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CASE NUMBER: 12-2-08537-4 SEA

HONORABLE CATHERINE SHAFER

KING COUNTY SUPERIOR COURT OF WASHINGTON

HARTLEY McGRATH,

Plaintiff,

v.

VESTUS LLC; and WINDERMERE  
REAL ESTATE/EAST, INC.,

Defendants.

NO. 12-2-08537-4 SEA

PLAINTIFF'S PROPOSED JURY  
INSTRUCTIONS With CITATIONS

Plaintiff Hartley McGrath submits Proposed Jury Instructions with citations. Plaintiff has indicated Instructions for which the parties have tentatively agreed.

INST #	WPI	SUBJECT	AGREED
		<b>GENERAL</b>	
1	1.02	Conclusion of Trial— Introductory Instruction	✓
2	1.03	Direct and Circumstantial Evidence	✓
3	1.07	Corporations and Similar Parties	✓
4	50.04	Both Principal and Agent Sued—No Issue as to Agency or Authority	✓
5	50.18	Corporation Acts Through its Employees—No Issue as to Scope of Agency	✓
6	2.10	Expert Testimony	✓
7	300.01	Issues—Breach of Contract—Damages [modified for other claims]	

1	8	21.01	Meaning of Burden of Proof—Preponderance of the Evidence	✓
2				
3	9	160.03	Fraud—Burden of Proof—Combined With Preponderance of Evidence	✓
4				
5			<b>BREACH OF CONTRACT</b>	
6	10	301.01	Contract Defined	
7	11	301.02	Promise Defined	
8	12	301.05	Contract Interpretation	✓
9	13	302.01	Breach of Contract—Non-Performance of Duty	
10	14	303.06	Contract—Mitigation of Damages	✓
11			<b>NEGLIGENCE - GENERAL</b>	
12	15	10.01	Negligence—Adult—Definition	
13	16	10.02	Ordinary Care—Adult—Definition	
14	17	12.07	Right to Assume Others Will Exercise Ordinary Care	✓
15	18	11.01	Contributory Negligence—Definition	✓
16	19	15.01	Proximate Cause—Definition	
17			<b>NEGLIGENT MISREPRESENTATION</b>	
18	20	165.02	Negligent Misrepresentation—Failure To Disclose Information--Burden of Proof On The Issues	
19	21	165.03	Negligent Misrepresentation—Failure To Disclose Information—Duty To Disclose	
20			<b>BREACH OF STATUTORY DUTY</b>	
21	22	60.01	Statute, Ordinance, or Administrative Rule	
22	23	60.03	Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence	✓
23			<b>CONSUMER PROTECTION ACT</b>	
24	24	310.10	Elements of a Violation of the Consumer Protection Act	
25	25	310.04	Public Interest Element	
26	26	310.06	Injury in Consumer Protection Act Claim	
27	27	310.07	Causation in Consumer Protection Act Claim	
28				

1 28 310.08 Definition—Unfair or Deceptive Act or Practice

2 29 310.09 Definition—Trade or Commerce

3 **DAMAGES**

4 30 30.02.01 Measure of Economic and Noneconomic  
5 303.01 Damages—Personal Injury—Contributory Negligence—No  
6 Counterclaim; RCW 4.56.250(1)(b); and Measure of  
7 Expectation Damages—Breach of Contract—No  
8 Counterclaim [modified]

9 31 303.04 Contract—Damages—Lost Profits

10 **CONCLUDING**

11 32 1.11 Concluding Instruction—For Special Verdict Form  
12 Special Verdict Form

13 Dated this 5th day of August 2013

14 REAUGH OETTINGER & LUPPERT, P.S.

15 By   
16 Sylvia Luppert, WSBA 14802  
17 Attorneys for Hartley McGrath  
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Plaintiff's Proposed Instruction 1  
**Introductory Instruction**

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses [, and the exhibits that I have admitted,] during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely. As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers'

remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

WPI 1.02 Conclusion of Trial—Introductory Instruction

**Plaintiff's Proposed Instruction 2**  
**Direct and Circumstantial Evidence**

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

WPI 1.03 Direct and Circumstantial Evidence

Plaintiff's Proposed Instruction 3  
Corporations and Similar Parties

The law treats all parties equally whether they are corporations, government entities, or individuals. This means that corporations and individuals are to be treated in the same fair and unprejudiced manner.

WPI 1.07 Corporations and Similar Parties

Plaintiff's Proposed Instruction 4

**Both Principal and Agent Sued—No Issue as to Agency or Authority**

Windermere Real Estate/East, Inc. and Vestus LLC are sued as principal and agent. Windermere is the principal and Vestus is the agent. If you find Vestus is liable, then you must find that Windermere is also liable. However, if you do not find that Vestus is liable, then Windermere is not liable.

WPI 50.04 Both Principal and Agent Sued—No Issue as to Agency or Authority



Plaintiff's Proposed Instruction 5

**Corporation Acts Through its Employees—No Issue as to Scope of Agency**

Vestus and Windermere are corporations. A corporation can act only through its officers and employees. Any act or omission of an officer or employee is the act or omission of the corporation.

WPI 50.18 Corporation Acts Through its Employees—No Issue as to Scope of Agency

Plaintiff's Proposed Instruction 6

**Expert Testimony**

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

WPI 2.10 Expert Testimony

Plaintiff's Proposed Instruction 7

**Issues—Breach of Contract—Damages**

The following is a summary of the claims of the parties provided to help you understand the issues in the case. You are not to take this instruction as proof of the matters claimed. It is for you to decide, based upon the evidence presented, whether a claim has been proved.

(1) The plaintiff, Hartley McGrath, claims that the defendants, Vestus and Windermere, entered into a contract with her for services in purchasing foreclosing properties. Plaintiff claims that Defendants breached this contract in one or more of the following respects:

Failing to disclose all information in Defendants' possession;

Failing to observe and report conditions of the property observable to the public.

(2) Plaintiff additionally claims that Defendants negligently misrepresented that they had disclosed all information in their possession and that they had diligently observed and reported the condition of the property visible from the exterior of the property.

(3) Plaintiff additionally claims that Defendants were negligent by violating duties required by statute.

(4) Plaintiff also claims that Defendants violated the Consumer Protection Act.

(5) Plaintiff also claims that she sustained damages as a result of the these actions or inactions by Defendants and she seeks a judgment against Defendants for these damages.

(6) Defendants deny these claims.

(7) and Defendants further deny that Plaintiff was damaged and the nature and extent of the claimed damage.

(8) Defendants further claim that Plaintiff was contributorily negligent.

(9) Defendants further claim that Plaintiff did not use reasonable efforts to avoid or minimize her damages.

WPI 300.01 Issues—Breach of Contract—Damages [modified to include other claims and defenses]

Plaintiff's Proposed Instruction 8

**Meaning of Burden of Proof—Preponderance of the Evidence**

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression “if you find” is used, it means that you must be persuaded, considering all the evidence in the case [bearing on the question], that the proposition on which that party has the burden of proof is more probably true than not true.

WPI 21.01 Meaning of Burden of Proof—Preponderance of the Evidence

Plaintiff's Proposed Instruction 9

**Fraud—Burden of Proof—Combined With Preponderance of Evidence**

A party who alleges negligent misrepresentation has the burden of proving each of the elements of negligent misrepresentation by clear, cogent, and convincing evidence. However, this burden of proof is applicable only to the proof of negligent misrepresentation. All other allegations of the respective parties must be proved by a preponderance of the evidence as that term is more fully defined in other instructions.

Proof by clear, cogent, and convincing evidence means that the element must be proved by evidence that carries greater weight and is more convincing than a preponderance of evidence. Clear, cogent, and convincing evidence exists when occurrence of the element has been shown by the evidence to be highly probable. However, it does not mean that the element must be proved by evidence that is convincing beyond a reasonable doubt.

WPI 160.03 Fraud—Burden of Proof—Combined With Preponderance of Evidence

Plaintiff's Proposed Instruction 10

**Breach of Contract—Non-Performance of Duty**

The failure to perform fully a contractual duty when it is due is a breach of contract.

WPI 302.01 Breach of Contract—Non-Performance of Duty

Plaintiff's Proposed Instruction 11

**Contract Defined**

A contract is a legally enforceable promise or set of promises.

WPI 301.01 Contract Defined

Plaintiff's Proposed Instruction 12

**Promise Defined**

A promise is an expression that justifies the person to whom it is made in reasonably believing that a commitment has been made that something specific will happen or not happen in the future. A promise may be expressed orally, in writing, or by conduct.

WPI 301.02 Promise Defined



Plaintiff's Proposed Instruction 13

**Contract Interpretation**

A contract is to be interpreted to give effect to the intent of the parties at the time they entered the contract.

You are to take into consideration all the language used in the contract, giving to the words their ordinary meaning, unless the parties intended a different meaning.

You are to determine the intent of the contracting parties by viewing the contract as a whole, considering the subject matter and apparent purpose of the contract, all the facts and circumstances leading up to and surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations offered by the parties.

WPI 301.05 Contract Interpretation

Plaintiff's Proposed Instruction 14  
**Contract—Mitigation of Damages**

A plaintiff who sustains damage as a result of a defendant's breach of contract has a duty to minimize her loss. Plaintiff is not entitled to recover for any part of the loss that she could have avoided with reasonable efforts. The defendants have the burden to prove plaintiff's failure to use reasonable efforts to minimize her loss, and the amount of damages that could have been minimized or avoided.

Plaintiff may recover expenses connected with reasonable efforts to avoid loss.

WPI 303.06 Contract—Mitigation of Damages

Plaintiff's Proposed Instruction 15

**Negligence—Adult—Definition**

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

WPI 10.01 Negligence—Adult—Definition

Plaintiff's Proposed Instruction 16  
**Ordinary Care—Adult—Definition**

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

WPI 10.02 Ordinary Care—Adult—Definition

Plaintiff's Proposed Instruction 17

**Right to Assume Others Will Exercise Ordinary Care**

Every person has the right to assume that others will exercise ordinary care and comply with the law, and a person has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary.

WPI 12.07 Right to Assume Others Will Exercise Ordinary Care

Plaintiff's Proposed Instruction 18

**Contributory Negligence—Definition**

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

WPI 11.01 Contributory Negligence—Definition

Plaintiff's Proposed Instruction 19

**Proximate Cause—Definition**

The term “proximate cause” means a cause which in a direct sequence produces the injury complained of and without which such injury would not have happened.

WPI 15.01 Proximate Cause—Definition

Plaintiff's Proposed Instruction 20

**Negligent Misrepresentation—Failure To Disclose Information—Burden of Proof On The Issues**

Plaintiff has the burden of proving by clear, cogent, and convincing evidence each of the following elements for the claim of negligent misrepresentation:

(1) that the defendant had a duty to disclose to Plaintiff the following information:

The property was on a slope; or

That settling issues had been identified, or

That Defendant had not carefully observed or reported conditions visible from the exterior of the property;

(2) that Defendant did not disclose this information to Plaintiff;

(3) that Defendant was negligent in failing to disclose this information;

(4) that the disclosure of this information would have caused Plaintiff to act differently; and

(5) that Plaintiff was damaged by the failure to disclose this information.

WPI 165.02 Negligent Misrepresentation—Failure To Disclose Information—Burden of Proof On The Issues



Plaintiff's Proposed Instruction 21

**Negligent Misrepresentation—Failure To Disclose Information—Duty To Disclose**

A party to a business transaction has a duty to disclose to the other party, before the transaction is completed, the following information under [any of] these circumstances:

- (a) matters known to him or her that the other is entitled to know because of a relationship of trust and confidence between them;
- (b) matters known to the party that he or she knows to be necessary to prevent his or her partial or ambiguous statement of the facts from being misleading;

WPI 165.03 Negligent Misrepresentation—Failure To Disclose Information—Duty To Disclose

Plaintiff's Proposed Instruction 22  
**Statute, Ordinance, or Administrative Rule**

A statute provides that:

A real estate broker owes to all parties to whom the broker renders real estate brokerage services the following duties, which may not be waived:

(a) To exercise reasonable skill and care;

(b) To deal honestly and in good faith;

(c) To disclose all existing material facts known by the broker and not apparent or readily ascertainable to a party; provided that the broker has no duty to investigate matters that the broker has not agreed to investigate;

(d) Unless otherwise agreed by the broker and a party, a broker owes no duty to conduct an independent inspection of the property, and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the broker to be reliable.

A "material fact" means information that substantially adversely affects the value of the property or a party's ability to perform its obligations in a real estate transaction, or operates to materially impair or defeat the purpose of the transaction.

Defendants are real estate brokers rendering real estate brokerage services.

WPI 60.01 Statute, Ordinance, or Administrative Rule [See, WA LEGIS 58 (2013)  
WASHINGTON 2013 LEGISLATIVE SERVICE 63rd Legislature, 2013 Regular Session,  
CHAPTER 58, Approved April 23, 2013, in which "broker" is substituted for "licensee."]

Plaintiff's Proposed Instruction 23

**Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence**

The violation, if any, of a statute is not necessarily negligence, but may be considered by you as evidence in determining negligence.

WPI 60.03 Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence

Plaintiff's Proposed Instruction 24

**Elements of a Violation of the Consumer Protection Act**

Plaintiff claims that Defendants have violated the Washington Consumer Protection Act. To prove this claim, Plaintiff has the burden of proving each of the following propositions:

- (1) That defendants engaged in an unfair or deceptive act or practice;
- (2) That the act or practice occurred in the conduct of defendants' trade or commerce;
- (3) That the act or practice affects the public interest;
- (4) That plaintiff was injured in either her business and property, and
- (5) That defendants' act or practice was a proximate cause of plaintiff's injury.

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for Plaintiff on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for Defendants and Winderemere.

WPI 310.01 Elements of a Violation of the Consumer Protection Act

Plaintiff's Proposed Instruction 25

**Public Interest Element**

An act or practice “affects the public interest” if the act or practice has or had the capacity to injure other persons

WPI 310.04 Public Interest Element

Plaintiff's Proposed Instruction 26

**Injury in Consumer Protection Act Claim**

Plaintiff has suffered an "injury" if her business or property has been injured to any degree. Under the Consumer Protection Act, Plaintiff has the burden of proving that she has been injured, but no monetary amount need be proved and proof of any injury is sufficient, even if expenses or losses caused by the violation are minimal.

Injuries to business or property do not include physical injury to a person's body, or pain and suffering.

Injuries to business or property, if any, include: financial loss, difficulty in securing a loan or other credit, and inability to tend to business establishment.

WPI 310.06 Injury in Consumer Protection Act Claim

Plaintiff's Proposed Instruction 27

**Causation in Consumer Protection Act Claim**

Plaintiff has the burden of proving that Defendants' unfair or deceptive act or practice was a proximate cause of Plaintiff's injury.

WPI 310.07 Causation in Consumer Protection Act Claim [Modified by deleting definition of proximate cause which is defined above.]

Plaintiff's Proposed Instruction 28

**Definition—Unfair or Deceptive Act or Practice**

In order to prove that Defendants engaged in an unfair or deceptive act or practice, it is sufficient to show that the act or practice had the capacity to deceive a substantial portion of the public. Plaintiff does not need to show that the act or practice was intended to deceive.

WPI 310.08 Definition—Unfair or Deceptive Act or Practice



Plaintiff's Proposed Instruction 29

**Definition—Trade or Commerce**

The phrase “trade or commerce” includes the sale of assets or services, and any commerce directly or indirectly affecting the people of the State of Washington. The word “assets” includes anything of value.

WPI 310.09 Definition—Trade or Commerce

Plaintiff's Proposed Instruction 30

**Measure of Economic and Noneconomic Damages—Personal Injury—Contributory Negligence—No Counterclaim**

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff on her claims, then you must first determine the amount of money required to reasonably and fairly compensate the plaintiff for the total amount of such damages as you find were proximately caused by the acts or failure to act by the defendants, apart from any consideration of fault by the plaintiff. If you find for the plaintiff

If you find for the plaintiff, you should consider the past economic or actual damages claimed;

In addition you should consider noneconomic damages including, but not limited to pain, suffering, inconvenience, mental anguish, emotional distress.

Actual damages are those losses that were reasonably foreseeable as a probable result of a breach of defendant's duty. A loss may be foreseeable as a probable result of a breach because it follows from the breach either

(a) in the ordinary course of events, or

(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

In calculating the plaintiff's actual damages, you should determine the sum of money that will put the plaintiff in as good a position as she would have been in if both plaintiff and defendant had performed all of their duties.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence. Your award must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

WPI 30.02.01 Measure of Economic and Noneconomic Damages—Personal Injury—Contributory Negligence—No Counterclaim; RCW 4.56.250(1)(b); WPI 303.01 Measure of Expectation Damages—Breach of Contract—No Counterclaim [modified]

Plaintiff's Proposed Instruction 31  
**Contract—Damages—Lost Profits**

In this case Plaintiff claims lost profits. Her damages may include net profits if she proves with reasonable certainty that net profits would have been earned, but were not earned because of Defendants' breach.

"Reasonable certainty" relates to the fact of damage rather than the amount of damage.

WPI 303.04 Contract—Damages—Lost Profits

**Concluding Instruction—For Special Verdict Form**

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that you have reached a verdict. The bailiff will bring you back into court where your verdict will be announced.

WPI 1.11 Concluding Instruction—For Special Verdict Form