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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

TAMI SKROVIG, as Personal)	CIV. 10-4022
Representative of the Estate of)	
Thomas Jeffrey Skrovig, deceased,)	
)	
Plaintiff,)	FINAL INSTRUCTIONS
)	TO THE JURY
vs.)	
)	
BNSF RAILWAY COMPANY, a)	
Delaware corporation,)	
)	
Defendant.)	

TABLE OF CONTENTS

FINAL INSTRUCTION

NO. 1 - INTRODUCTION	3
NO. 2 - MATTERS TO BE DISREGARDED	5
NO. 3 - DEFINITION OF EVIDENCE	6
NO. 4 - USE OF NOTES	8
NO. 5 - OBJECTIONS	9
NO. 6 - CREDIBILITY OF WITNESSES	10
NO. 7 - IMPEACHMENT	11
NO. 8 - EXPERT WITNESSES	12
NO. 9 - EQUALS BEFORE THE LAW	13
NO. 10 - AGENCY	14
NO. 11 - BURDEN OF PROOF	15
NO. 12 - DEFINITION OF NEGLIGENCE	16
NO. 13 - DEFINITION OF LEGAL CAUSE	17
NO. 14 - STANDARD OF CARE	18
NO. 15 - BNSF MAINTENANCE OF WAY OPERATING RULES	19
NO. 16 - BNSF ENGINEERING INSTRUCTIONS	20
NO. 17 - RIGHT TO ASSUME OTHER'S GOOD CONDUCT	21

NO. 18 - DEFINITION OF CONTRIBUTORY NEGLIGENCE AND COMPARATIVE NEGLIGENCE	22
NO. 19 - HIGHWAY DEFINED	24
NO. 20 - DUTY OF DRIVER USING HIGHWAY	25
NO. 21 - EFFECT OF CROSSBUCK SIGNS	26
NO. 22 - APPROACHING A RAILROAD GRADE CROSSING	27
NO. 23 - SPEED LIMIT AT OBSTRUCTED RAILWAY CROSSINGS .	28
NO. 24 - REPRESENTATIVE CAPACITY	29
NO. 25 - LIFE EXPECTANCY	30
NO. 26 - ELEMENTS OF DAMAGES	31
NO. 27 - DAMAGES-MATTERS TO BE DISREGARDED	33
NO. 28 - MITIGATION OF DAMAGES	34
NO. 29 - WITHDRAWAL OF CLAIM	35
NO. 30 - ISSUES TO BE DECIDED	36
NO. 31 - DUTY AS JURORS	38
NO. 32 - DUTY DURING DELIBERATIONS	40
VERDICT FORMS	

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 will be available to you in the jury room. The instructions explain the law that applies to this 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 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. 3. 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 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 - MATTERS TO BE DISREGARDED

It is your duty as a juror to determine the facts, and you must do this from the evidence produced here in open court. This consists of the testimony of the witnesses and the exhibits which have been received. This evidence is governed by various rules of law. Under these rules, it has been my duty as judge to rule on the admissibility of the evidence from time to time. You must not concern yourselves with the reasons for these rulings, and you must not consider any exhibit which was not received in evidence or any testimony which I ordered stricken. Such things you must put out of your mind. You must not consider anything you may have heard or read about this case other than the evidence produced here in open court.

FINAL INSTRUCTION NO. 3 - DEFINITION OF EVIDENCE

I mentioned the word “evidence.” “Evidence” includes the testimony of witnesses, documents and other things received as exhibits. 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. Exhibits that are identified by a party but not offered or received in evidence are not evidence.
3. 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.
4. Testimony I struck from the record or told you to disregard is not evidence and must not be considered.
5. 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.

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. 4 - 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. 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 - 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.

FINAL INSTRUCTION NO. 7 - IMPEACHMENT

In the previous instruction, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

FINAL INSTRUCTION NO. 8 - 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. 9 - EQUALS BEFORE THE LAW

In this case, the plaintiff is the personal representative of an estate and the defendant is a corporation. An estate and a corporation are entitled to the same fair trial as a private individual. No inference or presumption may be drawn against either party 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. 10 - AGENCY

A corporation acts only through its employees. An employee of a corporation may bind the corporation by acts and statements made while acting within the scope of his duties as an employee of the corporation.

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

FINAL INSTRUCTION NO. 11 - 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 this action, plaintiff has the burden of proving the following issues:

1. That defendant was negligent;
2. That the negligence of defendant was a legal cause of plaintiff's injuries; and
3. Plaintiff's damages, if any, legally caused by the negligence of defendant.

Defendant has the burden of proving the following issues:

1. That Mr. Skrovig was contributorily negligent;
2. That plaintiff failed to mitigate her damages.

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. 12 - DEFINITION OF NEGLIGENCE

Negligence is the failure to use reasonable care. It is the doing of something which a reasonable person would not do, or the failure to do something which a reasonable person would do, under facts similar to those shown by the evidence. The law does not say how a reasonable person would act under facts similar to those shown by evidence. That is for you to decide.

FINAL INSTRUCTION NO. 13 - DEFINITION OF LEGAL CAUSE

A legal cause is a cause that produces a result in a natural and probable sequence, and without which the result would not have occurred.

The term “legal cause” means an immediate cause which, in the natural or probable sequence, produces the injury complained of. For legal cause to exist, the harm suffered must be a foreseeable consequence of the act complained of. In other words, liability cannot be based on mere speculative possibilities or circumstances and conditions remotely connected to the events leading up to an injury. The defendant’s conduct must have such an effect in producing the harm as to lead reasonable people to regard it as a cause of Mr. Skrovig’s death.

The legal cause need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it causes the injury. However, for legal cause to exist, you must find that the conduct complained of was a substantial factor in bringing about the harm. A legal cause does not need to be the only cause of a result. A legal cause may act in combination with other causes to produce a result.

FINAL INSTRUCTION NO. 14 - STANDARD OF CARE

BNSF developed internal rules for on-track maintenance equipment, such as a ballast regulator.

You have received evidence of BNSF's Maintenance of Way Operating Rules and Engineering Instructions. Railway employees acting in conformity with the provisions of safety rules may be evidence BNSF was not negligent. Employees' acts or omissions not in accord with the safety rules may be evidence BNSF was negligent.

FINAL INSTRUCTION NO. 15 - BNSF MAINTENANCE OF WAY OPERATING RULES

One of BNSF's Maintenance of Way Operating Rules states:

6.50.2. Approaching Road Crossings. On-track equipment must approach all grade crossings prepared to stop and must yield the right of way to vehicular traffic.

FINAL INSTRUCTION NO. 16 - BNSF ENGINEERING INSTRUCTIONS

One of BNSF's Engineering Instructions states:

14.4.1 Operating Roadway Equipment Over Grade Crossings

A. Approaching Grade Crossings

When approaching a grade crossing with rail bound equipment:

1. Prepare to stop roadway equipment short of the crossing. NOTE: Roadway equipment using push cars or trailers require extra stopping distance.
3. Do not rely on the equipment to shunt the track and use the proper horn signal (2 long-short-long).

**FINAL INSTRUCTION NO. 17 - RIGHT TO ASSUME OTHER'S
GOOD CONDUCT**

A person who is exercising reasonable care has a right to assume that others will perform their duty and obey the law. Unless there is reasonable cause for thinking otherwise, people can assume that they are not exposed to danger from another person's violation of the law or duty of care.

FINAL INSTRUCTION NO. 18 - DEFINITION OF CONTRIBUTORY NEGLIGENCE AND COMPARATIVE NEGLIGENCE

Contributory negligence is negligence on the part of Mr. Skrovig which, when combined with the negligence of defendant, contributes as a legal cause in the bringing about Mr. Skrovig's death.

If Mr. Skrovig was contributorily negligent, plaintiff may still recover damages if the contributory negligence of Mr. Skrovig was slight, or less than slight, when compared with the negligence of defendant. The term "slight" means small when compared with the negligence of defendant.

In deciding this issue you must determine the answer to two questions:

1. Whether Mr. Skrovig and defendant were negligent; and
2. If both were negligent, whether Mr. Skrovig's negligence was
 - a. "slight" or less than "slight" or
 - b. more than "slight"

in comparison with the negligence of defendant.

In answering both parts in question #2, you must make a direct comparison between the conduct of Mr. Skrovig and defendant.

If you find Mr. Skrovig's contributory negligence was more than slight when compared with the negligence of defendant, then plaintiff is not entitled to recover.

If you find Mr. Skrovig's contributory negligence was slight, or less than slight, when compared with the negligence of defendant, then plaintiff is entitled to recover damages. However, plaintiff's damages must be reduced in proportion with the amount of Mr. Skrovig's contributory negligence.

FINAL INSTRUCTION NO. 19 - HIGHWAY DEFINED

In South Dakota a “highway” is defined as every roadway publicly maintained and open to the public for purposes of vehicular travel.

FINAL INSTRUCTION NO. 20 - DUTY OF DRIVER USING HIGHWAY

The driver of a vehicle using a public highway has a duty to exercise reasonable care at all times to avoid placing the driver or others in danger and to exercise reasonable care to avoid a collision.

While a driver may assume that others will exercise due care and obey the law, a driver may not for that reason omit any care which the law demands. Any person driving on a public highway is required to anticipate the presence on the highway of other persons, vehicles, and objects.

FINAL INSTRUCTION NO. 21 - EFFECT OF CROSSBUCK SIGNS

A crossbuck sign gives a motorist notice of the proximity of railroad tracks and warns the motorist of the necessity of looking out for trains. A crossbuck sign has the same meaning as a yield sign.

**FINAL INSTRUCTION NO. 22 - APPROACHING A RAILROAD
GRADE CROSSING**

When a clearly audible signal gives warning of the immediate approach of a railway train or car, a driver of a vehicle on a public highway approaching a railroad grade crossing shall bring his vehicle to a complete stop within fifty feet but not less than fifteen feet from the nearest rail of the railroad grade crossing and may not proceed until it is safe to do so.

This law sets the standard of care of a reasonable person. If you find Mr. Skrovig violated this law, such violation is negligence.

**FINAL INSTRUCTION NO. 23 - SPEED LIMIT AT OBSTRUCTED
RAILWAY CROSSINGS**

When approaching within fifty feet of a grade crossing of any railway when the driver's view is obstructed, the maximum speed shall be fifteen miles per hour. A driver's view is obstructed if at any time during the last two hundred feet of his approach to such crossing he does not have a clear and uninterrupted view of any traffic on such railway for a distance of four hundred feet in each direction.

This law sets the standard of care of a reasonable person. If you find Mr. Skrovig violated this law, such violation is negligence.

FINAL INSTRUCTION NO. 24 - REPRESENTATIVE CAPACITY

Plaintiff Tami Skrovig brings this action as the Personal Representative of the Estate of Thomas Skrovig, deceased. This action is for the exclusive benefit of Tami Skrovig, wife of the decedent, and their children, Jeffrey Skrovig, Renae Jensen, and Brian Skrovig.

If you return a verdict for the plaintiff, the verdict should be a single sum representing the pecuniary loss of all the decedent's heirs. It is the duty of the court to divide that sum among them.

FINAL INSTRUCTION NO. 25 - LIFE EXPECTANCY

Mr. Skrovig was 50 years old at the time of his death. According to the mortality table, the life expectancy of a 50-year-old white male is 29.2 additional years. The court takes judicial notice of this fact, which is now evidence for you to consider.

You should note the restricted significance of this evidence. Life expectancy shown by the mortality table is merely an estimate of the probable average length of life of all persons of a given age in the United States. It is an estimate because it is based on a limited record of experience.

Because it reflects averages, the table applies only to one who has the same health and exposure to danger as the average person that age.

Therefore, in connection with the mortality table evidence, you should also consider other evidence bearing on life expectancy. For example, you should consider the occupation, health, habits, and activities of the person whose life expectancy is in question.

FINAL INSTRUCTION NO. 26 - ELEMENTS OF DAMAGES

If you find in favor of plaintiff on the question of liability, then you must award plaintiff a sum of money as you find will fairly and justly compensate Ms. Skrovig and the children of Mr. Skrovig for any pecuniary loss proven by the evidence to have been legally caused by the conduct of defendant.

In determining pecuniary loss, you may consider what benefits of pecuniary value, including money, goods and services, Ms. Skrovig and the children of Mr. Skrovig might reasonably have expected to receive from Mr. Skrovig had he lived, bearing in mind the following:

1. Decedent's contributions in the past;
2. Decedent's life expectancy at the time of death;
3. Decedent's health, age, habits, talents and success;
4. Decedent's occupation;
5. Decedent's past earnings;
6. Decedent's likely future earnings; and prospects of bettering himself had he lived;
7. Decedent's personal living expenses, that is, those amounts he customarily spent on himself;
8. Decedent's contributions to services in the home;

9. All reasonable expenses incurred for ambulance services, towing services, the value of the 2002 Toyota Tundra pickup, decedent's funeral and burial;
10. The instruction, moral training and superintendence of education decedent might reasonably have given his children had he lived;
11. The counsel, guidance and aid decedent would reasonably have given his surviving spouse and children had he lived;
12. The advice, assistance, companionship, society and protection decedent would reasonably have given his surviving spouse had he lived; and
13. The life expectancy, health and physical condition of the surviving spouse and children.

**FINAL INSTRUCTION NO. 27 - DAMAGES - MATTERS
TO BE DISREGARDED**

The law does not permit you to, and you must not, award plaintiff any sum for the sorrow, mental distress and grief that the heirs may have suffered by reason of Mr. Skrovig's death, nor for suffering of the decedent, if any, caused by the collision.

FINAL INSTRUCTION NO. 28 - MITIGATION OF DAMAGES

Defendant has alleged plaintiff failed to take reasonable steps to minimize the estate's damages. In determining the amount of money which will reasonably compensate plaintiff, you are instructed that a person who suffers pecuniary loss must exercise reasonable care to minimize the existing pecuniary loss and prevent further loss and damages. Plaintiff cannot recover money for damages which could have been avoided by the exercise of reasonable care.

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

FINAL INSTRUCTION NO. 29 - WITHDRAWAL OF CLAIM

Plaintiff's claim that defendant failed to properly flag the crossing before the ballast regulator entered the crossing is no longer a part of this case, so you will not decide that claim. Why this claim is not part of the case cannot concern you. You should decide the case based solely on the evidence on the remaining claims before you.

FINAL INSTRUCTION NO. 30 - ISSUES TO BE DECIDED

The issues to be determined by you in this case are these:

Was defendant negligent?

If you find defendant was not negligent, you will return a verdict for defendant.

If you find defendant was negligent, the next issue you must decide is:

Was that negligence a legal cause of any injury to plaintiff?

If you find defendant's negligence was not a legal cause of plaintiff's injuries, plaintiff is not entitled to recover and you will return a verdict for defendant.

If you find defendant's negligence was a legal cause of plaintiff's injuries, the next issue you must decide is:

Was Mr. Skrovig also negligent?

If you find Mr. Skrovig was not negligent, you then must fix the amount of plaintiff's damages and return a verdict for plaintiff.

If you find Mr. Skrovig was also negligent, the next issue you must decide is:

Was that negligence a legal cause of plaintiff's injuries?

If you find Mr. Skrovig's negligence was not a legal cause of plaintiff's injuries, you then must fix the amount of plaintiff's damages and return a verdict for plaintiff.

If you find that Mr. Skrovig's negligence did contribute as a legal cause of plaintiff's injuries, plaintiff may still recover if the jury finds that the contributory negligence of Mr. Skrovig was slight in comparison with the negligence of defendant. If you find that Mr. Skrovig was contributorily negligent, but that Mr. Skrovig's negligence is under the circumstances slight in comparison with defendant's negligence, plaintiff is still entitled to recover, but the damages to be awarded plaintiff must be reduced in proportion to the amount of Mr. Skrovig's contributory negligence. If you find that the contributory negligence of Mr. Skrovig was more than slight in comparison with the negligence of defendant, plaintiff cannot recover.

As indicated in this instruction, you should first determine the question of liability before you undertake to fix an amount that would compensate for damage found to have been suffered.

FINAL INSTRUCTION NO. 31 - 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. 32 -

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 May 2, 2012.

BY THE COURT:



JEFFREY L. VIREN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

TAMI SKROVIG, as Personal)	CIV. 10-4022
Representative of the Estate of)	
Thomas Jeffrey Skrovig, deceased,)	
)	
Plaintiff,)	
)	VERDICT FOR PLAINTIFF
vs.)	
)	
BNSF RAILWAY COMPANY, a)	
Delaware corporation,)	
)	
Defendant.)	

We, the jury, duly impaneled in the above-entitled action and sworn to try the issues therein, find for the Plaintiff and assess Plaintiff's damages at the sum of \$_____.

Dated this _____ day of _____, 2012.

Foreperson

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

TAMI SKROVIG, as Personal)	CIV. 10-4022
Representative of the Estate of)	
Thomas Jeffrey Skrovig, deceased,)	
)	
Plaintiff,)	
)	VERDICT FOR DEFENDANT
vs.)	
)	
BNSF RAILWAY COMPANY, a)	
Delaware corporation,)	
)	
Defendant.)	

We, the jury, duly impaneled in the above-entitled action and sworn to try the issues therein, find for the Defendant.

Dated this _____ day of _____, 2012.

Foreperson