

Jury Charge

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1 afternoon, hopefully shortly.

2 Members of the jury, we come now to that portion
3 of the trial where you are instructed on the law which
4 applies to this particular case and after which you will
5 retire for your final deliberations.

6 You have now heard all of the evidence introduced
7 by the parties, and through arguments of their attorneys you
8 have learned the conclusions which each party believes
9 should be drawn from the evidence presented to you.

10 You will recall that at the beginning of this
11 trial I stated for you certain principles so that you could
12 have them in mind as the trial progressed. Briefly, they
13 were that you are bound to accept the law as I give it to
14 you whether you agree with it or not. You are not to ask
15 anyone else about the law. You should not consider or accept
16 any advice about the law from anyone else but me.

17 Furthermore, you must not conclude from my
18 rulings, or anything that I have said during the course of
19 this trial, that I favor either party.

20 Furthermore, you may not draw any conclusions from
21 an unanswered question nor consider testimony which has been
22 stricken from the record in reaching your final decision.

23 Finally, in deciding how much weight you choose to
24 give to the testimony of any particular witness there is no
25 magic formula that can be used. The test used in your

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1 everyday affairs to decide the reliability or unreliability
2 of statements made to you by others are the tests which you
3 should use during your deliberations.

4 The items to be taken into consideration in
5 determining the weight you will give to the testimony of a
6 witness include the interest or lack of interest of the
7 witness in the outcome of the case, the bias or prejudice of
8 the witness, if there be any, the age of the witness, the
9 appearance, the manner of the witness as the witness
10 testified, the opportunity that the witness had to observe
11 the facts about which he or she testified, the probability
12 or improbability of the witness' testimony when considered
13 in the light of all of the other evidence in this case.

14 If you find that any witness has willfully
15 testified falsely to any material fact, that is as to an
16 important matter, the law permits you to disregard
17 completely the entire testimony of that witness upon the
18 principle that one who testifies falsely about one material
19 fact is likely to testify falsely about everything.

20 You are not required, however, to consider such a
21 person as totally unbelievable. You may accept so much of
22 his or her testimony as you deem true and disregard what you
23 feel is false. By the processes which I have just described
24 to you, you as the sole judges of the facts decide which of
25 the witnesses you will believe, what portion of their

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1 testimony you are willing to accept, what weight you will
2 give to it.

3 The burden of proof rests on the plaintiff. That
4 means that it must be established by a fair preponderance of
5 the credible evidence that the claim that the plaintiff
6 makes is true.

7 The credible evidence means the testimony or
8 exhibits that you find to be worthy, to be believed. A
9 preponderance of the evidence means the greater part of such
10 evidence. That does not mean the greater number of witnesses
11 or the greater length of time taken by either side. The
12 phrase refers to the quality of the evidence, that is its
13 convincing quality, namely the weight and the effect that it
14 has on your minds.

15 The law requires that in order for the plaintiff
16 to prevail on the claim the evidence that supports his claim
17 must appeal to you as more nearly representing what took
18 place than the evidence opposed to it. If it does not or if
19 it weighs so evenly that you are unable to say that there is
20 a preponderance on either side then you must decide the
21 question in favor of the defendant.

22 It is only if the evidence favoring the
23 plaintiff's claim outweighs the evidence opposed to it that
24 you can find in favor of the plaintiff.

25 Now, you have heard the lawyers read portions---

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1 have you heard the lawyers read portions of a document
2 referred to as an Examination Before Trial also called a
3 deposition. There was some reading, I believe, in the case.

4 MR. LEVY: I think one question.

5 THE COURT: All right.

6 If in the course of your deliberations your
7 recollection of any part of the testimony should fail or you
8 have any question about my instructions to you on the law,
9 you have the right to return to the courtroom for the
10 purpose of having such testimony read to you or have such
11 question answered.

12 In deciding this case you may consider only the
13 exhibits which have been admitted in evidence and the
14 testimony of the witnesses as you have heard it in this
15 courtroom. However, arguments, remarks and the summations of
16 the attorneys are not evidence, nor is anything that I now
17 say or may have said with regard to the facts evidence in
18 this case.

19 The facts must be proven by evidence. Evidence
20 includes the testimony of a witness concerning what the
21 witness saw, heard or did. Evidence also includes writings,
22 photographs and other physical objects which may be
23 considered as proof of a fact. Evidence can be either direct
24 or circumstantial. Facts may be proven either by direct or
25 circumstantial evidence or by a combination of both.

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1 You may give circumstantial evidence less weight,
2 more weight or the same weight as direct evidence. Direct
3 evidence is evidence of what a witness saw, heard or did
4 which, if believed by you, proves a fact.

5 For example, let us suppose that a fact in dispute
6 is whether I knocked a glass of water over near this witness
7 chair. If someone testified that he actually saw me knock
8 over the glass, that is direct evidence that I knocked over
9 the glass.

10 Circumstantial evidence is evidence of a fact
11 which does not directly prove a fact in dispute but which
12 permits a reasonable inference or conclusion that the fact
13 exists.

14 For example, a witness testifies that he saw a
15 glass of water here on the bench. The witness states that
16 while he was looking the other way he heard the breaking of
17 glass, looked up and saw me wiping water off of my robe and
18 from the papers here on the bench. This testimony is not
19 direct evidence that I knocked over the glass, it is
20 circumstantial evidence from which you could reasonably
21 infer that I knocked over the glass. Those facts which form
22 the basis of an inference or conclusion must be proven and
23 the inference to be drawn must be one that may be reasonably
24 drawn.

25 In the example, even though the witness did not

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1 see me knock over the glass, if you believe that his or her
2 testimony or if you believe his or her testimony you could
3 conclude that I actually did knock over the glass.

4 Therefore, the circumstantial evidence, if accepted by you,
5 allows you to conclude that the fact in dispute has been
6 proven. In reaching your conclusion you may not guess or
7 speculate.

8 Suppose, for example, the witness testifies that
9 the glass of water was located equally distant between
10 myself and our court reporter. The witness states that he
11 heard the breaking of glass, looked up to see both the court
12 reporter and me brushing water off of our clothing. If you
13 believe that testimony you still could not decide on that
14 evidence alone who knocked over the glass of water.

15 Where these are the only proven facts it would be
16 only a guess as to who did it but if the witness also
17 testifies that he heard the court reporter say I am sorry,
18 this additional evidence would allow you to decide who
19 knocked over the glass of water. A little long but I think
20 it makes the point. We have circumstantial and direct
21 evidence in this case so I had to charge you.

22 Now, you will recall that a number of witnesses
23 came before you and testified concerning their
24 qualifications as experts in certain fields and they gave
25 their opinion concerning certain issues in this particular

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1 case. Mostly medical experts came before you.

2 When a case involves a matter of science or art or
3 requires special knowledge or skill not ordinarily possessed
4 by the average person, an expert is permitted to state his
5 or her opinion for the information of the court and the
6 jury.

7 The opinions stated by each expert who testified
8 before you were based on particular facts as the expert
9 obtained knowledge of them and testified to them before you
10 or as the attorneys, who questioned the expert, asked the
11 expert to assume.

12 You may reject the expert's opinion if you find
13 the facts to be different from those which form the basis
14 for the opinion. You may also reject the opinion if after
15 careful consideration of all of the evidence in this case,
16 expert and other, you disagree with the opinion.

17 In other words, you are not required to accept an
18 expert's opinion to the exclusion of the facts and
19 circumstances disclosed by other testimony. Such an opinion
20 is subject to the same rules concerning reliability as the
21 testimony of any other witness. It is given to assist you in
22 reaching a proper conclusion. It is entitled to such weight
23 as you find the expert's qualifications warrant and must be
24 considered by you but is not controlling upon your judgment.

25 I charge you that the health care professionals

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1 and the staff that were mentioned, who worked at Beth
2 Abraham, were acting within the scope of their employment
3 with the defendant, Beth Abraham, at the time of this
4 particular incident or occurrence. As such for the purpose
5 of this litigation those employees and staff members and
6 Beth Abraham are one and the same so you will see Beth
7 Abraham listed as the defendant or the employees that were--
8 had anything to do with this incident or occurrence, who you
9 heard about during the trial, are to be considered as Beth
10 Abraham for our purposes.

11 The plaintiff, Gaulbert Alvarez, came before you
12 and testified. As a party to this action he is an interested
13 witness. An interested witness is not necessarily less
14 believable than a disinterested witness. The fact that he is
15 interested in the outcome of this case does not mean that he
16 has not told the truth.

17 It is for you to decide from the demeanor of the
18 witness on the stand and such other tests, as your
19 experience dictates, whether or not the testimony has been
20 influenced intentionally or unintentionally by his interest.

21 You may, if you consider it proper under all the
22 of the circumstances, not believe the testimony of such a
23 witness even though it is not otherwise challenged or
24 contradicted. However, you are not required to reject the
25 testimony of such a witness and may accept all or such part

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1 of his testimony as you find to be reliable and reject such
2 part as you find to be unworthy of acceptance.

3 The fact that the witness Registered Nurse Joan
4 Morris was and is still employed by the defendant Beth
5 Abraham and the testimony that you have heard of her
6 relationship with her employer may be considered by you in
7 deciding whether the testimony is in any way influenced by
8 the employment relationship with the defendant Beth Abraham.

9 Negligence is lack of ordinary care. It is a
10 failure to use that degree of care that a reasonably prudent
11 person would have used under the same circumstances.

12 Negligence may arise from doing an act that a reasonably
13 prudent person would not have done under the same
14 circumstances or, on the other hand, from failing to do an
15 act that a reasonably prudent person would have done under
16 the same circumstances.

17 Negligence requires both a reasonably foreseeable
18 danger of injury to another and conduct that is unreasonable
19 in proportion to that danger.

20 A person is only responsible for the results of
21 his or her conduct if the risk of injury is reasonably
22 foreseeable.

23 The exact occurrence or exact injury does not have
24 to be foreseeable but injury as a result of negligent
25 conduct must be not merely possible but be probable. There

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1 is negligence if a reasonably prudent person could foresee
2 injury as a result of his or her conduct and acted
3 unreasonably in the light of what could be foreseen.

4 On the other hand, there is no negligence if a
5 reasonable prudent person could not have foreseen any injury
6 as a result of his or her conduct or acted reasonably in the
7 light of what could have been foreseen.

8 An act or omission is regarded as a cause of an
9 injury if it was a substantial factor in bringing about the
10 injury. That is if it had such an effect in producing the
11 injury that reasonable people would regard it as a cause of
12 the injury. There may be more than one cause of an injury
13 but to be substantial it cannot be slight or trivial. You
14 may, however, decide that a cause is substantial even if you
15 assign a relatively small percentage to it.

16 The plaintiff claims that the defendant violated a
17 number of regulations, federal regulations in particular. If
18 you find that the defendant violated any regulation or
19 regulations you may consider the violation as some evidence
20 of negligence along with the other evidence in this case
21 provided that such violation was a substantial factor in
22 bringing about the occurrence.

23 Now I will recite a number of rules or regulations
24 to you that apply to this particular charge. The statutory
25 standard of care, ordinances or regulations which has just

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1 be read to you. The first rule is entitled resident's
2 rights. The resident has the right to refuse treatment, to
3 participate in experimental research, and to formulate an
4 advanced directive.

5 If a resident's refusal of treatment brings about
6 a significant change the facility should reassess the
7 resident and institute care planning changes. A resident's
8 refusal of treatment does not absolve a facility from
9 providing a resident with care that allows him or her to
10 attain or maintain his or her highest practicable physical,
11 mental and psychosocial well-being in the context of making
12 that refusal.

13 Another rule or regulation entitled Quality of
14 Life. A facility must care for its residents in a manner and
15 in an environment that promotes maintenance or enhancement
16 of each resident's quality of life.

17 A resident assessment is the next one, accuracy of
18 assessment. The assessment must accurately reflect the
19 resident's status. The services provided or arranged by the
20 facility must meet professional standards of quality.

21 Professional standards of quality means services
22 that are provided according to accepted standards of
23 clinical practice.

24 The next rule, Comprehensive Care Plans. The
25 facility must develop a comprehensive care plan for each

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1 resident that includes measurable objectives, timetables to
2 meet a resident's mental and psychosocial needs that are
3 identified in the comprehensive assessments.

4 Pressure sores. Based on the comprehensive
5 assessment of a resident the facility must insure that, one,
6 the resident who enters the facility without pressure sores
7 does not develop pressure sores unless the individual's
8 clinical condition demonstrates that they were unavoidable;
9 and, two, a resident having pressure sores receives
10 necessary treatment and services to promote healing, prevent
11 infection and prevent new sores from developing.

12 The next section is the definition section.
13 Definitions. Avoidable means that the resident developed a
14 pressure ulcer and that the facility did not do one or more
15 of the following. Evaluate the resident's clinical condition
16 and pressure ulcer risk factors, define and implement
17 interventions that are consistent with resident's needs,
18 resident's goals and recognized standards of practice.
19 Monitor and evaluate the impact of the interventions or
20 review the interventions as appropriate.

21 Unavoidable means that the resident developed a
22 pressure ulcer even though the facility had evaluated the
23 resident's clinical condition and pressure ulcer risk
24 factors, defined and implemented interventions that are
25 consistent with resident's needs, goals and recognized

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1 standards and practice, impact of the interventions and
2 revise the approaches as appropriate.

3 Next section rule is entitled Abuse. The resident
4 has the right to be free from verbal, sexual, physical,
5 mental abuse, corporal punishment and involuntary seclusion.

6 Abuse means the willful affliction of injury,
7 unreasonable confinement, intimidation, pain, or mental
8 anguish. This also includes the deprivation by an individual
9 including a care plan that is necessary to maintain
10 physical, mental or psychosocial well-being.

11 The facility must insure a resident's abilities in
12 activities of daily living do not diminish. The facility
13 must insure a resident's abilities in activities of daily
14 living do not diminish. I read that twice because I didn't
15 think it was phrased correctly.

16 Facility must provide the necessary care and
17 services to attain or maintain the highest practicable
18 physical, mental and psychosocial well-being in accordance
19 with the comprehensive assessment and plan of care.

20 The next section that I will read is entitled
21 clinical records. A, the facility shall maintain clinical
22 records for each resident in accordance with accepted
23 professional standards and practice. The records shall be,
24 one, complete. Two, accurately documented. Three, regularly
25 accessible and, four, systematically organized. Five, the

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1 clinical records shall contain, six, I'll label this six, a
2 record of the resident's Comprehensive Assessment, a Plan of
3 Care and services provided.

4 The last section that I'll read is entitled
5 Dignity. The facility must promote care for residents for a
6 manner and in an environment that maintains or enhances each
7 resident's dignity and respect in full recognition of his or
8 her individual quality.

9 If you find that the defendant was negligent and
10 that the defendant's negligence contributed to causing this
11 particular incident or occurrence you must next consider
12 whether the plaintiff was also negligent and whether the
13 plaintiff's conduct contributed to causing his own injury.

14 The burden is on the defendant to prove that the
15 plaintiff was negligent and that his negligence contributed
16 to causing this occurrence and his own injury.

17 If you find that the plaintiff was not negligent
18 or if negligent that his negligence did not contribute to
19 causing this occurrence, or his own injury, you will then
20 decide the question of damages-- I want to read it again to
21 put it in context?

22 MR. LEVY: Yes.

23 THE COURT: Let me read it again to put it in
24 context.

25 The burden is on the defendant to prove that the

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1 plaintiff was negligent and that his negligence contributed
2 to causing this particular occurrence to his own injury.

3 If you find that the plaintiff was not negligent
4 or if negligent that his negligence did not contribute to
5 causing this occurrence, or his own injury, you will next
6 decide the question of damages.

7 If, however, you find that the plaintiff was
8 negligent and that his negligence contributed to causing
9 this occurrence and to his own injury or injuries you must
10 then apportion the fault between the plaintiff and the
11 defendant.

12 Weighing all of the facts and circumstances you
13 must consider the total negligence, that is the negligence
14 of both plaintiff and the defendant which contributed to
15 causing this occurrence and to his injury or injuries and
16 determine what percentage of fault is chargeable to each.

17 In your verdict you will state the percentages you
18 find. The total of those percentages must equal one hundred
19 percent.

20 For example, if you should find that the defendant
21 and the plaintiff were equally negligent you would report
22 that each was fifty, that's five zero, percent responsible.

23 If you should find that one party was more
24 negligent than the other in causing this occurrence, or his
25 injury, you would assign a higher percentage to that party

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1 and a lower percentage to the other with the total of the
2 percentages equally one hundred percent.

3 You must now decide from the evidence before you
4 the total amount of damages suffered by the plaintiff in
5 dollars and in accordance with the rules that I am about to
6 explain to you.

7 In arriving at the total you must not consider the
8 percentages of negligence but must simply report the total
9 amount of the plaintiff's damages.

10 My charge to you on the law of damages must not be
11 taken as a suggestion that you should find for the
12 plaintiff. It is for you to decide on the evidence presented
13 and the rules of law that I have given to you whether the
14 plaintiff is entitled to recover from the defendant.

15 If you decide that the plaintiff is not entitled
16 to recover from the defendant you need not consider damages.
17 Only if you decide that the plaintiff is entitled to recover
18 will you consider the measure of damages.

19 If you find that the plaintiff is entitled to
20 recover you must render a verdict in a sum of money that
21 will justly and fairly compensate the plaintiff for all
22 losses resulting from the injuries he sustained.

23 Stated a bit differently, the plaintiff is
24 entitled to recover a sum of money which will justly and
25 fairly compensate him for any injury and conscious pain and

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1 suffering from the date, or the dates, of the occurrence
2 until today's date.

3 In determining the amount, if any, to be awarded
4 plaintiff for pain and suffering you may take into
5 consideration the effect that plaintiff's injuries have had
6 on the plaintiff's ability to enjoy life.

7 Loss of enjoyment of life involves the loss of the
8 ability to perform daily tasks, to participate in the
9 activities which were a part of the person's life before the
10 injury and to experience the pleasures of life.

11 If you find that the plaintiff, as a result of his
12 injuries, suffered some loss of the ability to enjoy life
13 you may take that loss into consideration in determining the
14 amount to be awarded to the plaintiff for pain and suffering
15 from the date or dates of the alleged occurrence until
16 today's date.

17 If your verdict is in favor of the plaintiff the
18 plaintiff will not be required to pay income taxes on the
19 award and you must not add to or subtract from the award any
20 amount on account of income taxes.

21 With respect to any of the plaintiff's injuries or
22 disabilities the plaintiff is entitled to recover for future
23 pain, suffering and disability and the loss of his ability
24 to enjoy life in the future.

25 In this regard you should take into consideration

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1 the period of time that the injuries or disabilities are
2 expected to continue.

3 If you find that the injuries or disabilities are
4 permanent you should take into consideration the period of
5 time that the plaintiff can be expected to live. In
6 accordance with statistical life expectancy tables Mr.
7 Alvarez has a life expectancy of 42.7 years.

8 Such a table however provides nothing more than a
9 statistical average. It neither guarantees that Mr. Alvarez
10 will live an additional 42.7 years nor means that he will
11 not live for a longer period.

12 The life expectancy figure I have just given to
13 you is not binding upon you but may be considered by you
14 together with your own experience and the evidence that you
15 have heard concerning the condition of Mr. Alvarez' health,
16 his habits, employment and activities in deciding what Mr.
17 Alvarez' present life expectancy is.

18 During closing argument Mr. Kelly, counsel for the
19 plaintiff, suggested a specific dollar amount which he
20 believes to be appropriate compensation for the specific
21 elements of the plaintiff's damages.

22 An attorney is permitted to make suggestions as to
23 the amount that should be awarded but those suggestions are
24 argument only and not evidence in this case and should not
25 be considered by you as evidence of the plaintiff's damages.

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1 The determination of damages is solely for you, the jury, to
2 decide.

3 Now, while it is important that the views of all
4 jurors be considered a verdict of five of the six members of
5 this jury, the jury that will be deliberating, will be
6 sufficient under the law. Whenever five of your members are
7 in agreement on a verdict you may report the verdict to the
8 court. Let me be a little bit more specific.

9 This case will be decide on the basis of the
10 answers that you give to certain questions that will be
11 submitted to you in writing. Each of the questions asks,
12 calls for you to make a certain entry such as entering the
13 word none, yes, or no, or entering some numerical figure or
14 some percentage.

15 While it is important that the views of all jurors
16 be considered, again, five of the six of you must agree on
17 the answer to any question but the same five persons need
18 not agree on all of the answers. It could be any
19 combination. When five of you have agreed on any answer the
20 foreperson of this jury will write the answer in the space
21 provided for each answer and each juror will sign in the
22 appropriate place to indicate his or her agreement or
23 disagreement.

24 When you have answered all of the questions that
25 you are called on to answer please report to the court. I

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1 have to emphasize that because we took a great deal of care
2 in giving you a road map as to how you should proceed with
3 any one question. You may not have to answer all the
4 questions on the verdict sheet but if you read all of our
5 directions the road map that we gave you, you should be in
6 pretty good shape in responding to the questions that you
7 need to respond to. So please take your time and read them.

8 Do not assume from the questions or from the
9 wording of the questions, or from my instructions on them,
10 what the answers should be.

11 In reaching your verdict you are not to be of
12 effected by sympathy for any of the parties, what the
13 reaction of the parties or of the public to your verdict may
14 be, whether it will please or displease anyone, be popular
15 or unpopular or any consideration outside of this case as it
16 has been presented to you in this courtroom. You should
17 consider only the evidence, both the testimony and the
18 exhibits. Fine the facts from what you consider to be the
19 believable evidence and apply the rules of law as I have
20 given them to you to the facts. Your verdict will be
21 determined by the conclusion you reach no matter whom the
22 verdict helps or hurts.

23 I have now outlined for you the rules of law that
24 apply to this particular case and the processes by which you
25 weigh the evidence and decide facts. In a few minutes you

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1 will retire to the juryroom for your deliberations.

2 Traditionally juror number one, the lady seated closest to
3 me in the jurybox, acts as the foreperson.

4 If it comes to pass that she elects not to take on
5 this responsibility then I will ask you to conduct an
6 election in the juryroom to elect a foreperson. However, the
7 attorneys, when picking this jury, they were conscious of
8 the first person being picked and selected as being the
9 foreperson of this jury, so just please keep that in mind.

10 In order that your deliberations may proceed in an
11 orderly fashion you must have a foreperson but, of course,
12 his or her vote is entitled to no greater weight than that
13 of any other juror.

14 Your function is to reach a fair decision from the
15 law and the evidence is an important one. When you are in
16 the juryroom listen to each other and discuss the evidence
17 and the issues in the case among yourselves.

18 It is the duty of each of you, as jurors, to
19 consult with one another and to deliberate with a view of
20 reaching agreement on a verdict if you can do so without
21 violating your individual judgment and your conscience.

22 While you should not surrender conscientious
23 convictions of what the truth is and what the effect of the
24 evidence is, and while each of you must decide the case for
25 yourself and not merely consent to the decision of your

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1 fellow jurors, you should examine the issues and the
2 evidence before you with candor and frankness and with
3 proper respect and regard for the opinions of each other.

4 Remember, in your deliberations that the dispute
5 between the parties is for them a very important matter.
6 They and the court rely upon you to give full and
7 conscientious consideration to the issues and evidence
8 before you. By so doing you carry out to the fullest your
9 oath as jurors to truly try the issues of this case to
10 render a true verdict.

11 If you give me about five minutes with the
12 lawyers, and our court reporter, to discuss a couple of
13 issues, now you should have this case for final
14 deliberations shortly.

15 (Whereupon, the following discussion takes place
16 on the record, in the robing room, among the Court and
17 counsel:)

18 THE COURT: We'll do exceptions first and then
19 additional requests.

20 Mr. Levy.

21 MR. KELLY: No, Judge. No exceptions. No
22 additions.

23 MR. LEVY: No exceptions other than as previously
24 stated. No additional exceptions.

25 THE COURT: Let's give them the case. We'll let