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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

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| Ethel Jugle, Administrator of The Estate of Jay G. Jugle, Plaintiffs | : | |
| v. | : | No. 2:93-CV-51 |
| Volkswagen of America, Inc., Defendant. | : | |

JURY CHARGE

Now that you have heard the evidence and the arguments, it becomes my duty to instruct you on the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them.

As I mentioned at the beginning of the trial, Plaintiff has brought her claims under the legal theories of strict products liability, breach of implied warranty of merchantability, and failure to warn. Defendant denies these claims.

Each is a separate and distinct theory of recovery, requiring proof of different elements. Later I will instruct you on each one of these theories in turn. First, I would like to give you some general instructions.



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## Role of the Court, the Jury and Counsel

You have listened carefully to the testimony that has been presented to you. Now you must pass upon and decide the fact issues of this case. You are the sole and exclusive judge of the facts. You pass upon the weight of the evidence, you determine the credibility of the witnesses, you resolve such conflicts as there may be in the evidence, and you draw such inferences as may be warranted by the facts as you find them. I shall shortly define the word "evidence" for you and instruct you on how to assess it, including how to appraise the credibility or, to put it another way, the believability of the witnesses.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions I am about to give you, just as it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts. That is your function.

You are to discharge your duty as jurors in an attitude of complete fairness and impartiality. You should appraise the evidence deliberatively and without the slightest trace of sympathy, bias or prejudice for or against any party. All parties expect that you will carefully consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

## Corporations and Corporate Liability

A corporation is entitled to the same fair trial as is a private individual. All persons, including corporations, partnerships, unincorporated associations, and other organizations, stand equal before the law and are to be dealt with as equals in a court of justice.

When a corporation or partnership is involved, of course, it may act only through natural persons as its agents or employees. In general, agents or employees of a corporation or partnership may bind the corporation or partnership by their

acts and declarations made while acting within the scope of the authority delegated to them by the corporation or partnership, or within the scope of their duties as employees of the corporation or partnership.

Evidence in the Case

As I have said earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. Statements and arguments of counsel are not evidence in the case. When, however, the attorneys on both sides stipulate or agree as to the existence of a fact, you must accept the stipulation and regard that fact as proved.

The evidence includes any stipulated facts, the sworn testimony of the witnesses and the exhibits admitted in the record. Any evidence as to which an objection was sustained and any evidence that I ordered stricken from the record must be entirely disregarded.

Certain diagrams have been shown to you in order to help explain the facts which are in evidence in the case. However, such diagrams are not in and of themselves evidence or proof of any facts. If such diagrams do not correctly reflect facts or figures shown by the evidence in the case, you should disregard

them.

In other words, such diagrams are used only as a matter of convenience; so if, and to the extent that you find they are not in truth summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

Also, during the course of the trial I occasionally made comments to the lawyers, asked questions of a witness, or admonished a witness concerning the manner in which he or she responded to the questions of counsel. Do not assume from anything I have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

Direct and Circumstantial Evidence

The law recognizes two types of evidence -- direct and circumstantial. Direct evidence is provided when, for example, people testify to what they saw or heard themselves; that is, something which they have knowledge of by virtue of their senses. Circumstantial evidence consists of proof of facts and circumstances from which in terms of common experience, one may reasonably infer the ultimate fact sought to be established.

The following anecdote is a simple example of circumstantial evidence. Assume that when you came into the courthouse this morning the sun was shining and it was a nice day. As you were sitting here, someone walked in with an umbrella which was dripping wet. Then a few minutes later another person also entered with a wet umbrella. Now, you cannot look outside of the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But on the combination of facts which I have asked you to assume, it would be reasonable and logical for you to conclude that it had been raining. That is all there is to circumstantial evidence.

Such evidence, if believed, is of no less value than direct evidence. As a general rule, the law makes no distinction between direct and circumstantial evidence, but

simply requires that you find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

## Burden of Proof

This is a civil case and as such the Plaintiff has the burden of proving every element of their claims by a "preponderance of the evidence." The phrase "preponderance of the evidence" means the evidence of greater weight, logic, or persuasive force. It does not mean the greater number of witnesses or documents. It is a matter of quality, not quantity. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence,

regardless of who may have produced them.

If after considering all of the testimony you are satisfied that the Plaintiff has carried her burden of proof on each element of their claim, then you must find for the Plaintiff on that claim. If, after such consideration you find the testimony of both parties to be in balance or equally probable, then the Plaintiff has failed to sustain her burden and you must find for the Defendant.

## Witness Credibility

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor or manner while on the stand. Consider the witness's ability to observe the matters

as to which he or she has testified, and whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you should give the testimony of each witness such weight, if any, as you may think it deserves.

You may, in short, accept or reject the testimony of any witness in whole or in part.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or omission is "knowingly" done, if voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

## Expert Witnesses

You have heard testimony from several experts in this case. An expert is allowed to express his or her opinion on those matters about which he or she has special knowledge and

training. Expert testimony is presented to you on the theory that someone who is experienced in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing the expert's testimony, you may consider the expert's qualifications, his or her opinions, his or her reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness's testimony. You may give the expert testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept this witness's testimony merely because he or she is an expert. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

It sometimes happens that experts disagree. The way you resolve the conflict between experts is the same way that you decide other fact questions and the same way you decide whether to believe ordinary witnesses. In addition, you should consider the soundness of each expert's opinion, reasons for the opinion and his or her motive, if any, for testifying.

## Depositions--Use as Evidence

During the trial of this case, certain testimony has been presented to you by way of deposition, consisting of sworn recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case. In the alternative, the testimony of a witness who for some reason cannot be present to testify, may have been presented to you in the form of an affidavit or a statement under oath. Such testimony is entitled to the same consideration and is to be judged as to credibility, and weighed, and otherwise considered by the jury, in the same way as if the witness had been present and had testified from the witness stand. In other words, you must evaluate that testimony in the same manner you would evaluate the testimony of any other witness.

It is now my duty to give you instructions on the legal theories that apply to this case.

## A. Strict Products Liability

The first theory I will discuss with you is called strict products liability. In order to prevail upon their claim of strict liability against Volkswagen, Plaintiff must prove by a

preponderance of the evidence each of the following elements:

1. that the 1986 Volkswagen Jetta GLI or some component of the vehicle was in a defective condition when sold by Volkswagen;
2. that the defect, if any, made the vehicle unreasonably dangerous to users such as Jay Jugle;
3. that the vehicle was in substantially the same condition at the time of the accident as it was when it left the hands of Volkswagen; and
4. that the defect, if any, in the vehicle was the proximate cause of the injuries suffered by Jay Jugle.

*Design Defect*

On the first element, Plaintiff must prove by a preponderance of the evidence that there was some defect in the vehicle when it was sold by Defendant. Keep in mind that a product is not defective merely because it is possible for damage to occur from use of the product. Defendant is not required to guarantee that no one will be hurt using the vehicle. All that Defendant is required to do is to manufacture and sell a product that is free from defective and unreasonably dangerous conditions. The simple fact that Jay

Jugle was injured while operating the vehicle is not evidence that the product was defective.

Put another way, strict liability is not the same as absolute liability. Under Vermont's doctrine of strict liability, liability is imposed on a manufacturer or seller only when the product is unreasonably dangerous.

Plaintiff claims that the vehicle was defective in its design. A manufacturer has no duty to design an absolutely perfect product. The fact that there are alternative designs that, had they been adopted, would have prevented the accident is insufficient to establish liability; this is only one factor to be considered in determining if the product was unreasonably dangerous. It is not enough for Plaintiff to show that Defendant might have designed a safer product; if the vehicle as designed was safe for ordinary use, then the vehicle was not defectively designed.

A product is in a defective condition unreasonably dangerous to the user if it has a propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer, with ordinary knowledge common to the foreseeable class of users as to its characteristics.

In evaluating the adequacy of the design in guarding

against unreasonable risks, you should consider the gravity of the danger posed by the product's design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, and the adverse consequences to the product and to the consumer that would result from an alternative design. You may also consider standard industry practice at the time of the product's design and manufacture. Evidence that all product designers in the industry balance the competing factors in a particular way is clearly relevant to the determination of the product's design. Another relevant factor in determining whether an alternative design was feasible at the time of manufacture is the manufacturer's ability to eliminate the allegedly unsafe character of the product without impairing its usefulness.

Only if you find that the Plaintiff has proven that Jay Jugle's vehicle had an unreasonably dangerous defect, and that the defect was the proximate cause of his injuries, should you go on to determine the amount of their damages.

B. Implied Warranty of Merchantability

Plaintiff claims that Defendant has breached the implied warranty of merchantability, and that as a result of that

breach, the Plaintiff suffered economic losses. Under Vermont law, certain warranties are implied by law when goods, or services incidental to them, are sold. One of these is the warranty of merchantability, which provides that unless the parties have agreed on some other standard, all goods shall be fit for the ordinary purposes for which they are intended. That is to say, the goods must be free of defects and reasonably safe for the normal use for which the goods are made and sold.

In order to prevail on this claim, Plaintiff must prove that there was a breach of implied warranty and that the injuries complained of were proximately caused by that breach. In order to prevail on this claim, the Plaintiff must prove each of the following elements by a preponderance of the evidence:

1. that the vehicle sold by Defendant was not fit for the ordinary purposes for which it was intended;
2. that the vehicle was unfit for its ordinary purposes when it left Volkswagen's manufacturing plant; and
3. that the defect was the proximate cause of Plaintiff's damages.

Only if you find that the Plaintiff has proven that Defendant breached an implied warranty of merchantability and

that such breach was a proximate cause of Plaintiff's damage, should you go on to determine the amount of the damages.

Failure to Warn

Under the doctrine of strict liability, a seller of a product may be required to give warnings or directions to prevent the product from being unreasonably dangerous. The duty to warn exists if a manufacturer knows or should have known of a dangerous condition in its product, which is not generally known or recognized by a reasonable user of the product. In order to establish a claim of failure to warn in this case, the Plaintiff must establish the following:

(1) that the Defendant owed a duty to warn Plaintiff; (2) that lack of warning made the product unreasonably dangerous, hence defective; and (3) that Defendant's failure to warn was the proximate cause of Plaintiff's injury.

A manufacturer's duty to warn of known product defects arises when the product manufactured is dangerous to an extent beyond that which would be contemplated by the ordinary purchaser, that is, a consumer possessing the ordinary and common knowledge of the community as to the product's characteristics. A manufacturer's duty is to warn of dangers

which in the exercise of reasonable prudence in the circumstances could have been foreseen. That duty does not extend to patent dangers or those dangers which are generally known or recognized.

Proximate Cause

A breach is of no legal significance unless it is the proximate cause of damage. A proximate cause of damage is defined as a cause which, unbroken by any intervening cause, produces the damage, and without which the damage would not have occurred.

This does not mean that the law recognizes only one proximate cause of injury or damage, consisting of only one factor or theory, 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 proximate cause. If any one of them played a substantial part in bringing about or causing the injury and was attributable to Defendant, then you should find Defendant liable and calculate the amount of damages.

Comparative Fault

As part of its defense to the suit brought by Plaintiff, Defendant has raised the defense of comparative fault. Defendant claims that Jay Jugle was himself negligent and that his own negligence was the cause of his injuries.

Just as Plaintiff bears the burden of proof in showing that Defendant is liable, so here Defendant bears the burden of proving by a preponderance of the evidence that Jay Jugle was negligent in that he failed to exercise ordinary care and that his failure to exercise ordinary care was the proximate cause of his injuries.

To establish the defense of comparative fault, the Defendant must prove the following:

(1) Jay Jugle failed to act with reasonable, ordinary care. Ordinary care is that care which reasonably prudent persons exercise in the management of their own affairs, in order to avoid injury to themselves or their property, or the persons or property of others. Because the amount of care exercised by a reasonably prudent person varies in proportion to the danger that person encounters, it follows that the amount of caution and care required in the use of ordinary care will also increase.

(2) Jay Jugle's failure to use ordinary care was the proximate cause of the harm. A person's failure to use ordinary care is a proximate cause if that failure was a substantial factor in bringing about the harm.

Should you conclude that both Jay Jugle and Volkswagen contributed to the injuries suffered by Mr. Jugle, then it will be your job to ascribe a percentage of responsibility to each of the parties. That is, you must determine what percentage of the accident is a result of Volkswagen's liability, and what percentage is the result of Jay Jugle's fault. You may allocate that responsibility any way you feel appropriate. For example, you may find that no party is responsible for the injuries, or you may find that one party is entirely responsible for the injuries in question. In the alternative, you may find that the parties share in the responsibility for the injuries according to percentages designated by you, provided your percentages add up to 100%.

Before you allocate responsibility for the injuries, you, of course, must first consider the law that I have instructed you on and find that the parties have established the essential elements of their claims and sustained their burdens of proof as the Court has described them.

## Misuse

Defendant contends that Jay Jugle's injuries occurred as a proximate result of his misuse of the Jetta. If you find that Jay Jugle misused the Jetta in a manner for which the vehicle was not adapted and that misuse was not reasonably foreseeable by Defendant, you should then ask yourselves whether that misuse was the proximate cause of his injuries. If you find that the misuse was the sole and exclusive cause of those injuries, you must find for the Defendant. If that misuse partially contributed to the cause of the injuries, you should consider such misuse in assessing the degree of fault attributable to Plaintiff.

## Assumption of Risk

Defendant contends that Jay Jugle assumed the risk of injury from the dangers which Plaintiff contends caused his injuries. In order to establish this defense, Defendant must prove:

First: that the dangerous situation or condition was open and obvious, or that Jay Jugle knew of or should have known of the dangerous situation, and

Second: that Jay Jugle voluntarily exposed himself to the

danger and was injured thereby.

Intervening Event

As I explained to you earlier, in order to be a proximate cause of plaintiff's suffering or injury, an act of a defendant must be (1) causally connected to the injury suffered, and (2) the connection must be a natural and unbroken sequence, without intervening causes.

Under Vermont law, an event, act or omission which breaks the chain between the alleged defect in a product and the accident becomes an "efficient intervening cause" and is considered to be the cause of the harm to the plaintiff. It is your job in this case to determine whether there was an intervening cause between the ignition of the fire and the injuries suffered by Jay Jugle.

Negligence: Breach of Safety Statute

In this case, Defendant alleges that Jay Jugle was negligent in several ways including in breaching a safety statute, and that such negligence was the proximate cause of

his injuries.

The safety statute in question is Vermont's Driving While Intoxicated statute which provides:

(a) A person shall not operate, attempt to operate, or be in actual physical control of any vehicle on a public highway;

(1) when the person's blood alcohol concentration is 0.08 or more; or

(2) when the person is under the influence of intoxicating liquor; or

(3) when the person is under the influence of any other drug or under the combined influence of alcohol or any other drug to a degree which renders the person incapable of driving safely.

The fact that Jay Jugle may have been asleep or unconscious while he was in the Jetta does not prevent you from finding he was in "actual physical control" of that vehicle.

If you find that the statute in question is one designed to protect the public safety and that Jay Jugle did violate it, then I instruct you that, as a matter of law, Defendant has proved the essential elements of its negligence claim against the Plaintiff. Put another way, if you find Jay Jugle violated a safety statute, you may presume he was negligent and did not

exercise ordinary care. Defendant is also required to show by a preponderance of the evidence that Jay Jugle's injuries were proximately caused by his own negligence.

Unanimous Verdict

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges -- the judges of the facts. Your sole interest is to

seek the truth from the evidence in the case.

Notes

You have been permitted to take notes during the trial for use in your deliberations. You may take these notes with you when you retire to deliberate. They may be used to assist your recollection of the evidence, but your memory, as jurors, controls. Your notes are not evidence, and should not take precedence over your independent recollections of the evidence. The notes that you took are strictly confidential. Do not disclose your notes to anyone other than your fellow juror. Your notes should remain in the jury room and will be collected at the end of the case.

Closing Instructions

I have selected _____ to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesperson here in Court.

A form of special verdict has been prepared for your convenience. You will take this form to the jury room.

Each of the interrogatories or questions on the special verdict form requires the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question, and will date and sign

the special verdict, when completed.

Communications with the Court

If it becomes necessary during your deliberations to communicate with the Court, you may send a note through the Courtroom Security Officer, signed by your foreperson. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open Court.

You will note that all other persons are also forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person -- not even to the Court -- how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.