

WRONGFUL DEATH DAMAGES
William S. Mills
Glenn, Mills, Fisher & Mahoney, PA
Durham, North Carolina

1. HISTORY OF WRONGFUL DEATH IN NORTH CAROLINA

Before the 1969 amendment, the NC wrongful death statute (G.S. 28-174) provided only for the recovery of "such damages as are a fair and just compensation for the pecuniary injury resulting from such death." That language remained unchanged from 1869 to 1969. The Courts had construed that language to mean that the jury was required to determine the amount of money decedent would have earned during decedent's life time, determine and deduct his ordinary living expenses, and then ascertain the present net worth of those net earnings. That was considered the pecuniary value of the life of the decedent to his estate. See [Lamm v. Lorbacher, 235 N.C. 728, 71 S.E. 2d 49 \(1952\)](#). The statute made no provision for punitive damages, nor did it allow for nominal damages if there was no pecuniary loss. [Armentrout v. Hughes, 247 N.C. 631, 101 S.E. 2d 793 \(1958\)](#).

This meant the life of a young child, a retired person, a stay at home parent, or an unemployed person had no value.

As a result of dedicated work by some of the founders of the North Carolina Academy of Trial Lawyers, the General Assembly passed the wrongful death act in 1969. The preamble to that law reads as follows:

WHEREAS, human life is inherently valuable; and

WHERE, the present statute is so written and construed that damages recoverable from a person who has caused death by a wrongful act are effectually limited to such figure as can be calculated from the expected earnings of the deceased, which is far from an adequate measure of the value of human life, now therefore, the General Assembly of North Carolina do enact:...

This can be read and discussed in your closing argument.

**2. WRONGFUL DEATH DAMAGES ARE ONLY THOSE ALLOWED BY NCGS
28A- 18-2(B)**

The case law has always held that a wrongful death action is a statutorily based claim and therefore only the damages provided in the statute may be claimed and recovered. *Lamm v. Lorbacher*, 235 N.C. 728, 71 S.E.2d 49 (1952) North Carolina GS 28A-18-2(B) provides for the recovery of the following damages:

- (1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;
- (2) Compensation for pain and suffering of the decedent;
- (3) The reasonable funeral expenses of the decedent;
- (4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected;
 - a. Net income of the decedent,
 - b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,
 - c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;
- (5) Such punitive damages as the decedent could have recovered pursuant to Chapter 1D of the General Statutes had the decedent survived, and punitive damages for wrongfully causing the death of the decedent through malice or willful or wanton conduct, as defined in [G.S. 1D-5](#);
- (6) Nominal damages when the jury so finds.

The fact that the legislature included the following provision should always argue that strict adherence to the rules of evidence was not intended in the context of proving damages in a wrongful death action.

(c) All evidence which reasonably tends to establish any of the elements of damages included in subsection (b), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.

Had they not intended a broader scope of admissibility, the argument goes, the legislators would have stated "as allowed by the rules of evidence". The absence implies that if it is relevant to damages, it should be permitted.

3. PROOF OF ECONOMIC LOSSES - TOO SPECULATIVE OR NOT?

A question which often arises in the wrongful death of a child is whether the loss of net income is too speculative. For example, in *Bahl v. Talford*, 138 N.C. App. 119 (1999), the court vacated the award of damages and remanded the case for a new trial. The decedent children were ages 11 and 16. Their parents were the only beneficiaries in the wrongful action. An economist, Dr. Charles Alford, was accepted as an expert witness in the field of forensic economics and projection of future income streams of children. He then expressed his opinion that the earnings of the children through the parents' life expectancy, after deducting personal expenditures, would have a present value after taxes of approximately \$228,000 for the 11 year old and \$293,912 for the 16 year old. The appeal did not challenge the sufficiency of the evidence regarding the present value of the net income of decedents, but did challenge the sufficiency of evidence regarding the income the parents could have reasonably expected to receive from the deceased. *State v. Smith*, 90 N.C. App. 161, 169, 368 S.E.2d 33, 38-39 (1988) Aff'd, 323 N.C. 703, 374 S.E.2d 866 cert. denied, 490 U.S. 1100 (1989) (parents may "only recover the amount of income that they reasonably might have received had decedent lived")

In *Bahl* the trial court had submitted special interrogatories so that the record would reflect what the

jury awarded for the lost net income of the decedent children. In striking that portion of the recovery, the Court of Appeals stated:

"It appears plaintiffs were allowed to testify freely, yet presented no evidence that [their children] had ever expressed an intent to provide any of [their] income to [their] parents." [quoting from *Stutts v Adair*, 94 N.C. App.227, 239, 380 S.E.2d 411, 418.] indeed, during the directed verdict motion hearing, plaintiffs' counsel conceded his clients had brought forward "no absolute direct evidence" on the issue on what plaintiffs "could have expected to receive"."

However, in *Stutts v. Adair*, 94 N.C. App. 227, 380 S.E.2d 411 (1989), the court ruled that it although it was error for the judge to instruct the jury that it could award damages to decedent's parents for the loss of her net income, the court, after a lengthy discussion, concluded that it was harmless. The court stated that there was no reason to demand actual support of the parents as the sole ground for any recovery of lost income since such a requirement would run counter to the remedial purpose of this statute and to the evidentiary provisions of subsection 28A-18-2(c).

Despite *Stutts*, if you are putting on evidence of lost income of a child, look for some evidence from which the jury can find an expectation of support from the child to the parent(s).

While our courts have held that some speculation is necessary to determine damages in a wrongful death action, e.g., *Beck v. Carolina Power & Light Company*, 57 N.C. App. 373, 291 S.E.2d 897, Aff'd 307 N.C. 267, 297 S.E.2d 397 (1982), damages may not be assessed on the basis of sheer speculation in the absence of any factual evidence supporting the speculation. *Gay v. Thompson*, 266 N.C. 394, 146 S.E.2d 425 (1966) It should be noted that the *Gay* decision was based upon the wrongful death statute prior to its substantial amendment in 1969. *Di Donato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (1987) recognized that a wrongful death action can be maintained based upon the wrongful death of a viable fetus. However, the court followed the holding from

Gay, stating an award for lost income damages would be based upon sheer speculation and cannot be recovered as part of a wrongful death of a stillborn child.

In *Brown v. Moore*, 286 N.C. 664, 213 S.E.2d 342 (1975), the court found the recovery of lost net income from the wrongful death of a 17 year old to be proper. The court stated:

The present monetary value of the decedent to the persons entitled to receive the damages recovered will usually defy any precise mathematical computation [citation omitted] Therefore, the assessment of damages must, to a large extent, be left to the good sense and fair judgment of the jury...the fact that the full extent of the damages must be a matter of some speculation is not ground for refusing all damages [citation omitted]..."the damages in any wrongful death action are to some extent uncertain and speculative. A jury may indulge in such speculation where it is necessary and there are sufficient facts to support the speculation [citation omitted]

Id. 286 N.C. 673, 213 S.E.2d 348-349.

Although the wrongful death statute leaves it to the jury to determine the damages to the beneficiaries for the loss of services, companionship, etc., the better practice is to put on evidence about the relationship and services between the decedent and the beneficiaries. In *Fontenot v. Taser Int'l, Inc.*, 736 F.3d 318 (4th Cir. 2013), the 4th circuit set aside a verdict of \$6.15 million dollars on the grounds that there was insufficient evidence to support that award and remanded the case for retrial on damages only. The lesson from this is that you should not simply argue damages based upon the loss of a child without having the parents, and others, talk about the relationship and services.

4. MEANINGS OF KINDLY OFFICES, ETC.

The following is something one of our members posted on the list serve. I copied it and saved it in my stolen ideas folder, but did not note the author. The author may indeed be one of you attending this program:

"Office" comes from the Latin "officium" meaning "service" or "duty". I tell juries that "Kindly Offices" are the things that others do for you because they love you, not because they are paid to do it. These "others" who do these things for you are generally your parents, children, etc. They render these kindly offices when you are sick or otherwise in need. In a wrongful death case, the heirs are deprived of this priceless asset by the wrongful killing of the decedent.

Oxford Dictionary and Thesaurus gives pertinent synonyms as: "a duty attaching to one's position, a task or function;...a piece of kindness or attention; a service (esp. *through the good offices of*) ."

5. USE OF AN ECONOMIST TO PROVE VALUE OF LOST NET INCOME AND LOSS OF SERVICES.

The use of a forensic economist for establishing the economic losses suffered by the decedent's beneficiaries should always be done in a case that merits an economist. For example, you definitely want to use an economist for a decedent with a family that he or she supported. On the other hand, such an economist will not be able to do much for you if the person is either a very young child or a retired person. An unemployed person that provided services to those entitled to take may well justify the use of an economist.

A forensic economist may testify as to the monetary value of the decedent to the persons entitled to receive damages under subsection (b) without necessarily first placing into evidence the statistics, formula, calculations, and economic assumptions used in arriving at his opinion. The failure to do so has been held to go to the weight of the evidence and not to its admissibility. *Rutherford v. Bass Air Conditioning Company*, 38 N.C. App. 630, 248 S.E.2d 887 (1978) However, because the 2011 amendments to Rule 702 made North Carolina a "Daubert" state, I encourage you to elaborate on exactly the methods utilized by the economist as part of the foundation. The direct examination included in this appendix covers the additional items that now must be considered by the trial court in their gate-keeping capacity. The fact that the

North Carolina Courts have long recognized the legitimacy of using an economist in wrongful death cases should prevent exclusion as long as the direct at least touches on the new foundation issues in Rule 702.

In *Thorpe v. Wilson*, 58 N.C. App. 292, 293 S.E.2d 675 (1982), the court held that expert testimony is practically the only evidence available to prove future earnings in a wrongful death action. That seems to run afoul of the provision of 28A-18-2(c) which states that

All evidence which reasonably tends to establish any of the elements of damages including in subsection (b), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by a wrongful act."

For example, evidence that the decedent had always been gainfully employed, the amount of their income, evidence of their good health, and likelihood of continued employment should be enough. Witnesses to these issues can all be lay witnesses, co-workers, supervisors, family members or friends.

**1. DIRECT EXAMINATION CHANGES POST 2011
AMENDMENT TO RULE 702**

From a practical stand point, what should you do differently when qualifying your expert? Your direct examination should be just as it has always been in terms of qualifying the witness as an expert, having the expert discuss the scientific principles at issue, and describe in great detail what the expert did to gather sufficient data and facts needed to be able to form an opinion. Your audience for this portion is the judge, so use the exact phrasing from Rule 702. After doing all other aspects of your qualification portion, address each of the three prongs as follows:

(a) 702(a)(1): The testimony is based upon sufficient facts or data.

Example:

Q. Now that you have shared with us what you did to learn

about this case, I want to turn your attention to the sufficiency of the facts and data on which you base your opinion. (this is letting the trial court know you are covering that 702(a) prong) Based upon the economic principals you have already explained, did you have sufficient facts or data upon which to form an opinion?

A. Yes.

Q. What are the facts and data significant to your opinion?

A. Blah Blah

Q. Are there additional facts you need to learn before being able to render an opinion?

A. No.

(If you know that your opponent is critical over the fact that the witness failed to learn a particular fact or failed to do something - go ahead and cover that and have the witness explain why it is not critical. Then argue to judge that it may go to weight but not admissibility)

Q. Do you believe it is necessary that you know MISSING FACT?

A. No

Q. Why?

A. Brilliant explanation follows.

OR

End of example for 702(a)(1) prong.

Remember that you are building a record to show that the trial court had received evidence supporting the gate keeping preliminary finding that the opinion is based upon "sufficient facts or data". Once the trial court makes that determination it will only be reversed upon a finding of abuse of discretion.

(b) 702(a)(2) The testimony is the product of reliable principles and methods.

EXAMPLE

Q. Now that you have talked about the sufficiency of the facts and data available to you, I want to turn your attention to the principles and methods used by you in forming your opinion. Please describe those principles and methods.

A. Blah Blah (this is probably going to be someone repetitive because the expert has already touch on this when describing what she did after learning what she needed to learn about the facts)

Q. Are those principles and methods reliable? (recall that a trial court is not bound to accept the expert's unsupported statement that the principles and methods are reliable, but she can. Here is where the use of the extensive case law on admissibility of economist's opinion in wrongful death should help)

A. Yes.

Q. Please describe what you believe makes these principles and methods reliable?

A. Blah Blah.

(c) 702(a)(3) The witness has applied the principles and methods reliably to the facts of the case.

The last prong of Rule 702(a) is convincing the judge that the expert applied the principles and methods reliably to the facts of the case.

Example:

Q. Now that we have covered the principles and methods, I want to turn our attention to how you applied the principles and methods to the facts of this case and formed your opinion. So please explain to us how you did that?

A. Blah Blah

Q. Why did you (insert the various steps the expert describes in the foregoing answer so that the expert can elaborate on why it is necessary to apply the economic principals and methods, in the way that she did.

6. USE OF A PSYCHOLOGICAL EXPERT TO PROVE DAMAGE TO MINOR CHILD FROM WRONGFUL DEATH OF A PARENT.

Can you use an expert to help prove damages covered by 28A-18-2(B)(4)b. ("protection, care..") and c. (society, etc.)?

A. WHEN EXPERT IS A TREATING PSYCHOLOGIST

Although this writer could find no NC appellate opinion directly on point, the testimony of a treating psychologist, psychiatrist or clinical social worker should be admissible pursuant to Rule 702 of the Rules of evidence to the extent the expert has opinions regarding the impact on her patient from death of a parent. This is a simple treating physician analogy which is relevant and admissible as helpful to the jury.

B. WHEN THE EXPERT IS A NON-TREATING EXPERT TENDERED TO EDUCATE THE JURY ABOUT THE IMPACT OF THE LOSS OF A PARENT ON A MINOR CHILD

You have decided you want to have an expert help the jury understand the various ways the loss of a parent will likely impact the child through child hood and years that follow. This is a bit more tenuous. Plaintiff's arguments for admission is that it will help the jury understand the loss in a way that is more detailed and research based than the lay-person's understanding that of course a child's life is devastated by the loss of parent. Use the language of 28A-18-2(c) that any evidence tending to prove the statutory damages is admissible.

Anticipate that the defense will argue that it is not admissible because it does not meet the threshold issue of Rule 702 as being helpful to the finders of fact. The jury, as parents and children themselves, can easily assess these issues of damage. The counter argument will be case specific. For example, can an expert help sort out the difference in impact when the child is 2, 13, or 17?

Taking the question to the next step, you now want the expert to not only *educate* the jury about impact in general, you want the expert to *opine* about damage to this minor based upon a review of school records, deposition testimony, etc. Same analysis but may be easier since it is child specific with supporting opinions.

Whether you want to do this by necessity requires you to decide, with your client, whether you want to hand the defense an appeal issue. However, developing such evidence for a mediated settlement conference may be sufficiently valuable to justify the expense.

7. MISCELLANEOUS POINTS

A. CLAIMS FILED UNDER SECTION 1983

In claims arising under 42 U.S.C. §1983, since there is no federal statutory law regarding the measure of damages in a wrongful death case, the law which applies is the law contained in N.C.G.S. §28A-18-2. *Bowling v. Oldham*, 753 F.Supp. 588(M.D.N.C. 1990)

B. FILING A SURVIVORSHIP ACTION IN SAME SUIT AS WRONGFUL DEATH CLAIM

A survivorship claim for personal injury may be filed in the same suit with a wrongful death action. The reasoning is that a jury may determine that the negligently caused injury caused pain and suffering to the decedent prior to his death, but did not cause his death. Therefore, both actions may be pursued in the same cause of action. *Alston v. Britthaven, Inc.*, 177 N.C. App. 330, 628 S.E.2d 824 (2006) Rev. denied 361 N.C. 218, 642 S.E.2d 242 (2007)

C. WHEN TORTFEASOR IS A BENEFICIARY OF THE WRONGFUL DEATH ACTION

A wrongful death action is not precluded by the negligence of one of the statutory beneficiaries in causing the death. In such an action by an administrator under the wrongful death act where the tortfeasor is also a beneficiary under the Intestate Succession Act, any recovery must be reduced by the statutory share of the tortfeasor. *Saint Paul Fire and Marine Insurance Company v. Lack*, 476 F.2d 583 (4th Cir. 1973). When one parent

causes the death of a child, the other parent may still recover but can recover only for the losses pertaining to the non-negligent parent. *Carver v. Carver*, 310 N.C. 669 (1984)

D. IMPROPER INSTRUCTION AND ARGUMENT

It is error to instruct the jury or argue in closing that the award of damages in a wrongful death action is not subject to taxation by the state or federal government. *Scallon v. Hooper*, 58 N.C. App. 551, 293 S.E.2d 843 (1982) The *Scallon* court also ruled that it was reversible error for defense counsel to argue that the defendant would be obligated to pay every single dollar of the damage award.

E. HEDONIC DAMAGES NOT RECOVERABLE

Hedonic [loss of the enjoyment of life by the decedent] damages on the part of the decedent are not recoverable as part of a wrongful death action in North Carolina. *Livingston v. United States*, 817 F.Supp. 601 (E.D.N.C. 1993)

F. IMPACT OF REMARRIAGE BY SURVIVING SPOUSE.

Is it proper to argue that a surviving spouse's remarriage after death of first spouse is relevant to the amount of damages recoverable under 28A-18-2(4)? In 2013, our North Carolina Court of Appeals finally answered this. Fortunately, in *Katy v. Capriola*, 226 N.C. App. 470, 742 S.E.2d 247 (2013), the court held that the subsequent remarriage of the surviving spouse is irrelevant to the damages issues outlined in G.S. 28A-18-2. The Court of Appeals treated the subsequent re-marriage as a collateral source and not admissible in a wrongful death case. Perhaps that same logic should exclude the fact that the surviving spouse was having an affair before the wrongful death. I suspect that as soon as the surviving spouse said anything about how great the marriage was, the court would consider he/she had opened the door to that collateral source.

G. CAP FOR STATE TORTS CLAIM ACT WRONGFUL DEATH ACTIONS

If your wrongful death claim is a State Torts Claim Act filed in the Industrial Commission, your damages are

statutorily capped at \$1,000,000. NCGS 143-299.2(a) Which is much better than the \$50,000 when I started practicing law.

H. LIFE EXPECTANCY OF BENEFICIARY OR DECEDENT AS PROPER TIME PERIOD FOR THE JURY TO ASSESS DAMAGES.

If the life expectancy of the person entitled to take is shorter than the life expectancy of the decedent, then relevant time period for (4) damages is the life expectancy of the person entitled to take. If the life expectancy of the person entitled to take is longer than the life expectancy of the decedent, then relevant time period for (4) damages is the life expectancy of the decedent.

I. THOUGHTS FOR CLOSING IN THE DEATH OF A CHILD

When contemplating your closing argument in a case involving the wrongful death of a child, consider reading through President Obama's remarks in Newtown, CT, after the deadly shootings of 20 schoolchildren, and others. Especially this excerpt (full transcript is in Appendix):

All the world's religions - so many of them represented here today - start with a simple question: Why are we here? What gives our life meaning? What gives our acts purpose? We know our time on this Earth is fleeting. We know that we will each have our share of pleasure and pain; that even after we chase after some earthly goal, whether it's wealth or power or fame, or just simple comfort, we will, in some fashion, fall short of what we had hoped. We know that no matter how good our intentions, we will all stumble sometimes, in some way. We will make mistakes, we will experience hardships. And even when we're trying to do the right thing, we know that much of our time will be spent groping through the darkness, so often unable to discern God's heavenly plans.

There's only one thing we can be sure of, and that is the love that we have - for our children, for our families, for each other. The warmth of a small child's embrace - that is true. The memories we have of them, the joy that they bring, the wonder we see through their eyes, that fierce and boundless love we feel for them, a love that takes us out of ourselves,

and binds us to something larger - we know that's what matters. We know we're always doing right when we're taking care of them, when we're teaching them well, when we're showing acts of kindness. We don't go wrong when we do that.

The closing given by this writer in a case tried with Carlos Mahoney in McDowell County is in the appendix. The decedent child was 2 at the time of death and survived by her mother and father.

APPENDIX TABLE OF CONTENTS

THE 1969 BILL ADOPTING OUR MODERN WRONGFUL DEATH ACT

DEFINITIONS OF STATUTORY DAMAGES IN WRONGFUL DEATH STATUTE

DIRECT EXAMINATION OF ECONOMIST PROVIDED BY WILLIAM S. MILLS

DIRECT EXAMINATION AND ANSWERS OF ECONOMIST PROVIDED BY GARY
ALBRECHT, PHD

PETITION FOR APPROVING WRONGFUL DEATH SETTLEMENT

ORDER APPROVING WRONGFUL DEATH SETTLEMENT

CLOSING ARGUMENT FROM FRYE VS MCDOWELL COUNTY SHERIFF

PRESIDENT OBAMA'S REMARKS I NEWTOWN

PATTERN JURY INSTRUCTIONS

NORTH CAROLINA
GENERAL ASSEMBLY

1969 SESSION

RATIFIED BILL

CHAPTER 215

SENATE BILL 95

AN ACT TO REWRITE G. S. 28-174, RELATING TO DAMAGES RECOVERABLE
FOR DEATH BY WRONGFUL ACT.

WHEREAS, human life is inherently valuable; and

WHEREAS, the present statute is so written and construed
that damages recoverable from a person who has caused death by a
wrongful act are effectually limited to such figure as can be
calculated from the expected earnings of the deceased, which is
far from an adequate measure of the value of human life; Now,
therefore,

The General Assembly of North Carolina do enact:

Section 1. G. S. 28-174 is hereby rewritten to read as
follows:

"Sec. 28-174. Damages recoverable for death by wrongful act;
evidence of damages.--(a) Damages recoverable for death by
wrongful act include:

- (1) Expenses for care, treatment and hospitalization
incident to the injury resulting in death;
- (2) Compensation for pain and suffering of the decedent;
- (3) The reasonable funeral expenses of the decedent;
- (4) The present monetary value of the decedent to the
persons entitled to receive the damages recovered, including but
not limited to compensation for the loss of the reasonably
expected:

- (i) Net income of the decedent,
- (ii) Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,
- (iii) Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;
- (5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence;
- (6) Nominal damages when the jury so finds.

"(b) All evidence which reasonably tends to establish any of the elements of damages included in subsection (a), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act."

Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 3. This Act shall not apply to litigation pending on its effective date.

Sec. 4. This Act shall become effective on upon ratification.

In the General Assembly read three times and ratified, this the 14th day of April, 1969.

TAYLOR, JR.

EARL W. VAUGHN

P. Taylor, Jr.

Earl W. Vaughn

President of the Senate.

000017 Member of the House of Representatives.

DEFINITIONS OF STATUTORY LOSSES IN WRONGFUL DEATH ACTIONS¹

Services: Help, use, benefit. Helpful acts. Useful labor that does not produce a tangible commodity. (examples—cooking in the house, fixing the cars, vacuuming the house)

Protection: The act of protecting. To cover or shield from exposure, injury or destruction. Supervision or support of one that is smaller and weaker. (examples--who checks the doors at night? Nervous after break-in, kills snakes in the front yard)

Care: Painstaking or watchful attention; regard coming from desire or esteem; concern; solicitude. (example—calls or texts if late)

Assistance: The help supplied, the act of assisting; to give support or aid; help.

Society: Companionship or association with one's fellows; friendly or intimate intercourse; voluntary association of individuals for common ends. (example—couple dates, family vacations, going to church together, football games together)

Companionship: The fellowship existing among companions. Companions are comrades and associates. (example—been together for a long time)

Comfort: Strengthening aid; assistance; Support. Consolation in time of trouble or worry. (Example—getting over traumatic event)

Guidance: The act or process of guiding. conduct or course of living. A guide is one who leads or directs another in his way; someone who provides a person with guiding information; and one who directs a person in his conduct or course of life. (example—teaching driving, fishing, who to vote for)

Kindly Offices: Kindly is of an agreeable or beneficial nature, pleasant. And offices is a special duty or charge; a position of responsibility; something that one ought to do or must do; an assigned or assumed duty, task or role; something done for another. (example—carving Thanksgiving turkey, DJ at family functions, giving away daughter at her wedding)

Advice: Recommendation regarding a decision or course of conduct. (example—career choices, dealing with boss, girlfriend, teacher)

¹ This list was posted to one of the NCAJ list serves by one of its members. The writer of this paper did not save the source so it cannot be attributed to the author. However, once again thanks to all the NCAJ members who regularly post valuable advice and resources to the list serves.

DIRECT EXAMINATION OF AN ECONOMIST - OUTLINE

PREPARED BY WILLIAM S MILLS

QUALIFICATIONS

Please introduce yourself to the jury

Have you come here today to share your opinions and calculations of damages caused to the family of Mrs. Decedent by her premature death?

Dr. Econ, before we get to that opinion I want to discuss your education, training and career

Where are you employed

(Exhaust)

What sort of things do you do

(have her define terms as necessary)

Describe your education and training

(Exhaust)

Describe your experience and career as it relates to being an economist.

Cover relevant publications

Cover relevant offices held

Have you been accepted by other Courts as an expert in the field of economics for purposes of providing opinions related to damages in wrongful death cases?

How many times?

Dr. Econ, now that we know something about your qualifications and training, I want to turn out attention to what you have done to educate yourself about the facts in the case.

What have you reviewed?

Of those materials can you help us understand the facts of significance to your opinion?

Have you formed opinions related to damages to Mrs. Decedent's family?

Without giving us a figure of damages, what are the categories of damages

(lost net earning and loss of services)

Dr. Econ, now that we know about your qualifications and what you did to learn about this case, I have a few more foundation questions to ask

THIS IS WHERE I STICK THE DAUBERT STUFF AS FOLLOWS

(a) 702(a)(1): The testimony is based upon sufficient facts or data.

Example:

Q. Now that you have shared with us what you did to learn about this case, I want to turn your attention to the sufficiency of the facts and data on which you base your opinion. (this is letting the trial court know you are covering that 702(a) prong) Based upon the economic principals you have already explained, did you have sufficient facts or data upon which to form an opinion?

A. Yes.

Q. What are the facts and data significant to your opinion?

A. Blah Blah

Q. Are there additional facts you need to learn before being able to render an opinion?

A. No.

(If you know that your opponent is critical over the fact that the witness failed to learn a particular fact or failed to do something - go ahead and cover that and have the witness explain why it is not critical. Then argue to judge that it may go to weight but not admissibility)

Q. Do you believe it is necessary that you know MISSING FACT?

A. No

Q. Why?

A. Brilliant explanation follows.

OR

End of example for 702(a)(1) prong.

Remember that you are building a record to show that the trial court had received evidence supporting the gate keeping preliminary finding that the opinion is based upon "sufficient facts or data". Once the trial court makes that determination it will only be reversed upon a finding of abuse of discretion.

(b) 702(a)(2) The testimony is the product of reliable principles and methods.

EXAMPLE

Q. Now that you have talked about the sufficiency of the facts and data available to you, I want to turn your attention to the principles and methods used by you in forming your opinion. Please describe those principles and methods.

A. Blah Blah (this is probably going to be someone repetitive because the expert has already touch on this when describing what she did after learning what she needed to learn about the facts)

Q. Are those principles and methods reliable? (recall that a trial court is not bound to accept the expert's unsupported statement that the principles and methods are reliable, but she can. Here is where the use of the extensive case law on admissibility of economist's opinion in wrongful death should help)

A. Yes.

Q. Please describe what you believe makes these principles and methods reliable?

A. Blah Blah.

(c) 702(a)(3) The witness has applied the principles and methods reliably to the

facts of the case.

The last prong of Rule 702(a) is convincing the judge that the expert applied the principles and methods reliably to the facts of the case.

Example:

Q. Now that we have covered the principles and methods, I want to turn our attention to how you applied the principles and methods to the facts of this case and formed your opinion. So please explain to us how you did that?

A. Blah Blah

Q. Why did you (insert the various steps the expert describes in the foregoing answer so that the expert can elaborate on why it is necessary to apply the economic principals and methods, in the way that she did.

TENDER; ALTHOUGH TENDER IS NO LONGER REQUIRED I STILL LIKE TO DO IT AS IT LETS COURT AND OPPOSING PARTY KNOW I'M DONE WITH FOUNDATION. ASK JUDGE AS PART OF PRE-TRIAL IS SHE HAS ANY OBJECTION TO YOU TENDERING THE EXPERT. I HAVE NEVER HAD THE EXPERIENCE BUT APPARENTLY THERE ARE JUDGES WHO DON'T WANT YOU TO TENDER

YOUR HONOR, AT THIS TIME I TENDER DR. ECON AS AN EXPERT IN THE FIELD OF ECONOMICS TO GIVE HER OPINIONS REGARDING THE PRESENT VALUE OF THE ECONOMIC LOSS TO THE FAMILY OF MRS. DECEDENT.

Dr. Econ, earlier you stated you had made calculations (use calculations rather than opinions unless it draws and objection, then use opinions) as to the loss of net income and loss of services, can you first give us the figures for those two items.

Turning our attention to the loss of net income, please walk us through what you did?

(inject questions as necessary to follow up until this topic is exhausted)

Turning our attention to the loss of services, first, what are loss of services as used in your calculations?

Based upon your review of the evidence, what services were lost by the family of Mrs. Decedent based upon her premature death?

Describe the process and calculations you made as to the value of the loss of services to the family of Mrs. Decedent?

(inject questions as necessary to follow up until this topic is exhausted)

(TRIAL PLANNING - MAKE SURE THESE ARE DISCUSSED DURING THE DIRECT EXAMINATION OF THE FAMILY MEMBERS)

GARY R. ALBRECHT, PH.D.
Direct examination with answers

Q PLEASE STATE YOUR NAME

Q WHAT IS THE NATURE OF YOUR OCCUPATION? (ECONOMIST)

Q WHAT IN YOUR EDUCATIONAL BACKGROUND HAS PREPARED YOU TO DEVELOP YOUR OPINIONS, WHICH YOU ARE HERE TO EXPRESS TODAY? (PHD IN ECONOMICS)

Q DR. ALBRECHT, PLEASE DESCRIBE YOUR GENERAL EDUCATIONAL TRAINING AND BACKGROUND

Q WHAT IS YOUR EMPLOYMENT BACKGROUND

A I AM CURRENTLY EMPLOYED BY ALBRECHT ECONOMICS, INC. I HAVE BEEN EMPLOYED BY WAKE FOREST UNIVERSITY, THE UNIVERSITY OF KANSAS AND INDIANA UNIVERSITY

Q DID YOU TEACH AT WAKE FOREST UNIVERSITY (YES)

Q WHAT IN YOUR TEACHING EXPERIENCE AT WAKE FOREST UNIVERSITY HAS PREPARED YOU TO DEVELOP YOUR OPINIONS, WHICH YOU'RE HERE ABOUT TODAY

A ECONOMETRICS, ECONOMIC FORECASTING & MICROECONOMICS

Q HAVE YOU HAD TEACHING EXPERIENCE OTHER THAN AT WAKE FOREST

A YES, I TAUGHT AT INDIANA UNIVERSITY

Q WHAT COURSES DID YOU TEACH AT INDIANA UNIVERSITY THAT PREPARED YOU TO DEVELOP YOUR OPINIONS WHICH YOU'RE HERE ABOUT TODAY

A STATISTICS, MICROECONOMICS AND MACROECONOMICS

Q OTHER THAN TEACHING, WHAT EXPERIENCE HAVE YOU HAD AS AN ECONOMIST, THAT PREPARED YOU TO DEVELOP YOUR OPINIONS WHICH YOU'RE HERE ABOUT TODAY?

A 1984-1987

DIRECTOR OF ECONOMETRIC MODELING AND RESEARCH SCIENTIST,
INSTITUTE FOR PUBLIC POLICY AND BUSINESS RESEARCH,

UNIVERSITY OF KANSAS, LAWRENCE, KANSAS. MAIN RESPONSIBILITY WAS THE DESIGN AND DEVELOPMENT OF AN ECONOMETRIC FORECASTING MODEL FOR THE STATE OF KANSAS. OTHER RESPONSIBILITIES INCLUDED SUPERVISING IMPACT STUDIES.

1978-1984

RESEARCH ASSOCIATE, DIVISION OF RESEARCH, SCHOOL OF BUSINESS, INDIANA UNIVERSITY, BLOOMINGTON, INDIANA. RESPONSIBILITIES INCLUDED THE DEVELOPMENT OF AND FORECASTING WITH STATE AND SUB-STATE ECONOMETRIC MODELS, AND, ASSISTANCE IN THE GENERATION OF FORECASTS WITH A NATIONAL ECONOMETRIC MODEL.

Q DOCTOR ALBRECHT, ARE THERE ANY SPECIAL AREAS OF ECONOMICS THAT HAVE DRAWN YOUR ATTENTION AS AN ECONOMIST THAT HAVE PREPARED YOU TO DEVELOP YOUR OPINIONS WHICH YOU HOLD HERE ABOUT TODAY?

A YES, IN THE LAST 20 YEARS OR SO I HAVE HAD A PARTICULAR INTEREST IN THE AREA OF WHAT IS CALLED FORENSIC ECONOMICS OR LITIGATION ECONOMICS

Q COULD YOU EXPLAIN TO US WHAT FORENSIC ECONOMICS

A YES, FORENSIC ECONOMICS IS AN AREA OR FIELD OF ECONOMICS THAT SPECIALIZES IN THE APPLICATION OF ECONOMIC PRINCIPLES AND METHODS OF ANALYSIS TO QUESTIONS OF VALUATION THAT ARISE IN THE COURSE OF LITIGATION. FOR EXAMPLE, IN THE CASE WE ARE HERE ABOUT TODAY THERE IS A QUESTION CONCERNING THE ECONOMIC LOSS AS A RESULT OF AN INJURY. FORENSIC ECONOMICS IS THE USE OF ECONOMIC METHODS AND PRINCIPLES TO ANSWER THIS QUESTION

Q I SEE FROM YOUR VITAE THAT YOU HAVE PUBLISHED ARTICLES IN ACADEMIC JOURNALS.

A YES, I HAVE

Q WHAT IS THE PROCESS OF HAVING AN ARTICLE PUBLISHED IN AN ACADEMIC JOURNAL

A THE ARTICLE MUST GO THROUGH THE "REVIEW PROCESS" WHICH CONSISTS OF....

Q SO, NOT ALL PAPERS THAT ARE SUBMITTED FOR PUBLICATION WOULD ACTUALLY BE PUBLISHED

A CORRECT, ONLY A SMALL PORTION OF PAPERS THAT ARE SUBMITTED ARE ACTUALLY PUBLISHED

Q ARE ANY OF THE ARTICLES RELEVANT TO THE TESTIMONY YOU ARE ABOUT TO GIVE TODAY?

A YES.

Q COULD YOU BRIEFLY TELL US ABOUT THOSE?

A YES, I HAVE PUBLISHED SEVERAL PAPERS THAT DEAL WITH THE CALCULATION OF THE PRESENT VALUE...

Q HAVE YOU PRESENTED ACADEMIC PAPERS?

A YES.

Q TO WHOM HAVE YOU PRESENTED THE ACADEMIC PAPERS?

A TO OTHER ECONOMISTS.

Q HAVE YOU MADE OTHER PRESENTATIONS?

A YES, I HAVE MADE CONTINUING LEGAL EDUCATION PRESENTATIONS.

Q DOCTOR, ARE YOU CURRENTLY A MEMBER OF ANY PROFESSIONAL ORGANIZATIONS OR SOCIETIES THAT ARE DEDICATED TO INCREASING THE KNOWLEDGE AND UNDERSTANDING CONCERNING THE TESTIMONY YOU ARE ABOUT TO GIVE TODAY?

A YES

Q WHAT ARE THOSE

A THE NATIONAL ASSOCIATION OF FORENSIC ECONOMICS, THE AMERICAN ACADEMY OF ECONOMIC AND FINANCIAL EXPERTS

Q HAVE YOU HOLD ANY OFFICES IN THESE ORGANIZATIONS

A YES, I HAVE BEEN A VICE PRESIDENT AND MEMBER OF THE BOARD OF DIRECTORS OF THE NATIONAL ASSOCIATION OF FORENSIC ECONOMICS

Q HOW DID YOU BECOME A BOARD MEMBER

A I WAS ELECTED BY THE MEMBERSHIP

Q HOW MANY MEMBERS ARE THERE IN THE NATIONAL ASSOCIATION OF FORENSIC ECONOMICS

A AROUND 700

Q DOCTOR, HAVE YOU PREVIOUSLY BEEN ACCEPTED BY A COURT OF LAW IN THE STATE OF FLORIDA AS AN EXPERT IN THE FIELD OF ECONOMICS?

Q HAVE YOU PREVIOUSLY TESTIFIED AS AN EXPERT IN THE FIELD OF ECONOMICS?

END OF QUALIFICATIONS

Q HAVE YOU RECEIVED A SUBPOENA REQUIRING YOU TO APPEAR IN COURT IN THIS CASE

A YES

Q DOCTOR, JUST GENERALLY AND PRELIMINARY TO DETAILED QUESTIONS I WILL ASK YOU, COULD YOU TELL THE JURY THE BASIC NATURE OF YOUR ROLE IN THIS CASE?

A YES, I WAS ASKED TO REVIEWED MRS. REDACTED'S SITUATION AND CALCULATED THE ECONOMIC CONSEQUENCES, IF ANY, AS A RESULT OF HER DEATH.

Q DO YOU HAVE AN OPINION AS TO WHETHER OR NOT THERE ARE ECONOMIC CONSEQUENCES TO MRS. REDACTED AS A RESULT OF HER DEATH.

A YES, I HAVE AN OPINION

Q WHAT IS THAT OPINION

A IT IS MY OPINION THAT THERE ARE ECONOMIC CONSEQUENCES AS A RESULT OF HER DEATH.

Q WHAT ASSUMPTIONS DID YOU MAKE THAT LEAD TO YOUR OPINION THAT THERE ARE ECONOMIC CONSEQUENCES AS A RESULT OF MRS. REDACTED'S DEATH

A THAT SHE WAS PROVIDING CARE FOR THREE OF HER CHILDREN. THAT THREE OF HER CHILDREN LIVED IN HER HOUSEHOLD AND THAT SHE PERFORMED THE TYPICAL SERVICES THAT A MOTHER PROVIDES

Q WHAT ARE THE TYPICAL SERVICES THAT A MOTHER PROVIDES

A COOKING, CLEANING, LAUNDRY, GOING TO THE GROCERY STORE. THOSE TYPES OF ACTIVITIES. AND TO SOME EXTENT BEING THERE.

Q WAS MRS. REDACTED BEING PAID FOR DOING THESE ACTIVITIES

A NO

Q IF SHE WAS NOT BEING PAID HOW IS THERE AN ECONOMIC LOSS

A THE FACT THAT SHE WAS NOT BEING PAID DOES NOT MEAN THE ACTIVITIES DO NOT HAVE VALUE. FOR EXAMPLE, HOUSEWIVES ARE NOT PAID TO DO ALL THE ACTIVITIES THAT THEY DO BUT THE SERVICES PROVIDED ADD TO THE STANDARD OF LIVING OF THE HOUSEHOLD, THE ACTIVITIES HAVE VALUE.

Q HOW WOULD YOU MEASURE THE VALUE OF THE ACTIVITIES

A BY CALCULATING THE REPLACEMENT COST. THAT IS WHAT WOULD IT COST TO HIRE SOMEONE TO DO ALL THE ACTIVITIES THAT THE PERSON PROVIDED. IT WOULD BE POSSIBLE TO HIRE SOMEONE TO DO THE ACTIVITIES. THE COST OF HIRING SOMEONE TO DO THE ACTIVITIES IS A MEASUREMENT OF THE VALUE THAT WAS PROVIDED BY THE DECEASED.

Q WHAT INFORMATION HAVE YOU REVIEWED THAT ENABLES YOU TO BE ABLE TO CALCULATE THE VALUE OF THE ACTIVITIES THAT MRS. REDACTED PROVIDED

A AS I MENTIONED, I ASSUMED THAT MRS. REDACTED PROVIDED THE SERVICES THAT A TYPICAL MOTHER PROVIDES. SHE MAY HAVE PROVIDED MORE THAN THE TYPICAL MOTHER OR SHE MAY HAVE PROVIDED LESS. I SIMPLY DO NOT KNOW.

THE BUREAU OF LABOR STATISTICS COLLECTS DATA ON HOW INDIVIDUALS USE THEIR TIME. THE DATA ARE PUBLISHED IN THE AMERICAN TIME USE SURVEY. THE SURVEY IS ACTUALLY VERY GOOD.

FOR EXAMPLE IT BREAKS DOWN THE TIME A WOMAN IN A HOUSE WITH CHILDREN OF VARIOUS AGES SPENDS ON HOUSEHOLD CHORES, SLEEPING BEING WITH THE FAMILY.

SO, FROM THESE DATA WE CAN GET THE AMOUNT OF TIME THAT ARE SPENT ON THE ACTIVITIES.

AND, DATA EXIST ABOUT HOURLY WAGE RATES. THEN, THE HOURLY WAGE RATES ARE APPLIED TO THE NUMBER OF HOURS. THIS PROVIDES THE REPLACEMENT COST.

Q HAVE YOU PREPARED TABLES, WHICH WOULD HELP YOU EXPLAIN TO THE JURY HOW YOU MADE THE CALCULATIONS FOR QUANTIFYING THE DIMINISHED EARNING CAPACITY.

A YES.

Q PLEASE EXPLAIN YOUR CALCULATIONS TO THE JURY.

AT THIS POINT I WILL GO THROUGH THE CALCULATIONS OF THE DIMINISHED EARNING CAPACITY USING THE TABLES. INTERRUPT AS NECESSARY.

Q DO YOUR CALCULATIONS INCLUDE ANY HISTORICAL MEDICAL EXPENSES THAT WERE INCURRED

A NO

Q DO THE AMOUNTS YOU HAVE CALCULATED INCLUDE ANY PAYMENTS FOR PAIN AND SUFFERING

A NO

Q DO THE AMOUNTS YOU HAVE CALCULATED INCLUDE ANY PAYMENTS FOR THE LOST ABILITY TO ENJOY LIFE

A NO

MY DIRECT WILL TAKE APPROXIMATELY 60 MINUTES

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

THE ESTATE OF)
REDACTED, by and through)
Executrix REDACTED,)
)
Plaintiff,)
)
v.)
)
)
Defendants.)

PETITION FOR APPROVAL OF A WRONGFUL DEATH CLAIM

NOW COMES the undersigned counsel for plaintiff, pursuant to North Carolina General Statute §28A-13-3(23), and moves this Court for an Order approving settlement of the above-referenced action. Court approval is needed due to the fact that one of the beneficiaries, Mr. REDACTED's daughter REDACTED, is a minor.

1. This is a wrongful death action arising out of the death of DECEDENT, as a result of a motor vehicle collision on February 6, 2015. The intestate beneficiaries of this claim are Mr. REDACTED's surviving spouse, REDACTED, and their minor daughter REDACTED. REDACTED is 11 years old.

2. After the accident, Mr. REDACTED was initially transported to Danville Regional Medical Center in Danville Virginia, but then had to be flown to Carillion Medical Center in Roanoke, Virginia due

to his need for a neuro-surgeon. He remained hospitalized in Roanoke until his death on February 20, 2015.

3. The owner of the vehicle, defendant Howard, has a liability insurance policy issued by North Carolina Farm Bureau with limits of \$50,000.00. Those limits have been tendered.

4. The driver of the vehicle, defendant Woods, has a liability insurance policy issued by Nationwide Insurance Company with limits of \$50,000.00. Those limits have been tendered.

5. DECEDENT, III had Underinsured Motorist Coverage in the amount of \$100,000 with State Farm Insurance. There is no coverage available due to the fact that the two liability policies combined provide a total of \$100,000 in coverage. Counsel for plaintiff requested and obtained all documentation pertaining to Mr. REDACTED's application for automobile insurance to confirm that Mr. REDACTED had in fact purchased only \$100,000 in underinsured motorist coverage.

6. Mr. REDACTED's total medical bills exceeded \$230,000.

7. The decedent was a tenured full professor at North Carolina State University and was covered by the State Employees Health Plan. Plaintiff's counsel attempted to persuade SEHP to waive or reduce that lien but that request was denied. The SEHP paid \$117,087.03 and has asserted its statutory lien in the amount of \$32,761.01. (See attachment A for correspondence).

8. The claim of SEHP is not subject to the \$4,500 cap for the payment of medical bills set forth in 28A-18-2(a) and the SEHP lien

exhausts the funds available for the payment of any remaining medical charges.

9. Counsel for plaintiff have investigated the financial status of the defendants and believes that any effort to recover from the defendants' individual assets will be fruitless and cause an extensive delay in obtaining funds for the plaintiff estate.

10. Counsel for plaintiff have investigated the potential for bringing a products liability suit against Toyota due to the fact that the airbag failed to deploy in the decedent's Toyota Camry. Unfortunately the statute of repose has expired. Maintenance records were obtained to determine if any service had been performed that would have extended the time period in which suit could be filed and it was determined that no such service had occurred.

11. Counsel for plaintiff have also evaluated whether a medical negligence claim exists and determined that there was no viable and meritorious medical negligence claim.

12. Drew Haywood, Esquire, has served as the Guardian Ad litem to review this matter and is in agreement that this settlement should be approved so that the minor's mother can receive the limited funds available. The minor child will not receive any funds due to the fact that the first \$60,000 of any net recovery is paid to the surviving spouse pursuant to N.C.G.S §29-14(b)(1).

13. The plaintiff estate was represented by William S. Mills of Glenn, Mills, Fisher & Mahoney, P.A. The retainer agreement calls

for a contingent fee of one-third and the recovery of all expenses advanced.

14. The law firm of Glenn, Mills, Fisher & Mahoney, P.A. has advanced expenses on behalf of the plaintiff in the amount of \$1,144.65.

WHEREFORE, plaintiff respectfully request this Court:

1. To approve the settlement of this wrongful death and to approve all disbursements reflected on Exhibit B attached to the Consent Order.

2. To approve this settlement based upon this Petition and the documents filed herewith as consented to by the parties without requiring the parties to appear in court for a hearing. All parties, or their attorneys, have executed the Consent Order tendered to the Court simultaneously with this Petition.

This the ____ day of March, 2016.

William S. Mills
Glenn, Mills, Fisher & Mahoney, P.A.
404 Hunt Street - Suite 100
Post Office Drawer 3865
Durham, North Carolina 27702-3865
Telephone: (919) 683-2135
Attorney for Plaintiff

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

THE ESTATE OF redacted)
Executrix REDACTED,)
)
Plaintiff,)
)
v.)
)
)
Defendants.)

ORDER APPROVING SETTLEMENT OF WRONGFUL DEATH CLAIM

This matter came before the undersigned Superior Court Judge presiding upon the Plaintiff's motion pursuant to North Carolina General Statute §28A-13-3(23), seeking approval of the settlement of this wrongful death action. Court approval is needed due to the fact that one of the beneficiaries, Mr. REDACTED's daughter REDACTED REDACTED, is a minor.

Based upon the petition filed herein, and with the consent of all parties or their attorneys, the Court makes the following FINDINGS OF FACT:

1. This is a wrongful death action arising out of the death of REDACTED, as a result of a motor vehicle collision on February 6, 2015. The intestate beneficiaries of this claim are Mr. REDACTED's surviving spouse, REDACTED, and their minor daughter REDACTED REDACTED. REDACTED is 11 years old.

2. Mr. REDACTED was transported initially to Danville Regional Medical Center in Danville Virginia, but then had to be flown to Carillion Medical Center in Roanoke, Virginia due to his need for a neuro-surgeon. He remained hospitalized in Roanoke until his death on February 20, 2015.

3. The owner of the vehicle, defendant Howard, has a liability insurance policy issued by North Carolina Farm Bureau with limits of \$50,000.00. Those limits have been tendered.

4. The driver of the vehicle, defendant Woods, has a liability insurance policy issued by Nationwide Insurance Company with limits of \$50,000.00. Those limits have been tendered.

5. Walter REDACTED had Underinsured Motorist Coverage in the amount of \$100,000 with State Farm Insurance. Counsel for plaintiff requested and obtained all documentation pertaining to Mr. REDACTED's application for automobile insurance to confirm that Mr. REDACTED had in fact purchased only \$100,000 in underinsured motorist coverage. There is no underinsured motorist coverage available due to the fact that the two liability policies combined provide a total of \$100,000 in coverage.

6. Mr. REDACTED's total medical bills exceeded \$230,000.

7. The decedent was a full tenured professor at North Carolina State University and was covered by the State Employees

Health Plan. Plaintiff's counsel attempted to persuade SEHP to waive or reduce that lien but that request was denied. The SEHP paid \$117,087.03 and has asserted its statutory lien in the amount of \$32,761.01.

8. The claim of SEHP is not subject to the \$4,500 cap for the payment of medical bills set forth in 28A-18-2(a) and the SEHP lien exhausts the funds available for the payment of any remaining medical charges.

9. Counsel for plaintiff have investigated the financial status of the defendants and believes that any effort to recover from the defendants' individual assets will be fruitless and cause an extensive delay in obtaining funds for the plaintiff estate.

10. Counsel for plaintiff have investigated the potential for bringing a products liability suit against Toyota due to the fact that the airbag failed to deploy in the decedent's Toyota Camry. The statute of repose has expired on any such claim.

11. Counsel for plaintiff have also evaluated whether a medical negligence claim exists and determined that there was no viable and meritorious medical negligence claim.

12. Drew Haywood, Esquire, was appointed as the Guardian Ad litem to review this matter and is in agreement that this settlement should be approved. The minor child will not receive any funds due to the fact that the first \$60,000 of any

net recovery is paid to the surviving spouse pursuant to N.C.G.S §29-14(b)(1).

13. The plaintiff estate was represented by William S. Mills of Glenn, Mills, Fisher & Mahoney, P.A. The retainer agreement calls for a contingent fee of one-third and the recovery of all expenses advanced.

14. The law firm of Glenn, Mills, Fisher & Mahoney, P.A. has advanced expenses on behalf of the plaintiff in the amount of \$1,144.65.

Based upon the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

15. The settlement of this wrongful death claim has been consented to by all parties having an interest in this settlement as evidenced by their signatures below.

16. This settlement is in the best interest of the plaintiff estate and is hereby, approved.

17. The statutory lien of the State Employee's Health Plan in the amount of \$32,761.01 exhausts all funds available for the payment of any remaining amounts due to medical care providers.

Based upon the foregoing, it is therefore ORDERED, ADJUDGED, AND DECREED as follows:

1. The settlement of this wrongful death action is hereby approved and counsel for plaintiff shall proceed to disburse those funds as set forth on Exhibit 1 hereto.

2. This action is now dismissed with prejudice based upon the approval of this settlement.

This the _____ day of March, 2016.

Judge Presiding

WE CONSENT TO THE ENTRY OF THIS JUDGMENT:

William S. Mills
Glenn, Mills, Fisher & Mahoney
404 Hunt Street - Suite 100
Durham, North Carolina 27702-3865
Telephone: (919)683-2135
Attorney for Plaintiff

Drew Haywood
The Law Office of Drew Haywood
311 E. Main Street
Durham, North Carolina 27701
Telephone: (919)525-1775
Guardian Ad Litem to REDACTED

REDACTED,

a minor child

Durham, NC 27707
P.O. Box 51429
Durham, NC 27717
Telephone: (919)403-0000
Attorney for Defendants

REDACTED
Executor of the Estate of
REDACTED

The Complete family

Describe their wonderful life,

You heard David describe the fact that he had just changed jobs so that he would not have to travel as much and would be there for his family.

The family was complete

Remind them of the purpose of their trip that day

The trip was taken because Kim was taking care of her daughter - they were returning from being at the pediatricians' office.

This family has done everything we can possibly ask of a young family

The Special relationship of parent child

You all understand how the loss of a child is the biggest loss parents can have, none other comes close.

No other relationship compares to that of parent and child. It is a relationship that is unique - complex - There is the connection that is biological and emotional. A child is the parents link to the future - the promise that life will go on - After the birth of a child a parents life is changed forever and the parent's life revolves around the child. When a child is ripped suddenly from its parents - there is a hole that remains forever.

Friends and acquaintances just do not know what to do. An awkward silence will exist; a friend will be reluctant to share the joys of a child's achievement or milestone reached, because they fear that saying such a thing will again remind david or kimberly of their loss. To speak of a child's death is unnatural, too painful. But today we must speak of it.

All the events they will miss over the next 40 years

birthdays

graduations

special honors and recognitions

The Proms

The first love

The growth of the relationship as Kennedy would transition from teen to young adult

For Kimberly, planning her daughter's wedding, and for David - walking down that aisle and giving her away

The birth of a grandchild and joy of that relationship

Seeing Katherine and Kennedy grow together and form the special bond like Kimberly had with her sister Kathy.

All the reminders of her loss:

Every meal

Every holiday

Christmas -when we celebrate the birth of christ we do it with family.

Every special event

Every time you see another child the same age as Kennedy would have been

When you learn of the milestones missed that are being celebrated by other parents

Every night when they see only one of their daughters - sometimes bored because no one to play with, Sometimes sad at the memory of her lost sister that is etched forever by her physical scars - and the hole in their previously complete family

The law

Wrongful Death Damages

How do we value the life of a child

Eminent Domain - we all recognize and except without question that if the government takes you land they have to pay full value for that land.

How do we get our arms around the concept of placing a value on a child's life - the loss of that child to her parents?

Let's Look at some examples of our society recognizes the value of our children:

Recently we have all seen how quickly an industry was forced to recall millions of toys because of traces of lead. - Why, because it might harm our children. We do not hesitate to act despite the great costs to protect our children

Think of the millions of dollars that have been spent in this state and Nationally putting guard rails in the medians of interstates - all for the purpose of protecting life.

Jessica McClure - some of you are of an age, like myself, that can remember how the nation was captivated by the efforts to save Jessica McClure - the 18 month old girl who fell down the well in Texas. The Nation watched as hundreds of people worked night and day to do whatever needed to be done to keep Jessica alive and to get her out of that deep well, without regard to the cost of getting jessica back into the loving arms of her parents.

These are but a handful of reflections of our public policy that says "the lives of our children are valuable and we will do whatever it takes to take care of them"

The loss of Kennedy

The witnesses who came before you gave you a full and consistent picture of a family that lived by the family values and traditions held dear by this community - Family, Church, hard work.

Their life is forever changed and they have suffered a loss that no parent should have to endure.

Our society values the uniqueness of skilled athletes by paying them 10s of millions for just one year. Kennedy was every bit as unique, special and wonderful to Kimberly and David. I suggest to you that the minimal value of this loss that will be with them until the day they die, over 40 years, is at least \$1,000,000 per parent - an award of at least \$2,000,000 is a reasonable Verdict.

Kimberly and David have endured so many hardships, heartbreaks and horrors since that tragic day. Verdict comes from Latin for speak the truth. When you speak with your Verdict - gives this family some good news. Let David and Kimberly know that you recognize that Kennedy's life had great value.

When the Defendant argues

The defendants have told you that they accept responsibility but yet I suspect that they will stand before you and try to get you to minimize your Verdict.

The defendants will have the lawyers stand before you, not witnesses, and say “they have accepted responsibility” as if that somehow makes it better. You know that they accepted responsibility because of the evidence of what happened. It does not lessen the loss, it just shortens the trial.

The defense lawyers will tell you that this was an accident. An accident is something that happens despite everyone being careful, an Accident is something that can’t be avoided. This was a terrible tragedy caused by the negligence of defendant watson and could have easily been avoided. So please don’t let the repetition by the lawyer that this was an accident have anything to do with your Verdict.

They have presented no evidence to diminish anything our witnesses have testified about

We will not get to respond, the defendants, who caused all this harm, get the last word because of the way the law is - We can’t get up and respond, so...

As they attempt to minimize your Verdict for this family, I want you to think about the following three things:

First, I don’t know if they are going to suggest any numbers for you. But if they do, don’t let them get away with suggesting one number for all four claims, each claim must stand on its own merits.

Second, if they suggest a number, you should expect them to justify it based on the evidence presented, which is what the law requires

Third, and finally, please think about what David or Kimberly, or any of our witnesses you came before you and did testify, would say in response to the lawyers’ arguments.

Accountability theme

AS I SAID DURING THE OPENING OF THIS TRIAL, WHEN AN AGENT OF THE GOVERNMENT VIOLATES THEIR RULES AND TRAINING, KILLING AND MAIMING INNOCENT MEMBERS OF YOUR COMMUNITY HE SHOULD BE HELD ACCOUNTABLE, JUST LIKE ANY OF US WOULD BE.

YOUR VERDICT WILL SPEAK TO THE VALUES OF FAMILY IN THIS COMMUNITY.

WE ARE NOW AT THAT POINT WHERE THE POWER TO DETERMINE THAT ACCOUNTABILITY IS IN YOUR HANDS AS THE VOICE OF THE COMMUNITY. YOU HAVE BEEN CHOSEN TO DECIDE THIS CASE. YOUR VERDICT OF COMPENSATION THAT YOU WILL SOON DECIDE, IS THE ONLY ACCOUNTABILITY THE LAW ALLOWS FOR THIS FAMILY.

THE FRYE'S ARE CONFIDENT THAT WHEN YOU RENDER YOUR VERDICT AND SPEAK THE TRUTH - THAT THEY WILL RECEIVE THAT ACCOUNTABILITY.

WE ASK THAT YOU GIVE EACH OF KENNEDY'S PARENTS ONE MILLION DOLLARS, NOT A PENNY LESS.

REMARKS OF PRESIDENT OBAMA IN NEWTOWN

Thank you. Thank you, Governor. To all the families, first responders, to the community of Newtown, clergy, guests -- Scripture tells us: "...do not lose heart. Though outwardly we are wasting away...inwardly we are being renewed day by day. For our light and momentary troubles are achieving for us an eternal glory that far outweighs them all. So we fix our eyes not on what is seen, but on what is unseen, since what is seen is temporary, but what is unseen is eternal. For we know that if the earthly tent we live in is destroyed, we have a building from God, an eternal house in heaven, not built by human hands."

We gather here in memory of twenty beautiful children and six remarkable adults. They lost their lives in a school that could have been any school; in a quiet town full of good and decent people that could be any town in America.

Here in Newtown, I come to offer the love and prayers of a nation. I am very mindful that mere words cannot match the depths of your sorrow, nor can they heal your wounded hearts. I can only hope it helps for you to know that you're not alone in your grief; that our world too has been torn apart; that all across this land of ours, we have wept with you, we've pulled our children tight. And you must know that whatever measure of comfort we can provide, we will provide; whatever portion of sadness that we can share with you to ease this heavy load, we will gladly bear it. Newtown -- you are not alone.

As these difficult days have unfolded, you've also inspired us with stories of strength and resolve and sacrifice. We know that when danger arrived in the halls of Sandy Hook Elementary, the school's staff did not flinch, they did not hesitate. Dawn Hochsprung and Mary Sherlach, Vicki Soto, Lauren Rousseau,

Rachel Davino and Anne Marie Murphy -- they responded as we all hope we might respond in such terrifying circumstances -- with courage and with love, giving their lives to protect the children in their care.

We know that there were other teachers who barricaded themselves inside classrooms, and kept steady through it all, and reassured their students by saying "wait for the good guys, they're coming"; "show me your smile."

And we know that good guys came. The first responders who raced to the scene, helping to guide those in harm's way to safety, and comfort those in need, holding at bay their own shock and trauma because they had a job to do, and others needed them more.

And then there were the scenes of the schoolchildren, helping one another, holding each other, dutifully following instructions in the way that young children sometimes do; one child even trying to encourage a grown-up by saying, "I know karate. So it's okay. I'll lead the way out."

As a community, you've inspired us, Newtown. In the face of indescribable violence, in the face of unconscionable evil, you've looked out for each other, and you've cared for one another, and you've loved one another. This is how Newtown will be remembered. And with time, and God's grace, that love will see you through.

But we, as a nation, we are left with some hard questions. Someone once described the joy and anxiety of parenthood as the equivalent of having your heart outside of your body all the time, walking around. With their very first cry, this most precious, vital part of ourselves -- our child -- is suddenly exposed to the world, to possible mishap or malice. And every parent knows

there is nothing we will not do to shield our children from harm. And yet, we also know that with that child's very first step, and each step after that, they are separating from us; that we won't -- that we can't always be there for them. They'll suffer sickness and setbacks and broken hearts and disappointments. And we learn that our most important job is to give them what they need to become self-reliant and capable and resilient, ready to face the world without fear.

And we know we can't do this by ourselves. It comes as a shock at a certain point where you realize, no matter how much you love these kids, you can't do it by yourself. That this job of keeping our children safe, and teaching them well, is something we can only do together, with the help of friends and neighbors, the help of a community, and the help of a nation. And in that way, we come to realize that we bear a responsibility for every child because we're counting on everybody else to help look after ours; that we're all parents; that they're all our children.

This is our first task -- caring for our children. It's our first job. If we don't get that right, we don't get anything right. That's how, as a society, we will be judged.

And by that measure, can we truly say, as a nation, that we are meeting our obligations? Can we honestly say that we're doing enough to keep our children -- all of them -- safe from harm? Can we claim, as a nation, that we're all together there, letting them know that they are loved, and teaching them to love in return? Can we say that we're truly doing enough to give all the children of this country the chance they deserve to live out their lives in happiness and with purpose?

I've been reflecting on this the last few days, and if we're honest with ourselves, the answer is no. We're not doing enough. And we will have to change.

Since I've been President, this is the fourth time we have come together to comfort a grieving community torn apart by a mass shooting. The fourth time we've hugged survivors. The fourth time we've consoled the families of victims. And in between, there have been an endless series of deadly shootings across the country, almost daily reports of victims, many of them children, in small towns and big cities all across America -- victims whose -- much of the time, their only fault was being in the wrong place at the wrong time.

We can't tolerate this anymore. These tragedies must end. And to end them, we must change. We will be told that the causes of such violence are complex, and that is true. No single law -- no set of laws can eliminate evil from the world, or prevent every senseless act of violence in our society.

But that can't be an excuse for inaction. Surely, we can do better than this. If there is even one step we can take to save another child, or another parent, or another town, from the grief that has visited Tucson, and Aurora, and Oak Creek, and Newtown, and communities from Columbine to Blacksburg before that -- then surely we have an obligation to try.

In the coming weeks, I will use whatever power this office holds to engage my fellow citizens -- from law enforcement to mental health professionals to parents and educators -- in an effort aimed at preventing more tragedies like this. Because what choice do we have? We can't accept events like this as routine. Are we really prepared to say that we're powerless in the face of such carnage, that the politics are too hard? Are we prepared to say that such violence visited on our children year after year after year is somehow the price of our freedom?

All the world's religions -- so many of them represented here today -- start with a simple question: Why are we here? What gives our life meaning? What gives our acts purpose? We know our time on this Earth is fleeting. We know that we will each have our share of pleasure and pain; that even after we chase after some earthly goal, whether it's wealth or power or fame, or just simple comfort, we will, in some fashion, fall short of what we had hoped. We know that no matter how good our intentions, we will all stumble sometimes, in some way. We will make mistakes, we will experience hardships. And even when we're trying to do the right thing, we know that much of our time will be spent groping through the darkness, so often unable to discern God's heavenly plans.

There's only one thing we can be sure of, and that is the love that we have -- for our children, for our families, for each other. The warmth of a small child's embrace -- that is true. The memories we have of them, the joy that they bring, the wonder we see through their eyes, that fierce and boundless love we feel for them, a love that takes us out of ourselves, and binds us to something larger -- we know that's what matters. We know we're always doing right when we're taking care of them, when we're teaching them well, when we're showing acts of kindness. We don't go wrong when we do that.

That's what we can be sure of. And that's what you, the people of Newtown, have reminded us. That's how you've inspired us. You remind us what matters. And that's what should drive us forward in everything we do, for as long as God sees fit to keep us on this Earth.

"Let the little children come to me," Jesus said, "and do not hinder them -- for to such belongs the kingdom of heaven."

Charlotte. Daniel. Olivia. Josephine. Ana. Dylan. Madeleine.
Catherine. Chase. Jesse. James. Grace. Emilie. Jack. Noah.
Caroline. Jessica. Benjamin. Avielle. Allison.

God has called them all home. For those of us who remain, let us find the strength to carry on, and make our country worthy of their memory.

May God bless and keep those we've lost in His heavenly place. May He grace those we still have with His holy comfort. And may He bless and watch over this community, and the United States of America.

810.40 WRONGFUL DEATH DAMAGES - ISSUE AND BURDEN OF PROOF.

The (*state number*) issue reads:

"What amount is the estate of (*name deceased*) entitled to recover for wrongful death?"

If you have answered the (*state number*) issue "Yes" (and the (*state number*) issue "No") in favor of the estate, the estate is entitled to recover nominal damages even without proof of actual damages.ⁱ Nominal damages consist of some trivial amount such as one dollar in recognition of the technical damages incurred by the estate.

The estate may also be entitled to recover actual damages.ⁱⁱ On this issue, the burden of proof is on the estate. This means the estate must prove, by the greater weight of the evidence, the amount of actual damages [proximately caused by the negligence] [caused by the wrongful conduct] of the defendant.

i. *Porter v. Leneave*, 119 N.C. App. 343, 458 S.E.2d 513 (1995).

ii. N.C. Gen. Stat. § [28A-18-2\(b\)](#).

810.41 WRONGFUL DEATH DAMAGES - SET OFF/DEDUCTION OF WORKERS' COMPENSATION AWARD.

Evidence has been introduced that the estate received (*state dollar amount*) in workers' compensation benefits from (*name deceased's*) employer, (*state employer's name*). Under North Carolina law, the Court is required to deduct this amount from any amount of damages that you award the estate.ⁱ

I have advised you of the amount of the estate's workers' compensation award for the sole purpose of informing you that such amount will be deducted by the Court from any amount of damages you award the estate. You are not to consider the amount of the estate's workers' compensation recovery for any other purpose. Such awards are not calculated in accordance with the law of damages applicable to a civil trial, such as this one. They are determined by statute, according to a fixed formula.

I therefore instruct you that you are not to be guided or influenced by the amount of the estate's workers' compensation award in determining the amount of damages, if any, that you award the estate. Your decision on the amount of the damages the estate is entitled to recover is to be governed exclusively by the evidence in this case and the rules of law I have given you with respect to the measure of damages.

i. N.C. Gen. Stat. § [97-10.2](#)(e).

810.42 WRONGFUL DEATH DAMAGES - IN GENERAL.ⁱ

(For medical malpractice cases filed on or after 1 October 2011, use N.C.P.I. -Civil [809.142](#).)

Actual damages are the fair compensation to be awarded to the estate for the death of *(name deceased)* [proximately caused by the negligence] [caused by the wrongful conduct] of the defendant. Such damages may include:

[expenses for care, treatment and hospitalization incident to the injury resulting in death]ⁱⁱ

[pain and suffering]ⁱⁱⁱ

[reasonable funeral expenses]^{iv}

[the present monetary value of *(name deceased)* to *his* next-of-kin].^v

The total of all damages^{vi} are to be awarded in one lump sum.^{vii} I will now explain the law of damages as it relates to (each of) these.

i. *Bifurcation Note:* For actions commenced on or after 1 October 2011, N.C. [R. Civ. P. 42](#)(b)(3) specifies: "Upon motion of any party in an action in tort wherein the plaintiff seeks damages exceeding one hundred fifty thousand dollars (\$150,000), the court shall order *separate trials for the issue of liability and the issue of damages, unless the court for good cause shown orders a single trial. Evidence relating solely to compensatory damages shall not be admissible until the trier of fact has determined that the defendant is liable.* The same trier of fact that tries the issues relating to liability shall try the issues relating to damages."

ii. N.C. Gen. Stat. § [28A-18-2](#)(b)(1).

iii. N.C. Gen. Stat. § [28A-18-2](#)(b)(2).

iv. N.C. Gen. Stat. § [28A-18-2](#)(b)(3).

v. N.C. Gen. Stat. § [28A-18-2](#)(b)(4).

vi. In addition, punitive damages may be awarded for wrongful death of the deceased through the malice or willful or wanton conduct of the defendant as defined at N.C. Gen. Stat. § [1D-5](#). N.C. Gen. Stat. § [28A-18-2](#)(b)(5). Punitive damages issues should be submitted separately, however. See *Jones v. McCaskill*, 99 N.C. App. 764, 394 S.E.2d 254 (1990).

vii. *Kendrick v. Cain*, 272 N.C. 719, 159 S.E.2d 33 (1968).

810.44 WRONGFUL DEATH DAMAGES - MEDICAL EXPENSES.ⁱ

(Use for claims arising before 1 October 2011. For claims arising on or after 1 October 2011, use N.C.P.I.-Civil [810.44A](#), [810.04B](#), [810.44C](#) or [810.04Dⁱⁱ](#))

Expenses for care, treatment and hospitalization include all [hospital] [doctor] [drug] [*state other*] expenses reasonably paidⁱⁱⁱ or incurred^{iv} by (*name deceased*) as a [proximate result of the negligence] [result of the wrongful conduct] of the defendant.

(The parties have agreed and stipulated that (*name deceased*)'s reasonable medical expenses were (*state amount*).)

i. N.C. Gen. Stat. § [28A-18-2](#)(b)(1).

ii. See 2011 N.C. Sess. Laws 317 § 1.1 (modifying 2011 N.C. Sess. Laws 283 § 4.2).

iii. The cases speak of "actual" expenses. See *Taylor v. Boger*, 289 N.C. 560, 570, 223 S.E.2d 850, 356 (1976); *Williams v. Charles Stores Co.*, 209 N.C. 591, 601, 184 S.E.2d 496, 502 (1936). Where there is an issue as to the reasonableness of the medical expenses, the jury also should be instructed:

As to the reasonableness of the expenses, the plaintiff has the burden of proof by the greater weight of the evidence. However, where the plaintiff has testified regarding the amount of such expenses and has provided records or copies of such charges, you may find from this evidence alone that the charges are reasonable, but you are not compelled to do so.

See N.C. Gen. Stat. § [8-58.1](#) and [Rule of Evidence 301](#).

iv. If the expense has been incurred, there need not be evidence of actual payment. See *Williams*, 209 N.C. at 601–02, 184 S.E. at 502 (1936). Further, the fact that medical expenses were paid by the plaintiff's employer, his medical insurer, or some other collateral source generally does not deprive the plaintiff of the right to recover them. *Cates v. Wilson*, 321 N.C. 1, 5, 361 S.E.2d 734, 737 (1987); *Fisher v. Thompson*, 50 N.C. App. 724, 731, 275 S.E.2d 507, 513 (1981).

810.46 WRONGFUL DEATH DAMAGES - PAIN AND SUFFERING.

Damages for (*name deceased's*) death also include fair compensation for the actual physical pain and mental sufferingⁱ experienced by (*name deceased*) between the time of *his* injury and the time of *his* death. You may consider:

[the nature, extent and degree of the injury(ies) sustained by (*name deceased*)ⁱⁱ]

[the length of time (*name deceased*) lived and was consciousⁱⁱⁱ of *his* pain and suffering]

[*state any other factor supported by the evidence*].

There is no fixed formula for valuing physical pain and mental suffering. You will determine what is fair compensation by applying logic and common sense to the evidence.

i. N.C. Gen. Stat. § [28A-18-2](#)(b)(2).

ii. If reasonably established, a recovery may be had for pain and suffering to a fetus. *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489, *rehearing denied*, 320 N.C. 799, 361 S.E.2d 73 (1987).

iii. *Livingston v. United States*, 817 F.Supp. 601 (E.D.N.C. 1993).

810.48 WRONGFUL DEATH DAMAGES - FUNERAL EXPENSES.

(Use for claims arising before 1 October 2011. For claims arising on or after 1 October 2011, use N.C.P.I.-Civil [810.48A](#), [810.48B](#), [810.48C](#) or [810.48D](#).ⁱ⁾

Damages for (*name deceased*)'s death also include all funeral (and burial)ⁱⁱ expenses reasonably paidⁱⁱⁱ or incurred^{iv} by the estate.

(The parties have agreed and stipulated that the estate's reasonable funeral (and burial) expenses were (*state amount*).)

i. See 2011 N.C. Sess. Laws 317 § 1.1 (modifying 2011 N.C. Sess. Laws 283 § 4.2).

ii. There is no right of recovery for burial expenses separate and apart from the right to recover for wrongful death. Burial expenses are to be recovered out of the amount to be recovered in the action. *Davenport v. Patrick*, 227 N.C. 686, 691 44 S.E.2d 203 206–207 (1947).

iii. Where there is an issue as to the reasonableness of the funeral or burial expenses, the jury also may be instructed:

As to the reasonableness of the expenses the Estate has the burden of proof by the greater weight of the evidence. However, where the Estate has put into evidence the amount of such expenses and has provided records or copies of such charges, you may find them this evidence alone that the charges are reasonable, but you are not compelled to do so.

See N.C. Gen. Stat. §§ [8-58.1](#) and [Rule of Evidence 301](#).

iv. Proof of actual payment need not be made as long as the evidence competently establishes that the expense was incurred. Furthermore, the fact that some or all of the decedent's funeral or burial expenses were paid by a third party insurer or some, other collateral source generally does not deprive the Estate of the right to recover them.

N.C.P.I.-Civil 810.48
WRONGFUL DEATH DAMAGES-FUNERAL EXPENSES.
JUNE 2013

810.50 WRONGFUL DEATH DAMAGES - PRESENT MONETARY VALUE OF
DECEASED TO NEXT-OF-KIN.ⁱ

(For medical malpractice cases filed on or after 1 October 2011, use
N.C.P.I.-Civil [809.150](#) and [809.151](#))

Damages for (*name deceased*)'s death also include fair compensation
for the present monetary value of (*name deceased*) to *his* next-of-kin.ⁱⁱ (In
this case, (*name deceased*)'s next-of-kin are (*name persons and specify
relationships*).)

There is no fixed formula for determining the present monetary value
of (*name deceased*) to *his* next of kin. You must determine what is fair
compensation by applying logic and common sense to the evidence.ⁱⁱⁱ You
may consider:

[The net income (*name deceased*) would have earned during the
remainder of *his* life. You must subtract from (*name deceased*)'s reasonably
expected income the amount *he* would have spent on *himself* or for other
purposes which would not have benefited *his* next of kin.^{iv} The amount *he*
would have earned depends upon *his* prospects in life, health, character,
ability, industry and [the means *he* had for making money] [the business in
which *he* was employed]. It also depends upon *his* life expectancy- that is,
the length of time *he* could reasonably have been expected to live but for
the [negligence] [wrongful conduct] of the defendant.]

[The services, protection, care and assistance of (*name deceased*),
whether voluntary or obligatory, to *his* next-of-kin.^v These words are to be
given their ordinary meanings. You may consider the family and personal
relations between (*name deceased*) and *his* next-of-kin, and what you find

to be the reasonable value of the loss to them of these things over the life expectancy of (*name deceased*)^{vi} (or, as I will explain to you, over a shorter period).^{vii}]

[The society, companionship, comfort, guidance, kindly offices and advice of (*name deceased*) to *his* next-of-kin.^{viii} These words are to be given their ordinary meaning. You may consider the family and personal relations between (*name deceased*) and *his* next-of-kin and what you find to be the reasonable value of the loss to them of these things over the life expectancy of (*name deceased*)^{ix} (or, as I will explain to you, over a shorter period.)]

As I have indicated, in determining (*name deceased*)'s [net income expectancy] [the value of *his* services, protection, care and assistance] [the value of *his* society, companionship, comfort, guidance, kindly offices and advice], you must consider *his* life expectancy.^x Life expectancy is the period of time (*name deceased*) may reasonably have been expected to live but for the [negligence] [wrongful conduct] of the defendant. The life expectancy tables are in evidence.^{xi} They show that for one of (*name deceased*)'s age at the time of *his* death, *his* life expectancy would have been (*state expectancy*) years. In determining (*name deceased*)'s life expectancy, you will consider not only these tables, but also all other evidence as to *his* health, *his* constitution and *his* habits.^{xii}

(The life expectancy tables show that, at the time of the death of (*name deceased*), the life expectancy for (*name next-of-kin*) was (*state expectancy*), which was shorter than the expectancy shown by the tables for (*name deceased*). Therefore, you must determine the expectancy of (*name next-of-kin*) as well as the expectancy of (*name deceased*). In determining the expectancy of (*name next-of-kin*), you will consider not only these tables, but also all other evidence as to *his* health, *his* constitution and *his*

habits. If you find that the expectancy of (*name next-of-kin*) is shorter than that of (*name deceased*), you will determine the monetary value of the (*name deceased*) to (*name next-of-kin*) by the shorter of the two life expectancies. In other words, when the expectancy of a next-of-kin is shorter than that of a deceased, the award to the next-of-kin is limited to the value of benefits *he* might have expected to receive during *his* own life.)^{xiii}

In determining the amount of actual damages to be awarded to (*name deceased*)'s next-of-kin, you are not limited to the things which I have mentioned. You may consider any other evidence which reasonably tends to establish the monetary value of (*name deceased*) to *his* next-of-kin.

Any amount you allow as damages for the future monetary value of (*name deceased*) to *his* next-of-kin must be reduced to its present value, because a smaller sum received now is equal to a larger sum received in the future. (There is evidence before you that (*name deceased*)'s future monetary value to *his* next-of-kin already has been reduced to its present value. Whether it has in fact been so reduced is for you to determine from the evidence and from your logic and common sense. However, if you find that (*name decedent*)'s monetary value to *his* next-of-kin already has been reduced to present value, you must not reduce it again.)

i. N.C. Gen. Stat. § [28A-18-2](#)(b)(4).

ii. If the decedent's next-of-kin has not been stipulated or determined by the Court as a matter of law, a separate issue must be submitted.

iii. The jury also may consider all negative factors that would tend to diminish the present value of the deceased to his or her next-of-kin. Thus, a young decedent's low level of educational achievement, lack of regular employment, dependency on parents for financial support and history of substance abuse was relevant. *Pearce v. Fletcher*, 74 N.C. App. 543, 328 S.E.2d 889 (1985). See also *Hales v. Thompson*, 111 N.C. App. 350, 432

S.E.2d 388 (1993).

iv. N.C. Gen. Stat. § [28A-18-2](#)(b)(4)a. Only the net income of the deceased can be considered. *State v. Smith*, 90 N.C. App. 161, 368 S. E. 2d 33 (1988), *aff'd*, 323 N.C. 703, 374 S.E.2d 866, *cert. denied*, 490 U.S. 1100, 109 S. Ct. 2453, 104 L. Ed. 2d 1007 (1989).

v. N.C. Gen. Stat. § [28A-18-2](#)(b)(4)b.

vi. *Bowen v. Constructors Equip. Rental Co.*, 16 N.C. App. 70, 74, 191 S.E.2d 419, 422 (1972), *aff'd*, 283 N.C. 395, 196 S. E. 2d 789 (1973).

vii. *Id.* at 74–77, 191 S. E. 2d at 422–24. This and other parenthetical statements in the instruction keyed to this footnote should be used when there is evidence tending to show that the expectancy of one or more next-of-kin is shorter than that of the deceased.

viii. N.C. Gen. Stat. § [28A-18-2](#)(b)(4)c.

ix. These damages are not available where the deceased is a stillborn child. *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489, *reh'g denied*, 320 N.C. 799, 361 S.E.2d 73 (1987).

x. *Bowen*, 16 N.C. App. at 74, 191 S.E.2d at 422.

xi. "The [mortality] table is statutory, [N.C. Gen. Stat.] § [8-46](#), and need not be introduced but may receive judicial notice when facts are in evidence requiring or permitting its application." *Chandler v. Chem. Co.*, 270 N.C. 395, 400, 154 S.E.2d 502, 506 (1967).

xii. A failure to include this sentence, or its equivalent, is reversible error. See *Kinsey v. Kenly*, 263 N.C. 376, 139 S.E.2d 686 (1965); *Harris v. Greyhound Corp.*, 243 N.C. 346, 90 S.E.2d 710 (1956).

xiii. See note 7. However, the above parenthetical paragraph will need revision if the contention of a shorter life expectancy for the next of kin is based upon health evidence (e.g., terminal cancer) rather than age.

810.54 WRONGFUL DEATH DAMAGES - FINAL MANDATE (REGULAR).

(For medical malpractice cases filed on or after 1 October 2011, use N.C.P.I.-Civil [809.154](#). Use N.C.P.I.-Civil [810.56](#) in place of N.C.P.I.-Civil 810.54 when a per diem argument has been made.)

I instruct you that your findings on the (*state number*) issue must be based on the evidence and the rules of law I have given you with respect to the measure of damages.¹ You are not required to accept the amount of damages suggested by the parties or their attorneys.

Your award must be fair and just. You should remember that you are not seeking to punish either party, and you are not awarding or withholding anything on the basis of sympathy or pity.

Finally, as to the (*state number*) issue on which the estate has the burden of proof, if you find by the greater weight of the evidence the amount of actual damages [proximately caused by the negligence] [caused by the wrongful conduct] of the defendant, then it would be your duty to write that amount in the blank space provided.

If, on the other hand, you fail to so find, then it would be your duty to write a nominal sum such as "One Dollar" in the blank space provided.

i. Damages may not be based on sheer speculation, *Stetson v. Easterling*, 274 N.C. 152, 161 S.E.2d 531 (1968) and *Gay v. Thompson*, 266 N.C. 394, 146 S.E.2d 425 (1966), but, by necessity, some speculation is necessary to determine damages, *Beck v. Carolina Power & Light Co.*, 57 N.C. App. 373, 291 S.E.2d 897, *aff'd*, 307 N.C. 267, 297 S.E.2d 397 (1982), and this is acceptable as long as there are sufficient facts to support necessary speculation, *Gay, supra*, and *Beck, supra*.

810.56 WRONGFUL DEATH DAMAGES - FINAL MANDATE (*PER DIEM*
ARGUMENT BY COUNSEL).

(*For medical malpractice cases filed on or after 1 October 2011, use
N.C.P.I.-Civil [809.156](#). Use this instruction in place of [810.54](#) when a per
diem argument has been made.*)

I instruct you that, your findings on the (*state number*) issue must be based on the evidence and the rules of law I have given you with respect to the measure of damages.ⁱ You are not required to accept the amount of damages suggested by the parties or their attorneys.

(*Use only if counsel makes a per diem argument: An attorney is allowed to suggest an amount of damages and therefore can suggest an amount for each (specify unit(s) of time, e.g., "day, hour or minute") of physical pain or mental suffering. However, I instruct you that there is no fixed mathematical formula for computing damages for physical pain or mental suffering. Furthermore, an attorney's argument is not evidence but is merely an approach to the damage issue which you may consider but need not adopt.*ⁱⁱ)

Your award must be fair and just. You should remember that you are not seeking to punish either party, and you are not awarding or withholding anything on the basis of sympathy or pity.

Finally, as to the (*state number*) issue on which the estate has the burden of proof, if you find by the greater weight of the evidence the amount of actual damages [proximately caused by the negligence] [caused by the wrongful conduct] of the defendant, then it would be your duty to write that amount in the blank space provided.

If, on the other hand, you fail to so find, then it would be your duty to

N.C.P.I.-Civil 810.56

WRONGFUL DEATH DAMAGES-FINAL MANDATE (*PER DIEM* ARGUMENT BY
COUNSEL).

JUNE 2012

write a nominal sum such as "One Dollar" in the blank space provided.

i. Damages may not be based on sheer speculation, *Stetson v. Easterling*, 274 N.C. 152, 161 S.E.2d 531 (1968) and *Gay v. Thompson*, 266 N.C. 394, 146 S.E.2d 425 (1966), but, by necessity, some speculation is necessary to determine damages, *Beck v. Carolina Power & Light Co.*, 57 N.C. App. 373, 291 S.E.2d 897, *aff'd*, 307 N.C. 267, 297 S.E.2d 397 (1982), and this is acceptable as long as there are sufficient facts to support necessary speculation, *Gay, supra*, and *Beck, supra*.

ii. See *Weeks v. Holsclaw*, 306 N.C. 655, 661, 295 S.E.2d 596, 600 (1982), where the court held that the *per diem* argument is appropriate, but only if (1) there is a factual basis for it, and (2) cautionary instructions are given. In *Weeks*, the factual basis was the plaintiff's testimony that he suffered pain almost constantly, backed up by details of the pain and the ways in which the pain had altered his lifestyle.