

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

*(Use this instruction in place of 106.54 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.<sup>1</sup> 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.<sup>2</sup>)*

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<sup>1</sup>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*.

<sup>2</sup>See *Weeks v. Holsclaw*, 306 N.C. 655, 295 S.E.2d 596 (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 Estate's testimony and he suffered pain almost constantly, backed up by details of the pain and the ways in which the pain had altered his lifestyle.

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(Continued).

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.