or**

death which [have become a charge against (decedent's) **estate] [were paid by or on behalf of** (decedent) **by one other than a survivor].**

ELEMENTS FOR SURVIVING SPOUSE, CHILD, OR PARENTS OF CHILD:

In determining any damages to be awarded (decedent's) **personal representative for the benefit of** (decedent's) **surviving [spouse] [children] [or] [parents], you shall consider certain additional elements of damage for which there is no exact standard for fixing the compensation to be awarded. Any such award should be fair and just in the light of the evidence regarding the following elements:**

d. Damages of surviving spouse:

The [(wife's) (husband's)**] loss of** (decedent's) **companionship and protection, and [her] [his] mental pain and suffering as a result of** (decedent's) **injury and death [from the date of injury]. In determining the duration of the losses, you may consider the [joint life expectancy of** (decedent) **and** (surviving spouse)**] [life expectancy of** (surviving spouse)**] together with the other evidence in the case.**

NOTES ON USE FOR 502.2d

1. *F.S.* 768.18 and 768.21 (1990), applicable to causes of action accruing after October 1, 1990, expand eligible survivor claimants in wrongful death actions by surviving parents and children, but are not applicable to claims for medical malpractice as defined by *F.S.* 766.106(1) (1989).

2. This instruction is intended to allow a jury determination, if warranted by the evidence, that the surviving spouse's loss will continue beyond the "joint life expectancy" until the survivor's death, or will end before that actuarial period has elapsed.

e. Damages by surviving child:

The loss by (name all eligible children) **of parental companionship, instruction and guidance, and [his] [her] [their] mental pain and suffering as a result of** (decedent's) **injury and death [from the date of the injury]. In determining the duration of those losses, you may consider the [joint life expectancy of** (decedent) **and** (surviving child) **[each of** (surviving children)**]] [life expectancy of** (surviving children) **[each of the surviving children]] together with the other evidence in the case.**

f. Damages by surviving parent of child:

The mental pain and suffering of (parents) **as a result of the injury and death of** (child) **[from the date of injury]. In determining the duration of mental pain and suffering, you may consider the life [expectancy] [expectancies] of** (surviving parent(s)) **together with the other evidence in the case.**

ELEMENTS FOR SURVIVORS, INCLUDING SURVIVING SPOUSE, CHILD, OR PARENTS OF CHILD:

In determining any damages to be awarded (decedent's) **personal representative for the benefit of [each of]** (decedent's) **survivor[s]*** (name them all)**, you shall consider the following elements:**

**Further instructions may be required if there is a factual question of whether a person is a "survivor" within the meaning of F.S. 768.18(1).*

g. Lost support and services:

The [survivor's] [survivors', (name them all)**], loss, by reason of** (decedent's) **injury and death, of** (decedent's) **support and services [including interest at** (legal rate) **on any amount awarded for such loss from the date of injury to the date of death]. In determining the duration of any future loss, you may consider the joint life expectancy of the survivor(s) and** (decedent) **[and the period of minority, ending at age 25, of a healthy minor child].**

In evaluating past and future loss of support and services,

you shall consider the survivor's relationship to (decedent)**, the amount of** (decedent's) **probable net income available for distribution to the survivor and the replacement value of** (decedent's) **services to the survivor(s). ["Support" includes contributions in kind as well as sums of money. "Services" means tasks regularly performed by** (decedent) **for a survivor that will be a necessary expense to the survivor because of** (decedent's) **death.]***

**The bracketed material should be given only when warranted by the evidence and requested by a party.*

NOTES ON USE FOR 502.2g

1. *Period of minority.* The period of minority for purposes of the wrongful death act is age 25. *F.S.* 768.18(2). The bracketed reference to the period of minority, in the first paragraph, should not be given if the minor survivor's dependency will continue beyond that age because the child is not "healthy," or if the decedent was a minor on whose support or services the claimant survivor would remain dependent beyond that time.

2. Support and services specially defined. The special definitions of these terms bracketed in the second paragraph should be given only when warranted by the evidence and requested by a party.

h. Medical and funeral expenses paid by survivor:

[Medical] [or] [funeral] expenses due to (decedent's) **[injury] [or] [death] paid by any survivor.**

(Revised November 2, 2017.)

502.3 WRONGFUL DEATH DAMAGES OF ESTATE AND SURVIVORS: SEPARATE AWARDS FOR ESTATE AND SURVIVORS

Any damages that you find were sustained by (decedent's) **estate and by** (name survivors) **shall be separately stated in your verdict.**

502.4 WRONGFUL DEATH DAMAGES: ELEMENTS WHEN THERE ARE NO SURVIVORS

In determining the damages recoverable on behalf of (decedent's) **estate, you shall consider the following elements:**

a. Lost earnings:

Loss of earnings of (decedent) **from the date of injury to the date of death.**

b. Medical or funeral expenses:

Medical or funeral expenses due to (decedent's) **injury or death that have become a charge upon [his] [her] estate or were paid by or on behalf of** (decedent)**.**

c. Lost accumulations:

The estate's loss of net accumulations: "Net accumulations" is the part of (decedent's) **net income [from salary or business] after taxes, including pension benefits [but excluding income from investments continuing beyond death], which the decedent would have left as part of [his] [her] estate if [he] [she] had lived [his] [her] normal life expectancy.**

NOTE ON USE FOR 502.4c

When it is shown that decedent had no survivors as defined in *F.S.* 768.18(1), lost accumulations are recoverable only if decedent was age 25 or over. *F.S.* 768.21(6)(a) (1985). The committee expresses no opinion concerning whether "net accumulations" include income ending at death which is not derived from salary or business. See *F.S.* 768.18(5) (1985).

502.5 COMPARATIVE NEGLIGENCE, NON-PARTY FAULT, AND MULTIPLE DEFENDANTS

In determining the total amount of damages to (decedent's) **estate and [his] [her] survivors as a result of [his] [her] injury and death, you should not make any reduction because of the negligence, if any, of** (decedent or survivor or any other person)**. The court in entering judgment will make any appropriate reduction(s).**

When a Fabre issue is involved:

In determining the total amount of damages, you should [also] not make any reduction because of the [negligence] [fault], if any, of (identify any additional person or entity who will be on verdict form)**. The court in entering judgment will make any appropriate reduction(s).**

NOTES ON USE FOR 502.5

1. When the jury is instructed to apportion fault and a *Fabre* issue is involved, see *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993), and *Nash v. Wells Fargo Services, Inc.*, 678 So. 2d 1262 (Fla. 1996). The second paragraph of this instruction should be used to inform the jury of the appropriate procedure, so the jury does not make inappropriate adjustments to its verdict. There is support for giving a special instruction explaining to the jury the impact and effect of *F.S.* 768.81 apportionment of liability in such cases. See *Slawson v. Fast Food Enterprises*, 671 So. 2d 255, 260 (Fla. 4th DCA 1996); *Seminole Gulf Railway Limited Partnership v. Fassnacht*, 635 So. 2d 142, 144 (Fla. 2d DCA 1994) (Altenbernd, J., concurring in part and dissenting in part). Pending further development in the law, the committee takes no position on this issue.

2. The personal representative of the decedent's estate is the only appropriate party to bring a wrongful death claim, and the decedent's comparative fault, if any, will reduce the total recovery of the personal representative. However, it may also be necessary to have a specific determination by the jury of the survivor's

comparative negligence, which would be applied only to reduce that survivor's recovery. See *F.S.* 768.20; *Frazier v. Metropolitan Dade County*, 701 So. 2d 418 (Fla. 3d DCA 1997); *Childers v. Schachner*, 612 So. 2d 699 (Fla. 3d DCA 1993); *Gurney v. Cain*, 588 So. 2d 244 (Fla. 4th DCA 1991).

(Revised February 1, 2018; January 23, 2020 (288 So. 3d 1093).)

502.6 MORTALITY TABLES

a. Personal representative claiming damages for benefit of decedent's estate:

In determining how long (decedent) **would have lived, had [he] [she] lived out [his] [her] normal life, you may consider [his] [her] life expectancy at the time of [his] [her] death. The mortality tables received in evidence may be considered in determining how long [he] [she] may have been expected to live. Mortality tables are not binding on you but may be considered together with other evidence in the case bearing on [his] [her] health, age and physical condition, before [his] [her] [injury and] death, in determining the probable length of [his] [her] life.**

b. Personal representative claiming damages for loss to survivor:

In determining the duration of any future loss sustained by (name survivors) **by reason of the death of** (decedent)**, you may consider the joint life expectancy of** (name survivors) **and** (decedent)**. The joint life expectancy is that period of time when both the decedent and a survivor would have remained alive. The mortality tables received in evidence may be considered, together with the other evidence in the case, in determining how long each may have been expected to live.**

NOTE ON USE FOR 502.6b

Because instruction 502.6b will almost invariably be preceded by instruction 502.6a, it is unnecessary to make repeated elaboration in instruction 502.6b of the "other evidence in the case."

502.7 REDUCTION OF DAMAGES TO PRESENT VALUE

Any amount of damages which you allow for [loss of earnings] [the estate's loss of net accumulations], [or] [(describe any other future economic loss which is subject to reduction to present value)**] should be reduced to its present money value and only the present money value of these future economic damages should be included in your verdict.**

The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate (claimant) **for these losses as they are actually experienced in future years.**

NOTES ON USE FOR 502.7

1. Designing a standard instruction for reduction of damages to present value is complicated by the fact that there are several different methods used by economists and courts to arrive at a present-value determination. See, for example, *Delta Air Lines, Inc. v. Ageloff*, 552 So. 2d 1089 (Fla. 1989), and *Renuart Lumber Yards v. Levine*, 49 So. 2d 97 (Fla. 1950) (using approach similar to calculation of cost of annuity); *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), and *Loftin v. Wilson*, 67 So. 2d 185 (Fla. 1953) (lost stream of income approach); *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967) (total offset method); *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982), and *Seaboard Coast Line Railroad v. Garrison*, 336 So. 2d 423 (Fla. 2d DCA 1976) (discussing real interest rate discount method and inflation/market rate discount methods); and *Bould v. Touchette*, 349 So. 2d 1181 (Fla. 1977) (even without evidence, juries may consider effects of inflation).

2. Until the Supreme Court or the legislature adopts one approach to the exclusion of other methods of calculating present money value, the committee assumes that the present value of future economic damages is a finding to be made by the jury on the evidence; or, if the parties offer no evidence to control that finding, that the jury properly resorts to its own common knowledge as guided by instruction 502.7 and by argument. See *Seaboard Coast Line Railroad v. Burdi*, 427 So. 2d 1048 (Fla. 3d DCA 1983).

3. This instruction conflicts with *F.S.* 768.77(2)(a)2. and should not be given in medical malpractice cases when a party has requested that future damages be paid in periodic payments.

(Revised April 21, 2016.)

502.8 LIABILITY OF MULTIPLE TORTFEASORS

a. Comparative negligence cases (special verdicts):

Even if you decide that [both] [more than one] of the defendant[s] were negligent, you should determine [(claimant's)**] [each claimant's] damages in a single total amount, and write that amount, in dollars, on the verdict form.**

b. Cases not requiring special verdicts:

If you find for (claimant) **against [both] [more than one] of the defendant[s], you should assess** (claimant's) **damages in a single amount against [both defendants] [the defendants whom you find to be liable to** (claimant)**].**

B. PUNITIVE DAMAGES

NOTE ON USE FOR PUNITIVE DAMAGES CHARGES

Effective October 1, 1999, *F.S.* 768.735 changed the common law of punitive damages. These instructions are intended to comply with those statutory provisions. For instructions applicable to causes of action arising prior to October 1, 1999, see Appendix C to this book.

These instructions are intended for use in the majority of punitive damages cases with causes of action arising on or after October 1, 1999. They may not be applicable in cases involving a defendant acting under the influence of drugs or alcohol. See *F.S.* 768.736 (1999). Likewise, these instructions may not be applicable in cases involving child abuse, abuse of the elderly, or abuse of the developmentally disabled, or any civil action arising under *F.S.* Chapter 400. See *F.S.* 768.735 (1999).

Under certain circumstances, an additional instruction may be required regarding the upper limit on the amount of punitive damages. See *Wransky v. Dalfo*, 801 So. 2d 239 (Fla. 4th DCA 2001).

Upon timely motion, a demand for punitive damages and determination of the issues raised by such a demand must be submitted to the jury under the bifurcated procedure established in *W.R. Grace & Co. v. Waters*, 638 So. 2d 502 (Fla. 1994). Instruction 503.1 is intended to comply with the required bifurcated procedure. Absent a timely motion, punitive damage issues will be decided under a non-bifurcated procedure, as provided in 503.2.

503.1 PUNITIVE DAMAGES — BIFURCATED PROCEDURE

a. First stage of bifurcated punitive damages procedure:

There is an additional claim in this case that you must decide. If you find for (claimant) **and against** (defendant(s))**, you must decide whether, in addition to compensatory damages, punitive damages are warranted as punishment to [one or more of]** (defendant(s)) **and as a deterrent to others.**

The trial of the punitive damages issue is divided into two parts. In this first part, you will decide whether the conduct of (defendant(s) or individual(s) whose conduct may warrant punitive damages) **is such that punitive damages are warranted. If you decide that punitive damages are warranted, we will proceed to the second part of that issue during which the parties may present additional evidence and argument on the issue of punitive damages. I will then give you additional instructions, after which you will decide whether, in your discretion, punitive damages will be assessed and, if so, the amount.**

b(1). Punitive damages for acts of an individual defendant:

(Claimant) **claims that punitive damages should be awarded against** (defendant) **for [his] [her] [its] conduct in** (describe the alleged punitive conduct)**. Punitive damages are warranted against** (defendant) **if you find by clear and convincing evidence that** (defendant) **was guilty of [intentional misconduct] [or] [gross negligence], which was a substantial cause of [loss] [injury] [or] [damage] to** (claimant)**. Under those circumstances you may, in your discretion, award punitive damages against** (defendant)**. If clear and convincing evidence does not show such conduct by** (defendant)**, punitive damages are not warranted against** (defendant)**.**

["Intentional misconduct" means that (defendant) **had actual knowledge of the wrongfulness of the conduct and there was a high probability of injury or damage to** (claimant) **and, despite that knowledge, [he] [she] intentionally pursued that course of conduct, resulting in injury or damage.]**

["Gross negligence" means that (defendant's) **conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.]**

"Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. As I have already instructed you, "greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. "Clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

b(2). Direct liability for acts of managing agent, primary owner, or certain others:

(Claimant) **claims that punitive damages should be awarded against** (defendant) **for the acts of** (managing agent, primary owner, or other person whose conduct may warrant punitive damages without proof of a superior's fault) **in** (describe the alleged punitive conduct)**. Punitive damages are warranted against** (defendant) **if you find by clear and convincing evidence that** (managing agent, primary owner, or other person whose conduct may warrant punitive damages without proof of a superior's fault) **[was] [were] personally guilty of [intentional misconduct] [or] [gross negligence], which was a substantial cause of [loss] [injury] [or] [damage] to** (claimant)**. Under those circumstances you may, in your discretion, award punitive damages against** (defendant corporation or partnership)**. If clear and convincing evidence does not show such conduct by** (managing agent, primary owner, or other person whose conduct may warrant punitive damages without proof of a superior's fault)**, punitive damages are not warranted against** (defendant)**.**

["Intentional misconduct" means that (person whose conduct may warrant punitive damages) **had actual knowledge of the wrongfulness of the conduct and there was a high probability of injury or damage to** (claimant) **and, despite that knowledge, [he] [she] intentionally pursued that course of conduct, resulting in injury or damage.]**

["Gross negligence" means that the conduct of (person whose conduct may warrant punitive damages) **was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.]**

["Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. As I have already instructed you, "greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.] "Clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

b(3). Liability for acts of employee/agent who is party being sued for punitive damages:

(Claimant) **claims that punitive damages should be awarded against** (employee/agent) **and** (defendant employer) **for** (employee/agent's) **conduct in** (describe the alleged punitive conduct)**. Punitive damages are warranted against** (employee/agent) **if you find by clear and convincing evidence that** (employee/agent) **was personally guilty of [intentional misconduct] [or] [gross negligence], which was a substantial cause of [loss] [injury] [or] [damage] to** (claimant)**. Under those circumstances you may, in your discretion, award punitive damages against** (employee/agent)**. If clear and convincing evidence does not show such conduct by** (employee/agent)**, punitive damages are not warranted against either** (employee/agent) **or** (defendant employer)**.**

If you find that punitive damages are warranted against (employee/agent) **you may also, in your discretion, award punitive damages against** (defendant employer) **if you find from clear and convincing evidence that:**

(A). (defendant employer) **actively and knowingly participated in such conduct of** (employee/agent)**; or**

(B). **the [officers] [directors] [or] [managers] of** (defendant employer) **knowingly condoned, ratified, or consented to such conduct of** (employee/agent)**; or**

(C). (defendant employer) **engaged in conduct that constituted gross negligence and that contributed to the [loss] [damage] [or] [injury] to** (claimant)**.**

If clear and convincing evidence does not show such conduct by (defendant employer) **punitive damages are not warranted against** (defendant employer)**.**

["Intentional misconduct" means that (person whose conduct may warrant punitive damages) **had actual knowledge of the wrongfulness of the conduct and there was a high probability of injury or damage to** (claimant) **and, despite that knowledge, [he] [she] intentionally pursued that course of conduct, resulting in injury or damage.]**

["Gross negligence" means that the conduct of (person whose conduct may warrant punitive damages) **was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.]**

["Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. As I have already instructed you, "greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.] "Clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

b(4). Liability for acts of employee where employee/agent where employee/agent is not a party or is not being sued for punitive damages:

(Claimant) **claims that punitive damages should be awarded**

against (defendant employer) **for** (employee/agent's) **conduct in** (describe the alleged punitive conduct)**. Punitive damages are warranted if you find by clear and convincing evidence that** (employee/agent) **was personally guilty of [intentional misconduct] [or] [gross negligence], which was a substantial cause of [loss] [injury] [or] [damage] to** (claimant) **and that:**

(A). (defendant employer) **actively and knowingly participated in such conduct of** (employee/agent)**; or**

(B). **the [officers] [directors] [or] [managers] of** (defendant employer) **knowingly condoned, ratified, or consented to such conduct of** (employee/agent)**; or**

(C). (defendant employer) **engaged in conduct that constituted gross negligence and that contributed to the [loss] [damage] [or] [injury] to** (claimant)**.**

Under those circumstances you may, in your discretion, award punitive damages against (defendant employer)**. If clear and convincing evidence does not show such conduct by** (employee/agent)**, punitive damages are not warranted against** (defendant employer)**.**

["Intentional misconduct" means that (person whose conduct may warrant punitive damages) **had actual knowledge of the wrongfulness of the conduct and there was a high probability of injury or damage to** (claimant) **and, despite that knowledge, [he] [she] intentionally pursued that course of conduct, resulting in injury or damage.]**

["Gross negligence" means that the conduct of (person whose conduct may warrant punitive damages) **was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.]**

["Clear and convincing evidence" differs from the "greater

weight of the evidence" in that it is more compelling and persuasive. As I have already instructed you, "greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.] "Clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

b(5). When evidence admitted of harms caused to nonparties:

[In deciding the issue of punitive damages, you may consider any harm (defendant's) **conduct caused** (claimant/decedent)**.**

You have also heard evidence of harms (defendant's) **conduct [allegedly] caused to persons other than** (claimant/decedent)**.**

You may consider harms that (defendant's) **conduct caused to persons other than** (claimant/decedent) **in deciding the [reprehensibility] [or] [wrongfulness] of** (defendant's) **conduct only if the harms suffered by those other persons were caused by the same or similar conduct of** (defendant) **that harmed** (claimant/decedent)**.**

However, you may not punish (defendant) **for any harms suffered by persons other than** (claimant/decedent)**.**

**Refer to Note on Use 8.*

(Proceed to 601.01 et seq. and balance of instructions for the completion of the jury instructions.)

c. Second stage of bifurcated punitive damage procedure:

c(1). Opening instruction, second stage:

Members of the jury, I am now going to tell you about the rules of law that apply to determining whether punitive damages should be assessed and, if so, in what amount. When I finish with these instructions, the parties will present additional evidence.

You should consider this additional evidence along with the evidence presented, and you should decide any disputed factual issues by the greater weight of the evidence. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

c(2). Punitive damages — determination of amount:

You are to decide the amount of punitive damages, if any, to be assessed as punishment against (defendant(s)) **and as a deterrent to others. This amount would be in addition to the compensatory damages you have previously awarded. In making this determination, you should consider the following:**

(A). the nature, extent and degree of misconduct and the related circumstances, including the following:

i. whether the wrongful conduct was motivated solely by unreasonable financial gain;

ii. whether the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by [(defendant)**] [**(the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant)**];**

iii. whether, at the time of [loss] [injury] [or] [damage], [(defendant)**] [**(the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant)**] had a specific intent to harm** (claimant) **and the conduct of [**(defendant)**] [**(the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant)**] did in fact harm** (claimant)**, [and]**

[(B). [the financial resources of (defendant(s))**; and]***

**Refer to Note on Use 5.*

[(C). (Identify any other circumstance that the jury may consider in determining the amount of punitive damages.)**]***

**Refer to Note on Use 6.*

[However, you may not award an amount that would financially destroy *(defendant(s))***.]***

**Refer to Note on Use 7.*

[(D). *When evidence admitted of harms caused to nonparties:*

In deciding the issue of punitive damages, you may consider any harm (defendant's) **conduct caused** (claimant/decedent)**.**

You have also heard evidence of harms (defendant's) **conduct [allegedly] caused to persons other than** (claimant/decedent)**.**

You may consider harms that (defendant's) **conduct caused to persons other than** (claimant/decedent) **in deciding the [reprehensibility] [or] [wrongfulness] of** (defendant's) **conduct only if the harms suffered by those other persons were caused by the same or similar conduct of** (defendant) **that harmed** (claimant/decedent)**.**

However, you may not punish (defendant) **for any harms suffered by persons other than** (claimant/decedent)**.**

**Refer to Note on Use 8.*

You may in your discretion decline to assess punitive damages. [You may assess punitive damages against one defendant and not the other[s] or against more than one defendant. Punitive damages may be assessed against different defendants in different amounts.]

d. Closing instruction, second stage:

Members of the jury, you have now heard and received all of the evidence on the issue of punitive damages. Your verdict on the issues raised by the punitive damages claim of (claimant) **against** (defendant(s)) **must be based on the evidence that has been received during the trial of the first phase of this case and on the evidence that has been received in these proceedings and the law on which I have instructed you. In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice or sympathy for or against any party.**

Your verdict must be unanimous, that is, your verdict must be agreed to by each of you.

You will be given a form of verdict, which I shall now read to you:

When you have agreed on your verdict, the foreperson, acting for the jury, should date and sign the verdict. You may now retire to consider your verdict.

NOTES ON USE FOR 503.1

1. This instruction is designed so it can be given before the taking of evidence. Instruction 503.1a and the applicable part of 503.1b should be given as part of the general instruction on the case. Instruction 503.1c is designed to be given before the beginning of stage two of the punitive damages trial. And instruction 503.1d is designed to be given at the close of the evidence in the stage two proceeding.

2. Instruction 503.1a should be given in all cases involving bifurcated proceedings.

Instruction 503.1b(1) should be given when the demand for punitive damages is based on the conduct of an individual defendant.

Instruction 503.1b(2) should be given when the demand for punitive damages is based on the conduct of a managing agent or principal. *Bankers Multiple Line Insurance Co. v. Farish*, 464 So. 2d 530 (Fla. 1985). That person should be named in 503.1b(2). Pending

further development in the law, the committee takes no position regarding whether the independent negligence must be on the part of a managing agent or principal or whether it can be based on the independent negligence of another employee. See *Schropp v. Crown Eurocars, Inc.*, 654 So. 2d 1158 (Fla. 1995) and *Partington v. Metallic Engineering*, 792 So. 2d 498 (Fla. 4th DCA 2001). In appropriate cases, a corporate policy can provide the basis for punitive damages against a corporation even though the particular officers or agents of the corporation responsible for the policy are not discovered or identified. See, *e.g.*, *Schropp* at 1162 (Wells, J. concurring). In those cases, the instruction will need to be modified accordingly.

Instruction 503.1b(3) should be given when there is a demand for punitive damages against an employer/principal based on the conduct of an employee and punitive damages are also being sought against the employee. There may be situations other than employer-employee relationships where vicarious liability for punitive damages may be imposed. See, *e.g.*, *Knepper v. Genstar Corp.*, 537 So. 2d 619 (Fla. 3d DCA 1988) (joint venture); *Soden v. Starkman*, 218 So. 2d 763 (Fla. 3d DCA 1969) (partnership).

Instruction 503.1b(4) should be given when there is a demand for punitive damages against the employer/principal for the acts of an employee, but the employee is not a defendant or is not being sued for punitive damages.

In cases involving both direct and vicarious liability claims, instructions 503.1b(2) and 503.1b(3) or b(4) should be given with appropriate transitional language with respect to the claims based on vicarious liability.

"Intentional misconduct" and "gross negligence," as well as their definitions, are bracketed in these instructions because a defendant may be found liable for punitive damages if the jury finds by clear and convincing evidence that the defendant was guilty of either "intentional misconduct" or "gross negligence." See *F.S.* 768.72(2) (1999). Whether the jury should be instructed on "intentional misconduct," "gross negligence," or both, depends on the circumstances of the case. In addition, once the jury has been instructed on the definitions of "intentional misconduct" and "gross

negligence," those instructions do not have to be repeated.

The paragraphs in instructions 503.1b(2)–b(4) defining "clear and convincing evidence" are also bracketed because, once given, that definition does not have to be repeated.

3. Instructions 503.1b(1)–b(4) are designed for use in most common-law tort cases. However, certain types of intentional torts may require a punitive damage charge appropriate to the particular tort. See, *e.g.*, *First Interstate Development Corp. v. Ablanedo*, 511 So. 2d 536 (Fla. 1987); *Metropolitan Life Insurance Co. v. McCarson*, 467 So. 2d 277 (Fla. 1985). The same may be true when punitive damages are authorized by statute. See, *e.g.*, *Home Insurance Co. v. Owens*, 573 So. 2d 343, 346 (Fla. 4th DCA 1990).

4. It is not the purpose of instruction 503.1c second stage instructions to allow parties to relitigate in the second stage of the bifurcated proceeding, by new evidence or by argument, the underlying question decided in the first stage of the proceeding of whether an award of punitive damages is warranted. Rather, the purpose of instruction 503.1c is to advise the jury that in the second stage of the proceeding, evidence may be presented and argued which will allow the jury in its discretion to determine the amount of an award of punitive damages, and that the amount which the jury determines appropriate could be zero.

5. Instruction 503.1c(2)(B) should only be used when evidence of a defendant's financial worth is introduced.

6. Instruction 503.1c(2)(C) should be used only after the court has determined that the evidence includes some additional circumstance that may affect the amount of punitive damages. See, *e.g.*, *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483 (Fla. 1999) (listing various such factors). See generally *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). One such circumstance is the assessment of punitive damages against the defendant in prior cases. See *W.R. Grace & Co. v. Waters*, 638 So. 2d 502 (Fla. 1994).

7. This instruction is to be given when requested by the

defendant. See *Wransky v. Dalfo*, 801 So. 2d 239 (Fla. 4th DCA 2001). It appears that this instruction can only be used when evidence of the defendant's net worth has been introduced. See *Bould v. Touchette*, 349 So. 2d 1181 (Fla. 1977); *Rinaldi v. Aaron*, 314 So. 2d 762 (Fla. 1975). This instruction is not intended to supplant the court's function in determining whether a verdict is constitutional. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). The committee notes that many reported decisions have used alternative terms such as "bankrupt" or "economically castigate" to describe this limitation, instead of or in addition to the term "financially destroy." See, *e.g.*, *Wackenhut Corp. v. Canty*, 359 So. 2d 430 (Fla. 1978); *Lehman v. Spencer Ladd's Inc.*, 182 So. 2d 402 (Fla. 1966). The committee has selected the term "financially destroy" for its simplicity, but does not intend to foreclose the use of other legally valid terms where appropriate under the facts of the particular case.

8. Harm and risk of harm to nonparties. This instruction does not address what evidence of harm to nonparties is relevant or admissible in a particular case or whether additional instructions may be necessary to ensure due process based on the evidence admitted in a particular case or a particular phase of a bifurcated trial. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421–22 (2003). This instruction should be given, upon request, in cases in which evidence has been introduced that the defendant's conduct caused harm to others who are not parties to the case. See *Philip Morris USA v. Williams*, 549 U.S. 346, 355–57 (2007); *Philip Morris USA, Inc. v. Ledoux*, 230 So. 3d 530, 536 (Fla. 3d DCA 2017); *Philip Morris USA, Inc. v. Cohen*, 102 So. 3d 11, 18 (Fla. 4th DCA 2012), quashed on other grounds, 41 Fla. L. Weekly S113 (Fla. Jan. 29, 2016). Depending upon the evidence admitted in a particular case, additional language may be appropriate regarding the risk of harm the defendant's conduct posed to nonparties. See *Philip Morris USA v. Williams*, 549 U.S. at 355–57.

(Revised March 4, 2020;
August 13, 2021; November 19, 2021.)

503.2 PUNITIVE DAMAGES — NON-BIFURCATED PROCEDURE

a. Punitive damages generally:

There is an additional claim in this case that you must decide. If you find for (claimant) **and against** (defendant(s))**, you must decide whether, in addition to compensatory damages, punitive damages are warranted as punishment to [one or more of]** (defendant(s)) **and as a deterrent to others.**

b(1). Punitive damages for acts of an individual defendant:

(Claimant) **claims that punitive damages should be awarded against** (defendant) **for [his] [her] [its] conduct in** (describe the alleged punitive conduct)**. Punitive damages are warranted against** (defendant) **if you find by clear and convincing evidence that** (defendant) **was guilty of [intentional misconduct] [or] [gross negligence], which was a substantial cause of [loss] [injury] [or] [damage] to** (claimant)**. Under those circumstances you may, in your discretion, award punitive damages against** (defendant)**. If clear and convincing evidence does not show such conduct by** (defendant)**, punitive damages are not warranted against** (defendant)**.**

["Intentional misconduct" means that (defendant) **had actual knowledge of the wrongfulness of the conduct and that there was a high probability that injury or damage to** (claimant) **and, despite that knowledge, [he] [she] intentionally pursued that course of conduct, resulting in injury or damage.]**

["Gross negligence" means that (defendant's) **conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.]**

"Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. As I have already instructed you, "greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. "Clear and

convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

b(2). Direct liability for acts of managing agent, primary owner, or certain others:

(Claimant) **claims that punitive damages should be awarded against** (defendant) **for the acts of** (managing agent, primary owner, or other person whose conduct may warrant punitive damages without proof of a superior's fault) **in** (describe the alleged punitive conduct)**. Punitive damages are warranted against** (defendant) **if you find by clear and convincing evidence that** (managing agent, primary owner, or other person whose conduct may warrant punitive damages without proof of a superior's fault) **[was] [were] personally guilty of [intentional misconduct] [or] [gross negligence], which was a substantial cause of [loss] [injury] [or] [damage] to** (claimant)**. Under those circumstances you may, in your discretion, award punitive damages against** (defendant corporation or partnership)**. If clear and convincing evidence does not show such conduct by** (managing agent, primary owner, or other person whose conduct may warrant punitive damages without proof of a superior's fault)**, punitive damages are not warranted against** (defendant)**.**

["Intentional misconduct" means that (person whose conduct may warrant punitive damages) **had actual knowledge of the wrongfulness of the conduct and there was a high probability of injury or damage to** (claimant) **and, despite that knowledge, [he] [she] intentionally pursued that course of conduct, resulting in injury or damage.]**

["Gross negligence" means that the conduct of (person whose conduct may warrant punitive damages) **was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.]**

["Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. As I have already instructed you, "greater weight of the evidence" means the more persuasive and convincing force

and effect of the entire evidence in the case.] "Clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

b(3). Liability for acts of employee/agent who is a party being sued for punitive damages:

(Claimant) **claims that punitive damages should be awarded against** (employee/agent) **and** (defendant employer) **for** (employee/agent's) **conduct in** (describe the alleged punitive conduct)**. Punitive damages are warranted against** (employee/agent) **if you find by clear and convincing evidence that** (employee/agent) **was personally guilty of [intentional misconduct] [or] [gross negligence], which was a substantial cause of [loss] [injury] [or] [damage] to** (claimant)**. Under those circumstances you may, in your discretion, award punitive damages against** (employee/agent)**. If clear and convincing evidence does not show such conduct by** (employee/agent) **punitive damages are not warranted against either** (employee/agent) **or** (defendant employer)**.**

If you find that that punitive damages are warranted against (employee/agent) **you may also, in your discretion, award punitive damages against** (defendant employer) **if you find from clear and convincing evidence that:**

(A). (defendant employer) **actively and knowingly participated in such conduct of** (employee/agent)**; or**

(B). the [officers] [directors] [or] [managers] of (defendant employer) **knowingly condoned, ratified, or consented to such conduct of** (employee/agent)**; or**

(C). (defendant employer) **engaged in conduct that constituted gross negligence and that contributed to the [loss] [damage] [or] [injury] to** (claimant)**.**

If clear and convincing evidence does not show such conduct by (defendant employer)**, punitive damages are not warranted against** (defendant employer)**.**

["Intentional misconduct" means that (person whose conduct may warrant punitive damages) **had actual knowledge of the wrongfulness of the conduct and there was a high probability of injury or damage to** (claimant) **and, despite that knowledge, [he] [she] intentionally pursued that course of conduct, resulting in injury or damage.]**

["Gross negligence" means that the conduct of (person whose conduct may warrant punitive damages) **was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.]**

["Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. As I have already instructed you, "greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.] "Clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

(b)(4). Liability for acts of employee/agent where employee/agent is not a party or is not being sued for punitive damages:

(Claimant) **claims that punitive damages should be awarded against** (defendant employer) **for** (employee/agent's) **conduct in** (describe the alleged punitive conduct)**. Punitive damages are warranted if you find by clear and convincing evidence that** (employee/agent) **was personally guilty of [intentional misconduct] [or] [gross negligence], which was a substantial cause of [loss] [injury] [or] [damage] to** (claimant) **and that:**

(A). (defendant employer) **actively and knowingly participated in such conduct of** (employee/agent)**; or**

(B). the [officers] [directors] [or] [managers] of (defendant employer) **knowingly condoned, ratified, or consented to such conduct of** (employee/agent)**; or**

(C). (defendant employer) **engaged in conduct that constituted gross negligence and that contributed to the [loss] [damage] [or] [injury] to** (claimant)**.**

Under those circumstances you may, in your discretion, award punitive damages against (defendant employer)**. If clear and convincing evidence does not show such conduct by** (employee/agent)**, punitive damages are not warranted against** (defendant employer)**.**

["Intentional misconduct" means that (person whose conduct may warrant punitive damages) **had actual knowledge of the wrongfulness of the conduct and there was a high probability of injury or damage to** (claimant) **and, despite that knowledge, [he] [she] intentionally pursued that course of conduct, resulting in injury or damage.]**

["Gross negligence" means that the conduct of (person whose conduct may warrant punitive damages) **was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.]**

["Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. As I have already instructed you, "greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.] "Clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

(b)(5). When evidence admitted of harms caused to nonparties:

[In deciding the issue of punitive damages, you may consider any harm (defendant's) **conduct caused** (claimant/decedent)**.**

You have also heard evidence of harms (defendant's) **conduct [allegedly] caused to persons other than** (claimant/decedent)**.**

You may consider harms that (defendant's) **conduct caused to persons other than** (claimant/decedent) **in deciding the [reprehensibility] [or] [wrongfulness] of** (defendant's) **conduct only if the harms suffered by those other persons were caused by the same or similar conduct of** (defendant) **that harmed** (claimant/decedent)**.**

However, you may not punish (defendant) **for any harms suffered by persons other than** (claimant/decedent)**.]***

**Refer to Note on Use 7.*

c. Closing punitive damage instruction:

If you decide that punitive damages are warranted against [one or more of] (defendant(s)) **then you must decide the amount of punitive damages, if any, to be assessed as punishment against** (defendant(s)) **and as a deterrent to others. This amount would be in addition to the compensatory damages you have previously awarded. In making this determination, you should decide any disputed factual issues by the greater weight of the evidence. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.**

In determining the amount of punitive damages, if any, to be assessed, you should consider the following:

(1). the nature, extent and degree of misconduct and the related circumstances, including the following:

(A). whether the wrongful conduct was motivated solely by unreasonable financial gain;

(B). whether the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by [(defendant)**] [**(the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant)**];**

(C). whether, at the time of [loss] [injury] [or] [damage], [(defendant)**] [**(the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant)**] had a specific intent to harm** (claimant) **and the conduct of [**(defendant)**] [**(the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant)**] did in fact harm (**claimant**), [and]**

[(2). [the financial resources of (defendant(s))**; and]***

**Refer to Note on Use 4.*

[(3). (identify any other circumstance that the jury may consider in determining the amount of punitive damages.)**]***

**Refer to Note on Use 5.*

[However, you may not award an amount that would financially destroy (defendant(s))**.]***

**Refer to Note on Use 6.*

You may in your discretion decline to assess punitive damages. [You may assess punitive damages against one defendant and not the other[s] or against more than one defendant. Punitive damages may be assessed against different defendants in different amounts.]

(Proceed to 601.01 et seq. and balance of instructions for the completion of the jury instructions.)

NOTES ON USE TO 503.2

1. This instruction is designed so it can be given before the taking of evidence. Instruction 503.2a and the applicable part of 503.2b should be given as part of the general instruction on the case.

2. Instruction 503.2a should be given in all non-bifurcated cases.

Instruction 503.2b(1) should be given when the demand for

punitive damages is based on the conduct of an individual defendant.

Instruction 503.2b(2) should be given when the demand for punitive damages is based on the conduct of a managing agent or principal. *Bankers Multiple Line Insurance Co. v. Farish*, 464 So. 2d 530 (Fla. 1985). That person should be named in 503.2b(2). Pending further development in the law, the committee takes no position regarding whether the independent negligence must be on the part of a managing agent or principal or whether it can be based on the independent negligence of another employee. See *Schropp v. Crown Eurocars, Inc.,* 654 So. 2d 1158 (Fla. 1995); *Partington v. Metallic Engineering*, 792 So. 2d 498 (Fla. 4th DCA 2001). In appropriate cases, a corporate policy can provide the basis for punitive damages against a corporation even though the particular officers or agents of the corporation responsible for the policy are not discovered or identified. See, *e.g.*, *Schropp* at 1162 (Wells, J. concurring). In those cases, the instruction will need to be modified accordingly.

Instruction 503.2b(3) should be given when there is a demand for punitive damages against an employer/principal based on the conduct of an employee and punitive damages are also being sought against both the employee and employer. There may be situations other than employer-employee relationships where vicarious liability for punitive damages may be imposed. See, *e.g.*, *Knepper v. Genstar Corp.,* 537 So. 2d 619 (Fla. 3d DCA 1988) (joint venture); *Soden v. Starkman*, 218 So. 2d 763 (Fla. 3d DCA 1969) (partnership).

Instruction 503.2b(4) should be given when there is a demand for punitive damages against the employer/principal for the acts of an employee, but the employee is not a defendant or is not being sued for punitive damages.

In cases involving both direct and vicarious liability claims, instructions 503.2b(2) and 503.2b(3) or b(4) should be given with appropriate transitional language with respect to the claims based on vicarious liability.

"Intentional misconduct" and "gross negligence," as well as their definitions, are bracketed in these instructions because a defendant may be found liable for punitive damages if the jury finds by clear and

convincing evidence that the defendant was guilty of either "intentional misconduct" or "gross negligence." See *F.S.* 768.72(2) (1999). Whether the jury should be instructed on "intentional misconduct," "gross negligence," or both depends on the circumstances of the case. In addition, once the jury has been instructed on the definitions of "intentional misconduct" and "gross negligence," those instructions do not have to be repeated.

The paragraphs in instructions 503.2b(2)–b(4) defining "clear and convincing evidence" are bracketed because, once given, that definition does not have to be repeated.

3. Instructions 503.2b(1)–b(4) are designed for use in most common-law tort cases. However, certain types of intentional torts may require a punitive damage charge appropriate to the particular tort. See, *e.g.*, *First Interstate Development Corp. v. Ablanedo*, 511 So. 2d 536 (Fla. 1987); *Metropolitan Life Insurance Co. v. McCarson*, 467 So. 2d 277 (Fla. 1985). The same may be true where punitive damages are authorized by statute. See, *e.g.*, *Home Insurance Co. v. Owens,* 573 So. 2d 343, 346 (Fla. 4th DCA 1990).

4. Instruction 503.2c(2) should only be used when evidence of a defendant's financial worth is introduced.

5. Instruction 503.2c(3) should be used only after the court has determined that the evidence includes some additional circumstance that may affect the amount of punitive damages. See, *e.g.*, *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483 (Fla. 1999) (listing various such factors). See generally *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). One such circumstance is the assessment of punitive damages against the defendant in prior cases. See *W.R. Grace & Co. v. Waters*, 638 So. 2d 502 (Fla. 1994).

6. This instruction is to be given when requested by the defendant. See *Wransky v. Dalfo*, 801 So. 2d 239 (Fla. 4th DCA 2001). It appears that this instruction can only be used when evidence of the defendant's net worth has been introduced. See *Bould v. Touchette*, 349 So. 2d 1181 (Fla. 1977); *Rinaldi v. Aaron*, 314 So. 2d 762 (Fla. 1975). This instruction is not intended to supplant the court's

function in determining whether a verdict is constitutional. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). The committee notes that many reported decisions have used alternative terms such as "bankrupt" or "economically castigate" to describe this limitation, instead of or in addition to the term "financially destroy." See, *e.g.*, *Wackenhut Corp. v. Canty*, 359 So. 2d 430 (Fla. 1978); *Lehman v. Spencer Ladd's, Inc.*, 182 So. 2d 402 (Fla. 1966). The committee has selected the term "financially destroy" for its simplicity, but does not intend to foreclose the use of other legally valid terms where appropriate under the facts of the particular case.

7. Harm and risk of harm to nonparties. This instruction does not address what evidence of harm to nonparties is relevant or admissible in a particular case or whether additional instructions may be necessary to ensure due process based on the evidence admitted in a particular case or a particular phase of a bifurcated trial. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421–22 (2003). This instruction should be given, upon request, in cases in which evidence has been introduced that the defendant's conduct caused harm to others who are not parties to the case. See *Philip Morris USA v. Williams*, 549 U.S. 346, 355–57 (2007); *Philip Morris USA, Inc. v. Ledoux*, 230 So. 3d 530, 536 (Fla. 3d DCA 2017); *Philip Morris USA, Inc. v. Cohen*, 102 So. 3d 11, 18 (Fla. 4th DCA 2012), quashed on other grounds, 41 Fla. L. Weekly S113 (Fla. Jan. 29, 2016). Depending upon the evidence admitted in a particular case, additional language may be appropriate regarding the risk of harm the defendant's conduct posed to nonparties. See *Philip Morris USA v. Williams*, 549 U.S. at 355–57.

(Revised March 4, 2020; August 13, 2021; November 19, 2021.)

SECTION 600 — SUBSTANTIVE INSTRUCTIONS — GENERAL

601.1 Weighing the Evidence

601.2 Believability of Witnesses

601.3 Jury to Be Guided by Official English Translation/Interpretation

601.4 Multiple Claims, Numerous Parties, Consolidated Cases

601.5 Concluding Instruction (Before Final Argument)

601.1 WEIGHING THE EVIDENCE

In deciding this case, it is your duty as jurors [to decide the issues, and only those issues, that I submit for your determination] [to answer certain questions I ask you to answer on a special form, called a verdict form]. You must come to an agreement about [your verdict] [what your answers will be. Your agreed-upon answers to my questions are called your jury verdict].

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence [and] all facts that were admitted or agreed to by the parties [, and any fact of which the court has taken judicial notice (explain as necessary)**].**

In reaching your verdict, you must think about and weigh the testimony and any documents, photographs, or other material that has been received in evidence. You may also consider any facts that were admitted or agreed to by the lawyers. Your job is to determine what the facts are. You may use reason and common sense to reach conclusions. You may draw reasonable inferences from the evidence. But you should not guess about things that were not covered here. And, you must always apply the law as I have explained it to you.

601.2 BELIEVABILITY OF WITNESSES

a. General considerations:

Let me speak briefly about witnesses. In evaluating the believability of any witness and the weight you will give the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

b. Expert witnesses:

[You have heard opinion testimony [on certain technical subjects] from [a person] [persons] referred to as [an] expert witness[es].] [Some of the testimony before you was in the form of opinions about certain technical subjects.]

You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.

c. Witness talked to lawyer:

[It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited just because the witness talked with a lawyer about [his] [her] testimony.]

NOTES ON USE FOR 601.2

1. *Expert witness.* See *F.S.* 90.702 (1985), and *Shaw v. Puleo*,

159 So. 2d 641 (Fla. 1964). The court will select one or the other introductory sentence in keeping with the court's practice and preference in announcing before the jury, or acceding to counsel's characterization, that a tendered witness is an "expert."

2. *Common knowledge and everyday experience.* Except to the extent indicated in instruction 601.2, the committee recommends that the jury not be instructed that the jurors may bring to bear their "common knowledge and everyday experience."

3. *Failure to produce witness.* The committee recommends that no instruction be given. While it may be permissible in some circumstances to instruct the jury regarding inferences arising from a party's failure to produce a witness (compare *Weeks v. Atlantic Coast Line Railroad Co.*, 132 So. 2d 315 (Fla. 1st DCA 1961), with *Georgia Southern & Florida Railway Co. v. Perry*, 326 F.2d 921 (5th Cir. 1964)), the committee believes that generally such inferences are more properly referred to in counsel's argument.

4. *Witness talked to lawyer.* This may be given if requested as either a substantive or a curative instruction whenever there is testimony that a witness spoke to or met with an attorney for one of the parties. This instruction is not meant to prohibit or limit argument by counsel of the general considerations set forth in 601.2a.

(Revised November 2, 2017.)

601.3 JURY TO BE GUIDED BY OFFICIAL ENGLISH TRANSLATION/INTERPRETATION

[A] [Some] witness[es] have testified in (language used) **which was interpreted into English.**

The evidence you are to consider is only that provided through the official court interpreters. Although some of you may know (language used)**, it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English interpretation. You must disregard any different meaning.**

If, during the testimony there was a question as to the accuracy of the English interpretation and steps were taken to resolve any discrepancies and despite these efforts a discrepancy remains, I emphasize that you must rely only upon the official English interpretation as provided by the court interpreter and disregard any other contrary interpretation.

NOTES ON USE FOR 601.3

1. See *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998); *United States v. Rrapi*, 175 F.3d 742, 748 (9th Cir. 1999); *United States v. Fuentes-Montijo*, 68 F.3d 352, 355–56 (9th Cir. 1995).

2. When instructing the jury at the beginning of the case, use instruction 202.5 instead of this instruction. See Model Instruction No. 1.

601.4 MULTIPLE CLAIMS, NUMEROUS PARTIES, CONSOLIDATED CASES

In your deliberations, you will consider and decide [several] [(state the number)**] distinct claims.** (Identify claims to be considered.) **Although these claims have been tried together, each is separate from the other[s], and each party is entitled to have you separately consider each claim as it affects that party. Therefore, in your deliberations, you should consider the evidence as it relates to each claim separately, as you would had each claim been tried before you separately.**

NOTE ON USE FOR 601.4

This instruction is applicable to two or more consolidated actions as well as to two or more claims in the same action by or against different persons or by or against the same person in different capacities. The committee recommends that this instruction not be given to distinguish between a primary claim and a derivative claim (*e.g.*, that of the injured party and that of his or her spouse) or between a claim against a party primarily liable and a claim against a party liable only vicariously (*e.g.*, claims against a party actively negligent and against his employer) or claims under *F.S.* 768.0415.

601.5 CONCLUDING INSTRUCTION (BEFORE FINAL ARGUMENT)

That is the law you must follow in deciding this case. The attorneys for the parties will now present their final arguments. When they are through, I will have a few final instructions about your deliberations.

NOTE ON USE FOR 601.5

Instruction 601.5 is for use when instructing the jury before final argument. If the court's instruction is to be given after final argument, skip to instruction 700 and omit the bracketed sentence in the first paragraph.

SECTION 700 — CLOSING INSTRUCTIONS

700 Closing Instructions

SECTION 700 — CLOSING INSTRUCTIONS

Members of the jury, you have now heard all the evidence, my instructions on the law that you must apply in reaching your verdict and the closing arguments of the attorneys. You will shortly retire to the jury room to decide this case. [Before you do so, I have a few last instructions for you.]

During deliberations, jurors must communicate about the case only with one another and only when all jurors are present in the jury room. You will have in the jury room all of the evidence that was received during the trial. In reaching your decision, do not do any research on your own or as a group. Do not use dictionaries, the Internet, artificial intelligence, or any other reference materials. Do not investigate the case or conduct any experiments. Do not visit or view the scene of any event involved in this case or look at maps or pictures on the Internet. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. Do not read, listen to, or watch any news accounts of this trial.

You are not to communicate with any person outside the jury about this case. Until you have reached a verdict, you must not talk about this case in person or through the telephone, writing, or electronic communication, such as social media, e-mail, text message, or any other means. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. These communications rules apply until I discharge you at the end of the case.

If you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the bailiff.

Any notes you have taken during the trial may be taken to the jury room for use during your discussions. Your notes are simply an aid to your own memory, and neither your notes nor those of any other juror are binding or conclusive. Your notes are not a substitute for your own memory or that of other jurors.

Instead, your verdict must result from the collective memory and judgment of all jurors based on the evidence and testimony presented during the trial.

At the conclusion of the trial, the bailiff will collect your notes, which will be immediately destroyed. No one will ever read your notes.

In reaching your verdict, do not let bias, sympathy, prejudice, public opinion, or any other sentiment for or against any party influence your decision. Your verdict must be based on the evidence that has been received and the law on which I have instructed you.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way and you should not guess what I think your verdict should be from something I may have said or done. You should not think that I prefer one verdict over another. Therefore, in reaching your verdict, you should not consider anything that I have said or done, except for my specific instructions to you.

Pay careful attention to all the instructions that I gave you, for that is the law that you must follow. You will have a copy of my instructions with you when you go to the jury room to deliberate. All the instructions are important, and you must consider all of them together. There are no other laws that apply to this case, and even if you do not agree with these laws, you must use them in reaching your decision in this case.

When you go to the jury room, the first thing you should do is choose a presiding juror to act as a foreperson during your deliberations. The foreperson should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change

your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

[**I will give you a verdict form with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form carefully. You must consider each question separately. Please answer the questions in the order they appear. After you answer a question, the form tells you what to do next. I will now read the form to you:** (read form of verdict)]

[**You will be given** (state number) **forms of verdict, which I shall now read to you:** (read form of verdict(s))]

[**If you find for** (claimant(s)), **your verdict will be in the following form:** (read form of verdict)]

[**If you find for** (defendant(s)), **your verdict will be in the following form:** (read form of verdict)]

Your verdict[s] must be unanimous, that is, your verdict must be agreed to by each of you. When you have [agreed on your verdict[s]] [finished filling out the form[s]], your foreperson must write the date and sign it at the bottom and return the verdict[s] to the courtroom.

If any of you need to communicate with me for any reason, write me a note and give it to the bailiff. In your note, do not disclose any vote or split.

You may now retire to decide your verdict[s].

NOTES ON USE FOR 700

1. When final instructions are read to the jury before the attorney's closing arguments, this instruction should not be given at that time. It should be given following closing arguments, just before

the jury retires to deliberate. If, however, the entire instruction is given after final arguments, omit the bracketed sentence in the first paragraph.

2. Florida Rule of General Practice and Judicial Administration 2.451 governs jurors' use of electronic devices. Rule 2.451(b)(1) requires the trial court to remove cell phones and other electronic devices from jurors during their deliberations. This instruction may need to be modified to reflect the practices of a particular trial court when removing jurors' cell phones. The portion of this instruction dealing with communication with others and outside research may need to be modified to include other specific means of communication or research as technology develops.

3. Florida Rule of General Practice and Judicial Administration 2.430(k) provides that at the conclusion of the trial, the court shall collect and immediately destroy all juror notes.

4. *Quotient verdict.* The committee recommends that no instruction generally be given to admonish the jury against returning a "quotient verdict."

5. When it is impracticable to take all of the evidence into the jury room, this instruction should be modified accordingly.

(Revised May 23, 2023 (115 So. 3d 208); revised December 4, 2014 (152 So. 3d 529); revised February 1, 2018 (287 So. 3d 401); revised January 23, 2020 (288 So. 3d 1093); revised October 29, 2025.)

SECTION 800 — SUPPLEMENTAL MATTERS

801.1 Juror Questions During Deliberations

801.2 Read-Back of Testimony

801.3 Jury Deadlocked

801.4 Instructions upon Discharge of Jury

801.1 JUROR QUESTIONS DURING DELIBERATIONS

Members of the jury, I have discussed your [note] [question] with the attorneys. You have [asked the following question] [made the following request]:

(read juror's note):

If I have not read your [note] [question] correctly, please raise your hand.

(clarify question as needed):

1. The answer is:

(respond to question):

OR

2. I am not able to [answer] [respond to] this [question] [request] because it [calls for information that is not in evidence] [is not proper to be considered in this case] [(other reason why question or request is improper)**]. Your decision must be based only on the evidence presented in the trial and the law that I have given you. [If you have any other specific questions, please send another note, and I will see if I can answer it.] [**(other appropriate response)**].**

NOTES ON USE FOR 801.1

1. The procedure contained in 801.1 assumes that a juror question or request will be in writing. Oral questions from jurors are discouraged.

2. In responding to a juror's question or request, the court should answer as specifically as possible. To avoid inadvertent error, it is a good practice to prepare a written answer with the assistance of the attorneys and then read this answer to the jury.

3. All written questions and answers should be preserved and placed in the court file.

801.2 READBACK OR PLAYBACK OF TESTIMONY

a. Readback or playback granted as requested:

Members of the jury, you have asked that the following testimony be [read] [or] [played] back to you: (describe testimony)**.**

The testimony that you have requested will now be [read] [or] [played].

OR

b. Readback or playback deferred when more time is needed to prepare the transcript or recording:

Members of the jury, I have discussed with the attorneys your request to have certain testimony [read] [or] [played] back to you. It will take approximately (amount of time) **to prepare and [read] [or] [play] back the requested testimony.**

I now direct you to return to the jury room and discuss your request further. If you are not able to resolve your question about the requested testimony by relying on your collective memory, then you should write down a more specific description of the part of the witness(es)' testimony which you want to hear again. Make your request for [reading] [or] [playing] back testimony as specific as possible.

c. Response to general request for transcripts to be sent to jury room:

Members of the jury, you have made a general request for transcripts that does not identify any particular witness's testimony that you wish to review. I am not able to send transcripts back to the jury room. If you would like to request a readback, you must specify the particular trial testimony you wish to have read back. I now direct you to return to the jury room and discuss your request further.

d. Readback or playback denied:

Members of the jury, you have asked that the following testimony be [read] [or] [played] back to you: (describe testimony)**.**

I am not able to grant your request because (give reason(s) for denying request)**.**

NOTES ON USE FOR 801.2

1. Any juror may request that testimony be read back or played back. *Fla. R. Civ. P.* 1.453.

2. In civil cases, the decision to allow readback or playback of testimony lies within the sound discretion of the trial court. *Broward Cnty. Sch. Bd. v. Ruiz*, 493 So. 2d 474, 479–480 (Fla. 4th DCA 1986). However, the trial court must not tell jurors that they are prohibited from requesting a readback or playback of testimony. *Johnson v. State*, 53 So. 3d 1003 (Fla. 2010).

3. Any readback or playback of testimony must take place in open court in the presence of all parties after notice to counsel for the parties. Transcripts or tapes of testimony must not be sent back to the jury room. The court may respond in writing to a request for readback or playback of testimony without having the jury brought before the court, provided that the parties have received the opportunity to place objections on the record and both the request and response are made part of the record. *Fla. R. Civ. P.* 1.453(a).

(Revised October 12, 2023.)

801.3 JURY DEADLOCKED

Members of the jury, we understand you are having difficulty reaching a verdict. This case is important to the parties, and we appreciate your efforts. But I am going to ask you to go back to try again to reach a verdict if you reasonably can.

Please carefully consider the views of all the jurors, including those you disagree with. Keep an open mind and feel free to change your view if you conclude it is wrong.

You should not, however, give up your own conscientiously held views simply to end the case or avoid further discussion. Each of you must decide the case for yourself and not merely go along with the conclusions of other jurors.

If you cannot agree on what a witness said, you may ask that the court reporter read back to you a portion of any witness's testimony. To avoid delay, your request should be as specific as possible.

You may now return to the jury room for further deliberations.

NOTES ON USE FOR 801.3

1. This instruction should not be given unless the jury indicates it is deadlocked. *Moore v. State*, 635 So. 2d 998 (Fla. 4th DCA 1994); *Armstrong v. State*, 364 So. 2d 1238 (Fla. 1st DCA 1978).

2. This instruction should be given only once. If after having received this instruction, the jury announces *again* that it is deadlocked, the jury cannot be sent back for further deliberations. *Tomlinson v. State*, 584 So. 2d 43 (Fla. 4th DCA 1991).

801.4 INSTRUCTION UPON DISCHARGE OF JURY

Ladies and gentlemen, on behalf of the parties, lawyers and the people of the State of Florida, I wish to thank you for your time and consideration of this case.

I also wish to advise you of some very special privileges enjoyed by jurors.

No juror can be required to talk about the discussions that occurred in the jury room, except by court order. For many centuries, our society has relied upon juries for consideration of difficult cases. We have recognized for hundreds of years that a jury's deliberations, discussions and votes should remain their private affair as long as they wish it. Therefore, the law gives you a unique privilege not to speak about the jury's work.

The lawyers and their representatives are not permitted to initiate any communication with you about the trial. However, you may speak to the lawyers or anyone else about the trial. You also have the right to refuse to speak with anyone. A request may come from those who are simply curious, or from those who might seek to find fault with you. It will be up to you to decide whether to preserve your privacy as a juror.

(In discharging the jury, the court should advise them of their further responsibilities, if any.)

NOTE ON USE FOR 801.4

After this instruction, the jury should be discharged and no further discussion should be had between the judge and the jurors, or between the attorneys and jurors, except in accordance with applicable law. See *Fla.R.Civ.P.* 1.431(h); Rule Reg. Fla. Bar 4-3.5(d)(4).

801.5 INCONSISTENT OR ERRONEOUS VERDICT

I cannot accept your verdict[s] as written because: (insert a brief description why the verdict(s) [is] [are] inconsistent, incomplete, or otherwise erroneous)**.**

[A [new] [second] verdict form is provided for your use [if needed].] Please complete the verdict form based on all of the jury instructions that were read to you.

[Do not destroy or further mark the first verdict form.]

NOTES ON USE FOR 801.5

1. In *Coba v. Tricam Indus., Inc.*, 164 So. 3d 637, 643 (Fla. 2015), the Supreme Court of Florida stated, "[a]n inconsistent verdict is defined as when two definite findings of fact material to the judgment are mutually exclusive." For discussion of the distinctions between inconsistent and inadequate verdicts. See *Id.* at 643–44 ("A verdict is not necessarily inconsistent simply because it fails to award enough money or even no money at all.") See also *Eulen Am. v. Lopez*, 2023 WL 2589788 (Fla. 3d DCA Mar. 22, 2023).

2. For examples of inconsistent verdicts see *Coba* 164 So. 3d 637; *Alvarez v. Rendon*, 953 So. 2d 702 (Fla. 5th DCA 2007).

3. The trial court has the right and duty before discharging the jurors to call their attention to a defective verdict and give them an opportunity to return a proper verdict. *Stevens Markets, Inc. v. Markantonatos*, 189 So. 2d 624, 626 (Fla. 1966) (citing *Tobin v. Garry*, 127 So. 2d 698, 700 (Fla. 2d DCA 1961) (internal citations and quotations omitted)). When a defective verdict is returned and the defect discovered before the jury is discharged, resubmission by the trial court is a legal duty, not simply a discretionary call. *Morton Roofing, Inc. v. Prather*, 864 So. 2d 64, 67 (Fla. 5th DCA 2003). However, the committee takes no position on whether a new verdict form should be provided to the jury.

4. When a defective verdict is resubmitted by the trial court before the jury is discharged, the jury is still in control of the verdict

— at liberty to review the case and to bring in an entirely new verdict. *Stevens Markets* 189 So. 2d at 626. The jurors, on reconsideration of their verdict on a second retirement, may amend it in substance, if they so agree, or they may submit an entirely different verdict. Id. In such an event, the entire cause remains in the hands of the jury and the jurors are not bound by their former action as a verdict which has not became final is subject to reconsideration in its entirety by the jury. *Morton Roofing* 864 So. 2d at 67–68; *Tobin* 127 So. 2d at 700 ("When they [jurors] are sent back to further or reconsider the matter, the case is still in their hands. They are not bound by their former action. They are at liberty to review the case and to bring in an entirely new verdict."). It is within the sound discretion of the trial court whether to resubmit to the jury: the first verdict form in its entirety; a copy of the first verdict form, marked for identification purposes; a new verdict form; or a new verdict form, together with a copy of the first verdict form, marked for identification purposes.

5. A clerical error in the verdict form which becomes apparent before the jury is polled or discharged may be resubmitted to the jury for clarification or correction. *Esskuchen v. State*, 756 So. 2d 156, 158 (Fla. 5th DCA 2000). This jury instruction may be used for facially improper or irregular verdict forms that are returned by a jury. See *Cory v. Greyhound Lines, Inc.*, 257 So. 2d 36 (Fla. 1971) (transposed damage amounts); *McElhaney v. Uebrich*, 699 So. 2d 1033 (Fla. 4th DCA 1997) (mathematical error in verdict); *Central Taxi Service, Inc. v. Greenberg*, 418 So. 2d 333 (Fla. 3d DCA 1982) (incomplete verdict form).

(Adopted October 12, 2023.)

APPENDIX A
MODEL JURY INSTRUCTIONS

Summary

The following Model Jury Instructions are included to illustrate the use of *Florida Standard Jury Instructions*. The hypothetical facts upon which each instruction is based are set forth before the instruction. The committee made arbitrary decisions about various factors involved in each hypothetical case, and the Model Instructions are not intended to be incorporated entirely into a court's instruction.

The numbers of the instructions used in the examples are indicated within brackets. In instances in which changes have been made to adapt the standard instructions to the circumstances of the hypothetical case, the committee has *italicized* the instructions.

These Model Instructions are provided *only* as examples of how the instructions are intended to be used. Revisions in the Model Instructions often lag some time behind revisions in the substantive charges the use of which is illustrated in the Model Instructions. DO NOT, therefore, rely on the Model Instructions for correct wording when preparing instructions. Always refer to the standard instructions and forms provided in Parts I through VIII.

Model Instruction No. 1: Automobile collision; comparative negligence; single claimant and defendant; no counterclaim; no-fault issue; witnesses testifying in foreign language; instructions for beginning and end of case; use of special verdict in burden of proof and damage instructions

Model Instruction No. 2: Automobile collision; driver's comparative negligence including failure to wear seat belt; aggravation of pre-existing injury; multiple events

Model Instruction No. 3: Automobile collision; comparative negligence; wrongful death damages; *Fabre* issue

Model Instruction No. 4: Automobile collision; comparative negligence; claim and counterclaim

Model Instruction No. 5: Injury in three-car collision; settlement with injured party by one tortfeasor; independent contribution claim by him against others; reasonableness of settlement as well as liability contested

Model Instruction No. 6: Claimant suing three alleged joint tortfeasors; comparative negligence in issue; contribution shares to be determined in action

Model Instruction No. 7: Product liability case; negligence and strict liability claims; comparative negligence defense; aggravation of pre-existing injury

MODEL INSTRUCTION NO. 1

Automobile collision; comparative negligence; single claimant and defendant; no counterclaim; no-fault issue; witnesses testifying in foreign language; instructions for beginning and end of case; use of special verdict in burden of proof and damage instructions

Facts of the hypothetical case:

John Doe was injured when the automobile he was driving collided with one driven by Rachel Rowe. After obtaining medical attention, including a course of treatment by Dr. Dubious, John Doe sued Rachel Rowe. Rachel Rowe pleaded comparative negligence. Further, her medical expert opined that Dr. Dubious's treatment was not reasonable or necessary, and may actually have harmed John Doe. Questions of negligence, comparative negligence, causation, permanency of John Doe's injuries, and damages are to be submitted to the jury. Traffic Accident Reconstruction experts testified in the case. There is no *Fabre* issue. Several witnesses will testify in Spanish.

The court's instruction:

These instructions illustrate: (1) instructions to be given at the beginning of the case, (a) before Voir Dire, and (b) after Voir Dire, including evidentiary instructions as they may occur during the course of the trial, (2) instructions to be given before hearing evidence, and (3) instructions to be given before final argument and the closing instructions to be given after final argument. Instruction number (3), to be given before final argument, also illustrates how the court could utilize the Special Verdict questions in the burden of proof portion of the instruction. Instruction (4) is to be given following closing arguments.

(1) Instruction for the beginning of the case:

Before Voir Dire

[201.1] Welcome. [I] [The clerk] will now administer your

oath.

[101.1] Do you solemnly swear or affirm that you will answer truthfully all questions asked of you as prospective jurors [so help you God]?

[continuation of 201.1] Now that you have been sworn, I'd like to give you an idea about what we are here to do.

This is a civil trial. A civil trial is different from a criminal case, where a defendant is charged by the state prosecutor with committing a crime. The subject of a civil trial is a disagreement between people or companies [or others, as appropriate], where the claims of one or more of these parties have been brought to court to be resolved. It is called "a trial of a lawsuit."

This is a case about an automobile collision. John Doe alleges that he was permanently injured when the automobile he was driving collided with one driven by Rachel Rowe. John Doe has sued Rachel Rowe and alleges that she was negligent and that her negligence was the cause of the accident. Rachel Rowe denies that she was negligent and alleges that John Doe was comparatively negligent.

The incident involved in this case occurred on (date) **at** (location)**.** (Add any other information relevant to voir dire.)

The principal witnesses who will testify in this case are (list witnesses)**.**

[201.2] Judge/Court: **I am the Judge. You may hear people occasionally refer to me as "The Court." That is the formal name for my role. My job is to maintain order and decide how to apply the rules of the law to the trial. I will also explain various rules to you that you will need to know in order to do your job as the jury. It is my job to remain neutral on the issues of this lawsuit.**

Parties: **A party who files a lawsuit is called the Plaintiff. A party that is sued is called the Defendant.**

Attorneys: **The attorneys have the job of representing their clients. That means they speak for their client here at the trial. They have taken oaths as attorneys to do their best and to follow the rules for their profession.**

Plaintiff's Counsel: **The attorney on this side of the courtroom,** (introduce by name)**, represents John Doe and is the person who filed the lawsuit here at the courthouse. [His] [Her] job is to present [his] [her] client's side of things to you. [He] [She] and [his] [her] client will be referred to most of the time as "the plaintiff."** (Attorney name)**, will you please introduce who is sitting at the table with you?**

Defendant's Counsel: **The attorney on this side of the courtroom,** (introduce by name)**, represents Rachel Rowe, the one who has been sued. [His] [Her] job is to present [his] [her] client's side of things to you. [He] [She] and [his] [her] client will usually be referred to here as "the defendant."** (Attorney name)**, will you please introduce who is sitting at the table with you?**

Court Clerk: **This person sitting in front of me,** (name)**, is the court clerk. [He] [She] is here to assist me with some of the mechanics of the trial process, including the numbering and collection of the exhibits that are introduced in the course of the trial.**

Court Reporter: **The person sitting at the stenographic machine,** (name)**, is the court reporter. [His] [Her] job is to keep an accurate legal record of everything we say and do during this trial.**

Bailiff: **The person over there,** (name)**, is the bailiff. [His] [Her] job is to maintain order and security in the courtroom. The bailiff is also my representative to the jury. Anything you need or any problems that come up for you during the course of the trial should be brought to [him] [her]. However, the bailiff cannot answer any of your questions about the case. Only I can do that.**

Jury: **Last, but not least, is the jury, which we will begin to select in a few moments from among all of you. The jury's job**

will be to decide what the facts are and what the facts mean. Jurors should be as neutral as possible at this point and have no fixed opinion about the lawsuit.

In order to have a fair and lawful trial, there are rules that all jurors must follow. A basic rule is that jurors must decide the case only on the evidence presented in the courtroom. You must not communicate with anyone, including friends and family members, about this case, the people and places involved, or your jury service. You must not disclose your thoughts about this case or ask for advice on how to decide this case.

I want to stress that this rule means you must not use electronic devices or computers to communicate about this case, including tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all. Do not send or accept any messages to or from anyone about this case or your jury service.

You must not do any research or look up words, names, [maps], or anything else that may have anything to do with this case. This includes reading newspapers, watching television or using a computer, cell phone, the Internet, any electronic device, or any other means at all, to get information related to this case or the people and places involved in this case. This applies whether you are in the courthouse, at home, or anywhere else.

Many of you may have cell phones, tablets, laptops, or other electronic devices with you here in the courtroom.**

***The Standard Jury Instructions contain two alternatives concerning electronic devices such as cell phones, tablets, and laptops. Alternative A requires all such devices to be turned off. Alternative B does not allow any such devices in the courtroom. This model uses alternative A.*

[All cell phones, computers, tablets, or other types of electronic devices must be turned off while you are in the courtroom. Turned off means that the phone or other electronic device is actually off and not in a silent or vibrating mode. You

may use these devices during recesses, but even then you may not use your cell phone or electronic device to find out any information about the case or communicate with anyone about the case or the people involved in the case. Do not take photographs, video recordings, or audio recordings of the proceedings or of your fellow jurors. After each recess, please double check to make sure your cell phone or electronic device is turned off. At the end of the case, while you are deliberating, you must not communicate with anyone outside the jury room. You cannot have in the jury room any cell phones, computers, or other electronic devices. If someone needs to contact you in an emergency, the court can receive messages and deliver them to you without delay. A contact phone number will be provided to you.]

What are the reasons for these rules? These rules are imposed because jurors must decide the case without distraction and only on the evidence presented in the courtroom. If you investigate, research, or make inquiries on your own outside of the courtroom, the trial judge has no way to make sure that the information you obtain is proper for the case. The parties likewise have no opportunity to dispute or challenge the accuracy of what you find. That is contrary to our judicial system, which assures every party the right to ask questions about and challenge the evidence being considered against it and to present argument with respect to that evidence. Any independent investigation by a juror unfairly and improperly prevents the parties from having that opportunity our judicial system promises.

Any juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. A mistrial is a tremendous expense and inconvenience to the parties, the court, and the taxpayers. If you violate these rules, you may be held in contempt of court, and face sanctions, such as serving time in jail, paying a fine, or both.

All of your communications with courtroom personnel, or

me, will be part of the record of these proceedings. That means those communications shall either be made in open court with the court reporter present or, if they are in writing, the writing will be filed with the court clerk. This means, if you are outside the courtroom, any communication with me must be in writing, unsigned, and handed directly to the bailiff. Do not share the content of the writing with anyone, including other jurors. I have instructed the courtroom personnel that any communications you have with them outside of my presence must be reported to me, and I will tell the parties [and their attorneys] about any communication from you that I believe may be of interest to the parties [and their attorneys].

However, you may communicate directly with courtroom personnel about matters concerning your comfort and safety, such as [juror parking] [location of break areas] [how and when to assemble for duty] [dress] [what personal items can be brought into the courthouse or jury room] [list any other types of routine ex parte communications permitted].

If you become aware of any violation of these instructions or any other instruction I give in this case, you must tell me by giving a note to the bailiff.

[201.3] The last thing I want to do, before we begin to select the jury, is to explain to you how the selection process works.

Questions/Challenges: **This is the part of the case where the parties and their lawyers have the opportunity to get to know a little bit about you, in order to help them come to their own conclusions about your ability to be fair and impartial, so they can decide who they think should be the jurors in this case.**

How we go about that is as follows: First, I'll ask some general questions of you. Then, each of the lawyers will have more specific questions that they will ask of you. After they have asked all of their questions, I will meet with them and they will tell me their choices for jurors. Each side can ask that I exclude a person from serving on a jury if they can give me a reason to believe that he or she might be unable to be fair and

impartial. That is what is called a challenge for cause. The lawyers also have a certain number of what are called peremptory challenges, by which they may exclude a person from the jury without giving a reason. By this process of elimination, the remaining persons are selected as the jury. It may take more than one conference among the parties, their attorneys, and me before the final selections are made.

Purpose of Questioning: **The questions that you will be asked during this process are not intended to embarrass you or unnecessarily pry into your personal affairs, but it is important that the parties and their attorneys know enough about you to make this important decision. If a question is asked that you would prefer not to answer in front of the whole courtroom, just let me know and you can come up here and give your answer just in front of the attorneys and me. If you have a question of either the attorneys or me, don't hesitate to let me know.**

Response to Questioning: **There are no right or wrong answers to the questions that will be asked of you. The only thing that I ask is that you answer the questions as frankly and as honestly and as completely as you can. You [will take] [have taken] an oath to answer all questions truthfully and completely and you must do so. Remaining silent when you have information you should disclose is a violation of that oath as well. If a juror violates this oath it not only may result in having to try the case all over again but also can result in civil and criminal penalties against a juror personally. So, again, it is very important that you be as honest and complete with your answers as you possibly can. If you don't understand the question, please raise your hand and ask for an explanation or clarification.**

In the process of selecting the jury, some of the lawyers' questions may be meant to help them anticipate if your beliefs, experiences, or attitudes might make it difficult for you to apply the rules of law. Jurors take an oath to follow the law. After the jury is chosen and sworn in, I will instruct the jury on the rules they must follow in deciding this case. It is important for you to remember that it will not be the jury's job to decide what the law

ought to be. Rather, the jury is to determine what the facts are, then apply the law to those facts, using the court's instructions on the rules of law to apply—which will be fully given to the jury at the appropriate time.

In sum, this is a process to assist the parties and their attorneys to select a fair and impartial jury. All of the questions they ask you are for this purpose. If, for any reason, you do not think you can be a fair and impartial juror, you must tell us.

2. Voir Dire:

Instructions After Voir Dire

[101.2] Members of the jury, do you solemnly swear or affirm that you will well and truly try this case between John Doe and Rachel Rowe, and a true verdict render according to the law and evidence?

[202.1] You have now taken an oath to serve as jurors in this trial. Before we begin, I am going to tell you about the rules of law that apply to this case and let you know what you can expect as the trial proceeds.

It is my intention to give you [all] [most] of the rules of law but it might be that I will not know for sure all of the law that will apply in this case until all of the evidence is presented. However, I can anticipate most of the law and give it to you at the beginning of the trial so that you will better understand what to be looking for while the evidence is presented. If I later decide that different or additional law applies to the case, I will tell you. In any event, at the end of the evidence I will give you the final instructions on which you must base your verdict. At that time, you will have a complete written set of the instructions so you do not have to memorize what I am about to tell you.

[401.2] The claims and defenses in this case are as follows. John Doe claims that Rachel Rowe was negligent in the operation of the vehicle she was driving which caused him harm.

Rachel Rowe denies that claim and also claims that John Doe was himself negligent in the operation of his vehicle, which caused his harm.

The parties must prove their claims by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

[401.3] "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

[401.4] Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

If there is an issue about the applicability of a statute this instruction would be omitted at this time.

[401.9] *(Read or paraphrase the applicable statute or refer to the ordinance or regulation admitted in evidence.)* **Violation of this statute is evidence of negligence. It is not, however, conclusive evidence of negligence. If you find that Rachel Rowe violated this statute, you may consider that fact, together with the other facts and circumstances, in deciding whether she was negligent.**

[401.12(a)] Negligence is a legal cause of loss, injury, or damage if it directly and in natural and continuous sequence produces or contributes substantially to producing such loss, injury, or damage, so that it can reasonably be said that, but for the negligence, the loss, injury, or damage would not have occurred.

[401.12(b)] In order to be regarded as a legal cause of loss, injury, or damage negligence need not be the only cause. Negligence may be a legal cause of loss, injury, or damage even though it operates in combination with some other cause if the

negligence contributes substantially to producing such loss, injury, or damage.

[401.18(a)] The issues you must decide on John Doe's claim against Rachel Rowe are whether Rachel Rowe was negligent in the operation of her vehicle, and, if so, whether that negligence was a legal cause of the loss, injury, or damage to John Doe.

[401.21] If the greater weight of the evidence does not support John Doe's claim, your verdict should be for Rachel Rowe.

[401.22] If, however, the greater weight of the evidence supports John Doe's claim, then you shall consider the defense raised by Rachel Rowe.

[401.22(a)] On that defense, the issue for you to decide is whether John Doe was himself negligent in the operation of his vehicle and, if so, whether that negligence was a contributing legal cause of injury or damage to John Doe.

[401.23] If the greater weight of the evidence does not support Rachel Rowe's defense and the greater weight of the evidence does support John Doe's claim, then your verdict should be for John Doe in the total amount of his damages.

If, however, the greater weight of the evidence shows that both John Doe and Rachel Rowe were negligent and that the negligence of each contributed as a legal cause of loss, injury, or damage sustained by John Doe, you should decide and write on the verdict form, which I will give you at the end of the case, what percentage of the total negligence of both parties to this action you apportion to each of them.

[501.3] If your verdict is for Rachel Rowe, you will not consider the matter of damages. But, if the greater weight of the evidence supports John Doe's claim, you should determine and write on the verdict form, in dollars, the total amount of money that the greater weight of the evidence shows will fairly and adequately compensate John Doe for the following elements of

damage to the extent that they have not been paid and are not payable by personal injury protection benefits, including damage that John Doe is reasonably certain to incur in the future:

The reasonable expense of hospitalization and medical care and treatment necessarily or reasonably obtained by John Doe in the past, or to be so obtained in the future.

Any earnings lost in the past, and any loss of ability to earn money in the future.

You must next decide whether John Doe's injury, resulting from the incident in this case, is permanent. An injury is permanent if it, in whole or in part, consists of an injury that the evidence shows is permanent to a reasonable degree of medical probability.

If the greater weight of the evidence does not establish that John Doe's injury is permanent, then your verdict is complete. If, however, the greater weight of the evidence shows that John Doe's injury is permanent, you should also award damages for this additional element of damage:

Any bodily injury sustained by John Doe and any resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience or loss of capacity for the enjoyment of life experienced in the past, or to be experienced in the future. There is no exact standard for measuring such damage. The amount should be fair and just, in the light of the evidence.

[501.4] In determining the total amount of damages, you should not make any reduction because of the negligence, if any, of John Doe. The court in entering judgment will make any appropriate reduction(s).

[501.5c] If you find that Rachel Rowe caused loss, injury, or damage to John Doe, then Rachel Rowe is also responsible for any additional loss, injury, or damage caused by medical care or treatment reasonably obtained by John Doe.

[501.6] If the greater weight of the evidence shows that John Doe has been permanently injured, you may consider his life expectancy. The mortality tables received in evidence may be considered in determining how long John Doe may be expected to live. Mortality tables are not binding on you, but may be considered together with other evidence in the case bearing on John Doe's health, age and physical condition, before and after the injury, in determining the probable length of his life.

[501.7] Any amount of damages, which you allow for future medical expenses or loss of ability to earn money in the future, should be reduced to its present money value, and only the present money value of these future economic damages should be included in your verdict. The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate John Doe for these losses as they are actually experienced in future years.

[601.1] In deciding this case, it is your duty as jurors to decide the issues, and only those issues, that I submit for your determination at the end of the case and to answer certain questions I will ask you to answer on a special form, called a verdict form. You must come to an agreement about what your answers will be. Your agreed-upon answers to my questions are called your jury verdict.

In reaching your verdict, you must think about and weigh the testimony and any documents, photographs, or other material that has been received in evidence. You may also consider any facts that were admitted or agreed to by the lawyers. Your job is to determine what the facts are. You may use reason and common sense to reach conclusions. You may draw reasonable inferences from the evidence. But you should not guess about things that were not covered here. And, you must always apply the law as I finally explain it to you at the end of the case.

[601.2(a)] Let me speak briefly about witnesses. In evaluating the believability of any witness and the weight you

will give the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

[601.2(b)] Some of the testimony you hear may be in the form of opinions about certain technical subjects.

You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.

[202.2] Now that you have heard the law, I want to let you know what you can expect as the trial proceeds.

Opening Statements: **In a few moments, the attorneys will each have a chance to make what are called opening statements. In an opening statement, an attorney is allowed to give you [his] [her] views about what the evidence will be in the trial and what you are likely to see and hear in the testimony.**

Evidentiary Phase: **After the attorneys' opening statements the plaintiff will bring his witnesses and evidence to you.**

Evidence: **Evidence is the information that the law allows you to see or hear in deciding this case. Evidence includes the testimony of the witnesses, documents, and anything else that I instruct you to consider.**

Witnesses: **A witness is a person who takes an oath to tell the truth and then answers attorneys' questions for the jury. The answering of attorneys' questions by witnesses is called "giving**

testimony." Testimony means statements that are made when someone has sworn an oath to tell the truth.

The plaintiff's lawyer will normally ask a witness the questions first. That is called direct examination. Then the defense lawyer may ask the same witness additional questions about whatever the witness has testified to. That is called cross-examination. Certain documents or other evidence may also be shown to you during direct or cross-examination. After the plaintiff's witnesses have testified, the defendant will have the opportunity to put witnesses on the stand and go through the same process. Then the plaintiff's lawyer gets to do cross-examination. The process is designed to be fair to both sides.

It is important that you remember that testimony comes from witnesses. The attorneys do not give testimony and they are not themselves witnesses.

Objections: **Sometimes the attorneys will disagree about the rules for trial procedure when a question is asked of a witness. When that happens, one of the lawyers may make what is called an "objection." The rules for a trial can be complicated, and there are many reasons for attorneys to object. You should simply wait for me to decide how to proceed. If I say that an objection is "sustained," that means the witness may not answer the question. If I say that the objection is "overruled," that means the witness may answer the question.**

When there is an objection and I make a decision, you must not assume from that decision that I have any particular opinion other than that the rules for conducting a trial are being correctly followed. If I say a question may not be asked or answered, you must not try to guess what the answer would have been. That is against the rules, too.

Side Bar Conferences: **Sometimes I will need to speak to the attorneys about legal elements of the case that are not appropriate for the jury to hear. The attorneys and I will try to have as few of these conferences as possible while you are giving us your valuable time in the courtroom. But, if we do have to**

have such a conference during testimony, we will try to hold the conference at the side of my desk so that we do not have to take a break and ask you to leave the courtroom.

Recesses: **Breaks in an ongoing trial are usually called "recesses." During a recess you still have your duties as a juror and must follow the rules, even while having coffee, at lunch, or at home.**

Instructions Before Closing Arguments: **After all the evidence has been presented to you, I will again instruct you in the law that you must follow. It is important that you remember these instructions to assist you in evaluating the final attorney presentations, which come next, and later, during your deliberations, to help you correctly sort through the evidence to reach your decision.**

Closing Arguments: **The attorneys will then have the opportunity to make their final presentations to you, which are called closing arguments.**

Final Instructions: **After you have heard the closing arguments, I will instruct you further in the law as well as explain to you the procedures you must follow to decide the case.**

Deliberations: **After you hear the final jury instructions, you will go to the jury room and discuss and decide the questions I have put on your verdict form. [You will have a copy of the jury instructions to use during your discussions.] The discussions you have and the decisions you make are usually called "jury deliberations." Your deliberations are absolutely private and neither I nor anyone else will be with you in the jury room.**

Verdict: **When you have finished answering the questions, you will give the verdict form to the bailiff, and we will all return to the courtroom where your verdict will be read. When that is completed, you will be released from your assignment as a juror.**

What are the rules?

Finally, before we begin the trial, I want to give you just a brief explanation of rules you must follow as the case proceeds.

Keeping an Open Mind. **You must pay close attention to the testimony and other evidence as it comes into the trial. However, you must avoid forming any final opinion or telling anyone else your views on the case until you begin your deliberations. This rule requires you to keep an open mind until you have heard all of the evidence and is designed to prevent you from influencing how your fellow jurors think until they have heard all of the evidence and had an opportunity to form their own opinions. The time and place for coming to your final opinions and speaking about them with your fellow jurors is during deliberations in the jury room, after all of the evidence has been presented, closing arguments have been made, and I have instructed you on the law. It is important that you hear all of the facts and that you hear the law and how to apply it before you start deciding anything.**

Consider Only the Evidence. **It is the things you hear and see in this courtroom that matter in this trial. The law tells us that a juror can consider only the testimony and other evidence that all the other jurors have also heard and seen in the presence of the judge and the lawyers. Doing anything else is wrong and is against the law. That means that you must not do any work or investigation of your own about the case. You must not obtain on your own any information about the case or about anyone involved in the case, from any source whatsoever. This includes reading newspapers, watching television or using a computer, cell phone, the Internet, any electronic device, or any other means at all, to get information related to this case or the people and places involved in this case. This applies whether you are in the courthouse, at home, or anywhere else. You must not visit places mentioned in the trial or use the internet to look at maps or pictures to see any place discussed during trial.**

Do not provide any information about this case to anyone, including friends or family members. Do not let anyone, including the closest family members, make comments to you or

ask questions about the trial. Jurors must not have discussions of any sort with friends or family members about the case or the people and places involved. So, do not let even the closest family members make comments to you or ask questions about the trial. In this age of electronic communication, I want to stress again that just as you must not talk about this case face-to-face, you must not talk about this case by using an electronic device. You must not use phones, tablets, computers, or other electronic devices to communicate. Do not send or accept any messages related to this case or your jury service. Do not discuss this case or ask for advice by any means at all, including posting information on an Internet website, chatroom, or blog.

No Mid-Trial Discussions. **When we are in a recess, do not discuss anything about the trial or the case with each other or with anyone else. If attorneys approach you, don't speak with them. The law says they are to avoid contact with you. If an attorney will not look at you or speak to you, do not be offended or form a conclusion about that behavior. The attorney is not supposed to interact with jurors outside of the courtroom and is only following the rules. The attorney is not being impolite. If an attorney or anyone else does try to speak with you or says something about the case in your presence, please inform the bailiff immediately.**

Only the Jury Decides. **Only you get to deliberate and answer the verdict questions at the end of the trial. I will not intrude into your deliberations at all. I am required to be neutral. You should not assume that I prefer one decision over another. You should not try to guess what my opinion is about any part of the case. It would be wrong for you to conclude that anything I say or do means that I am for one side or another in the trial. Discussing and deciding the facts is your job alone.**

[202.3] If you would like to take notes during the trial, you may do so. On the other hand, of course, you are not required to take notes if you do not want to. That will be left up to you individually.

You will be provided with a note pad and a pen for use if you

wish to take notes. Any notes that you take will be for your personal use. However, you should not take them with you from the courtroom. During recesses, the bailiff will take possession of your notes and will return them to you when we reconvene. After you have completed your deliberations, the bailiff will collect your notes, which will be immediately destroyed. No one will ever read your notes.

If you take notes, do not get so involved in note-taking that you become distracted from the proceedings. Your notes should be used only as aids to your memory.

Whether or not you take notes, you should rely on your memory of the evidence and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than each juror's memory of the evidence.

[202.4] During the trial, you may have a question about these proceedings. If so, please write it down and hand it to the bailiff, who will then hand it to me. I will review your questions with the parties [and their attorneys] before responding.

Questions for witnesses: **You also may have a question you think should be asked of a witness. If so, there is a way for you to request that I ask the witness a question. After all the attorneys have completed their questioning of the witness, you should raise your hand if you have a question. I will then give you sufficient time to write the question on a piece of paper, fold it, and give it to the bailiff, who will pass it to me. Do not put your name on the question, show it to anyone, or discuss it with anyone.**

I will then review the question with the attorneys. Under our law, only certain evidence may be considered by a jury in determining a verdict. You are bound by the same rules of evidence that control the attorneys' questions. If I decide that the question may not be asked under our rules of evidence, I will tell you. Otherwise, I will direct the question to the witness. The attorneys may then ask follow-up questions if they wish. If there are additional questions from jurors, we will follow the same

procedure again.

By providing this procedure, I do not mean to suggest that you must or should submit written questions for witnesses. In most cases, the lawyers will have asked the necessary questions.

[202.5] During the trial, some witnesses may testify in Spanish which will be interpreted in English.

The evidence you are to consider is only that provided through the official court interpreters. Although some of you may know Spanish, it is important that all jurors consider the same evidence. Therefore, you must accept the English interpretation. You must disregard any different meaning.

If, however, during the testimony there is a question as to the accuracy of the English interpretation, you should bring this matter to my attention immediately by raising your hand. You should not ask your question or make any comment about the interpretation in the presence of the other jurors, or otherwise share your question or concern with any of them. I will take steps to see if your question can be answered and any discrepancy resolved. If, however, after such efforts a discrepancy remains, I emphasize that you must rely only upon the official English interpretation as provided by the court interpreter and disregard any other contrary interpretation.

The attorneys will now present their opening statements after which you will begin hearing the evidence.

(2) Evidence instructions during trial

Evidence instructions are to be given during the trial process when/if the particular evidentiary issue occurs and the instruction becomes applicable. Here is a listing of the available standard jury instructions on evidence:

301.1 Deposition Testimony, Interrogatories, Stipulated Testimony, Stipulations, and Admissions

301.2 Instruction when First Item of Documentary, Photographic, or Physical Evidence Is Admitted

301.3 Instruction when Evidence is First Published to Jurors

301.4 Instruction Regarding Visual or Demonstrative Aids

301.5 Evidence Admitted for a Limited Purpose

301.6 Jury to Be Guided by Official English Translation/Interpretation

301.7 Jury to Be Guided by Official English Transcript of Recording in Foreign Language (Accuracy Not in Dispute)

301.8 Jury to Be Guided by Official English Translation/Interpretation – Transcript of Recording in Foreign Language (Accuracy in Dispute)

301.9 Disregard Stricken Matter

301.10 Instruction Before Recess

301.11 Failure to Maintain Evidence or Keep a Record

(3) Instruction before final argument:

[401.1] Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are, however, the same as [if different explain how] what I gave you at the beginning and it is these rules of law that you must now follow. When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

[401.2] The claims and defenses in this case are as follows. John Doe claims that Rachel Rowe was negligent in the operation of the vehicle she was driving which caused him harm.

Rachel Rowe denies that claim and also claims that John Doe was himself negligent in the operation of his vehicle, which caused his harm.

The parties must prove their claims by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

[401.3] "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

[401.4] Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

[401.9] *(Read or paraphrase the applicable statute or refer to the ordinance or regulation admitted in evidence.)* **Violation of this statute is evidence of negligence. It is not, however, conclusive evidence of negligence. If you find that Rachel Rowe violated this statute, you may consider that fact, together with the other facts and circumstances, in deciding whether she was negligent.**

[401.12(a)] Negligence is a legal cause of loss, injury, or damage if it directly and in natural and continuous sequence produces or contributes substantially to producing such loss, injury, or damage, so that it can reasonably be said that, but for the negligence, the loss, injury, or damage would not have occurred.

[401.12(b)] In order to be regarded as a legal cause of loss, injury, or damage negligence need not be the only cause. Negligence may be a legal cause of loss, injury, or damage even though it operates in combination with some other cause if the negligence contributes substantially to producing such loss, injury, or damage.

[401.18] The issues you must decide on John Doe's claim against Rachel Rowe are whether Rachel Rowe was negligent in the operation of her vehicle, and, if so, whether that negligence was a legal cause of the loss, injury, or damage to John Doe.

You will be given a Special Verdict to use in this case. The first question in the Special Verdict is:

1. Was there negligence on the part of Defendant, Rachel Rowe, which was a legal cause of damage to Plaintiff, John Doe?

YES NO

[401.21, 22] If the greater weight of the evidence supports John Doe's claim, you will answer that question "YES." If, however, your answer to question 1 is "NO," your verdict is for the Defendant, and you should not proceed further, except to date and sign the Special Verdict and return it to the courtroom.

If you answered the first question YES, then you shall consider the defense raised by Rachel Rowe.

[401.22(a)] On that defense, the issue for you to decide is whether John Doe was himself negligent in the operation of his vehicle and, if so, whether that negligence was a contributing legal cause of injury or damage to John Doe. In connection with that defense, the second question in the Special Verdict is:

2. Was there negligence on the part of Plaintiff, John Doe, which was a legal cause of his damage?

YES NO

[401.23] If the greater weight of the evidence supports Rachel Rowe's defense, you will answer that question "Yes." If, however, your answer to that question is "NO" and the greater weight of the evidence supports John Doe's claim, then your verdict should be for John Doe in the total amount of his damages and you will skip the third question in the Special Verdict and proceed directly to the questions concerning

damages.

If, however, the greater weight of the evidence shows that both John Doe and Rachel Rowe were negligent and that the negligence of each contributed as a legal cause of loss, injury, or damage sustained by John Doe, you should decide and write on the verdict form what percentage of the total negligence of both parties to this action you apportion to each of them. In that connection, the third question in the Special Verdict is:

3. State the percentage of negligence which was a legal cause of damage to Plaintiff, John Doe, that you charge to:

Rachel Rowe %

John Doe %

[501.3] If your verdict is for Rachel Rowe, you will not consider the matter of damages. But, if the greater weight of the evidence supports John Doe's claim and you answered the first question "YES," you should determine and write on the verdict form, in dollars, the total amount of money that the greater weight of the evidence shows will fairly and adequately compensate John Doe for the following elements of damage to the extent that they have not been paid and are not payable by personal injury protection benefits, including damage that John Doe is reasonably certain to incur in the future:

The reasonable expense of hospitalization and medical care and treatment necessarily or reasonably obtained by John Doe in the past, or to be so obtained in the future:

Any earnings lost in the past, and any loss of ability to earn money in the future.

You must next decide whether John Doe's injury, resulting from the incident in this case, is permanent. An injury is permanent if it, in whole or in part, consists of an injury that the evidence shows is permanent to a reasonable degree of medical probability.

If the greater weight of the evidence does not establish that John Doe's injury is permanent, then your verdict is complete. If, however, the greater weight of the evidence shows that John Doe's injury is permanent, you should also award damages for this additional element of damage:

Any bodily injury sustained by John Doe and any resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience or loss of capacity for the enjoyment of life experienced in the past, or to be experienced in the future. There is no exact standard for measuring such damage. The amount should be fair and just, in the light of the evidence.

[501.4] In determining the total amount of damages, you should not make any reduction because of the negligence, if any, of John Doe. The court in entering judgment will make any appropriate reduction(s).

[501.6] If the greater weight of the evidence shows that John Doe has been permanently injured, you may consider his life expectancy. The mortality tables received in evidence may be considered in determining how long John Doe may be expected to live. Mortality tables are not binding on you, but may be considered together with other evidence in the case bearing on John Doe's health, age and physical condition, before and after the injury, in determining the probable length of his life.

[501.7] Any amount of damages which you allow for future medical expenses or loss of ability to earn money in the future should be reduced to its present money value, and only the present money value of these future economic damages should be included in your verdict. The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate John Doe for these losses as they are actually experienced in future years.

[601.1] In deciding this case, it is your duty as jurors to decide the issues, and only those issues, that I submit for your

determination and to answer certain questions I have asked you to answer on a special form, called a verdict form. You must come to an agreement about what your answers will be. Your agreed-upon answers to my questions are called your jury verdict.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence, and all facts that were admitted or agreed to by the parties.

In reaching your verdict, you must think about and weigh the testimony and any documents, photographs, or other material that has been received in evidence. You may also consider any facts that were admitted or agreed to by the lawyers. Your job is to determine what the facts are. You may use reason and common sense to reach conclusions. You may draw reasonable inferences from the evidence. But you should not guess about things that were not covered here. And, you must always apply the law as I have explained it to you.

[601.2(a)] Let me speak briefly about witnesses. In evaluating the believability of any witness and the weight you will give the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

[601.2(b)] Some of the testimony before you was in the form of opinions about certain technical subjects.

You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.

[601.3] Some witnesses testified in Spanish during this trial, which had to be interpreted into English.

The evidence you are to consider is only that provided through the official court interpreters. Although some of you may know Spanish, it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English interpretation. You must disregard any different meaning.

If, during the testimony there was a question as to the accuracy of the English interpretation and steps were taken to resolve any discrepancies and despite these efforts a discrepancy remains, I emphasize that you must rely only upon the official English interpretation as provided by the court interpreter and disregard any other contrary interpretation.

[601.5] That is the law you must follow in deciding this case. The attorneys for the parties will now present their final arguments. When they are through, I will have a few final instructions about your deliberations.

(4) Instruction following closing arguments:

[700] Members of the jury, you have now heard all the evidence, my instructions on the law that you must apply in reaching your verdict, and the closing arguments of the attorneys. You will shortly retire to the jury room to decide this case. Before you do so, I have a few last instructions for you.

During deliberations, jurors must communicate about the case only with one another and only when all jurors are present in the jury room. You will have in the jury room all of the evidence that was received during the trial. In reaching your decision, do not do any research on your own or as a group. Do not use dictionaries, the Internet, or any other reference materials. Do not investigate the case or conduct any experiments. Do not visit or view the scene of any event involved in this case or look at maps or pictures on the Internet. If you happen to pass by the scene, do not stop or investigate. All jurors

must see or hear the same evidence at the same time. Do not read, listen to, or watch any news accounts of this trial.

You are not to communicate with any person outside the jury about this case. Until you have reached a verdict, you must not talk about this case in person or through the telephone, writing, or electronic communication, such as a blog, twitter, e-mail, text message, or any other means. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. These communications rules apply until I discharge you at the end of the case.

If you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the bailiff.

Any notes you have taken during the trial may be taken to the jury room for use during your discussions. Your notes are simply an aid to your own memory, and neither your notes nor those of any other juror are binding or conclusive. Your notes are not a substitute for your own memory or that of other jurors. Instead, your verdict must result from the collective memory and judgment of all jurors based on the evidence and testimony presented during the trial.

At the conclusion of the trial, the bailiff will collect your notes, which will be immediately destroyed. No one will ever read your notes.

In reaching your verdict, do not let bias, sympathy, prejudice, public opinion, or any other sentiment for or against any party influence your decision. Your verdict must be based on the evidence that has been received and the law on which I have instructed you.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way and you should not guess what I think your verdict should be from something I may have said or done. You should not think that I prefer one verdict over another. Therefore, in reaching your verdict, you should not

consider anything that I have said or done, except for my specific instructions to you.

Pay careful attention to all the instructions that I gave you for that is the law that you must follow. You will have a copy of my instructions with you when you go to the jury room to deliberate. All the instructions are important and you must consider all of them together. There are no other laws that apply to this case, and even if you do not agree with these laws, you must use them in reaching your decision in this case.

When you go to the jury room, the first thing you should do is choose a presiding juror to act as a foreperson during your deliberations. The foreperson should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

I will give you a verdict form with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form carefully. You must consider each question separately. Please answer the questions in the order they appear. After you answer a question, the form tells you what to do next. I will now read the form to you: *(read form of verdict)*

Your verdict must be unanimous, that is, your verdict must be agreed to by each of you. When you have finished filling out the form, your foreperson must write the date and sign it at the bottom and return the verdict to the bailiff.

If any of you need to communicate with me for any reason, write me a note and give it to the bailiff. In your note, do not disclose any vote or split.

You may now retire to decide your verdict.

VERDICT

We, the jury, return the following verdict:

1. Was there negligence on the part of Defendant, Rachel Rowe, which was a legal cause of damage to Plaintiff, John Doe?

YES NO

If your answer to question 1 is NO, your verdict is for the Defendant, and you should not proceed further, except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES, please answer question 2.

2. Was there negligence on the part of Plaintiff, John Doe, which was a legal cause of his damage?

YES NO

If your answer to question 2 is YES, please answer question 3. If your answer to question 2 is NO, please skip question 3 and answer questions 4 and 5.

3. State the percentage of negligence which was a legal cause of damage to Plaintiff, John Doe, that you apportion to:

Rachel Rowe %

John Doe %

Total must be 100%

In determining the amount of any damages, do not make any reduction because of the negligence, if any, of Plaintiff, John Doe. If you find Plaintiff, John Doe, negligent in any degree,

the court in entering judgment will make any appropriate reduction.

Please answer questions 4, 5, and 6.

4. What is the total amount of John Doe's damages for medical expenses incurred in the past, and medical expenses to be incurred in the future? $

5. What is the total amount of John Doe's damages for lost earnings in the past and loss of earning capacity in the future? $

6. Did John Doe sustain a permanent injury?

YES _____ NO _____

If your answer to question 6 is NO, you should not proceed further except to total the damages, date, and sign this verdict form, and return it to the courtroom.

If your answer to question 6 is YES, please answer question 7.

7. What is the total amount of John Doe's damages for pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, aggravation of a disease or physical defect and loss of capacity for the enjoyment of life sustained in the past and to be sustained in the future? $

TOTAL DAMAGES OF JOHN DOE (add lines 4, 5, and, if applicable, 7) $ _____

SO SAY WE ALL, this day of , 2

FOREPERSON

(Revised February 1, 2018;
revised January 23, 2020.)

MODEL INSTRUCTION NO. 2

Automobile collision; driver's comparative negligence including failure to wear seat belt; aggravation of pre-existing injury; multiple events

Facts of the hypothetical case:

Jane Doe was injured when the automobile she was driving collided with one driven by Richard Rowe. Jane Doe, who is married to John Doe, sued Richard Rowe. Her husband, John Doe, sued for loss of consortium. Richard Rowe pleaded that Jane Doe was comparatively negligent because of the operation of her own vehicle and because she was not wearing a seat belt at the time of the collision. There are issues of a pre-existing injury and multiple accidents. Questions of negligence, causation and damages are to be submitted to the jury.

The court's instruction:

The committee assumes that the court will give these instructions as part of the instruction at the beginning of the case and that these instructions will be given again before Final Argument. When given at the beginning of the case, 202.1 will be used in lieu of 401.1 and these instructions will be followed by the applicable portions of 202.2 through 202.5. See Model Instruction No. 1 for a full illustration of the instruction to be given at the beginning and the end of the case.

[401.1] Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are, however, the same as what I gave you at the beginning and it is these rules of law that you must now follow. When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

[401.2] The claims and defenses in this case are as follows. Jane Doe claims that Richard Rowe was negligent in the operation of the vehicle he was driving which caused her harm.

Richard Rowe denies that claim and also claims that Jane Doe was herself negligent in the operation of her vehicle and in her failure to use her seat belt, both of which caused her harm.

The parties must prove their claims by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

[401.3] "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

[401.4] Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

[401.9] *F.S.* 316.614, provides that "[i]t is unlawful for any person . . . [t]o operate a motor vehicle in this state unless the person is restrained by a safety belt." Violation of this statute is evidence of negligence. It is not, however, conclusive evidence of negligence. If you find that Jane Doe violated this statute, you may consider that fact, together with the other facts and circumstances, in deciding whether she was negligent.

[401.12(a)] Negligence is a legal cause of loss, injury, or damage if it directly and in natural and continuous sequence produces or contributes substantially to producing such loss, injury, or damage, so that it can reasonably be said that, but for the negligence, the loss, injury, or damage would not have occurred.

[401.12(b)] In order to be regarded as a legal cause of loss, injury, or damage negligence need not be the only cause.

Negligence may be a legal cause of loss, injury, or damage even though it operates in combination with some other cause if the negligence contributes substantially to producing such loss, injury, or damage.

[401.12(c)] Negligence may also be a legal cause of loss, injury, or damage even though it operates in combination with the act of another or some other cause occurring after the negligence occurs if such other cause was itself reasonably foreseeable and the negligence contributes substantially to producing such loss, injury, or damage.

[401.18] The issues you must decide on Jane Doe's claim against Richard Rowe are whether Richard Rowe was negligent in the operation of his vehicle, and, if so, whether that negligence was a legal cause of the loss, injury, or damage to Jane Doe.

[401.21] If the greater weight of the evidence does not support Jane Doe's claim, your verdict should be for Richard Rowe.

[401.22] If, however, the greater weight of the evidence supports Jane Doe's claim, then you shall consider the defense raised by Richard Rowe.

[401.22(a)] On that defense, the issue for you to decide is whether Jane Doe was herself negligent in the operation of her vehicle and/or in failing to wear her seat belt, and, if so, whether that negligence was a contributing legal cause of injury or damage to Jane Doe.

[401.23] If the greater weight of the evidence does not support Richard Rowe's defense and the greater weight of the evidence does support Jane Doe's claim, then your verdict should be for Jane Doe in the total amount of her damages.

If, however, the greater weight of the evidence shows that both Richard Rowe and Jane Doe were negligent and that the negligence of each contributed as a legal cause of loss, injury, or damage sustained by Jane Doe, you should decide and write on

the verdict form what percentage of the total negligence of both parties to this action you apportion to each of them.

[501.1(b)] If your verdict is for Richard Rowe you will not consider the matter of damages. But if the greater weight of the evidence supports Jane Doe's claim, you should determine and write on the verdict form, in dollars, the total amount of loss, injury or damage which the greater weight of the evidence shows will fairly and adequately compensate her for her loss, injury, or damage, including any damages that Jane Doe is reasonably certain to incur or experience in the future. You shall consider the following elements:

[501.2(a)] Any bodily injury sustained by Jane Doe and any resulting pain and suffering, disability, or physical impairment, disfigurement, mental anguish, inconvenience, or loss of capacity for the enjoyment of life experienced in the past, or to be experienced in the future. There is no exact standard for measuring such damage. The amount should be fair and just, in the light of the evidence.

[501.2(b)] The reasonable expense of hospitalization and medical care and treatment necessarily or reasonably obtained by Jane Doe in the past, or to be so obtained in the future.

[501.2(c)] Any earnings lost in the past and any loss of ability to earn money in the future.

[501.2(d)] On the claim brought by John Doe, you should award him an amount of money which the greater weight of the evidence shows will fairly and adequately compensate John Doe for any loss by reason of his wife's injury, of her services, comfort, society, and attentions in the past and in the future caused by the incident in question.

[501.2(h)] Any damage to Jane Doe's automobile. The measure of such damage is the reasonable cost of repair, if it was practicable to repair the automobile, with due allowance for any difference between its value immediately before the collision and its value after repair. You shall also take into consideration any

loss to Jane Doe for towing or storage charges and by being deprived of the use of her automobile during the period reasonably required for its repair.

[501.4] In determining the total amount of damages, you should not make any reduction because of the negligence, if any, of Jane Doe. The court in entering judgment will make any appropriate reduction(s).

[501.5(a)] If you find that Richard Rowe caused a bodily injury, and that the injury resulted in an aggravation of an existing disease or physical defect, you should attempt to decide what portion of Jane Doe's condition resulted from the aggravation. If you can make that determination, then you should award only those damages resulting from the aggravation. However, if you cannot make that determination, or if it cannot be said that the condition would have existed apart from the injury, then you should award damages for the entire condition suffered by Jane Doe.

[501.5(b)] You have also heard that Jane Doe may have been injured in two events. If you decide that Jane Doe was injured by Richard Rowe and was later injured by another event, then you should try to separate the damages caused by the two events and award Jane Doe money only for those damages caused by Richard Rowe. However, if you cannot separate some or all of the damages, you must award Jane Doe any damages that you cannot separate as if they were all caused by Richard Rowe.

[501.6] If the greater weight of the evidence shows that Jane Doe has been permanently injured, you may consider her life expectancy. The mortality tables received in evidence may be considered in determining how long Jane Doe may be expected to live. Mortality tables are not binding on you but may be considered together with other evidence in the case bearing on Jane Doe's health, age, and physical condition, before and after the injury, in determining the probable length of her life.

[501.7] Any amount of damages which you allow for future medical expenses or loss of ability to earn money in the future

should be reduced to its present money value, and only the present money value of these future economic damages should be included in your verdict.

The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate Jane Doe for these losses as they are actually experienced in future years.

[601.1] In deciding this case, it is your duty as jurors to decide the issues, and only those issues, that I submit for your determination and to answer certain questions I ask you to answer on a special form, called a verdict form. You must come to an agreement about what your answers will be. Your agreed-upon answers to my questions are called your jury verdict.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence, and all facts that were admitted or agreed to by the parties.

In reaching your verdict, you must think about and weigh the testimony and any documents, photographs, or other material that has been received in evidence. You may also consider any facts that were admitted or agreed to by the lawyers. Your job is to determine what the facts are. You may use reason and common sense to reach conclusions. You may draw reasonable inferences from the evidence. But you should not guess about things that were not covered here. And, you must always apply the law as I have explained it to you.

[601.2(a)] Let me speak briefly about witnesses. In evaluating the believability of any witness and the weight you will give the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness,

considered in the light of all the evidence in the case and in the light of your own experience and common sense.

[601.2(b)] Some of the testimony before you was in the form of opinions about certain technical subjects.

You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.

[601.5] That is the law you must follow in deciding this case. The attorneys for the parties will now present their final arguments. When they are through, I will have a few final instructions about your deliberations.

VERDICT

We, the jury, return the following verdict:

1. Was there negligence on the part of Defendant, Richard Rowe, which was a legal cause of damage to Plaintiff, Jane Doe?

YES NO

If your answer to question 1 is NO, your verdict is for the defendant, and you should not proceed further, except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES, please answer question 2.

2. Was there negligence on the part of Plaintiff, Jane Doe, which was a legal cause of her damage?

YES NO

If your answer to question 2 is YES, please answer question 3. If your answer to question 2 is NO, skip question 3 and answer questions 4, 5, and 6.

3. State the percentage of any negligence which was a

legal cause of damage to Plaintiff, Jane Doe, that you apportion to:

Defendant, Rachel Rowe **%**

Plaintiff, John Doe **%**

Total must be 100%

In determining the total amount of damages, do not make any reduction because of the negligence, if any, of plaintiff, Jane Doe. If you find Plaintiff, Jane Doe, was negligent in any degree, the court, in entering judgment will make any appropriate reduction.
Please answer questions 4, 5, and 6.

4. What is the total amount of Jane Doe's damages for lost earnings in the past, loss of earning capacity in the future, medical expenses incurred in the past, and medical expenses to be incurred in the future? $

5. What is the total amount of Jane Doe's damages for pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, aggravation of a disease or physical defect, and loss of capacity for the enjoyment of life sustained in the past and to be sustained in the future? $

TOTAL DAMAGES OF JANE DOE (add lines 4 and 5) $ _____

6. What is the total amount of John Doe's damage caused by the loss of his wife's:

[a.] comfort, society, and attention? $

[b.] services $

TOTAL DAMAGES OF JOHN DOE

(add lines 6a and 6b) $ _____

SO SAY WE ALL, this day of , 2

FOREPERSON

NOTE ON USE

This model instruction illustrates the instruction to be given when it is alleged that a driver was comparatively negligent for not wearing a seat belt. Different factual situations may require that different portions of *F.S.* 316.614 be read or paraphrased. See *Ridley v. Safety Kleen Corp.*, 693 So. 2d 934 (Fla. 1996).

(Revised February 1, 2018; revised January 23, 2020.)

MODEL INSTRUCTION NO. 3

Automobile collision; comparative negligence; wrongful death damages; *Fabre* issue

Facts of the hypothetical case:

Mary Smith, as personal representative of the estate of John Smith, deceased, has brought an action against Fast Transport Co. for damages resulting from the instantaneous death of John Smith in a collision between his car and a tractor trailer owned by Fast Transport Co. and driven by Joe Johnson, Fast Transport Co.'s employee. There is no issue as to Fast Transport Co.'s responsibility for any negligence of its driver, Joe Johnson. Questions of negligence, comparative negligence, causation, and damages for the estate and for the benefit of the widow, Mary Smith, and a daughter, Nancy Smith, who is 15 years old are to be submitted to the jury. Additionally, Joe Johnson claims that his actions were due to the negligence of another driver, Bill Jones.

The court's instruction:

The committee assumes that the court will give these instructions at the beginning of the case and that these instructions will be given again before final argument. When given at the beginning of the case, 202.1 will be used in lieu of 401.1 and these instructions will be followed by the applicable portions of 202.2 through 202.5. See Model Instruction No. 1 for a full illustration of the instruction to be given at the beginning and end of the case.

[401.1] Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are, however, the same as what I gave you at the beginning and it is these rules of law that you must now follow. When I finish telling you

about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

[401.2] The claims and defenses in this case are as follows. Mary Smith, as personal representative of the estate of John Smith, claims that Fast Transport Co.'s driver, Joe Johnson, was negligent in the operation of the vehicle he was driving which caused the death of John Smith.

Fast Transport Co. denies that claim and also claims that John Smith was himself negligent in the operation of his vehicle, which caused his death. Additionally, Fast Transport Co. claims that John Smith's death was due to negligence of Bill Jones, who is not a party to this case.

The parties must prove their claims by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

[401.3] "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

[401.4] Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

[401.12(a)] Negligence is a legal cause of a death if it directly and in natural and continuous sequence produces or contributes substantially to producing such death, so that it can reasonably be said that, but for the negligence, the death would not have occurred.

[401.12(b)] In order to be regarded as a legal cause of d negligence need not be the only cause. Negligence may be a legal cause of death even though it operates in combination with the act of another or some other cause if the negligence contributes substantially to producing such death.

[401.13(b)] The court has determined and now instructs you that Fast Transport Co. is responsible for any negligence of its employee, Joe Johnson.

[401.18] The issues you must decide on Mary Smith's claim against Fast Transport Co. are whether Fast Transport Co.'s employee, Joe Johnson, was negligent in the operation of his vehicle, and, if so, whether that negligence was a legal cause of John Smith's death.

[401.21] If the greater weight of the evidence does not support Mary Smith's claim, your verdict should be for Fast Transport Co.

[401.22] If, however, the greater weight of the evidence supports Mary Smith's claim, then you shall consider the defenses raised by Fast Transport Co.

[401.22(a)] On Fast Transport Co.'s first defense, the issues for you to decide are whether John Smith was himself negligent in the operation of his vehicle and, if so, whether that negligence was a contributing legal cause of his death.

[401.22(f)] On Fast Transport Co.'s second defense, the issues for you to decide are whether Bill Jones was also negligent in the operation of his vehicle, and, if so, whether that negligence was a contributing legal cause of John Smith's death.

[401.23] If the greater weight of the evidence does not support Fast Transport Co.'s defenses and the greater weight of the evidence does supports Mary Smith's claim, then your verdict should be for Mary Smith as personal representative of the estate of John Smith, in the total amount of the damages sustained by those for whom this action is brought.

If, however, the greater weight of the evidence shows that John Smith. Joe Johnson, or Bill Jones were negligent and that the negligence of one or each contributed as a legal cause to the death of John Smith, you should decide and write on the verdict form what percentage of the total negligence of all parties to this

action you apportion to each of them.

[502.1(b)] If your verdict is for Fast Transport Co., you will not consider the matter of damages. But if the greater weight of the evidence supports Mary Smith's claim, as personal representative of the estate of John Smith, you should determine and write on the verdict form, in dollars, the total amount of loss, injury, or damage which the greater weight of the evidence shows the estate of John Smith and his survivors sustained as a result of his injury and death, including any damages that the estate and the survivors are reasonably certain to incur or experience in the future.

[502.2] In determining the damages recoverable on behalf of John Smith's estate, you shall consider the following elements:

[502.2(b)] The estate's loss of net accumulations: "Net accumulations" is the part of John Smith's net income from salary or business after taxes, including pension benefits, which John Smith, after paying his personal expenses and monies for the support of his survivors, would have left as part of his estate if he had lived his normal life expectancy.

[502.2(c)] Medical or funeral expenses due to John Smith's injury or death which have become a charge against John Smith's estate.

In determining any damages to be awarded to John Smith's personal representative for the benefit of John Smith's survivors, Mary Smith and Nancy Smith, you shall consider certain additional elements of damage for which there is no exact standard for fixing the compensation to be awarded. Any such award should be fair and just in the light of the evidence regarding the following elements:

[502.2(d)] Mary Smith's loss of John Smith's companionship and protection, and her mental pain and suffering as a result of John Smith's injury and death. In determining the duration of the losses, you may consider the joint life expectancy of John Smith and Mary Smith, together with the other evidence in the

case.

[502.2(e)] The loss by Nancy Smith of parental companionship, instruction and guidance, and her mental pain and suffering as a result of John Smith's injury and death. In determining the duration of those losses, you may consider the joint life expectancy of John Smith and Nancy Smith, together with the other evidence in the case.

In determining any damages to be awarded John Smith's personal representative for the benefit of John Smith's survivors, Mary Smith and Nancy Smith, you shall also consider the following elements:

[502.2(g)] The loss suffered by survivors Mary Smith and Nancy Smith, by reason of John Smith's injury and death, of John Smith's support and services including interest at (legal rate) **on any amount awarded for such loss from the date of injury to the date of death. In determining the duration of any future loss, you may consider the joint life expectancy of the survivor and John Smith and the period of minority, ending at age 25, of Nancy Smith.**

In evaluating past and future loss of support and services, you shall consider the survivors' relationship to John Smith, the amount of John Smith's probable net income available for distribution to the survivors and the replacement value of John Smith's services to the survivors. "Support" includes contributions in kind as well as sums of money. "Services" means tasks regularly performed by John Smith for a survivor that will be a necessary expense to the survivor because of John Smith's death.

[502.3] Any damages that you find were sustained by John Smith's estate and by Mary Smith and Nancy Smith shall be separately stated in your verdict.

[502.5] In determining the total amount of damages to John Smith's estate and his survivors as a result of his injury and death, you should not make any reduction because of the

negligence, if any, of John Smith or Bill Jones. The court in entering judgment will make any appropriate reductions.

[502.6(a)] In determining how long John Smith would have lived, had he lived out his normal life, you may consider his life expectancy at the time of his death. The mortality tables received in evidence may be considered in determining how long he may have been expected to live. Mortality tables are not binding on you but may be considered together with other evidence in the case bearing on his health, age and physical condition, before his death, in determining the probable length of his life.

[502.6(b)] In determining the duration of any future loss sustained by Mary Smith and Nancy Smith by reason of the death of John Smith, you may consider the joint life expectancy of Mary Smith, Nancy Smith, and John Smith. The joint life expectancy is that period of time when both the decedent and a survivor would have remained alive. The mortality tables received in evidence may be considered, together with the other evidence in the case bearing on the health, age, and physical condition of each, in determining how long each may be expected to live.

[502.7] Any amount of damages which you allow for the estate's loss of net accumulations or for loss of John Smith's support and services in the future should be reduced to its present money value and only the present money value of these future economic damages should be included in your verdict.

The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate Mary Smith and Nancy Smith for these losses as they are actually experienced in future years.

[601.1] In deciding this case, it is your duty as jurors to decide the issues, and only those issues, that I submit for your determination and to answer certain questions I ask you to answer on a special form, called a verdict form. You must come

to an agreement about what your answers will be. Your agreed-upon answers to my questions are called your jury verdict.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in the evidence, and all facts that were admitted or agreed to by the parties.

In reaching your verdict, you must think about and weigh the testimony and any documents, photographs, or other material that has been received in evidence. You may also consider any facts that were admitted or agreed to by the lawyers. Your job is to determine what the facts are. You may use reason and common sense to reach conclusions. You may draw reasonable inferences from the evidence. But you should not guess about things that were not covered here. And, you must always apply the law as I have explained it to you.

[601.2(a)] Let me speak briefly about witnesses. In evaluating the believability of any witness and the weight you will give the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

[601.2(b)] Some of the testimony before you was in the form of opinions about certain technical subjects.

You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.

[601.5] That is the law you must follow in deciding this

case. The attorneys for the parties will now present their final arguments. When they are through, I will have a few final instructions about your deliberations.

VERDICT

We, the jury, return the following verdict:

1. Was there negligence on the part of Joe Johnson, Fast Transport Co.'s driver, which was a legal cause of the death of John Smith?

YES NO

If your answer to question 1 is NO, your verdict is for the defendant, and you should not proceed further, except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES, please answer question 2.

2. Was there negligence on the part of the decedent, John Smith, which was a legal cause of his death?

YES NO

3. Was there negligence on the part of Bill Jones, which was a legal cause of John Smith's death?

YES NO

If your answer to either question 2 or 3 is YES, please answer question 4. If your answer to questions 2 and 3 is NO, skip question 4 and answer questions 5, 6, and 7.

4. State the percentage of any negligence, which was a legal cause of John Smith's death, that you apportion to:

Joe Johnson (Fast Transit Co.'s driver) %

John Smith (decedent) %

Bill Jones (other driver) **%**

Total must be 100%

In determining the total amount of damages, do not make any reduction because of the negligence, if any, of the decedent, John Smith or of Bill Jones. If you find that either John Smith or Bill Jones were to any extent negligent, the court in entering judgment will make any appropriate reduction.

Please answer questions 5, 6, and 7.

DAMAGES OF THE ESTATE

5. What is the total amount of any damages sustained by the estate for any medical or funeral expenses resulting from John Smith's injury and death and the net accumulations lost by the estate resulting from John Smith's injury and death? $

DAMAGES OF MARY SMITH

6a. What is the total amount of damages sustained by Mary Smith for the loss of John Smith's support and services? $

6b. What is the total amount of damages sustained by Mary Smith for the loss of her husband's companionship and protection and from her pain and suffering as a result of John Smith's injury and death? $

TOTAL DAMAGES OF MARY SMITH (add lines 6a and 6b) $

DAMAGES OF NANCY SMITH

7a. What is the total amount of any damages sustained by Nancy Smith for the loss of John Smith's support and services? $

7b. What is the amount of damages sustained by Nancy Smith for the loss of parental companionship, instruction and guidance and Nancy Smith's pain and suffering as a result of John Smith's injury and death? $

TOTAL DAMAGES OF NANCY SMITH (add lines 7a and 7b) $

SO SAY WE ALL, this day of , 2

FOREPERSON

(Revised February 1, 2018; revised January 23, 2020.)

MODEL INSTRUCTION NO. 4

Automobile collision; comparative negligence; claim and counterclaim

Facts of the hypothetical case:

Betty Jones and Rachel Rowe were both injured when their automobiles collided at an intersection. Betty Jones sued Rachel Rowe, who denied the allegations of negligence, pleaded in defense that Betty Jones was negligent and counterclaimed for her own damages. On the counterclaim, Betty Jones denied that she was negligent and pleaded in defense that Rachel Rowe was negligent.

The court's instruction:

The committee assumes that the court will give these instructions at the beginning of the case and that these instructions will be given again before final argument. When given at the beginning of the case, 202.1 will be used in lieu of 401.1 and these instructions will be followed by the applicable portions of 202.2 through 202.5. See Model Instruction No. 1 for a full illustration of the instructions to be given at the beginning and end of the case.

[401.1] Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are, however, the same as what I gave you at the beginning and it is these rules of law that you must now follow. When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

[401.2] The claims and defenses in this case are as follows. Betty Jones claims that Rachel Rowe was negligent in the operation of the vehicle she was driving which caused her harm.

Rachel Rowe denies that claim and claims instead that it

was Betty Jones who was negligent in the operation of her vehicle, which caused harm to Rachel Rowe.

The parties must prove their claims by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

[401.3] "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

[401.4] Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

[401.9] *(Read or paraphrase the applicable statute or refer to the ordinance or regulation admitted in evidence.)* **Violation of this statute is evidence of negligence. It is not, however, conclusive evidence of negligence. If you find that either Rachel Rowe or Betty Jones violated this statute, you may consider that fact, together with the other facts and circumstances, in deciding whether she was negligent.**

[401.12(a)] Negligence is a legal cause of loss, injury, or damage if it directly and in natural and continuous sequence produces or contributes substantially to producing such loss, injury, or damage, so that it can reasonably be said that, but for the negligence, the loss, injury, or damage would not have occurred.

[401.12(b)] In order to be regarded as a legal cause of loss, injury, or damage, negligence need not be the only cause. Negligence may be a legal cause of loss, injury, or damage even though it operates in combination with some other cause if the negligence contributes substantially to producing such loss, injury, or damage.

[401.18] The issues you must decide on Betty Jones' claim against Rachel Rowe are whether Rachel Rowe was negligent in the operation of her vehicle, and, if so, whether that negligence was a legal cause of the loss, injury, or damage to Betty Jones.

[401.21] If the greater weight of the evidence does not support Betty Jones' claim, your verdict on that claim should be for Rachel Rowe.

Similarly, the issues for your determination on the claim of Rachel Rowe against Betty Jones are whether Betty Jones was negligent in the operation her vehicle, and, if so, whether such negligence was a legal cause of loss, injury, or damage to Rachel Rowe.

If the greater weight of the evidence does not support Rachel Rowe's claim, then your verdict on that claim should be for Betty Jones.

If the greater weight of the evidence supports the claim of Betty Jones and shows that the negligence of Rachel Rowe was a legal cause of loss, injury, or damage to Betty Jones, but does not support the claim of Rachel Rowe, your verdict should be for Betty Jones in the total amount of her damages.

Similarly, if the greater weight of the evidence supports the claim of Rachel Rowe and shows that the negligence of Betty Jones was a legal cause of loss, injury, or damage to Rachel Rowe, but does not support the claim of Betty Jones, your verdict should be for Rachel Rowe in the total amount of her damages.

If, however, the greater weight of the evidence shows that both Betty Jones and Rachel Rowe were negligent, and that the negligence of each contributed as a legal cause of loss, injury, or damage to each, you should determine what percentage of the total negligence of both parties to this action you apportion to each of them.

[501.1(b)] If your verdict is for Rachel Rowe on the claim of

Betty Jones you will not consider the matter of Betty Jones' damages. Similarly, if your verdict is for Betty Jones on the claim of Rachel Rowe, you will not consider the matter of Rachel Rowe's damages. But if the greater weight of the evidence supports the claim of either Betty Jones or Rachel Rowe, or both of their claims, you should determine and write on the verdict form, in dollars, the total amount of loss, injury, or damages which the greater weight of the evidence shows will fairly and adequately compensate the claimant for such loss, injury, or damage, including any damages the claimant is reasonably certain to incur or experience in the future. You shall consider the following elements:

[501.2(a)] Any bodily injury sustained, any resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience or loss of capacity for the enjoyment of life experienced in the past or to be experienced in the future. There is no exact standard for measuring such damage. The amount should be fair and just in the light of the evidence.

[501.2(b)] The reasonable expense of hospitalization and medical care and treatment necessarily or reasonably obtained in the past or to be so obtained in the future.

[501.2(c)] Any earnings lost in the past, and any loss of ability to earn money in the future.

[501.2(h)] Any damage to Betty Jones' or Rachel Rowe's automobile. The measure of such damage is the reasonable cost of repair, if it was practicable to repair the automobile, with due allowance for any difference between its value immediately before the collision and its value after repair. You shall also take into consideration any loss for towing or storage charges and by being deprived of the use of her automobile during the period reasonably required for its repair.

[501.4] In determining the total amount of damages, you should not make any reduction because of the negligence, if any, of Betty Jones and/or Rachel Rowe. The court in entering

judgment will make any appropriate reduction(s).

[501.6] If the greater weight of the evidence shows that either Betty Jones and/or Rachel Rowe have been permanently injured, you may consider her life expectancy. The mortality tables received in evidence may be considered in determining how long Betty Jones and/or Rachel Rowe may be expected to live. Mortality tables are not binding on you but may be considered together with other evidence in the case bearing on Betty Jones' and/or Rachel Rowe's health, age and physical condition, before and after the injury, in determining the probable length of her life.

[501.7] Any amount of damages which you allow for future medical expenses or loss of ability to earn money in the future should be reduced to its present money value, and only the present money value of these future economic damages should be included in your verdict. The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate Betty Jones and/or Rachel Rowe for these losses as they are actually experienced in future years.

[601.1] In deciding this case, it is your duty as jurors to answer certain questions I ask you to answer on a special form, called a verdict form. You must come to an agreement about what your answers will be. Your agreed-upon answers to my questions are called your jury verdict.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence and all fact that were admitted or agreed to by the parties.

In reaching your verdict, you must think about and weigh the testimony and any documents, photographs, or other material that has been received in evidence. You may also consider any facts that were admitted or agreed to by the lawyers. Your job is to determine what the facts are. You may use reason and common sense to reach conclusions. You may draw reasonable inferences from the evidence. But you should not

guess about things that were not covered here. And, you must always apply the law as I have explained it to you.

[601.2(a)] Let me speak briefly about witnesses. In evaluating the believability of any witness and the weight you will give the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

[601.2(b)] Some of the testimony before you was in the form of opinions about certain technical subjects.

You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.

[601.5] That is the law you must follow in deciding this case. The attorneys for the parties will now present their final arguments. When they are through, I will have a few final instructions about your deliberations.

VERDICT

We, the jury, return the following verdict:

1. Was there negligence on the part of Rachel Rowe which was a legal cause of damage to Betty Jones?

YES NO

2. Was there negligence on the part of Betty Jones which

was a legal cause of damage to Rachel Rowe?

YES **NO**

If your answers to questions 1 and 2 are both NO, your verdict on each claim is for the defendant, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to either question 1 or 2 is YES, please answer question 3.

3. State the percentage of any negligence that you apportion to:

Rachel Rowe %

Betty Jones %

Total must be 100%

Your answers to question 3 must total 100%, and should include a zero for any party you found not negligent in answer to questions 1 and 2. Please answer question 4 only if your answer to question 1 is YES. Answer question 5 only if your answer to question 2 is YES.

In determining the amount of damages, do not make any reduction because of the negligence, if any, of Betty Jones and/or Rachel Rowe. If you find that Betty Jones and/or Rachel Rowe were to any extent negligent, the court in entering judgment will make any appropriate reduction.

Please answer questions 4, 5, 6 and 7.

DAMAGES OF BETTY JONES

4. What is the total amount of Betty Jones' damages for lost earnings in the past, loss of earning capacity in the future, medical expenses incurred in the past, medical expenses to be incurred in the future?

$

5. What is the total amount of Betty Jones' damages for pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, aggravation of a disease or physical defect, and loss of capacity for the enjoyment of life sustained in the past and to be sustained in the future?

$

TOTAL DAMAGES OF BETTY JONES (add lines 4 and 5) $ _____

DAMAGES OF RACHEL ROWE

6. What is the total amount of Rachel Rowe's damages for lost earnings in the past, loss of earning capacity in the future, medical expenses incurred in the past, medical expenses to be incurred in the future? $

7. What is the total amount of Rachel Rowe's damages for pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, aggravation of a disease or physical defect and loss of capacity for the enjoyment of life sustained in the past and to be sustained in the future?

$

TOTAL DAMAGES OF RACHEL ROWE (add lines 6 and 7) $ _____

SO SAY WE ALL, this day of , 2

FOREPERSON

(Revised February 1, 2018; revised January 23, 2020.)

MODEL INSTRUCTION NO. 5

Injury in three-car collision; settlement with injured party by one tortfeasor; independent contribution claim by him against others; reasonableness of settlement as well as liability contested

Facts of the hypothetical case:

John Adams, driver of one of three vehicles involved in a collision, presented a claim for his injuries to Marvel Transport Co., owner of one of the other vehicles. Marvel Transport Co., taking into consideration John Adams' injuries, his comparative negligence and its potential exposure, paid John Adams $75,000.00 and obtained a general release of all responsible persons. Marvel Transport Co. then sued the owner of the other vehicle, Perishable Produce, Inc., for contribution. The issues to be resolved by the jury are whether Perishable Produce, Inc.'s driver was negligent in contributing to John Adams' injuries, whether the amount paid by Marvel Transport Co. was reasonable and, if Perishable Produce, Inc.'s driver was negligent, the relative degrees of responsibility of Marvel Transport Co. and Perishable Produce, Inc.

The court's instruction:

The committee assumes that the court will give these instructions at the beginning of the case and that these instructions will be given again before final argument. When given at the beginning of the case, 202.1 will be used in lieu of 412.3 and these instructions will be followed by the applicable portions of 202.2 through 202.5. See Model Instruction No. 1 for a full illustration of the instructions to be given at the beginning and end of the case.

[412.3] Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are, however, the same as

what I gave you at the beginning and it is these rules of law that you must now follow. When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

[412.4] The claims in this case are as follows. Marvel Transport Co. seeks to recover from Perishable Produce, Inc., part of the sum of $75,000.00, which Marvel Transport Co. paid John Adams to satisfy the claim of John Adams resulting from his injury in the three-vehicle accident involving John Adams, and vehicles owned by Marvel Transport Co. and Perishable Produce, Inc. Marvel Transport Co. claims that Perishable Produce, Inc. was partly negligent in causing the collision.

Perishable Produce, Inc. denies that claim.

Marvel Transport Co. must prove its claim by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

[412.5] "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

[412.6] Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

[412.7(a)] Negligence is a legal cause of loss, injury, or damage if it directly and in natural and continuous sequence produces or contributes substantially to producing such loss, injury, or damage, so that it can reasonably be said that, but for the negligence, the loss, injury, or damage would not have occurred.

[412.7(b)] In order to be regarded as a legal cause of loss, injury, or damage negligence need not be the only cause.

Negligence may be a legal cause of loss, injury, or damage even though it operates in combination with the act of another or some other cause if the negligence contributes substantially to producing such loss, injury, or damage.

[412.8] The issues for you to decide on Marvel Transport Co.'s claim are whether Tom Jones, the employee of Perishable Produce, Inc., was negligent in his operation of Perishable Produce, Inc.'s truck, which was involved in the collision and, if so, whether such negligence was a legal cause of injury and damage to John Adams.

If the greater weight of the evidence does not support the claim of Marvel Transport Co. against Perishable Produce, Inc., your verdict should be for Perishable Produce, Inc.

However, if the greater weight of the evidence supports the claim of Marvel Transport Co., you should also determine whether the amount of money paid by Marvel Transport Co. to John Adams was reasonable under all of the circumstances shown by the evidence. If the greater weight of the evidence shows that the amount of money paid by Marvel Transport Co. to John Adams in settlement did not exceed a reasonable amount under all of the circumstances, you should so find by your verdict. However, if the amount of money paid by Marvel Transport Co. to John Adams exceeded a reasonable amount, you should determine the amount which would have been reasonable under all of the circumstances for Marvel Transport Co. to pay to John Adams in settlement. The court will then determine the amount that Marvel Transport Co. will recover from Perishable Produce, Inc.

In deciding whether the amount of money paid by Marvel Transport Co. to John Adams was reasonable, I instruct you that John Adams would have been able to sue Marvel Transport Co. for an amount of money that would fairly and adequately compensate him for his loss, injury, and damage, including any damage that John Adams would have been reasonably certain to incur or experience in the future, for the following elements:

[501.2(a)] Any bodily injury sustained by John Adams and any resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience or loss of capacity for the enjoyment of life experienced in the past or to be experienced in the future. There is no exact standard for measuring such damage. The amount should be fair and just in the light of the evidence.

[501.2(b)] The reasonable expense of hospitalization and medical care and treatment necessarily or reasonably obtained by John Adams in the past, or to be so obtained in the future.

[501.2(c)] Any earnings John Adams lost in the past, and any loss of ability to earn money in the future.

[501.2(h)] Any damage to John Adams' automobile. The measure of such damage is the reasonable cost of repair, if it was practicable to repair the automobile, with due allowance for any difference between its value immediately before the collision and its value after repair. You shall also take into consideration any loss to John Adams for towing or storage charges and by being deprived of the use of his automobile during the period reasonably required for its repair.

[601.1] In deciding this case, it is your duty as jurors to decide the issues, and only those issues, that I submit for your determination and to answer certain questions I ask you to answer on a special form, called a verdict form. You must come to an agreement about what your answers will be. Your agreed-upon answers to my questions are called your jury verdict.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence, and all facts that were admitted or agreed to by the parties.

In reaching your verdict, you must think about and weigh the testimony and any documents, photographs, or other material that has been received in evidence. You may also consider any facts that were admitted or agreed to by the lawyers. Your job is to determine what the facts are. You may use

reason and common sense to reach conclusions. You may draw reasonable inferences from the evidence. But you should not guess about things that were not covered here. And, you must always apply the law as I have explained it to you.

[601.2(a)] Let me speak briefly about witnesses. In evaluating the believability of any witness and the weight you will give the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

[601.2(b)] Some of the testimony before you was in the form of opinions about certain technical subjects.

You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.

[601.5] That is the law you must follow in deciding this case. The attorneys for the parties will now present their final arguments. When they are through, I will have a few final instructions about your deliberations.

VERDICT

We, the jury, return the following verdict:

1. Was there negligence on the part of Tom Jones, the driver of the truck owned by Defendant, Perishable Produce, Inc., which was a legal cause of damage to John Adams?

YES **NO**

If your answer to question 1 is NO, your verdict is for defendant, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES, please answer question 2.

2. State the percentage of any negligence, which was a legal cause of damage to John Adams, that you apportion to:

Tom Jones (Perishable Produce, Inc.'s driver) %

Frank Foot (Marvel Transport Co.'s driver) %

Total must be 100%

Please answer question 3.

3. Did Marvel Transport Co. payment of $75,000.00 to Adams exceed a reasonable settlement under all of the circumstances?

YES **NO**

If your answer to question 3 is NO, do not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 3 is YES, please answer question 4.

4. What would have been a reasonable settlement, under all of the circumstances, for Marvel Transport Co. to pay John Adams?

$

SO SAY WE ALL, this day of , 2

FOREPERSON

(Revised February 1, 2018.)

MODEL INSTRUCTION NO. 6

Claimant suing three alleged joint tortfeasors; comparative negligence in issue; contribution shares to be determined in action

Facts of the hypothetical case:

Mary Smith was injured while driving her car, which was involved in a four-car pile-up. She filed suit against the drivers of the other vehicles—Ron Rowe, Sally Jones, and Tom Torpor—alleging that their combined negligence caused the pile-up and her injuries. All defendants have asserted that the negligence of Smith contributed to her injuries. The defendants filed cross-claims raising the issue of contribution. The court has determined that a single verdict can conveniently determine the contribution shares of the defendants found to be liable to Smith.

The court's instruction:

The committee assumes that the court will give these instructions at the beginning of the case and that these instructions will be given again before final argument. When given at the beginning of the case, 202.1 will be used in lieu of 401.1 and these instructions will be followed by the applicable portions of 202.2 through 202.5. See Model Instruction No. 1 for a full illustration of the instructions to be given at the beginning and end of the case.

[401.1] Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are, however, the same as what I gave you at the beginning and it is these rules of law that you must now follow. When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

[401.2] The claims and defenses in this case are as follows. Mary Smith claims that Ron Rowe and/or Sally Jones and/or Tom Torpor were negligent in the operation of their vehicles, which caused her harm.

Ron Rowe, Sally Jones and Tom Torpor each deny that claim and they each also claim that Mary Smith was herself negligent in the operation of her vehicle, which caused her harm.

The parties must prove their claims by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

[401.3] "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

[401.4] Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

[401.12(a)] Negligence is a legal cause of loss, injury, or damage if it directly and in natural and continuous sequence produces or contributes substantially to producing such loss, injury, or damage, so that it can reasonably be said that, but for the negligence, the loss, injury, or damage would not have occurred.

[401.12(b)] In order to be regarded as a legal cause of loss, injury, or damage negligence need not be the only cause. Negligence may be a legal cause of loss, injury, or damage even though it operates in combination with the act of another or some other cause if the negligence contributes substantially to producing such loss, injury, or damage.

[401.18(b)] The issues you must decide on Mary Smith's claim against Ron Rowe and/or Sally Jones and/or Tom Torpor

are whether any one or more of those defendants were negligent in the operation of the vehicles they were driving; and, if so, whether that negligence was a legal cause of loss, injury, or damage to Mary Smith.

[401.21] If the greater weight of the evidence does not support the claim of Mary Smith against a particular defendant, then your verdict should be for that defendant.

[401.22] If, however, the greater weight of the evidence supports Mary Smith's claim against one or more of the defendants, then you shall consider the defense raised by the defendants.

[401.22(a)] On that defense, the issue for you to decide is whether Mary Smith was herself negligent in the operation of her vehicle and, if so, whether that negligence was a contributing legal cause of injury or damage to Mary Smith.

[401.23] If the greater weight of the evidence does not support the defense of the defendants and the greater weight of the evidence does support Mary Smith's claim against one or more of the defendants, then you should decide and write on the verdict form what percentage of the total negligence of those defendants you apportion to each defendant whose negligence you find was a legal cause of loss, injury, or damage to Mary Smith.

If, however, the greater weight of the evidence shows that both Mary Smith and one or more of the defendants were negligent and that the negligence of each contributed as a legal cause of loss, injury, or damage sustained by Mary Smith, you should decide and write on the verdict form what percentage of the total negligence of all parties to this action you apportion to each of them.

[501.1(b)] If your verdict is for the defendants you will not consider the matter of damages. But if the greater weight of the evidence supports Mary Smith's claim against one or more of the defendants, you should determine and write on the verdict form,

in dollars, the total amount of loss, injury, or damage, which the greater weight of the evidence shows will fairly and adequately compensate her for her loss, injury or damage, including any damages that Mary Smith is reasonably certain to incur or experience in the future. You shall consider the following elements:

[501.2(a)] Any bodily injury sustained by Mary Smith and any resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience or loss of capacity for the enjoyment of life experienced in the past, or to be experienced in the future. There is no exact standard for measuring such damage. The amount should be fair and just, in the light of the evidence.

[501.2(b)] The reasonable expense of hospitalization and medical care and treatment necessarily or reasonably obtained by Mary Smith in the past, or to be so obtained in the future.

[501.2(c)] Any earnings lost in the past, and any loss of ability to earn money in the future.

[501.2(h)] Any damage to Mary Smith's automobile. The measure of such damage is the reasonable cost of repair, if it was practicable to repair the automobile, with due allowance for any difference between its value immediately before the collision and its value after repair.

You shall also take into consideration any loss to Mary Smith for towing or storage charges and by being deprived of the use of her automobile during the period reasonably required for its repair.

[501.4] In determining the total amount of damages, you should not make any reduction because of the negligence, if any, of Mary Smith. The court in entering judgment will make any appropriate reduction(s).

[501.6] If the greater weight of the evidence shows that Mary Smith has been permanently injured, you may consider her

life expectancy. The mortality tables received in evidence may be considered in determining how long Mary Smith may be expected to live. Mortality tables are not binding on you, but may be considered together with other evidence in the case bearing on Mary Smith's health, age and physical condition, before and after the injury, in determining the probable length of her life.

[501.7] Any amount of damages which you allow for future medical expenses or loss of ability to earn money in the future should be reduced to its present money value, and only the present money value of these future economic damages should be included in your verdict. The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate Mary Smith for these losses as they are actually experienced in future years.

[501.9(a)] Even if you decide that more than one of the defendants were negligent, you should determine Mary Smith's damages in a single total amount, and write that amount, in dollars, on the verdict form.

[601.1] In deciding this case, it is your duty as jurors to decide the issues, and only those issues, that I submit for your determination and to answer certain questions I ask you to answer on a special form, called a verdict form. You must come to an agreement about what your answers will be. Your agreed-upon answers to my questions are called your jury verdict.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence, and all facts that were admitted or agreed to by the parties.

In reaching your verdict, you must think about and weigh the testimony and any documents, photographs, or other material that has been received in evidence. You may also consider any facts that were admitted or agreed to by the lawyers. Your job is to determine what the facts are. You may use reason and common sense to reach conclusions. You may draw reasonable inferences from the evidence. But you should not

guess about things that were not covered here. And, you must always apply the law as I have explained it to you.

[601.2(a)] Let me speak briefly about witnesses. In evaluating the believability of any witness and the weight you will give the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

[601.2(b)] Some of the testimony before you was in the form of opinions about certain technical subjects.

You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.

[601.5] That is the law you must follow in deciding this case. The attorneys for the parties will now present their final arguments. When they are through, I will have a few final instructions about your deliberations.

VERDICT

We, the jury, return the following verdict:

1. Was there negligence on the part of any of the defendants, which was a legal cause of damage to Plaintiff, Mary Smith?

Ron Rowe	**YES**	**NO**
Sally Jones	**YES**	**NO**

Tom Torpor YES NO

If your answer to question 1 is NO as to all defendants, your verdict is for the defendants, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES as to any of the defendants, please answer question 2.

2. Was there negligence on the part of Plaintiff, Mary Smith, which was a legal cause of her damage?

YES NO

Please answer question 3.

3. State the percentage of any negligence, which was a legal cause of damage to Plaintiff, Mary Smith, that you apportion to:

Ron Rowe %

Sally Jones %

Tom Torpor %

Mary Smith %

Total must be 100%

Your answers to question 3 must total 100% and should include a zero for any person you found not negligent in answer to questions 1 and 2.

In determining the amount of any damages, do not make any reduction because of the negligence, if any, of Plaintiff, Mary Smith. If you find Plaintiff, Mary Smith, was negligent in any degree, the court in entering judgment will make any appropriate reduction.

Please answer questions 4 and 5.

4. What is the total amount of Mary Smith's damages for lost earnings in the past, loss of earning capacity in the future, medical expenses incurred in the past, medical expenses to be incurred in the future? $

5. What is the total amount of Mary Smith's damages for pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, aggravation of a disease or physical defect, and loss of capacity for the enjoyment of life sustained in the past and to be sustained in the future?
$

TOTAL DAMAGES OF MARY SMITH (add lines 4 and 5) $ _____

SO SAY WE ALL, this day of , 2

FOREPERSON

(Revised February 1, 2018; revised January 23, 2020.)

MODEL INSTRUCTION NO. 7

Strict product liability and negligence case; with aggravation of pre-existing injury; and comparative negligence defense

Facts of the hypothetical case:

John Smith claims he was injured when a hay baler being driven on the highway by Dilbert Driver struck his car. The hay baler suddenly swerved across the road into the path of John Smith, who was driving in the opposite direction. At the time, John Smith was looking at a group of deer in a field near the road, and therefore took no evasive action to avoid the collision. An examination of the hay baler revealed that a bolt that was part of the steering mechanism was designed in such a way that it could not sustain the speed of highway driving, would loosen over time, weaken, and eventually break. At the time of the accident, Dilbert Driver was operating the hay baler at an unsafe speed when the bolt suddenly broke, making it impossible for Dilbert Driver to steer the hay baler, which crashed into the car being driven by John Smith and injured him as a result. John Smith sued Dilbert Driver, alleging that his operation of the hay baler had been negligent. John Smith also sued the manufacturer of the hay baler, Mishap Manufacturing Co., and the retailer seller, Sharp Sales Co., alleging that the hay baler had been defectively designed. The defendants denied liability, and affirmatively alleged that John Smith had been comparatively negligent. The defendants also alleged that some of John Smith's injuries pre-existed the collision with the hay baler and John Smith alleged that his pre-existing condition was aggravated by the collision with the hay baler.

The court's instruction:

The committee assumes that the court will give these instructions as part of the instruction at the beginning of the case and that these instructions will be given again before Final Argument. When given at the beginning of the case, 202.1 will be used in lieu of 403.1 and these instructions will be followed by the applicable portions of 202.2 through

202.5. See Model Instruction No. 1 for a full illustration of the instructions to be given at the beginning and end of the case.

[403.1] Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are the same as what I gave you at the beginning and it is these rules of law that you must now follow. When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

[403.2] The claims and defenses in this case are as follows. John Smith claims that Dilbert Driver was negligent in operation of the hay baler he was driving which caused him harm. John Smith also claims that the hay baler designed by Mishap Manufacturing Co. and sold by Sharp Sales Co. was defective and that the defect in the hay baler caused him harm.

All three defendants deny those claims and also claim that John Smith was himself negligent in the operation of his vehicle, which caused his harm.

The parties must prove their claims by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

[403.3] "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

[401.4] Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

[403.7b] A product is defective because of a design defect if it is in a condition unreasonably dangerous to the user or a person in the vicinity of the product and the product is expected to and does reach the user without substantial change affecting that condition.

A product is unreasonably dangerous because of its design if the product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the manufacturer.

In deciding whether the hay baler was defective because of a design defect, you shall consider the state-of-the-art of scientific and technical knowledge and other circumstances that existed at the time of the hay baler's manufacture, not at the time of the loss, injury, or damage.

[401.12a and 403.12a] Negligence or a defect in a product is a legal cause of loss, injury, or damage if it directly and in natural and continuous sequence produces or contributes substantially to producing such loss, injury, or damage, so that it can reasonably be said that, but for the negligence or defect, the loss, injury, or damage would not have occurred.

[401.12b and 403.12b] In order to be regarded as a legal cause of loss, injury, or damage, negligence or a defect in a product need not be the only cause. Negligence or a defect in a product may be a legal cause of loss, injury, or damage even though it operates in combination with the act of another or some other cause if the negligence or defect contributes substantially to producing such loss, injury, or damage.

[401.18a] The issues you must decide on John Smith's claim against Dilbert Driver are whether Dilbert Driver was negligent in his operation of the hay baler, and, if so, whether that negligence was a legal cause of the loss, injury, or damage to John Smith.

[403.15e] The issues you must decide on John Smith's claims of defect in the hay baler against Mishap Manufacturing

Co., the manufacturer of the hay baler, and Sharp Sales Co., the seller of the hay baler, are whether the hay baler failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer and the hay baler reached Dilbert Driver without substantial change affecting the condition and, if so, whether that failure was a legal cause of the loss, injury, or damage to John Smith.

[403.17] If the greater weight of the evidence does not support one or more of John Smith's claims then your verdict should be for Dilbert Driver, Mishap Manufacturing Co., and Sharp Sales Co.

[403.18a] If, however, the greater weight of the evidence supports one or more of John Smith's claims against one or more of the defendants, then you shall consider the defenses raised by those defendants.

[403.18(a)] On the defense, the issue for you to decide is whether John Smith was himself negligent in driving and, if so, whether that negligence was a contributing legal cause of the injury or damage to John Smith.

[403.19] If the greater weight of the evidence does not support the defenses of Dilbert Driver, Mishap Manufacturing Co., and Sharp Sales Co., and the greater weight of the evidence supports one or more of John Smith's claims, then you should decide and write on the verdict form what percentage of the total negligence or responsibility you apportion to each defendant whose negligence, fault, or responsibility you find was a legal cause of loss, injury, or damage to John Smith.

If, however, the greater weight of the evidence shows that both John Smith and one or more of the defendants were negligent or responsible and that the negligence or responsibility of each contributed as a legal cause of loss, injury, or damage sustained by John Smith, you should decide and write on the verdict form what percentage of the total negligence, fault, or responsibility of all parties to this action you apportion to each

of them.

[501.1b] If your verdict is for Dilbert Driver, Mishap Manufacturing Co., and Sharp Sales Co., you will not consider the matter of damages. But if the greater weight of the evidence supports one or more of John Smith's claims, you should determine and write on the verdict form, in dollars, the total amount of loss, injury, or damage which the greater weight of the evidence shows will fairly and adequately compensate him for his loss, injury, or damage, including any damages that John Smith is reasonably certain to incur or experience in the future. You shall consider the following elements:

[501.2a] Any bodily injury sustained by John Smith and any resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience or loss of capacity for the enjoyment of life experienced in the past or to be experienced in the future. There is no exact standard for measuring such damage. The amount should be fair and just in the light of the evidence.

[501.2b] The reasonable expense of hospitalization and medical care and treatment necessarily or reasonably obtained by John Smith in the past or to be so obtained in the future.

[501.2c] Any earnings lost in the past and any loss of ability to earn money in the future.

[501.2h] Any damage to John Smith's automobile. The measure of such damage is the reasonable cost of repair, if it was practicable to repair the automobile, with due allowance for any difference between its value immediately before the collision and its value after repair.

You shall also take into consideration any loss to John Smith for towing or storage charges and by being deprived of the use of his automobile during the period reasonably required for its repair.

[501.4] In determining the total amount of damages, you

should not make any reduction because of the negligence, fault, or responsibility, if any, of John Smith or Dilbert Driver, Mishap Manufacturing Co., and Sharp Sales Co. The court in entering judgment will make any appropriate reduction(s).

The court will also take into account, in entering judgment against any defendant whom you find to have been negligent or responsible, the percentage of that defendant's negligence or responsibility compared to the total negligence or responsibility of all the parties to this action.

[501.5a] If you find that one or more of the defendants caused a bodily injury, and that the injury resulted in an aggravation of an existing disease or physical defect or activation of a latent disease or physical defect, you should attempt to decide what portion of John Smith's condition resulted from the aggravation or activation. If you can make that determination, then you should award only those damages resulting from the aggravation or activation. However, if you cannot make that determination, or if it cannot be said that the condition would have existed apart from the injury, then you should award damages for the entire condition suffered by John Smith.

[501.6] If the greater weight of the evidence shows that John Smith has been permanently injured, you may consider his life expectancy. The mortality tables received in evidence may be considered in determining how long John Smith may be expected to live. Mortality tables are not binding on you but may be considered together with other evidence in the case bearing on John Smith's health, age, and physical condition, before and after the injury, in determining the probable length of his life.

[501.7] Any amount of damages which you allow for future medical expenses or loss of ability to earn money in the future should be reduced to its present money value and only the present money value of these future economic damages should be included in your verdict.

The present money value of future economic damages is the sum of money needed now which, together with what that sum

will earn in the future, will compensate John Smith for these losses as they are actually experienced in future years.

[601.1] In deciding this case, it is your duty as jurors to answer certain questions I ask you to answer on a special form, called a verdict form. You must come to an agreement about what your answers will be. Your agreed- upon answers to my questions are called your jury verdict.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence and all facts that were admitted or agreed to by the parties.

In reaching your verdict, you must think about and weigh the testimony and any documents, photographs, or other material that has been received in evidence. You may also consider any facts that were admitted or agreed to by the lawyers. Your job is to determine what the facts are. You may use reason and common sense to reach conclusions. You may draw reasonable inferences from the evidence. But you should not guess about things that were not covered here. And, you must always apply the law as I have explained it to you.

[601.2a] Let me speak briefly about witnesses. In evaluating the believability of any witness and the weight you will give the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

[601.2b] Some of the testimony before you was in the form of opinions about certain technical subjects. You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience,

training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.

[601.4] In your deliberations, you will consider and decide three distinct claims. The first is the negligence claim against Dilbert Driver. The second is the negligence claims against Mishap Manufacturing Co. and Sharp Sales Co. The third is the product defect claims against Mishap Manufacturing Co. and Sharp Sales Co. Although these claims have been tried together, each is separate from the others, and each party is entitled to have you separately consider each claim as it affects that party. Therefore, in your deliberations, you should consider the evidence as it relates to each claim separately, as you would had each claim been tried before you separately.

[601.5] That is the law you must follow in deciding this case. The attorneys for the parties will now present their final arguments. When they are through, I will have a few final instructions about your deliberations.

VERDICT

We, the jury, return the following verdict:

1. Was there negligence on the part of defendant Dilbert Driver which was a legal cause of damage to plaintiff, John Smith?

YES NO

2. Did defendants Mishap Manufacturing Co. and Sharp Sales Co. place the hay baler on the market with a defect which was a legal cause of damage to plaintiff, John Smith?

YES NO

If your answers to questions 1 and 2 are both NO, your verdict is for the defendants, and you should not proceed further except to date and sign this verdict form and return it to the

courtroom. If your answer to either question 1 or 2 is YES, answer question 3.

3. Was there negligence on the part of plaintiff, John Smith, which was a legal cause of his damage?

YES NO

4. State the percentage of any responsibility for plaintiff, John Smith's, damages that you apportion to:

Defendant Dilbert Driver (fill in only if you answered YES to question 1)	**%**
Defendants Mishap Manufacturing Co. and Sharp Sales Co. (fill in only if you answered YES to question 2)	**%**
Plaintiff, John Smith (fill in only if you answered YES to question 3)	**%**
	Total must be 100%

Please answer question 5.

5. What is the total amount (100%) of any damages sustained by plaintiff, John Smith, and caused by the incident in question?

Total damages of plaintiff, John Smith $

In determining the total amount of damages, do not make any reduction because of the negligence, if any, of plaintiff, John Smith. If you find plaintiff, John Smith, negligent in any degree, the court, in entering judgment, will reduce Smith's total amount of damages (100%) by the percentage of negligence which you find is chargeable to John Smith.

SO SAY WE ALL, this day of , 20 .

FOREPERSON

NOTE ON USE

For a model itemized verdict form, as contemplated by section 768.77, Florida Statutes, refer to Model Verdict Forms 2(a) and 2(b).

(Adopted March 26, 2015; revised February 27, 2020 (290 So. 3d 840 (Fla. 2020)).)

MODEL INSTRUCTION NO. 8

Automobile collision; comparative negligence; claim and counterclaim; applying section *F.S.* 768.81(6), commonly known as section 9, HB 837

Facts of the hypothetical case:

Polly Palmer and Doris Davis were both injured when their automobiles collided at an intersection. Polly Palmer sued Doris Davis, who denied the allegations of negligence, pleaded in defense that Polly Palmer was negligent and counterclaimed for her own damages. On the counterclaim, Polly Palmer denied that she was negligent and pleaded in defense that Doris Davis was negligent.

The court's instruction:

The committee assumes that the court will give these instructions at the beginning of the case and that these instructions will be given again before final argument. When given at the beginning of the case, 202.1 will be used in lieu of 401.1 and these instructions will be followed by the applicable portions of 202.2 through 202.5. See Model Instruction No. 1 for a full illustration of the instructions to be given at the beginning and end of the case.

[401.1] Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are, however, the same as what I gave you at the beginning and it is these rules of law that you must now follow. When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

[401.2] The claims and defenses in this case are as follows. Polly Palmer claims that Doris Davis was negligent in the operation of the vehicle she was driving which caused her harm.

Doris Davis denies that claim and claims instead that it was Polly Palmer who was negligent in the operation of her vehicle, which caused harm to Doris Davis.

The parties must prove their claims by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

[401.3] "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

[401.4] Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

[401.9] *(Read or paraphrase the applicable statute or refer to the ordinance or regulation admitted in evidence.)* **Violation of this statute is evidence of negligence. It is not, however, conclusive evidence of negligence. If you find that either Doris Davis or Polly Palmer violated this statute, you may consider that fact, together with the other facts and circumstances, in deciding whether she was negligent.**

[401.12(a)] Negligence is a legal cause of loss, injury, or damage if it directly and in natural and continuous sequence produces or contributes substantially to producing such loss, injury, or damage, so that it can reasonably be said that, but for the negligence, the loss, injury, or damage would not have occurred.

[401.12(b)] In order to be regarded as a legal cause of loss, injury, or damage, negligence need not be the only cause. Negligence may be a legal cause of loss, injury, or damage even though it operates in combination with some other cause if the negligence contributes substantially to producing such loss, injury, or damage.

[401.18] The issues you must decide on Polly Palmer's claim against Doris Davis are whether Doris Davis was negligent in the operation of her vehicle, and, if so, whether that negligence was a legal cause of the loss, injury, or damage to Polly Palmer.

[401.21] If the greater weight of the evidence does not support Polly Palmer's claim, your verdict on that claim should be for Doris Davis.

Similarly, the issues for your determination on the claim of Doris Davis against Polly Palmer are whether Polly Palmer was negligent in the operation her vehicle, and, if so, whether such negligence was a legal cause of loss, injury, or damage to Doris Davis.

If the greater weight of the evidence does not support Doris Davis's claim, then your verdict on that claim should be for Polly Palmer.

If the greater weight of the evidence supports the claim of Polly Palmer and shows that the negligence of Doris Davis was a legal cause of loss, injury, or damage to Polly Palmer, but does not support the claim of Doris Davis, your verdict should be for Polly Palmer in the total amount of her damages.

Similarly, if the greater weight of the evidence supports the claim of Doris Davis and shows that the negligence of Polly Palmer was a legal cause of loss, injury, or damage to Doris Davis, but does not support the claim of Polly Palmer, your verdict should be for Doris Davis in the total amount of her damages.

If, however, the greater weight of the evidence shows that both Polly Palmer and Doris Davis were negligent, and that the negligence of each contributed as a legal cause of loss, injury, or damage to each, you should determine what percentage of the total negligence of both parties to this action you apportion to each of them.

[501.15(b)] If your verdict is for Doris Davis on the claim of Polly Palmer or if you have assigned greater than 50% of any

negligence to Polly Palmer, you will not consider the matter of Polly Palmer's damages. But if the greater weight of the evidence supports Polly Palmer's claim, and if you have assigned 50% or less of any negligence to Polly Palmer, you should determine and write on the verdict form, in dollars, the total amount of loss, injury, or, damage which the greater weight of the evidence shows will fairly and adequately compensate her for her loss, injury, or damage, including any damages that Polly Palmer is reasonably certain to incur or experience in the future. You shall consider the following elements:

[501.2(a)] Any bodily injury sustained, any resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience or loss of capacity for the enjoyment of life experienced in the past or to be experienced in the future. There is no exact standard for measuring such damage. The amount should be fair and just in the light of the evidence.

[501.2(b)] The reasonable expense of hospitalization and medical care and treatment necessarily or reasonably obtained in the past or to be so obtained in the future.

[501.2(c)] Any earnings lost in the past, and any loss of ability to earn money in the future.

Similarly, if your verdict is for Polly Palmer on the claim of Doris Davis or if you have assigned greater than 50% of any negligence to Doris Davis, you will not consider the matter of Doris Davis's damages. But if the greater weight of the evidence supports Doris Davis's claim, and if you have assigned 50% or less of any negligence to Doris Davis, you should determine and write on the verdict form, in dollars, the total amount of loss, injury, or, damage which the greater weight of the evidence shows will fairly and adequately compensate her for her loss, injury, or damage, including any damages that Doris Davis is reasonably certain to incur or experience in the future. You shall consider the following elements:

[501.2(a)] Any bodily injury sustained, any resulting pain

and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience or loss of capacity for the enjoyment of life experienced in the past or to be experienced in the future. There is no exact standard for measuring such damage. The amount should be fair and just in the light of the evidence.

[501.2(b)] The reasonable expense of hospitalization and medical care and treatment necessarily or reasonably obtained in the past or to be so obtained in the future.

[501.2(c)] Any earnings lost in the past, and any loss of ability to earn money in the future.

[501.2(h)] Any damage to Polly Palmer's or Doris Davis's automobile. The measure of such damage is the reasonable cost of repair, if it was practicable to repair the automobile, with due allowance for any difference between its value immediately before the collision and its value after repair. You shall also take into consideration any loss for towing or storage charges and by being deprived of the use of her automobile during the period reasonably required for its repair.

[501.4] In determining the total amount of damages, you should not make any reduction because of the negligence, if any, of Polly Palmer and/or Doris Davis. The court in entering judgment will make any appropriate reduction(s).

[501.6] If the greater weight of the evidence shows that either Polly Palmer and/or Doris Davis have been permanently injured, you may consider her life expectancy. The mortality tables received in evidence may be considered in determining how long Polly Palmer and/or Doris Davis may be expected to live. Mortality tables are not binding on you but may be considered together with other evidence in the case bearing on Polly Palmer' and/or Doris Davis's health, age and physical condition, before and after the injury, in determining the probable length of her life.

[501.7] Any amount of damages which you allow for future

medical expenses or loss of ability to earn money in the future should be reduced to its present money value, and only the present money value of these future economic damages should be included in your verdict. The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate Polly Palmer and/or Doris Davis for these losses as they are actually experienced in future years.

[601.1] In deciding this case, it is your duty as jurors to answer certain questions I ask you to answer on a special form, called a verdict form. You must come to an agreement about what your answers will be. Your agreed-upon answers to my questions are called your jury verdict.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence and all fact that were admitted or agreed to by the parties.

In reaching your verdict, you must think about and weigh the testimony and any documents, photographs, or other material that has been received in evidence. You may also consider any facts that were admitted or agreed to by the lawyers. Your job is to determine what the facts are. You may use reason and common sense to reach conclusions. You may draw reasonable inferences from the evidence. But you should not guess about things that were not covered here. And, you must always apply the law as I have explained it to you.

[601.2(a)] Let me speak briefly about witnesses. In evaluating the believability of any witness and the weight you will give the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the

light of your own experience and common sense.

[601.2(b)] Some of the testimony before you was in the form of opinions about certain technical subjects.

You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.

[601.5] That is the law you must follow in deciding this case. The attorneys for the parties will now present their final arguments. When they are through, I will have a few final instructions about your deliberations.

VERDICT

We, the jury, return the following verdict:

1. Was there negligence on the part of Doris Davis which was a legal cause of loss, injury, or damage to Polly Palmer?

YES NO

2. Was there negligence on the part of Polly Palmer which was a legal cause of her loss, injury, or damage?

YES NO

If your answers to questions 1 and 2 are both NO, your verdict on each claim is for the defendant, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to either question 1 or 2 is YES, please answer question 3.

3. State the percentage of any negligence, which was a legal cause of loss, injury, or damage to Polly Palmer that you charge to:

Doris Davis _____%

Polly Palmer _____%

Total must be 100%

(Note: For any response of "NO" to question 1 or 2, place a zero as to that person in answering question 3.)

Your answers to question 3 must total 100%, and should include a zero for any party you found not negligent in answer to questions 1 and 2.

Please answer questions 4 and 5 only if your answer to question 3 assigns 50% or less of any negligence to Polly Palmer.

Please answer questions 6 and 7 only if your answer to question 3 assigns 50% or less of any negligence to Doris Davis.

In determining the amount of damages, do not make any reduction because of the negligence, if any, of Polly Palmer. If you find that Polly Palmer was negligent, the court in entering judgment will make an appropriate reduction in the damages awarded.

Similarly, in determining the amount of damages, do not make any reduction because of the negligence, if any, of Doris Davis. If you find that Doris Davis was negligent, the court in entering judgment will make an appropriate reduction in the damages awarded.

DAMAGES OF POLLY PALMER

4. What is the total amount of Polly Palmer's damages for lost earnings in the past, loss of earning capacity in the future, medical expenses incurred in the past, medical expenses to be incurred in the future?

$

5. What is the total amount of Polly Palmer's

damages for pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, aggravation of a disease or physical defect, and loss of capacity for the enjoyment of life sustained in the past and to be sustained in the future?

$

TOTAL DAMAGES OF POLLY PALMER (add lines 4 and 5) **$**

DAMAGES OF DORIS DAVIS

6. What is the total amount of Doris Davis's damages for lost earnings in the past, loss of earning capacity in the future, medical expenses incurred in the past, medical expenses to be incurred in the future? **$**

7. What is the total amount of Doris Davis's damages for pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, aggravation of a disease or physical defect and loss of capacity for the enjoyment of life sustained in the past and to be sustained in the future?

$

TOTAL DAMAGES OF DORIS DAVIS (add lines 6 and 7) **$**

SO SAY WE ALL, this _____ day of _____, 2_____.

FOREPERSON

(Adopted December 4, 2024.)

MODEL INSTRUCTION NO. 9

Strict product liability and negligence case; with aggravation of pre-existing injury; and comparative negligence defense; applying *F.S.* 768.81(6), commonly known as section 9, HB 837

Facts of the hypothetical case:

Louis Lee claims he was injured when a hay baler being driven on the highway by David Dunn struck his car. The hay baler suddenly swerved across the road into the path of Louis Lee, who was driving in the opposite direction. At the time, Louis Lee was looking at a group of deer in a field near the road, and therefore took no evasive action to avoid the collision. An examination of the hay baler revealed that a bolt that was part of the steering mechanism was designed in such a way that it could not sustain the speed of highway driving, would loosen over time, weaken, and eventually break. At the time of the accident, David Dunn was operating the hay baler at an unsafe speed when the bolt suddenly broke, making it impossible for David Dunn to steer the hay baler, which crashed into the car being driven by Louis Lee and injured him as a result. Louis Lee sued David Dunn, alleging that his operation of the hay baler had been negligent. Louis Lee also sued the manufacturer of the hay baler, Meadow Manufacturing Co., and the retailer seller, Urgent Sales Co., alleging that the hay baler had been defectively designed. The defendants denied liability, and affirmatively alleged that Louis Lee had been comparatively negligent. The defendants also alleged that some of Louis Lee's injuries pre-existed the collision with the hay baler and Louis Lee alleged that his pre-existing condition was aggravated by the collision with the hay baler.

The court's instruction:

The committee assumes that the court will give these instructions as part of the instruction at the beginning of the case and that these instructions will be given again before Final Argument. When given at the beginning of the case, 202.1 will be used in lieu of 403.1 and these instructions will be followed by the applicable portions of 202.2 through

202.5. See Model Instruction No. 1 for a full illustration of the instructions to be given at the beginning and end of the case.

[403.1] Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are the same as what I gave you at the beginning and it is these rules of law that you must now follow. When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

[403.2] The claims and defenses in this case are as follows. Louis Lee claims that David Dunn was negligent in operation of the hay baler he was driving which caused him harm. Louis Lee also claims that the hay baler designed by Meadow Manufacturing Co. and sold by Urgent Sales Co. was defective and that the defect in the hay baler caused him harm.

All three defendants deny those claims and also claim that Louis Lee was himself negligent in the operation of his vehicle, which caused his harm.

The parties must prove their claims by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

[403.3] "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

[401.4] Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

[403.7b] A product is defective because of a design defect if it is in a condition unreasonably dangerous to the user or a person in the vicinity of the product and the product is expected to and does reach the user without substantial change affecting that condition.

A product is unreasonably dangerous because of its design if the product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the manufacturer.

In deciding whether the hay baler was defective because of a design defect, you shall consider the state-of-the-art of scientific and technical knowledge and other circumstances that existed at the time of the hay baler's manufacture, not at the time of the loss, injury, or damage.

[401.12a and 403.12a] Negligence or a defect in a product is a legal cause of loss, injury, or damage if it directly and in natural and continuous sequence produces or contributes substantially to producing such loss, injury, or damage, so that it can reasonably be said that, but for the negligence or defect, the loss, injury, or damage would not have occurred.

[401.12b and 403.12b] In order to be regarded as a legal cause of loss, injury, or damage, negligence or a defect in a product need not be the only cause. Negligence or a defect in a product may be a legal cause of loss, injury, or damage even though it operates in combination with the act of another or some other cause if the negligence or defect contributes substantially to producing such loss, injury, or damage.

[401.18a] The issues you must decide on Louis Lee's claim against David Dunn are whether David Dunn was negligent in his operation of the hay baler, and, if so, whether that negligence was a legal cause of the loss, injury, or damage to Louis Lee.

[403.15e] The issues you must decide on Louis Lee's claims of defect in the hay baler against Meadow Manufacturing Co., the manufacturer of the hay baler, and Urgent Sales Co., the seller of

the hay baler, are whether the hay baler failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer and the hay baler reached David Dunn without substantial change affecting the condition and, if so, whether that failure was a legal cause of the loss, injury, or damage to Louis Lee.

[403.17] If the greater weight of the evidence does not support one or more of Louis Lee's claims then your verdict should be for David Dunn, Meadow Manufacturing Co., and Urgent Sales Co.

[403.18a] If, however, the greater weight of the evidence supports one or more of Louis Lee's claims against one or more of the defendants, then you shall consider the defenses raised by those defendants.

[403.18(a)] On the defense, the issue for you to decide is whether Louis Lee was himself negligent in driving and, if so, whether that negligence was a contributing legal cause of the injury or damage to Louis Lee.

[403.19] If the greater weight of the evidence does not support the defenses of David Dunn, Meadow Manufacturing Co., and Urgent Sales Co., and the greater weight of the evidence supports one or more of Louis Lee's claims, then you should decide and write on the verdict form what percentage of the total negligence or responsibility you apportion to each defendant whose negligence, fault, or responsibility you find was a legal cause of loss, injury, or damage to Louis Lee.

If, however, the greater weight of the evidence shows that both Louis Lee and one or more of the defendants were negligent or responsible and that the negligence or responsibility of each contributed as a legal cause of loss, injury, or damage sustained by Louis Lee, you should decide and write on the verdict form what percentage of the total negligence, fault, or responsibility of all parties to this action you apportion to each of them.

[501.15b] If your verdict is for David Dunn or if you have assigned greater than 50% of any negligence to Louis Lee, you will not consider the matter of damages. But if the greater weight of the evidence supports Louis Lee's claim, and if you have assigned 50% or less of any negligence to Louis Lee, you should determine and write on the verdict form, in dollars, the total amount of loss, injury, or damage which the greater weight of the evidence shows will fairly and adequately compensate him for his loss, injury, or damage, including any damages that Louis Lee is reasonably certain to incur or experience in the future. You shall consider the following elements:

[501.2a] Any bodily injury sustained by Louis Lee and any resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience or loss of capacity for the enjoyment of life experienced in the past or to be experienced in the future. There is no exact standard for measuring such damage. The amount should be fair and just in the light of the evidence.

[501.2b] The reasonable expense of hospitalization and medical care and treatment necessarily or reasonably obtained by Louis Lee in the past or to be so obtained in the future.

[501.2c] Any earnings lost in the past and any loss of ability to earn money in the future.

[501.2h] Any damage to Louis Lee's automobile. The measure of such damage is the reasonable cost of repair, if it was practicable to repair the automobile, with due allowance for any difference between its value immediately before the collision and its value after repair.

You shall also take into consideration any loss to Louis Lee for towing or storage charges and by being deprived of the use of his automobile during the period reasonably required for its repair.

[501.4] In determining the total amount of damages, you should not make any reduction because of the negligence, fault,

or responsibility, if any, of Louis Lee or David Dunn, Meadow Manufacturing Co., and Urgent Sales Co. The court in entering judgment will make any appropriate reduction(s).

The court will also take into account, in entering judgment against any defendant whom you find to have been negligent or responsible, the percentage of that defendant's negligence or responsibility compared to the total negligence or responsibility of all the parties to this action.

[501.5a] If you find that one or more of the defendants caused a bodily injury, and that the injury resulted in an aggravation of an existing disease or physical defect or activation of a latent disease or physical defect, you should attempt to decide what portion of Louis Lee's condition resulted from the aggravation or activation. If you can make that determination, then you should award only those damages resulting from the aggravation or activation. However, if you cannot make that determination, or if it cannot be said that the condition would have existed apart from the injury, then you should award damages for the entire condition suffered by Louis Lee.

[501.6] If the greater weight of the evidence shows that Louis Lee has been permanently injured, you may consider his life expectancy. The mortality tables received in evidence may be considered in determining how long Louis Lee may be expected to live. Mortality tables are not binding on you but may be considered together with other evidence in the case bearing on Louis Lee's health, age, and physical condition, before and after the injury, in determining the probable length of his life.

[501.7] Any amount of damages which you allow for future medical expenses or loss of ability to earn money in the future should be reduced to its present money value and only the present money value of these future economic damages should be included in your verdict.

The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate Louis Lee for these losses

as they are actually experienced in future years.

[601.1] In deciding this case, it is your duty as jurors to answer certain questions I ask you to answer on a special form, called a verdict form. You must come to an agreement about what your answers will be. Your agreed- upon answers to my questions are called your jury verdict.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence and all facts that were admitted or agreed to by the parties.

In reaching your verdict, you must think about and weigh the testimony and any documents, photographs, or other material that has been received in evidence. You may also consider any facts that were admitted or agreed to by the lawyers. Your job is to determine what the facts are. You may use reason and common sense to reach conclusions. You may draw reasonable inferences from the evidence. But you should not guess about things that were not covered here. And, you must always apply the law as I have explained it to you.

[601.2a] Let me speak briefly about witnesses. In evaluating the believability of any witness and the weight you will give the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

[601.2b] Some of the testimony before you was in the form of opinions about certain technical subjects. You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the

witness for the opinion expressed, and all the other evidence in the case.

[601.4] In your deliberations, you will consider and decide three distinct claims. The first is the negligence claim against David Dunn. The second is the negligence claims against Meadow Manufacturing Co. and Urgent Sales Co. The third is the product defect claims against Meadow Manufacturing Co. and Urgent Sales Co. Although these claims have been tried together, each is separate from the others, and each party is entitled to have you separately consider each claim as it affects that party. Therefore, in your deliberations, you should consider the evidence as it relates to each claim separately, as you would had each claim been tried before you separately.

[601.5] That is the law you must follow in deciding this case. The attorneys for the parties will now present their final arguments. When they are through, I will have a few final instructions about your deliberations.

VERDICT

We, the jury, return the following verdict:

1. Was there negligence on the part of defendant David Dunn which was a legal cause of damage to plaintiff, Louis Lee?

YES NO

2. Did defendants Meadow Manufacturing Co. and Urgent Sales Co. place the hay baler on the market with a defect which was a legal cause of damage to plaintiff, Louis Lee?

YES NO

If your answers to questions 1 and 2 are both NO, your verdict is for the defendants, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to either question 1 or 2 is YES, answer question 3.

3. Was there negligence on the part of plaintiff, Louis Lee, which was a legal cause of his damage?

YES NO

4. State the percentage of any responsibility for plaintiff, Louis Lee's, damages that you apportion to:

Defendant David Dunn (fill in only if you answered YES to question 1)	**%**
Defendants Meadow Manufacturing Co. and Urgent Sales Co. (fill in only if you answered YES to question 2)	**%**
Plaintiff, Louis Lee (fill in only if you answered YES to question 3)	**%**
	Total must be 100%

Please answer question 5 only if your answer to question 4 assigns 50% or less of any negligence to plaintiff, Louis Lee.

5. What is the total amount (100%) of any damages sustained by plaintiff, Louis Lee, and caused by the incident in question?

Total damages of plaintiff, Louis Lee $

In determining the total amount of damages, do not make any reduction because of the negligence, if any, of plaintiff, Louis Lee. If you find plaintiff, Louis Lee, negligent in any degree, the court, in entering judgment, will reduce Smith's total amount of damages (100%) by the percentage of negligence which you find is chargeable to Louis Lee.

SO SAY WE ALL, this day of , 20 .

FOREPERSON

NOTE ON USE

For a model itemized verdict form, as contemplated by *F.S.* 768.77, refer to Model Verdict Forms 2(a) and 2(b).

(Adopted December 4, 2024.)

APPENDIX B
VERDICT FORMS

The following Model Verdict forms are included as examples of how issues can be submitted to the jury. They may be changed on a case-by-case basis depending on the rulings and facts in a particular case.

Historically, a general verdict on compensatory damages was considered appropriate, and that is the only form of verdict provided in the Florida Rules of Civil Procedure. See *Fla.R.Civ.P. Form* 1.986(a). However, with the advent of special verdicts and bifurcation of issues, it is now common for cases to be submitted to the jury with a special verdict. The committee has therefore drafted the following special verdict forms. None of the following are complete verdicts and in some instances more than one of these forms might apply.

Form of verdict itemizing damages introductory comment

1. Model form of verdict for general negligence with apportionment of fault

1.5 Model Form Of Verdict For General Negligence With Apportionment Of Fault — Cases Applying Section 9, Chapter 2023-15

2. Damages — Introductory Comment

2a. Model form of verdict for personal injury damages

2b. Model form of verdict for wrongful death damages

3a. Model form of verdict for bifurcated punitive damage cases

3b. Model form of verdict for non-bifurcated punitive damage cases

4. Model form of verdict for statute of limitations defense in a medical negligence case

5a. Model form of verdict for emergency medical treatment; no issue as to the applicability of *F.S.* 768.13(2)(b)

5b. Model form of verdict for emergency medical treatment; issue as to the applicability of *F.S.* 768.13(2)(b); no issue as to comparative negligence

5c. Model form of verdict for emergency medical treatment; issues as to both applicability of *F.S.* 768.13(2)(b) and comparative negligence

6. Model form of verdict for personal injury protection insurance benefits (PIP) (medical benefits only)

FORM 1. MODEL FORM OF VERDICT FOR GENERAL NEGLIGENCE WITH APPORTIONMENT OF FAULT

VERDICT

We, the jury, return the following verdict:

1. Was there negligence on the part of (defendant) **which was a legal cause of [loss] [injury] [or] [damage] to** (claimant) (decedent)**?**

YES NO

If your answer to question 1 is NO, your verdict is for defendant, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES, please answer question 2.

2. Was there negligence on the part of (claimant) (decedent) **which was a legal cause of [his] [her] [loss] [injury] [or] [damage]?**

YES NO

Please answer question 3.

3. Was there [negligence] [(specify other type of conduct)**] on the part of** (identify additional person or entity) **which was a contributing legal cause of [loss] [injury] [or] [damage] to** (claimant) (decedent)**?**

YES NO

This question should be repeated, and the question numbers adjusted accordingly, for each additional person or entity as to which the evidence is sufficient to permit the jury to apportion fault.

Please answer question 4.

4. State the percentage of any negligence [or fault], which was a legal cause of [loss] [injury] [or] [damage] to (claimant)

(decedent) **that you apportion to:**

(defendant)	_____**%**
(identify additional person or entity)	_____**%**
(claimant)	_____**%**

Total must be 100%

(Note: For any response of "NO" to question 1, 2, or 3, place a zero as to that person [or entity] in answering question 4.)

If the evidence is sufficient to permit the jury to apportion fault to more than one additional person or entity, a separate line should be added for each such additional person or entity.

In determining the amount of damages, do not make any reduction because of the negligence, if any, of (claimant) (decedent) **or the [negligence] [**(specify other type of conduct)**], if any, of** (identify additional person(s) or entit(y)(ies))**. If you find that** (claimant) (decedent) **or** (identify additional person(s) or entit(y)(ies)) **[was] [were] negligent [or at fault], the court in entering judgment will make an appropriate reduction in the damages awarded.**

Please answer question 5.

Select the appropriate damage questions from forms 2(a) or (b).

SO SAY WE ALL, this _____ day of _____, 2_____.

FOREPERSON

NOTE ON USE FOR FORM 1

The verdict form should list all persons or entities among whom the jury may apportion fault. This will permit the trial court to allocate damages, determine setoffs, if appropriate, and facilitate appellate review.

(Revised February 1, 2018.)

FORM 1.5 MODEL FORM OF VERDICT FOR GENERAL NEGLIGENCE WITH APPORTIONMENT OF FAULT — CASES APPLYING SECTION 9, CHAPTER 2023-15

VERDICT

We, the jury, return the following verdict:

1. Was there negligence on the part of (defendant) **which was a legal cause of [loss] [injury] [or] [damage] to** (claimant) (decedent)**?**

YES **NO**

If your answer to question 1 is NO, your verdict is for defendant, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES, please answer question 2.

2. Was there negligence on the part of (claimant) (decedent) **which was a legal cause of [his] [her] [loss] [injury] [or] [damage]?**

YES **NO**

Please answer question 3.

3. Was there [negligence] [(specify other type of conduct)**] on the part of** (identify additional person or entity) **which was a contributing legal cause of [loss] [injury] [or] [damage] to** (claimant) (decedent)**?**

YES **NO**

This question should be repeated, and the question numbers adjusted accordingly, for each additional person or entity as to which the evidence is sufficient to permit the jury to apportion fault.

Please answer question 4.

4. State the percentage of any [negligence] [or fault],

which was a legal cause of [loss] [injury] [or] [damage] to (claimant) (decedent) **that you charge to:**

(defendant)	%
(identify additional person or entity)	%
(claimant)	%

Total must be 100%

(Note: For any response of "NO" to question 1, 2, or 3, place a zero as to that person [or entity] in answering question 4.)

If the evidence is sufficient to permit the jury to apportion fault to more than one additional person or entity, a separate line should be added for each such additional person or entity.

If your answer to question 4 assigns greater than 50% of any [negligence] [fault] to (claimant) (decedent)**, then your verdict is for the defendant, and you should not proceed further except to date and sign this verdict form and return it to the courtroom.**

If your answer to question 4 assigns 50% or less of any [negligence] [fault] to (claimant) (decedent)**, please answer question 5.**

In determining the amount of damages, do not make any reduction because of the [negligence] [fault], if any, of (claimant) (decedent) **or the [negligence] [fault] [**(specify other type of conduct)**], if any, of** (identify additional person(s) or entit(y)(ies))**. If you find that** (claimant) (decedent) **or** (identify additional person(s) or entit(y)(ies)) **[was] [were] [negligent] [or at fault], the court in entering judgment will make an appropriate reduction in the damages awarded.**

Select the appropriate damage questions from forms 2(a) or (b).

SO SAY WE ALL, this day of , 2 .

FOREPERSON

NOTES ON USE FOR FORM 1.5

1. The verdict form should list all persons or entities among whom the jury may apportion fault. This will permit the trial court to allocate damages, determine setoffs, if appropriate, and facilitate appellate review.

2. This verdict form should be used in cases to which section 9, Chapter 2023-15, Laws of Florida, applies. This law, also commonly known as section 9, HB 837, is codified at *F.S.* 768.81(6).

3. Section 9, Chapter 2023-15, Laws of Florida ("HB 837") changed Florida civil tort actions from a pure comparative fault to modified comparative fault where the plaintiff will be barred from recovery if found to be more than 50% at fault. *Hoffman v. Jones*, 280 So. 2d 431 (1973) (Florida Supreme Court adopted the doctrine of comparative fault and replaced the doctrine of contributory negligence; a plaintiff's percentage of fault reduced his damages in proportion to his fault). There are a number of cases in which the Florida Supreme Court approved instructions telling the jury that a finding of contributory negligence barred a plaintiff's recovery. See *Medina v. McAllister*, 202 So. 2d 755, 759 (Fla. 1967); *Martin v. Stone*, 51 So. 2d 33, 35 (Fla. 1951); *Boston v. Shelton*, 13 So. 2d 453, 455 (Fla. 1943); *Turner v. Seegar*, 10 So. 2d 320, 321 (Fla. 1942); *Greiper v. Coburn*, 190 So. 902, 904 (Fla. 1939).

(Adopted June 19, 2024.)

2. DAMAGES

INTRODUCTORY COMMENT

In 1986, the legislature adopted *F.S.* 768.77 which required separate determinations by the trier of fact of economic damages, noneconomic damages, and punitive damages, and further required designation of those damages which occurred prior to the verdict, as well as those amounts intended to compensate for losses to be incurred in the future. A further requirement existed for future damages to be itemized both before and after reduction to present value and for a determination of the period of years over which future damages are intended to provide compensation. *F.S.* 768.78, adopted at the same time, provided for alternative methods of payment of damage awards when "the trier of fact" makes an award to compensate for future economic damages in excess of $250,000.

Effective October 1, 1999, the legislature substantially amended those provisions. *F.S.* 768.77 was amended to delete the requirements that required designation of past or future damages, itemization of future damages both before and after reduction to present value, and a determination of the period of years over which future damages are intended to provide compensation. Under the 1999 amendment to *F.S.* 768.77(1), damages for all non-medical negligence cases only have to be segregated into economic losses, noneconomic losses, and punitive damages. *F.S.* 768.77(2), however, requires further itemization for medical negligence cases. At the same time, *F.S.* 768.78 was amended to substitute the words "the Court determines" in place of the words "trier of fact," but additional questions on the verdict form may be required to provide the court with the findings of fact necessary for the statute to be utilized.

The legislature also enacted a provision in 1999 stating that if the statutes are determined to be encroaching upon the authority of the Florida Supreme Court, the legislature requested a rule change under the provisions of Art. V, §2, of the Florida Constitution consistent with the statutes. No court opinion has expressly determined whether *F.S.* 768.77 or 768.78 is constitutional under the provisions of Art. II, §3, of the Florida Constitution.

The committee drafted Model Verdict Forms 2(a) and 2(b) to comply with the minimum requirements of the 1999 amendments to *F.S.* 768.77(1). In some cases additional questions may be required to preserve issues for appeal or for other reasons. The committee takes no position on how a court would, if requested, comply with *F.S.* 768.78 in cases where a jury determines that the future economic damages exceed $250,000.

Depending on the evidence presented, certain elements of damages may be considered economic, noneconomic, or a mixture of both, thus requiring appropriate modification of the verdict form.

For verdict requirements in medical negligence claims, see *F.S.* 768.77(2) and 768.78(2)(a).

FORM 2(a). MODEL FORM OF VERDICT FOR PERSONAL INJURY DAMAGES

These or similar damage questions should appear in the verdict form after findings on liability issues.

[In determining the amount of damages, do not make any reduction because of the negligence, if any, of (name)**. If you find that** (name) **was to any extent negligent, the court in entering judgment will make an appropriate reduction in the damages awarded.]**

Please answer question(s) * .

*** . What is the total amount of** (claimant's) **damages for lost earnings in the past, loss of earning capacity in the future, medical expenses incurred in the past, medical expenses to be incurred in the future, and** (list any other economic damages)**?** $

*** . What is the total amount of** (claimant's) **damages for pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, aggravation of a disease or physical defect** (list any other noneconomic damages) **and loss of capacity for the enjoyment of life sustained in the past and to be sustained in the future?** $

TOTAL DAMAGES OF (claimant) **(add lines 1 and 2)** $ _____

*** . What is the total amount of damage sustained by** (spouse) **in loss of [his wife's] [her husband's]:**

[a.] comfort, society, and attention? $

[b.] services? $

TOTAL DAMAGES OF (spouse) **(add lines *a and *b)** $ _____

*Insert appropriate numbers.

FORM 2(b). MODEL FORM OF VERDICT FOR WRONGFUL DEATH DAMAGES

These or similar damage questions should appear in the verdict form after findings on liability issues.

[In determining the amount of damages, do not make any reduction because of the negligence, if any, of (name)**. If you find that** (name) **was to any extent negligent, the court in entering judgment will make an appropriate reduction in the damages awarded.]**

Please answer questions * .

DAMAGES OF THE ESTATE

*** . What is the total amount of any damages sustained by the estate for [any earnings of the decedent lost from the date of injury to the death not including any amount of support lost by a survivor in that period] [,] [the amount of any medical or funeral expenses resulting from** (decedent's) **injury and death charged to the estate or paid by someone other than a survivor] [,] [and] [loss of net accumulations] [,] [**(list other damages sustained by estate)**]?** $

DAMAGES OF (surviving spouse)

***a. What is the amount of any damages sustained by** (surviving spouse) **for the [loss of the** (decedent's) **support] [and] [services] [, and] [medical or funeral expenses] resulting from** (decedent's) **injury and death paid by** (surviving spouse)**]?** $

***b. What is the total amount of damages sustained by** (surviving spouse) **for the loss of [his wife's] [her husband's] companionship and protection and for [his] [her] pain and suffering as a result of** (decedent's) **injury and death?** $

TOTAL DAMAGES OF (surviving spouse)
(add lines *a and *b) $ ___

*Insert appropriate numbers.

DAMAGES OF (surviving child)

***a. What is the total amount of damages sustained by** (surviving child) **for the [loss of the** (decedent's) **support] [and] [services] [, and] [medical or funeral expenses resulting from** (decedent's) **death paid by** (surviving child)**]?** $

***b. What is the total amount of damages sustained by** (surviving child) **for the loss of parental companionship, instruction and guidance and** (surviving child's) **pain and suffering as a result of** (decedent's) **injury and death?** $

TOTAL DAMAGES OF (surviving child)
(add lines *a and *b) $ _____

DAMAGES OF (surviving mother)

*** . What is the total amount of damages sustained by** (surviving mother) **for her [pain and suffering as a result of the injury and death of** (minor child)**] [and] [medical or funeral expenses resulting from** (decedent's) **injury and death paid by** (surviving mother)**]?**

TOTAL DAMAGES OF (surviving mother) $ _____

DAMAGES OF (surviving father)

*** . What is the total amount of damages sustained by** (surviving father) **for his [pain and suffering as a result of the injury and death of** (minor child)**] [and] [medical or funeral expenses**

resulting from (decedent's) **injury and death paid by** (surviving father)**]?**

TOTAL DAMAGES OF (surviving father) $ _____

*Insert appropriate numbers

NOTE ON USE FOR FORM 2(b)

The selection of applicable portions of this form depends upon determination of the survivors under the Wrongful Death Act, *F.S.* 768.16–768.26.

(Revised January 23, 2020.)

FORM 3(a). MODEL FORM OF VERDICT FOR BIFURCATED PUNITIVE DAMAGE CASES

Verdict form 3(a) should be used in the first stage of the bifurcated trial prescribed by W.R. Grace & Co. v. Waters, 638 So. 2d 502 (Fla. 1994). Verdict form 3(b) is used only if the jury determined in the first stage that punitive damages are warranted, and after the jury has received any additional evidence relevant to the amount of punitive damages in the second stage and has received the appropriate second stage instructions.

(1). Punitive Damage Liability — Stage One Determination:

Under the circumstances of this case, state whether you find by clear and convincing evidence that punitive damages are warranted against:

(defendant) **Yes** **No**

(defendant) **Yes** **No**

Note: List only the defendant(s) whose conduct the court has determined may warrant punitive damages. It may be necessary to modify this verdict form where punitive damages based on either direct or vicarious liability are at issue under PD 1a(3) or (4).

(2). Amount of Punitive Damages — Stage Two Determination:

a. Causes of action arising prior to October 1, 1999:

What is the total amount of punitive damages, if any, which you find, by the greater weight of the evidence, should be assessed against defendant[s]?

(defendant) **$**

(defendant) **$**

If you elect not to assess punitive damages against a defendant, you should enter a zero (0) as the amount of damages.

Note: List only the defendant(s) against whom the jury has determined, in the first stage of the bifurcated punitive damages trial, that punitive damages are warranted.

b. Causes of action arising on or after October 1, 1999:

What is the total amount of punitive damages, if any, which you find, by the greater weight of the evidence, should be assessed against defendant[s]?

(defendant) **$**

(defendant) **$**

Note: List only the defendant(s) against whom the jury has determined, in the first stage of the bifurcated punitive damages trial, that punitive damages are warranted.

If you elect not to assess punitive damages against a defendant, you should enter a zero (0) as the amount of damages, and sign and date the verdict form.

[If you have elected not to assess punitive damages against (defendant) **then you should skip the remaining questions and sign and date the verdict form. If, however, you have elected to assess punitive damages against** (defendant)**, the law requires you to answer the following questions:]**

[If you have elected not to assess punitive damages against any defendant then you should skip the remaining questions and sign and date the verdict form. If, however, you have elected to assess punitive damages against some but not all of the defendants, you should enter (0) as the amount of damages for any defendant for whom you have elected not to assess punitive damages. You also must answer the following questions:]

[At the time of [loss] [injury] [or] [damage] to (claimant)**, did [**(defendant)**] [the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the** (defendant)**] have a specific intent to harm** (claimant) **and did the**

conduct of [defendant] [the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant] in fact harm (claimant)**]?**

(defendant) **Yes** **No**

[(the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant)**]?**

Yes **No**

[Was the wrongful conduct of [(defendant)**] [the managing agent, director, officer or other person responsible for making policy decisions on behalf of the defendant] motivated solely by unreasonable financial gain and was the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, actually known by [**(defendant)**] [the managing agent, director, officer or other person responsible for making policy decisions on behalf of the defendant]?**

(defendant) **Yes** **No**

[(the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant)**]?**

Yes **No**

NOTE ON USE FOR FORM 3(a)

In punitive damages cases, the jury is required to apply a clear and convincing standard to determine liability and a greater weight of the evidence standard to determine the amount of damages. In order to minimize jury confusion, the relevant burden of proof is specified for these questions. The committee does not recommend that the burden of proof be stated on the verdict form in other types of cases not involving this unique situation.

FORM 3(b). MODEL FORM OF VERDICT FOR NON-BIFURCATED PUNITIVE DAMAGE CASES

(1). Causes of action arising prior to October 1, 1999:

Under the circumstances of this case, state whether you find by clear and convincing evidence that punitive damages are warranted against:

(defendant) **Yes** **No**

(defendant) **Yes** **No**

Note: List only the defendant(s) whose conduct the court has determined may warrant punitive damages. It may be necessary to modify this verdict form where punitive damages based on either direct or vicarious liability are at issue.

As to each defendant for whom you answered "yes," what is the total amount of punitive damages, if any, which you find, by the greater weight of the evidence, should be assessed against that defendant?

(defendant) **$**

(defendant) **$**

If you elect not to assess punitive damages against a defendant, you should enter a zero (0) as the amount of damages.

(2). Causes of action arising on or after October 1, 1999:

Under the circumstances of this case, state whether you find by clear and convincing evidence that punitive damages are warranted against:

(defendant) **Yes** **No**

(defendant) **Yes** **No**

Note: List only the defendant(s) whose conduct the court has determined may warrant punitive damages. It may be necessary to modify this verdict form where punitive damages based on either direct or vicarious liability are at issue.

If you elect not to assess punitive damages against the defendant, you should enter a zero (0) as the amount of damages. If you elect not to assess damages against the defendant, then you should skip the remaining questions and sign and date the verdict form.

[If you have elected not to assess punitive damages against (defendant) **then you should skip the remaining questions and sign and date the verdict form. If, however, you have elected to assess punitive damages against** (defendant)**, the law requires you to answer the following questions:]**

[If you have elected not to assess punitive damages against any defendant then you should skip the remaining questions and sign and date the verdict form. If, however, you have elected to assess punitive damages against some but not all of the defendants, you should enter (0) as the amount of damages for any defendant for whom you have elected not to assess punitive damages. You also must answer the following questions:]

At the time of [loss] [injury] [or] [damage] to (claimant)**, did [**(defendant)**] [the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant] have a specific intent to harm** (claimant) **and did the conduct of [**(defendant)**] [the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant] in fact harm** (claimant)**?**

(defendant) **Yes** **No**

[(the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant)**]**

Yes **No**

[Was the wrongful conduct of [(defendant)**] [the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant] motivated solely by unreasonable financial gain and was the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, actually known by [**(defendant)**] [the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant]?**

(defendant) **Yes** **No**

[(the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant)**]**

Yes **No**

NOTE ON USE FOR FORM 3(b)

In punitive damages cases, the jury is required to apply a clear and convincing standard to determine liability and a greater weight of the evidence standard to determine the amount of damages. In order to minimize jury confusion, the relevant burden of proof is specified for these questions. The committee does not recommend that the burden of proof be stated on the verdict form in other types of cases not involving this unique situation.

FORM 4. MODEL FORM OF VERDICT FOR STATUTE OF LIMITATIONS DEFENSE IN A MEDICAL NEGLIGENCE CASE

VERDICT

We, the Jury, return the following verdict:

1. Was there negligence on the part of (defendant) **which was a legal cause of [loss] [injury] [or] [damage] to** (claimant)**?**

YES NO

If your answer to question 1 is NO, your verdict is for (defendant) **and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES, please answer question 2.**

2. Did (claimant) **know, or by the use of reasonable care should [he] [she] have known, on or before** (date)**, that** (claimant or person for whose injury or death claim is made) **had sustained injury or damage and that there was a reasonable possibility that the injury or damage was caused by medical negligence?**

YES NO

If your answer to question 2 is YES, then your verdict is for (defendant) **and you should not proceed further except to date and sign the verdict form and return it to the courtroom. If your answer to question 2 is NO, please answer question 3.**

3. Was there negligence on the part of (claimant) **which was a legal cause of [his] [her] [loss] [injury] [or] [damage]?**

YES NO

If your answer to question 3 is YES, please answer question 4. If your answer to question 3 is NO, skip question 4 and proceed to question 5.

4. State the percentage of any negligence which was a legal cause of [loss] [injury] [or] [damage] to (claimant) **that you**

charge to:

(defendant) _____**%**

(claimant) _____**%**

Total must be 100%

In determining the amount of damages, do not make any reduction because of the negligence, if any, of (claimant) (decedent) **or the [negligence] [**(specify other type of conduct)**], if any, of** (identify additional person(s) or entit(y)(ies))**. If you find that** (claimant) (decedent) **or** (identify additional person(s) or entit(y)(ies)) **[was] [were] negligent [or at fault], the court in entering judgment will make an appropriate reduction in the damages awarded.**

Please answer question 5.

Select the appropriate damage questions from Forms 2(a) and (b).

SO SAY WE ALL, this day of , 2

FOREPERSON

(Revised November 22, 2017.)

FORM 5(a). MODEL FORM OF VERDICT FOR EMERGENCY MEDICAL TREATMENT; NO ISSUE AS TO THE APPLICABILITY OF *F.S.* 768.13(2)(b)

VERDICT

We, the jury, return the following verdict:

1. Was there reckless disregard on the part of (defendant hospital, hospital employee, physician) **which was a legal cause of [loss] [injury] [or] [damage] to** (claimant) (decedent)**?**

YES NO

If your answer to question 1 is NO, your verdict is for defendant, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES, please answer question 2.

Refer to Forms 2(a) and (b) for itemized damage interrogatories.

SO SAY WE ALL, this day of , 2

FOREPERSON

NOTE ON USE FOR FORM 5(a)

Pending further developments in the law, the committee reserves the issue of whether comparative negligence is a defense when the reckless disregard standard is in effect. However, if the court decides that comparative negligence is a defense, and that there is sufficient evidence to support such a defense, this verdict form should be modified accordingly.

FORM 5(b). MODEL FORM OF VERDICT FOR EMERGENCY MEDICAL TREATMENT; ISSUE AS TO THE APPLICABILITY OF *F.S.* 768.13(2)(b); NO ISSUE AS TO COMPARATIVE NEGLIGENCE

VERDICT

We, the jury, return the following verdict:

1. Was there negligence on the part of (defendant hospital, hospital employee, physician) **which was a legal cause of [loss] [injury] [or] [damage] to** (claimant) (decedent)**?**

YES NO

If your answer to question 1 is NO, your verdict is for defendant, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES, please answer question 2.

2. Did (defendant hospital, hospital employee, physician) **render [care] [treatment] to** (claimant) (decedent) **under emergency circumstances?**

YES NO

If your answer to question 2 is YES, please answer question 3. If your answer to question 2 is NO, skip question 3 and answer question 4.

3. Was there reckless disregard on the part of (defendant hospital, hospital employee, physician) **which was a legal cause of [loss] [injury] [or] [damage] to** (claimant) (decedent)**?**

YES NO

Please answer question 4.

4. What is the total amount (100%) of any damages sustained by (claimant) (decedent) **and caused by the incident in question?**

Total damages of (claimant) (decedent) **$**

Refer to Forms 2(a) and (b) for itemized damage interrogatories.

SO SAY WE ALL, this day of , 2

FOREPERSON

FORM 5(c). MODEL FORM OF VERDICT FOR EMERGENCY MEDICAL TREATMENT; ISSUES AS TO BOTH APPLICABILITY OF *F.S.* 768.13(2)(b) AND COMPARATIVE NEGLIGENCE

VERDICT

We, the jury, return the following verdict:

1. Was there negligence on the part of (defendant hospital, hospital employee, physician) **which was a legal cause of [loss] [injury] [or] [damage] to** (claimant) (decedent)**?**

YES NO

If your answer to question 1 is NO, your verdict is for defendant, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES, please answer question 2.

2. Did (defendant hospital, hospital employee, physician) **render [care] [treatment] to** (claimant) (decedent) **under emergency circumstances?**

YES NO

If your answer to question 2 is YES, please answer question 3. If your answer to question 2 is NO, skip question 3 and answer question 4.

3. Was there reckless disregard on the part of (defendant hospital, hospital employee, physician) **which was a legal cause of [loss] [injury] [or] [damage] to** (claimant) (decedent)**?**

YES NO

Please answer question 4.

4. Was there negligence on the part of (claimant) (decedent) **which was a legal cause of [his] [her] [loss] [injury] [or] [damage]?**

YES NO

If your answer to question 4 is YES, please answer question 5. If your answer to question 4 is NO, skip question 5 and answer question 6.

5. State the percentage of any negligence, which was a legal cause of [loss] [injury] [or] [damage] to (claimant) (decedent)**, that you apportion to:**

(defendant hospital, hospital employee, physician) _____**%**

(claimant) (decedent) _____**%**

Total must be 100%

Please answer question 6.

6. What is the total amount (100%) of any damages sustained by (claimant) (decedent) **and caused by the incident in question?**

Total damages of (claimant) (decedent) **$**

Refer to Forms 2(a) and (b) for itemized damage interrogatories.

In determining the total amount of damages, do not make any reduction because of the negligence, if any, of (claimant) (decedent)**. If you have found** (claimant) (decedent) **negligent in any degree, the court in entering judgment will reduce** (claimant's) (decedent's) **total amount of damages (100%) by the percentage of negligence which you apportion by** (claimant) (decedent)**.**

SO SAY WE ALL, this day of , 2

FOREPERSON

NOTE ON USE FOR FORM 5(c)

Pending further developments in the law, the committee reserves the issue of whether comparative negligence is a defense when the

reckless disregard standard is in effect. However, when issues as to both the applicability of the statute and comparative negligence are present, and the court decides that comparative negligence *is* a defense to a claim based upon the statute, this verdict form should be modified accordingly.

(Revised February 1, 2018.)

FORM 6. MODEL FORM OF VERDICT FOR PERSONAL INJURY PROTECTION INSURANCE BENEFITS (PIP) (MEDICAL BENEFITS ONLY)

VERDICT

1. Are any of the services related to the accident of (date)?

YES NO

If your answer is NO, your verdict is for the Defendant and you should go no further but to sign and date the verdict form. If your answer is YES, you should answer question 2.

2. Are any of the services medically necessary?

YES NO

If your answer is NO, your verdict is for the Defendant and you should go no further but to sign and date the verdict form. If your answer is YES, you should answer question 3.

3. [Is the charge for the service reasonable?] [Are the charges for the services reasonable?] If you find the charge or charges reasonable, you should proceed to number 4. However, if you find the charge or charges unreasonable, you must determine a reasonable amount for the charge or charges, then proceed to question 4.

4. What is the total amount you find reasonable?
$

SO SAY WE ALL, this day of , 2

FOREPERSON

APPENDIX C

PUNITIVE DAMAGE INSTRUCTIONS FOR CAUSES OF ACTION ARISING PRIOR TO OCTOBER 1, 1999

PD 1.Punitive damages — Bifurcated Procedure:

a. Introduction:

There is an additional claim in this case that you must decide. If you find for (claimant) **and against** (defendant(s))**, you must decide whether, in addition to compensatory damages, punitive damages are warranted as punishment to [one or more of]** (defendant(s)) **and as a deterrent to others.**

The trial of the punitive damages issue is divided into two parts. In this first part, you will decide whether the conduct of (defendant or individual whose conduct may warrant punitive damages) **is such that punitive damages are warranted. If you decide that punitive damages are warranted, we will proceed to the second part of that issue during which the parties may present additional evidence and argument on the issue of punitive damages. I will then give you additional instructions, after which you will decide whether, in your discretion, punitive damages will be assessed and, if so, the amount.**

Punitive damages are warranted if you find by clear and convincing evidence that:

(1). the conduct causing [loss] [injury] [or] [damage] to (claimant) **was so gross and flagrant as to show a reckless disregard of human life or of the safety of persons exposed to the effects of such conduct; or**

(2). the conduct showed such an entire lack of care that (defendant) **must have been consciously indifferent to the consequences; or**

(3). the conduct showed such an entire lack of care that (defendant) **must have wantonly or recklessly disregarded the**

safety and welfare of the public; or

(4). the conduct showed such reckless indifference to the rights of others as to be equivalent to an intentional violation of those rights.

[You may determine that punitive damages are warranted against one defendant and not the other[s] or against more than one defendant.]

"Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. As I have already instructed you, "greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, "clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

b(1). Punitive damages against individual defendant:

If you find for (claimant) **and against** (defendant)**, and you also find that clear and convincing evidence shows that the conduct of** (defendant) **was a substantial cause of [loss] [injury] [or] [damage] to** (claimant) **and that such conduct warrants punitive damages under the standards I have given you, then in your discretion you may determine punitive damages are warranted against** (defendant)**.**

b(2). Direct liability for acts of managing agent, primary owner, or certain others:

If you find for (claimant) **and against** (defendant)**, and you also find that clear and convincing evidence shows that the conduct of** (managing agent, primary owner, or other person whose conduct may warrant punitive damages without proof of a superior's fault) **was a substantial cause of [loss] [injury] [or] [damage] to** (claimant) **and that such conduct warrants punitive damages under the standards I have given you, then in your discretion**

you may determine that punitive damages are warranted against (defendant)**.**

b(3). Vicarious liability for acts of employee:

If you find for (claimant) **and against** (employee/agent) **and** (defendant employer)**, and you also find that clear and convincing evidence shows that the conduct of** (employee/agent) **was a substantial cause of [loss] [injury] [or] [damage] to** (claimant) **and that such conduct warrants punitive damages under the standards I have given you, then in your discretion you may determine punitive damages are warranted against** (employee/agent)**. If you further find that the clear and convincing evidence shows also that** (defendant employer) **was negligent and that such negligence contributed to** (claimant's) **[loss] [injury] [or] [damage], you may determine that punitive damages are warranted against** (defendant employer)**. If clear and convincing evidence does not show such negligence by** (defendant employer) **independent of the conduct of** (employee/agent)**, punitive damages are not warranted against** (defendant employer)**.***

**Refer to Note on Use 1.*

b(4). Vicarious liability for acts of employee where the employee is not a party or is not being sued for punitive damages:

If you find for (claimant) **and against** (defendant employer/principal)**, and you find also that** (name employee/agent) **acted in such a manner as to warrant punitive damages, then if the clear and convincing evidence shows also that** (defendant employer) **was negligent and that such negligence contributed to** (claimant's) **[loss] [injury] [or] [damage], you may determine that punitive damages are warranted against** (defendant employer)**. If clear and convincing evidence does not show such negligence by** (defendant employer) **independent of the conduct of** (name employee/agent)**, punitive damages are not warranted against** (defendant employer)**.***

**Refer to Note on Use 1.*

b(5). When evidence admitted of harms caused to nonparties:

[In deciding the issue of punitive damages, you may consider any harm (defendant's) **conduct caused** (claimant/decedent)**.**

You have also heard evidence of harms (defendant's) **conduct [allegedly] caused to persons other than** (claimant/decedent)**.**

You may consider harms that (defendant's) **conduct caused to persons other than** (claimant/decedent) **in deciding the [reprehensibility] [or] [wrongfulness] of** (defendant's) **conduct only if the harms suffered by those other persons were caused by the same or similar conduct of** (defendant) **that harmed** (claimant/decedent)**.**

However, you may not punish (defendant) **for any harms suffered by persons other than** (claimant/decedent)**.]**

**Refer to Note on Use 6.*

c. Second stage of bifurcated punitive damage procedure:

(1). Opening instruction, second stage:

Members of the jury, I am now going to tell you about the rules of law that apply to determining whether punitive damages should be assessed and, if so, in what amount. When I finish with these instructions, the parties will present additional evidence. You should consider this additional evidence along with the evidence already presented, and you should decide any disputed factual issues by the greater weight of the evidence. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

(2). Punitive damages — determination of amount:

You are to decide the amount of punitive damages, if any, to be assessed as punishment and as a deterrent to others. This amount would be in addition to the compensatory damages you have previously awarded. In making this determination, you

should consider the following:

(A). the nature, extent and degree of misconduct and the related circumstances; [and]

[(B). [the] [each] defendant's financial resources; and]*

**Refer to Note on Use 3.*

[(C). (identify any other circumstance that the jury may consider in determining the amount of punitive damages.)**]***

**Refer to Note on Use 4.*

[However, you may not award an amount that would financially destroy (defendant)**.]***

**Refer to Note on Use 5.*

[(D). *When evidence admitted of harms caused to nonparties:*

In deciding the issue of punitive damages, you may consider any harm (defendant's) **conduct caused** (claimant/decedent)**.**

You have also heard evidence of harms (defendant's) **conduct [allegedly] caused to persons other than** (claimant/decedent)**.**

You may consider harms that (defendant's) **conduct caused to persons other than** (claimant/decedent) **in deciding the [reprehensibility] [or] [wrongfulness] of** (defendant's) **conduct only if the harms suffered by those other persons were caused by the same or similar conduct of** (defendant) **that harmed** (claimant/decedent)**.**

However, you may not punish (defendant) **for any harms suffered by persons other than** (claimant/decedent)**.]**

**Refer to Note on Use 6.*

You may in your discretion decline to assess punitive damages. [You may assess punitive damages against one

defendant and not the other[s] or against more than one defendant. Punitive damages may be assessed against different defendants in different amounts.]

(3). Closing instruction, second stage:

Members of the jury, you have now heard and received all of the evidence on the issue of punitive damages. Your verdict on the issues raised by the punitive damages claim of (claimant) **against** (defendant(s)) **must be based on the evidence that has been received during the trial of the first phase of this case and on the evidence that has been received in these proceedings and the law on which I have instructed you. In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice or sympathy for or against any party.**

Your verdict must be unanimous, that is, your verdict must be agreed to by each of you.

You will be given a form of verdict, which I shall now read to you:

When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign the verdict. You may now retire to consider your verdict.

PD 2.Punitive damages — Non-Bifurcated Procedure:

a. Introduction:

There is an additional claim in this case that you must decide. If you find for (claimant) **and against** (defendant(s))**, you must decide whether, in addition to compensatory damages, punitive damages are warranted as punishment to [one or more of]** (defendant(s)) **and as a deterrent to others.**

Punitive damages are warranted if you find by clear and convincing evidence that:

(1). the conduct causing [loss] [injury] [or] [damage] to

(claimant) **was so gross and flagrant as to show a reckless disregard of human life or of the safety of persons exposed to the effects of such conduct; or**

(2). the conduct showed such an entire lack of care that (defendant) **must have been consciously indifferent to the consequences; or**

(3). the conduct showed such an entire lack of care that (defendant) **must have wantonly or recklessly disregarded the safety and welfare of the public; or**

(4). the conduct showed such reckless indifference to the rights of others as to be equivalent to an intentional violation of those rights.

[You may determine that punitive damages are warranted against one defendant and not the other[s] or against more than one defendant.]

"Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. As I have already instructed you, "greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, "clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

b(1). Punitive damages against individual defendant:

If you find for (claimant) **and against** (defendant)**, and you also find that clear and convincing evidence shows that the conduct of** (defendant) **was a substantial cause of [loss] [injury] [or] [damage] to** (claimant) **and that such conduct warrants punitive damages under the standards I have given you, then in your discretion you may determine punitive damages are warranted against** (defendant)**.**

b(2). Direct liability for acts of managing agent, primary owner, or certain others:

If you find for (claimant) **and against** (defendant)**, and you find also find that clear and convincing evidence shows that the conduct of** (name managing agent, primary owner, or other person whose conduct may warrant punitive damages without proof of a superior's fault) **was a substantial cause of [loss] [injury] [or] [damage] to** (claimant) **and that such conduct warrants punitive damages under the standards I have given you, then in your discretion you may determine that punitive damages are warranted against** (defendant)**.**

b(3). Vicarious liability for acts of employee:

If you find for (claimant) **and against** (employee/agent) **and** (defendant employer)**, and you also find that that clear and convincing evidence shows that the conduct of** (employee/agent) **was a substantial cause of [loss] [injury] [or] [damage] to** (claimant) **and that such conduct warrants punitive damages under the standards I have given you, then in your discretion you may determine punitive damages are warranted against** (employee/agent)**. If you further find that the clear and convincing evidence shows also that** (defendant employer) **was negligent and that such negligence contributed to** (claimant's) **[loss] [injury] [or] [damage], you may determine that punitive damages are warranted against** (defendant employer)**. If clear and convincing evidence does not show such negligence by** (defendant employer) **independent of the conduct of** (name employee/agent)**, punitive damages are not warranted against** (defendant employer)**.***

**Refer to Note on Use 1.*

b(4). Vicarious liability for acts of employee where the employee is not a party or is not being sued for punitive damages:

If you find for (claimant) **and against** (defendant employer/principal)**, and you find also that** (name employee/agent) **acted in such a manner as to warrant punitive damages, then if the clear and convincing evidence shows also that** (defendant

employer) **was negligent and that such negligence contributed to** (claimant's) **[loss] [injury] [or] [damage], you may determine that punitive damages are warranted against** (defendant employer)**. If clear and convincing evidence does not show such negligence by** (defendant employer) **independent of the conduct of** (name employee/agent)**, punitive damages are not warranted against** (defendant employer)**.***

**Refer to Note on Use 1.*

b(5). When evidence admitted of harms caused to nonparties:

[In deciding the issue of punitive damages, you may consider any harm (defendant's) **conduct caused** (claimant/decedent)**.**

You have also heard evidence of harms (defendant's) **conduct [allegedly] caused to persons other than** (claimant/decedent)**.**

You may consider harms that (defendant's) **conduct caused to persons other than** (claimant/decedent) **in deciding the [reprehensibility] [or] [wrongfulness] of** (defendant's) **conduct only if the harms suffered by those other persons were caused by the same or similar conduct of** (defendant) **that harmed** (claimant/decedent)**.**

However, you may not punish (defendant) **for any harms suffered by persons other than** (claimant/decedent)**.]**

**Refer to Note on Use 6.*

c. Punitive damages — determination of amount:

If you decide that punitive damages are warranted against [one or more of] (defendant(s)) **you must decide the amount of punitive damages, if any, to be assessed as punishment and as a deterrent to others. This amount would be in addition to the compensatory damages you have previously awarded. In making this determination, you should consider the following:**

(1). the nature, extent and degree of misconduct and the

related circumstances; [and]

[(2). [the] [each] defendant's financial resources; and]*

**Refer to Note on Use 3.*

[(3). (identify any other circumstance that the jury may consider in determining the amount of punitive damages.)**]***

**Refer to Note on Use 4.*

[However, you may not award an amount that would financially destroy (defendant)**.]***

**Refer to Note on Use 5.*

[(4). *When evidence admitted of harms caused to nonparties:*

In deciding the issue of punitive damages, you may consider any harm (defendant's) **conduct caused** (claimant/decedent)**.**

You have also heard evidence of harms (defendant's) **conduct [allegedly] caused to persons other than** (claimant/decedent)**.**

You may consider harms that (defendant's) **conduct caused to persons other than** (claimant/decedent) **in deciding the [reprehensibility] [or] [wrongfulness] of** (defendant's) **conduct only if the harms suffered by those other persons were caused by the same or similar conduct of** (defendant) **that harmed** (claimant/decedent)**.**

However, you may not punish (defendant) **for any harms suffered by persons other than** (claimant/decedent)**.]**

**Refer to Note on Use 6.*

You may in your discretion decline to assess punitive damages. [You may assess punitive damages against one defendant and not the other[s] or against more than one defendant. Punitive damages may be assessed against different defendants in different amounts.]

NOTES ON USE FOR PD 1 AND 2

1. Instruction PD 1a or PD 2a should be given in all cases. Instruction PD 1b(1) or PD 2b(1) should be given when the claim is based on the conduct of an individual defendant.

Instruction PD 1b(2) or PD 2b(2) should be given when the claim is based on the conduct of a managing agent or principal. *Bankers Multiple Line Insurance Co. v. Farish*, 464 So. 2d 530 (Fla. 1985). That person should be named in instruction PD 1b(2) or PD 2b(2). Pending further development in the law, the committee takes no position regarding whether the independent negligence must be on the part of a managing agent or principal or whether it can be based on the independent negligence of another employee. See *Schropp v. Crown Eurocars, Inc.*, 654 So. 2d 1158 (Fla. 1995) and *Partington v. Metallic Engineering*, 792 So. 2d 498 (Fla. 4th DCA 2001). In appropriate cases a corporate policy can provide the basis for punitive damages against a corporation even though the particular officers or agents of the corporation responsible for the policy are not discovered or identified. See, *e.g.*, *Schropp* at 1162 (Wells, J. concurring). In those cases, the instruction will need to be modified accordingly.

Instruction PD 1b(3) or PD 2b(3) should be given when there is a demand for punitive damages against an employer/principal based on the conduct of an employee and punitive damages are also being sought against both the employee and employer. These instructions require additional proof of "some independent fault" by the employer/principal. See *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545, 548–49 (Fla. 1981). While these instructions use the term "negligence," some courts appear to use that term and the "some fault" language from *Mercury Motors* interchangeably. See, *e.g.*, *Schropp* at 1159; *Estate of Despain v. Avante Group. Inc.*, 900 So. 2d 637, 641 (Fla. 5th DCA 2005); *Barnett Bank of Marion County v. Shirley*, 655 So. 2d 1156 (Fla. 5th DCA 1995); *Taylor v. Gunter Trucking Co.*, 520 So. 2d 624 (Fla. 1st DCA 1988). Pending further development in the law, the committee takes no position on whether these terms are interchangeable. There may be situations other than employer-employee relationships where vicarious liability for punitive damages may be imposed. See, *e.g.*, *Knepper v. Genstar Corp.*, 537 So.

2d 619 (Fla. 3d DCA 1988) (joint venture); *Soden v. Starkman*, 218 So. 2d 763 (Fla. 3d DCA 1969) (partnership).

Instruction PD 1b(4) or PD 2b(4) should be given when there is a demand for punitive damages against the employer/principal for the acts of an employee, but the employee is not a defendant or is not being sued for punitive damages.

In cases involving both direct and vicarious liability claims, instruction PD 1b(2) or PD 2b(2) and PD 1b(3)–b(4) or PD 2b(3)–b(4) should be given with appropriate transitional language with respect to the claims based on vicarious liability.

These instructions are designed for use in most common law tort cases. However, certain types of intentional torts may require a punitive damage instruction appropriate to the particular tort. See, *e.g.*, *First Interstate Development Corp. v. Ablanedo*, 511 So. 2d 536 (Fla. 1987); *Metropolitan Life Insurance Co. v. McCarson*, 467 So. 2d 277 (Fla. 1985). The same may be true where punitive damages are authorized by statute. See, *e.g.*, *Home Insurance Co. v. Owens*, 573 So. 2d 343, 346 (Fla. 4th DCA 1991).

3. Subparagraph (2) in instruction PD 1c or PD 2c should only be used when evidence of a defendant's financial worth is introduced.

4. Subparagraph (3) should be used only after the court has determined that the evidence includes some additional circumstance that may affect the amount of punitive damages. See, *e.g.*, *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483 (Fla. 1999) (listing various such factors). See generally *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). One such circumstance is the assessment of punitive damages against the defendant in prior cases. See *W.R. Grace & Co. v. Waters*, 638 So. 2d 502 (Fla. 1994).

5. This instruction is to be given when requested by the defendant. See *Wransky v. Dalfo*, 801 So. 2d 239 (Fla. 4th DCA 2001). It appears that this instruction can only be used when evidence of the defendant's net worth has been introduced. See *Bould v. Touchette*,

349 So. 2d 1181 (Fla. 1977); *Rinaldi v. Aaron*, 314 So. 2d 762 (Fla. 1975). This instruction is not intended to supplant the court's function in determining whether a verdict is constitutional. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). The committee notes that many reported decisions have used alternative terms such as "bankrupt" or "economically castigate" to describe this limitation, instead of or in addition to the term "financially destroy." See, *e.g.*, *Wackenhut Corp. v. Canty*, 359 So. 2d 430 (Fla. 1978); *Lehman v. Spencer Ladd's, Inc.*, 182 So. 2d 402 (Fla. 1966). The committee has selected the term "financially destroy" for its simplicity, but does not intend to foreclose the use of other legally valid terms where appropriate under the facts of the particular case.

6. *Harm and risk of harm to nonparties*. This instruction does not address what evidence of harm to nonparties is relevant or admissible in a particular case or whether additional instructions may be necessary to ensure due process based on the evidence admitted in a particular case or a particular phase of a bifurcated trial. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421–22 (2003). This instruction should be given, on request, in cases in which evidence has been introduced that the defendant's conduct caused harm to others who are not parties to the case. See *Philip Morris USA v. Williams*, 549 U.S. 346, 355–57 (2007); *Philip Morris USA, Inc. v. Ledoux*, 230 So. 3d 530, 536 (Fla. 3d DCA 2017); *Philip Morris USA, Inc. v. Cohen*, 102 So. 3d 11, 18 (Fla. 4th DCA 2012), *quashed on other grounds*, 41 Fla. L. Weekly S113 (Fla. Jan. 29, 2016). Depending upon the evidence admitted in a particular case, additional language may be appropriate regarding the risk of harm the defendant's conduct posed to nonparties. See *Philip Morris USA v. Williams*, 549 U.S. at 355–57.

(Revised March 2, 2023.)

APPENDIX D

How to Write and Use Jury Instruction in Civil Cases

By Ralph Artigliere and William Michael Artigliere

Available with the hardbound edition of Florida Standard Jury Instructions in Civil Cases through LexisNexis:

http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&skuId=SKU13275&catId=366&prodId=13275

[https://store.lexisnexis.com/categories/area-of-practice/shop-by-jurisdiction-156/florida-standard-jury-instructions-in-civil-cases-skuusSku13275]

APPENDIX E

402.16 EMERGENCY MEDICAL TREATMENT CLAIMS INSTRUCTIONS FOR CAUSES OF ACTION ARISING PRIOR TO SEPTEMBER 15, 2003

INTRODUCTORY COMMENT

Instruction 402.16 addresses the provisions of *F.S.* 768.13(2)(b). It applies only to cases described in that statute or to cases in which there is a jury issue as to the applicability of the statute. Instruction 402.16 does not apply to cases involving patients capable of receiving treatment as non-emergency patients, even if treated in an emergency room.

Instruction 402.16a applies to cases in which there is a jury issue as to whether the statute applies. Instruction 402.16b applies to cases in which either the parties agree that the statute applies or the court has ruled that the statute applies as a matter of law.

The applicable part of instruction 402.16 should be preceded by instructions 402.1, 402.2, 402.3, and 403.6. Instruction 402.4 should not be given in the ordinary sequence as it is, to the extent applicable, incorporated in instruction 402.16. If there are any preliminary vicarious liability issues, instructions 402.9 and 402.10 should also be given.

No reported decision construes the legislative intent behind this section. Based upon the definition of "reckless disregard" in *F.S.* 768.13(2)(b)3., the committee has concluded that the intent was to limit liability in civil actions for damages arising out of fact situations to which the statute applies to cases where something more than "simple" negligence is established. Therefore, the standard instructions dealing with "simple" negligence are not appropriate for civil damage actions to which the statute applies.

402.16a EMERGENCY MEDICAL TREATMENT—JURY ISSUE AS TO APPLICATION OF *F.S.* 768.13(2)(B)

(1). Preliminary issue on application of statute:

The first issue for you to decide on (claimant's) **claim against** (defendant) **is whether** (claimant) **was being [cared for] [treated] under emergency circumstances.**

[Care] [treatment] is rendered under emergency circumstances when a [hospital] [physician] renders medical [care] [treatment] required by a sudden, unexpected situation or event that resulted in a serious medical condition demanding immediate medical attention, for which (claimant or decedent) **initially entered the hospital through its [emergency room] [trauma center], before** (claimant or decedent) **was medically stabilized and capable of receiving [care] [treatment] as a nonemergency patient.**

If the greater weight of the evidence does not support that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances then you shall proceed to decide whether** (defendant) **was negligent in [his] [her] [its] [care] [treatment] of** (claimant or decedent)**.**

However, if the greater weight of the evidence supports that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances, then you shall proceed to decide whether** (defendant) **acted in reckless disregard of the consequences in [his] [her] [its] [care] [treatment] of** (claimant or decedent)**.**

(2). Issues regarding negligence:

[If you find that (claimant's or decedent's) **[care] [treatment] was not being rendered under emergency circumstances,] the [next] issue for you to decide is whether** (defendant) **was negligent in** (describe conduct in question)**; and, if so, whether that negligence was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made)**.**

"Negligence" is the failure to use reasonable care. Reasonable care on the part of a [hospital] [physician] is that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably careful [hospitals] [physicians]. Negligence on the part of a [hospital] [physician] is doing something that a reasonably careful [hospital] [physician] would not do under like circumstances or failing to do something that a reasonably careful [hospital] [physician] would do under like circumstances.

If the greater weight of the evidence does not support this claim, then your verdict [on this claim] should be for (defendant)**.**

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then your verdict [on this claim] should be for** (claimant) **and against** (defendant)**.]**

[However, if the greater weight of the evidence does support (claimant's) **claim, then you should consider the defense(s) raised by** (defendant)**.]**

(3). Issues regarding reckless disregard:

[If you find that (claimant's or decedent's) **[care] [treatment] was being rendered under emergency circumstances,] the [next] issue for you to decide is whether** (defendant) **acted with reckless disregard of the consequences in** (describe conduct in question)**; and, if so, whether that reckless disregard was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made)**.]**

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical

consultation] [and] [the inability to obtain an appropriate medical history of the patient].

If emergency circumstances have not been established by the greater weight of the evidence but the greater weight of the evidence supports (claimant's) **claim of negligence, then [your verdict [on this claim] should be for** (claimant) **and against** (defendant)**] [you should consider the defense(s) raised by** (defendant)**].**

(Proceed to instructions 402.14 and 402.15)

[However, if the greater weight of the evidence does not support (claimant's) **claim of negligence, then your verdict [on this claim] should be for** (defendant)**.]**

On the other hand, if emergency circumstances have been established by the greater weight of the evidence and the greater weight of the evidence also supports (claimant's) **claim of reckless disregard of the consequences, then [your verdict [on this claim] should be for** (claimant) **and against** (defendant)**] [you should consider the defense(s) raised by** (defendant)**].**

(Proceed to instructions 402.14 and 402.15)

[However, if the greater weight of the evidence does not support (claimant's) **claim of reckless disregard of the consequences, then your verdict [on this claim] should be for** (defendant) **and against** (claimant)**.]**

402.16b EMERGENCY MEDICAL TREATMENT

(Describe conduct in question) **occurred in the course of [rendering] [or] [failing to render] emergency [care] [treatment] to** (claimant or decedent)**. The issue for you to decide is whether** (defendant) **acted with reckless disregard of the consequences in** (describe conduct in question)**; and, if so, whether that reckless disregard was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made)**.**

A [hospital] [physician] acts with "reckless disregard" for the consequences of [its] [his] [her] actions if [it] [he] [she] knew or should have known at the time [it] [he] [she] rendered emergency services that [its] [his] [her] conduct would likely result in injury or death, considering [the seriousness of the situation] [the lack of a prior patient-physician relationship] [time constraints due to other emergencies requiring [care] [treatment] at the same time] [the lack of time or ability to obtain appropriate medical consultation] [and] [the inability to obtain an appropriate medical history of the patient].

If the greater weight of the evidence does not support (claimant's) **claim, then your verdict [on this claim] should be for** (defendant)**.**

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then your verdict [on this claim] should be for** (claimant) **and against** (defendant)**.]**

[However, if the greater weight of the evidence does support (claimant's) **claim on these issues, then you should consider the defense(s) raised by** (defendant)**.]**

(Proceed to instructions 402.14 and 402.15)

NOTES ON USE FOR 402.16

1. Instruction 402.16a should be given when there is a jury issue as to whether the care or treatment was being rendered under

emergency circumstances. An appropriate special verdict will be necessary to distinguish between a finding that the care or treatment was not being rendered under emergency circumstances, in which case the standard of care is negligence, and a finding that the care or treatment was being rendered under emergency circumstances, in which case the standard of care is reckless disregard of the circumstances. The verdict should contain instructions to guide the jury depending on their finding as to whether the care and treatment was or was not rendered under emergency circumstances. The burden of proof provisions of instruction 402.16a should also be modified to incorporate the instructions in the special verdict. See Appendix A, Model Jury Instructions.

2. Instruction 402.16b should be given when the parties agree that the statute applies or when the court has ruled it applies as a matter of law.

3. Negligence of a patient, which contributes to or causes the medical condition for which treatment is sought, is not available as a defense (as comparative negligence) to subsequent medical negligence which causes a distinct injury. See, *e.g.*, *Norman v. Mandarin Emergency Care Ctr., Inc.*, 490 So. 2d 76 (Fla. 1st DCA 1986); *Matthews v. Williford*, 318 So. 2d 480 (Fla. 2d DCA 1975); but see *Vandergrift v. Fort Pierce Mem. Hos., Inc.*, 354 So. 2d 398 (Fla. 4th DCA 1978). Rare circumstances may arise, involving a patient's negligence after emergency care or treatment has begun, in which comparative negligence is a legitimate issue. See generally *Whitehead v. Linkous*, 404 So. 2d 377 (Fla. 1st DCA 1981).

4. Pending further developments in the law, the committee reserves the issue of whether comparative negligence is a defense when the reckless disregard standard is in effect. If the court decides that comparative negligence is a defense, then an instruction on simple negligence should be given.

5. "Reckless disregard," as defined and used in the context of *F.S.* 768.13(2)(b), does not appear to have the same meaning as reckless disregard when used in the context of standards for punitive damages. See Fla. Std. Jury Instr. (Civ.) 501.12 and 501.13.

(Revised April 21, 2016.)