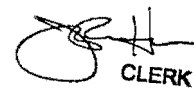


UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED

JUL 01 2011


CLERK

JAMES L. VARNER,) CIV. 09-5076-JLV
)
Plaintiff,)
)
vs.) FINAL INSTRUCTIONS
) TO THE JURY
)
)
BNSF RAILWAY COMPANY,)
)
)
Defendant.)

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FINAL INSTRUCTION NO. 1 - INTRODUCTION

Members of the jury, I will take a few minutes to give you the instructions that are to guide and govern you in arriving at a verdict. These final instructions are in writing and will be available to you in the jury room. The instructions explain the law that applies to this case. Consider these instructions with all written and oral instructions given to you during and at the end of the trial and apply them to the facts of the case. You must consider my instructions as a whole and not single out some instructions and ignore others. All instructions, whenever given and whether in writing or not, are equally binding on you and must be followed. The order in which the instructions are given has no significance as to their relative importance.

This is a civil case brought by James L. Varner against BNSF Railway Company. Mr. Varner is the plaintiff in this case, and BNSF Railway Company ("BNSF") is the defendant. During the course of his employment as a track inspector for BNSF, Mr. Varner claims he was injured on December 28, 2007, while removing a dead animal carcass from between the rails of track on BNSF right of way. Mr. Varner claims BNSF was negligent by failing to provide reasonably safe work conditions, reasonably safe work methods, reasonably safe tools and equipment, and reasonably proper training for the work he did on December 28, 2007, and Mr. Varner claims these alleged acts or failures to act caused injury to him. BNSF denies the allegations. BNSF claims

Mr. Varner was negligent and failed to mitigate his damages.

This case is presented to you because the parties dispute certain facts. You will decide the facts from the evidence presented in court. "Evidence" is defined in Final Instruction No. 2. You are entitled to consider that evidence in light of your own observations and experiences. You may use reason and common sense to draw conclusions from facts established by the evidence. You will then apply the law, which I give you in these instructions, to the facts to reach your verdict. You are the sole judges of the facts, but you must follow the law as stated in my instructions, whether you agree with the law or not.

It is vital to the administration of justice that each of you faithfully perform your duties as jurors. You must carefully and honestly consider this case with due regard for the rights and interests of both parties. Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict based solely on the evidence, your common sense, and the law as I give it to you. Your verdict must not be based on speculation, guess, or conjecture.

Finally, do not take anything I said or did during the trial as an indication of what I think about the evidence or what I think your verdict should be. Do not conclude from any ruling or comment I made that I have any opinion on how you should decide the case.

FINAL INSTRUCTION NO. 2 - DEFINITION OF EVIDENCE

I mentioned the word “evidence.” “Evidence” includes the testimony of witnesses, documents and other things received as exhibits, and stipulated facts. Stipulated facts are facts that are formally agreed to by the parties. Certain things are *not* evidence. I shall list those things for you now:

1. Statements, arguments, questions, and comments by lawyers representing the parties in the case are not evidence. Opening statements and closing arguments by lawyers are not evidence.
2. Objections and rulings on objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
3. Testimony I struck from the record or told you to disregard is not evidence and must not be considered.
4. Anything you see or hear about this case outside the courtroom is not evidence.

The fact that an exhibit was shown to you does not mean you must rely on it more than you rely on other evidence.

During the trial, certain evidence was presented by deposition. The witness testified under oath at the deposition just as if the witness was in

court. You should consider this testimony together with all other evidence received.

Some of you may have heard the terms “direct evidence” and “circumstantial evidence.” You should not be concerned with those terms. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

Finally, the weight of the evidence is not determined by the number of witnesses testifying as to the existence or non-existence of any fact. Also, the weight of the evidence should not be determined merely by the number or volume of documents or exhibits. The weight of the evidence depends on its quality, not quantity. The quality and weight of the evidence are for you to decide.

FINAL INSTRUCTION NO. 3 - CREDIBILITY OF WITNESSES

You are the sole judges of all questions of fact and the credibility of witnesses. In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness says, only part of it, or none of it.

In deciding what testimony to believe, you may consider the witness's intelligence; the opportunity the witness had to see or hear the things testified about; the witness's memory; any motives the witness may have for testifying a certain way; the behavior of the witness while testifying; whether the witness said something different at an earlier time; the general reasonableness of the testimony; and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind people sometimes see or hear things differently and sometimes forget things. You need to consider whether a contradiction results from an innocent misrecollection or sincere lapse of memory or instead from an intentional falsehood or pretended lapse of memory and that may depend on whether it has to do with an important fact or only a small detail.

FINAL INSTRUCTION NO. 4 - EXPERT WITNESSES

You may have heard testimony from persons described as experts. Persons who, by knowledge, skill, training, education or experience, have become an expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it and give it as much weight as you think it deserves considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.

FINAL INSTRUCTION NO. 5 - OBJECTIONS

The lawyers made objections during the trial that I ruled upon. If I sustained an objection to a question before it was answered, do not draw any inferences or conclusions from the question itself. The lawyers have a duty to object to testimony or other evidence they believe is not properly admissible. Do not hold it against a lawyer or the party the lawyer represents because the lawyer made objections.

FINAL INSTRUCTION NO. 6 - USE OF NOTES

You must make your decision based on the evidence. We have an official court reporter making a record of the trial. However, we will not have a typewritten transcript of the trial available for your use in reaching a verdict.

Notes you took during the trial are not necessarily more reliable than your memory or another juror's memory. Therefore, you should not be overly influenced by the notes.

At the end of the trial, you may take your notes out of the notebook and keep them or leave them, and we will destroy them. No one will read the notes.

FINAL INSTRUCTION NO. 7 - EQUALS BEFORE THE LAW

In this case, Mr. Varner is an individual and BNSF is a corporation. A corporation is entitled to the same fair trial as a private individual. No inference or presumption may be drawn against BNSF that would be improper in a case between individuals. You should consider and decide this case with the same fairness and consideration as though it were a case between individuals. All parties in this case stand equal before the law and are entitled to a fair and impartial consideration of the entire case.

FINAL INSTRUCTION NO. 8 - BURDEN OF PROOF

In civil actions, the party who has the burden of proving an issue must prove that issue by the greater weight of the evidence.

Greater weight means that after weighing the evidence on both sides there is enough evidence to convince you that something is more likely true than not true. In the event the evidence is evenly balanced so that you are unable to say the evidence on either side of an issue has the greater weight, then your finding upon the issue must be against the party who has the burden of proving it.

In determining whether or not an issue has been proved by the greater weight of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

FINAL INSTRUCTION NO. 9 - FEDERAL EMPLOYERS' LIABILITY ACT

Mr. Varner seeks to recover damages under a law of the United States called the Federal Employers' Liability Act ("FELA").

Section I of FELA provides in part:

Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment . . .

It is agreed that, at the time and place alleged by Mr. Varner, BNSF was a railroad common carrier engaged in interstate commerce. Mr. Varner was then an employee of BNSF, engaged in such commerce. Mr. Varner's right, if any, to recover in this case is governed by the provisions of FELA.

FINAL INSTRUCTION NO. 10 - ELEMENTS OF NEGLIGENCE

Your verdict must be for Mr. Varner and against BNSF on Mr. Varner's claim if all of the following elements have been proven by the greater weight of the evidence:

First, Mr. Varner was an employee of BNSF;

Second, BNSF failed to provide:

- a. reasonably safe conditions for work in that BNSF negligently failed to provide reasonably safe conditions for work in that it required track inspectors to remove animal carcasses from tracks without a study or analysis to determine how the work task could be performed safely; or
- b. reasonably safe tools and equipment in that the track inspector's truck was not equipped with a lifting or dragging device to move animal carcasses off the tracks; or
- c. reasonably adequate help in that co-workers who were present at animal carcass removal were not instructed or required to assist fellow workers; or
- d. reasonably safe methods for work in that it required Mr. Varner to manually remove animal carcasses without the aid of appropriate tools or equipment; or

- e. reasonably safe work conditions, safe work methods, proper training, and adequate supervision to Mr. Varner to perform the job he was directed to do; or
- f. reasonably safe conditions for work in that BNSF required Mr. Varner to remove animal carcasses when he was not adequately trained to perform such work; or
- g. reasonably safe tools and equipment in that the track inspectors were not provided proper and safe tools to perform the work tasks of removing animal carcasses; and

Third, BNSF in any one or more of the ways described in Paragraph *Second* was negligent; and

Fourth, such negligence resulted in whole or in part in injury to Mr. Varner.

If any of the four elements above have not been proven by the greater weight of the evidence, then your verdict must be for BNSF.

FINAL INSTRUCTION NO. 11 - ACCIDENT ALONE

Proof of an accident alone does not constitute proof that a party was negligent.

**FINAL INSTRUCTION NO. 12 - DEFINITIONS OF “NEGLIGENT” OR
“NEGLIGENCE” AND “ORDINARY CARE”**

The term “negligent” or “negligence” as used in these instructions means the failure to use ordinary care. The phrase “ordinary care” means that degree of care that an ordinarily careful person would use under the same or similar circumstances. The degree of care used by an ordinarily careful person depends upon the circumstances which are known or should be known and varies in proportion to the harm that person reasonably should foresee. In deciding whether a person was negligent or failed to use ordinary care, you must consider what that person knew or should have known and the harm that should reasonably have been foreseen.

FINAL INSTRUCTION NO. 13 -

KNOWLEDGE OF A PARTICULAR RISK OR DANGER

The definition of “negligence” under FELA requires BNSF to guard against those risks or dangers of which it knew or by the exercise of due care should have known. In other words, BNSF’s duty is measured by what a ordinarily careful person would anticipate or foresee resulting from particular circumstances. In determining whether BNSF knew or, through the exercise of reasonable care, should have known of a particular risk or danger, you may consider:

First, any evidence presented concerning any knowledge of BNSF or its supervisors or agents;

Second, any evidence presented concerning whether the risk was brought to the attention of BNSF, its supervisors or agents, by such means as statements, complaints or protests that a particular condition or assignment was dangerous; and

Third, whether an ordinarily careful person would have performed inspections that would have brought the dangerous condition to BNSF’s attention or otherwise would have known of the condition.

If you find by the greater weight of the evidence that an ordinarily careful person would have taken reasonable precautions against the risk based on such actual knowledge, statements, complaints, or protests, or reasonable

inspection, and you find that BNSF failed to take such reasonable precautions, then you may find that BNSF was negligent.

BNSF's duty to exercise reasonable care applies to its assignment of employees to particular tasks. BNSF may be found negligent if you find that it assigned Mr. Varner to duties BNSF knew or, in the exercise of reasonable care should have known, were beyond Mr. Varner's physical capacity or would otherwise cause injury to Mr. Varner.

You may find BNSF negligent if you find that BNSF instructed its employees to perform tasks that it knew or in the exercise of reasonable care should have known would result in injuries.

In determining whether BNSF was negligent, you may consider the evidence concerning the custom in the industry or safety rules. If you find there were such customs or rules, they may indicate recognition of a hazard and the means to avoid it, which may indicate what may be reasonable in a given situation.

However, you may find that an industry custom or safety rule does not reflect the level of care an ordinarily careful person would take and that BNSF was negligent although an industry custom or safety rule was followed.

Even if you find BNSF violated or failed to enforce a safety rule or did not take customary precautions, such a violation or failure does not require a

finding of negligence. Before you may impose liability on BNSF, you must still find that BNSF failed to exercise reasonable care under the circumstances.

If BNSF had no reasonable ground to anticipate that a particular condition would or might result in a mishap and injury, then BNSF was not required to do anything to correct the condition.

FINAL INSTRUCTION NO. 14 -

DUTY OF EMPLOYER AS TO PLACE OF WORK

BNSF had a continuing duty as an employer at the time and place of Mr. Varner's alleged injury to use ordinary care under the circumstances in furnishing Mr. Varner with a reasonably safe place in which to work. It was also BNSF's continuing duty to use ordinary care under the circumstances to maintain and keep such place of work in a reasonably safe condition.

This does not mean that BNSF is a guarantor or insurer of the safety of the place to work. The extent of BNSF's duty is to exercise ordinary care under the circumstances to see that the place in which the work is to be performed is reasonably safe under the circumstances shown by the evidence.

FINAL INSTRUCTION NO. 15 - SAFE AND SUITABLE TOOLS

While BNSF is not required to furnish the latest, best, and safest tools for its employees, BNSF does have a duty to use reasonable care to provide its employees, including Mr. Varner, with reasonably safe and suitable tools with which to work.

FINAL INSTRUCTION NO. 16 - FELA CAUSATION

For purposes of this action, injury or damage is said to be caused or contributed to by an act or failure to act when it appears from the greater weight of the evidence in the case that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage. So if you should find from the evidence in the case that any negligence of BNSF contributed in any way toward any injury or damage suffered by Mr. Varner, you may find that such injury or damage was caused by BNSF's act or omission. Likewise, if you should find from the evidence in the case that any negligence of Mr. Varner contributed in any way toward any injury or damage suffered by Mr. Varner, you may find that such injury or damage was caused by Mr. Varner's act or omission.

Stated another way, an act or omission is the cause of injury or damage if the injury or damage would not have happened but for the act or omission, even though the act or omission combined with other causes.

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

FINAL INSTRUCTION NO. 17 - AGENCY

Since a corporation can only act through its officers, or employees, or other agents, the burden is on Mr. Varner to establish, by the greater weight of the evidence in this case, that the negligence of one or more officers, or employees, or other agents of BNSF (other than Mr. Varner himself) was a cause of any injuries and consequent damages sustained by Mr. Varner.

Any negligent act or omission of an officer, or employee, or other agent of a corporation, in the performance of that person's duties, is held in law to be the negligence of the corporation.

If Mr. Varner's injury is caused or contributed to by the negligent act or omission of a fellow employee, acting in the course of the fellow employee's employment, then BNSF would be responsible for the act or omission of the fellow employee.

FINAL INSTRUCTION NO. 18 -

ASSUMPTION OF THE RISK NOT A DEFENSE

Section 4 of FELA provides, in part:

In any action brought against any common carrier . . . to recover damages for injuries to . . . any of its employees, such employee shall not be held to have assumed the risks of his employment in any cases where such injury . . . resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

FINAL INSTRUCTION NO. 19 -

SECTION 3 OF FELA: CONTRIBUTORY NEGLIGENCE

Section 3 of FELA provides in part:

In all actions . . . brought against any . . . common carrier by railroad . . . to recover damages for personal injuries to an employee, . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

In addition to denying that any negligence of BNSF caused any injury or damage to Mr. Varner, BNSF alleges, as a further defense, that contributory negligence on the part of Mr. Varner himself was a cause of any injuries and consequent damages he may have sustained. Contributory negligence is fault on the part of a person injured, which occurs in some degree with the negligence of another, and so helps to bring about the injury.

By the defense of contributory negligence, BNSF alleges that, even though BNSF may have been guilty of some negligent act or omission which was one of the causes, Mr. Varner himself, by his own failure to use ordinary care under the circumstances for his own safety, at the time and place of Mr. Varner's alleged injury, also contributed as one of the causes of any injuries and damages Mr. Varner may have sustained.

The burden is on BNSF, alleging the defense of contributory negligence, to establish, by the greater weight of the evidence in the case, the claim that Mr. Varner himself was also at fault, and that such fault contributed as one of

the causes of any injuries and consequent damages Mr. Varner may have sustained.

**FINAL INSTRUCTION NO. 20 -
ELEMENTS OF CONTRIBUTORY NEGLIGENCE**

If you find in favor of Mr. Varner under Final Instruction No. 10, you must consider whether Mr. Varner was also negligent. Under this instruction, you must assess a percentage of the total negligence to Mr. Varner on his claim against BNSF if all of the following elements have been proven by the greater weight of the evidence:

First, Mr. Varner:

- a. failed to exercise reasonable care for his own safety and well-being; or
- b. failed to observe conditions which could lead to injury, or if observed, to heed such conditions; or
- c. failed to adopt and use safe work habits; or
- d. failed to request additional physical or mechanical assistance which was then and there available, if necessary; or
- e. failed to use the tools and equipment provided in an appropriate and safe manner; or
- f. failed to assume a safe working position and use proper body mechanics or techniques to perform his tasks; or

- g. failed to avoid lifting beyond his capabilities, and further failed to perform such lifting in the proper and prescribed manner so as not to cause or aggravate any injury to his body; or
- h. failed to coordinate any lifting efforts with co-workers; or
- i. failed to establish and maintain secure footing while lifting;
or
- j. failed to conduct himself in accordance with the established customs and practices; or
- k. failed to take time to work safely; or
- l. failed to institute proper procedures so as not to injure himself in violation of BNSF Safety Rules and common practice, and other rules applicable; or
- m. failed to report that he was experiencing any difficulty or problems with the tools, equipment or work area; or
- n. failed to request different or alternative tools or equipment to perform his job assignment; or
- o. failed to act within and in accordance with specific instruction and orders of his superiors; or

p. failed to act within and in accordance with training received through classroom instruction and on-the-job experience;
and

Second, Mr. Varner was thereby negligent; and

Third, such negligence of Mr. Varner resulted in whole or in part in his injuries.

If any of the three elements above have not been proven by the greater weight of the evidence, then you must not assess a percentage of negligence to Mr. Varner.

FINAL INSTRUCTION NO. 21 - MITIGATION OF DAMAGES

BNSF has alleged that Mr. Varner failed to take reasonable steps to minimize his damages in the following respects:

- (1) by failing to make reasonable efforts to recover from his injuries;
- (2) by failing to follow the treatment prescribed by his health care providers;
- (3) by failing to timely seek and obtain appropriate and competent treatment which would resolve or reduce any alleged injury; or
- (4) by failing to timely seek other employment or retraining consistent with any physical limitations or problems.

If you find BNSF has proven by the greater weight of the evidence that Mr. Varner failed to take reasonable steps to minimize his damages, then your award must not include any sum for any amount of damage which you find Mr. Varner might reasonably have avoided by taking such steps.

FINAL INSTRUCTION NO. 22 - FELA DAMAGES

If you find in favor of Mr. Varner, then you must award Mr. Varner a sum as you find will fairly and justly compensate him for any damages you find he sustained and is reasonably certain to sustain in the future as a direct result of Mr. Varner's fall on December 28, 2007. You should consider the following elements of damages:

1. The physical pain and mental and emotional suffering Mr. Varner has experienced and is reasonably certain to experience in the future; the nature and extent of the injury and whether the injury is temporary or permanent;
2. The earnings Mr. Varner has lost to date and the present value of earnings Mr. Varner is reasonably certain to lose in the future.

Remember, throughout your deliberation, you must not engage in any speculation, guess, conjecture, or sympathy. You may not include in your award any sum for court costs or attorneys' fees.

If you assess a percentage of negligence to Mr. Varner by reason of Final Instruction No. 20, do not diminish the total amount of damages by the percentage of negligence you assess to the Mr. Varner. The court will do this.

FINAL INSTRUCTION NO. 23 - PRESENT VALUE OF FUTURE LOSS

If you find that Mr. Varner is reasonably certain to lose earnings in the future, then you must determine the present value in dollars of such future damage, since the award of future damages necessarily requires that payment be made now in one lump sum and Mr. Varner will have the use of the money now for a loss that will not occur until some future date. You must decide what those future losses will be and then make a reasonable adjustment for the present value.

FINAL INSTRUCTION NO. 24 - INCOME TAX EFFECTS OF AWARD

Mr. Varner will not be required to pay any federal or state income taxes on any amount that you award. When calculating lost earnings, if any, you should use after-tax earnings.

FINAL INSTRUCTION NO. 25 - DUTY AS JURORS

A verdict must represent the considered judgment of each juror. Your verdict must be unanimous. It is your duty to consult with one another and to deliberate with a view to reaching agreement if you can do so without violence to your individual judgment. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict. Each of you must decide the case for yourself, but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations, you should not hesitate to re-examine your own views and change your opinion if you are convinced it is wrong. To bring the jury to a unanimous result, you must examine the questions submitted to you openly and frankly with proper regard for the opinions of others and with a willingness to re-examine your own views.

Remember that you are not partisans. You are judges of the facts. Your sole interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

You may conduct your deliberations as you choose. However, I suggest you carefully consider all of the evidence bearing upon the questions before you. You may take all the time you feel is necessary.

There is no reason to think that another trial would be tried in a better way or that a more conscientious, impartial, or competent jury would be selected to hear it. Any future jury must be selected in the same manner and from the same source as you. If you should fail to agree on a verdict, the case is left open and must be resolved at some later time.

FINAL INSTRUCTION NO. 26 - DUTY DURING DELIBERATIONS

There are certain rules you must follow while conducting your deliberations and returning your verdict:

First, when you go to the jury room, you must select one of your members as the foreperson. He or she will preside over your discussions and speak for you here in court.

Second, if you need to communicate with me during your deliberations, you may send a note to me through the court security officer, signed by one or more jurors. After conferring with the lawyers, I will respond as soon as possible, either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

Third, your verdict must be based solely on the evidence and on the law in these instructions. **The verdict must be unanimous.** Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision you reach in this case. You will take this form to the jury room. When you have unanimously agreed on the verdict, the foreperson will fill in the form, sign and date it, and advise the court security officer that you have reached a verdict. You will then return to the courtroom where your verdict will be received and announced.

Dated June 30, 2011.

BY THE COURT:

A handwritten signature in black ink, appearing to read "J. Viken", written over a horizontal line.

JEFFREY L. VIKEN

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

JAMES L. VARNER,) CIV. 09-5076-JLV
)
 Plaintiff,)
)
 vs.) VERDICT FORM
)
)
 BNSF RAILWAY COMPANY,)
)
)
 Defendant.)

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiff James L. Varner against defendant BNSF
Railway Company, we, the jury, find in favor of:

Plaintiff James L. Varner or Defendant BNSF Railway Company

Note: Complete the next paragraph only if the above finding is in favor of
the plaintiff James L. Varner.

We, the jury, assess the total damages of plaintiff James L. Varner at
\$_____.

DO NOT REDUCE THIS AMOUNT BY THE PERCENTAGE OF NEGLIGENCE, IF
ANY, YOU FIND IN THE NEXT QUESTION.

NOTE: If you do not assess a percentage of negligence to plaintiff James L. Varner under Final Instruction No. 20, then write "0" (zero) in the blank in the following paragraph. If you do assess a percentage of negligence to plaintiff James L. Varner because of Final Instruction No. 20, then write the percentage of negligence in the blank in the following paragraph. The court will then reduce the total damages you assess above by the percentage of negligence you assess to plaintiff James L. Varner.

We, the jury, find plaintiff James L. Varner to be _____% negligent.

Date

Foreperson