
you by the Court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss or concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

7. These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

8. The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

9. When words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

10. Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight and degree of credible evidence admitted in this case. Whenever a question requires an answer other than "Yes" or "No," your answer must be based on a preponderance of the evidence.

QUESTION NO. 1

“Negligence,” when used with respect to the conduct of Humana Health Plan of Texas, Inc., means failure to use ordinary care, that is, failing to do that which a managed care entity of ordinary prudence would have done under the same or similar circumstances or doing that which a managed care entity of ordinary prudence would not have done under the same or similar circumstances.

“Negligence,” when used with respect to the conduct of Michael W. Mann, M.D., or Fred C. Campbell, Jr., M.D., means failure to use ordinary care, that is, failing to do that which a primary care physician of ordinary prudence would have done under the same or similar circumstances or doing that which a primary care physician of ordinary prudence would not have done under the same or similar circumstances.

“Negligence,” when used with respect to the conduct of Alamo City Medical Group, PA, means failure to use ordinary care, that is, failing to do that which a medical group of ordinary prudence would have done under the same or similar circumstances or doing that which a medical group of ordinary prudence would not have done under the same or similar circumstances.

A finding of negligence may not be based solely on evidence of a bad result to the patient in question, but such a bad result may be considered by you, along with other evidence, in determining the issue of negligence; you shall be the sole judges of the weight, if any, to be given to any such evidence.

“Ordinary care,” when used with respect to the conduct of Humana Health Plan of Texas, Inc., means that degree of care that a managed care entity of ordinary prudence would use under the same or similar circumstances.

“Ordinary care,” when used with respect to the conduct of Michael W. Mann, M.D., or Fred C. Campbell, Jr., M.D., means that degree of care that a primary care physician of ordinary prudence would use under the same or similar circumstances.

“Ordinary care,” when used with respect to the conduct of Alamo City Medical Group, PA, means that degree of care that a medical group of ordinary prudence would use under the same or similar circumstances.

“Proximate cause,” when used with respect to the conduct of Humana Health Plan of Texas, Inc., means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a managed care entity using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

“Proximate cause,” when used with respect to the conduct of Michael W. Mann, M.D., or Fred C. Campbell, Jr., M.D., means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a primary care physician

using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

“Proximate cause,” when used with respect to the conduct of Alamo City Medical Group, PA, means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a medical group using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

Did the negligence, if any, of those named below proximately cause the injury in question?

Answer "Yes" or "No" for each.

Humana Health Plan of Texas, Inc.:

Yes

Michael W. Mann, M.D.:

Yes

Alamo City Medical Group, P.A.:

Yes

Fred C. Campbell, Jr., M.D.:

No

If you have answered "Yes" to Question No. 1 for more than one of those named below, then answer Question No. 2. Otherwise, do not answer Question No. 2.

QUESTION NO. 2

The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The negligence attributable to any one named below is not necessarily measured by the number of acts or omissions found. The percentage attributable to any one need not be the same percentage attributed to that one in answering another question.

What percentage of the negligence that caused the injury do you find to be attributable to each of those listed below and found by you, in your answer to Question No. 1, to have been negligent?

Humana Health Plan of Texas, Inc.:	<u>35</u>
Michael W. Mann, M.D.:	<u>50</u>
Alamo City Medical Group, P.A.:	<u>15</u>
Fred C. Campbell, Jr., M.D.:	<u>0</u>
Total	<u>100</u> %

QUESTION NO. 3

Did Defendant Humana Health Plan of Texas, Inc. commit fraud against plaintiffs?

“Fraud” occurs when –

- (a) A party makes a material misrepresentation;
- (b) The misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion;
- (c) The misrepresentation is made with the intention that it should be acted on by the other party; and
- (d) The other party acts in reliance on the misrepresentation and thereby suffers injury.

A “misrepresentation” means:

- (a) A false statement of fact;
- (b) A promise of future performance made with an intent not to perform as promised;
- (c) A statement of opinion based on a false statement of fact;
- (d) A statement of opinion that the maker knows to be false; or
- (e) An expression of opinion that is false, made by one claiming or implying to have special knowledge of the subject matter of the opinion.

“Special knowledge” means knowledge or information superior to that possessed by the other party and to which the other party did not have equal access.

OR

“Fraud” occurs when –

- (a) A party fails to disclose a material fact within the knowledge of that party;
- (b) The party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth;
- (c) The party intends to induce the other party to take some action by failing to disclose the fact; and
- (d) The other party suffers injury as a result of acting without knowledge of the undisclosed fact.

Answer “Yes” or “No”:

Answer:

No

If, in the answer to Question No. 1, you have answered "Yes," to one or more of those named in Question No. 1, or, you answered Question No. 3 "Yes" then answer Question No. 4. Otherwise, do not answer Question No. 4.

QUESTION NO. 4

What sum of money, if paid now in cash, would fairly and reasonably compensate plaintiffs for their damages, if any, resulting from the death of Joan Smelik?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

a. Pecuniary loss.

"Pecuniary loss" means the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value, excluding loss of inheritance, that plaintiffs, in reasonable probability, would have received from Joan Smelik had she lived.

Answer in dollars and cents for damages, if any.

Answer: \$300,000⁰⁰

b. Loss of companionship and society.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that plaintiffs, in reasonable probability, would have received from Joan Smelik had she lived.

Answer, with respect to the elements listed above, in dollars and cents for damages, if any, that --

Were sustained in the past by John Peter Smelik. Answer: \$700,000⁰⁰

Were sustained in the past by John Smelik, Sr. Answer: \$-0-

Were sustained in the past by Janice Smelik: Answer: \$-0-

In reasonable probability will be sustained by John Peter Smelik, in the future. Answer: \$700,000⁰⁰

In reasonable probability will be sustained by John Smelik, Sr. in the future. Answer: \$-0-

In reasonable probability will be sustained by Janice Smelik in the future. Answer: \$-0-

c. Mental anguish.

“Mental anguish” means the emotional pain, torment, and suffering experienced by plaintiffs because of the death of Joan Smelik.

Answer, with respect to the elements listed above, in dollars and cents for damages, if any, that --

Were sustained in the past by John Peter Smelik.	Answer:	\$ <u>700,000⁰⁰</u>
Were sustained in the past by John Smelik, Sr.	Answer:	\$ <u>50,000⁰⁰</u>
Were sustained in the past by Janice Smelik:	Answer:	\$ <u>50,000⁰⁰</u>
In reasonable probability will be sustained by John Peter Smelik, in the future.	Answer:	\$ <u>700,000⁰⁰</u>
In reasonable probability will be sustained by John Smelik, Sr. in the future.	Answer:	\$ <u>50,000⁰⁰</u>
In reasonable probability will be sustained by Janice Smelik in the future.	Answer:	\$ <u>50,000⁰⁰</u>

In determining damages for elements b and c, you may consider the relationship between each plaintiff and Joan Smelik, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

d. Loss of inheritance.

“Loss of inheritance” means the loss of the present value of the assets that the deceased, in reasonable probability, would have added to the estate and left at natural death to plaintiffs.

Answer in dollars and cents for damages, if any.

Answer: \$ -0-

If, in the answer to Question No. 1, you have answered "Yes," to one or more of those named in Question No. 1, or, you answered Question No. 3 "Yes" then answer Question No. 5. Otherwise, do not answer Question No. 5.

QUESTION NO. 5

What sum of money would have fairly and reasonably compensated Joan Smelik for her;

- a. Pain and mental anguish.

"Pain and mental anguish" means the conscious physical pain and emotional pain, torment, and suffering experienced by Joan Smelik before her death as a result of the occurrence in question.

Answer in dollars and cents for damages, if any.

ANSWER: \$ 4,000,000⁰⁰

- b. Medical expenses.

"Medical expenses" means the reasonable expense of the necessary medical and hospital care received by Joan Smelik for treatment of injuries sustained by her as a result of the occurrence in question.

Answer in dollars and cents for damages, if any.

ANSWER: \$ 156,374.⁷⁸

- c. Funeral and burial expenses.

"Funeral and burial expenses" means the reasonable amount of expenses for funeral and burial for Joan Smelik reasonably suitable to her station in life.

Answer in dollars and cents for damages, if any.

ANSWER: \$ 6,776.³⁴

If you answered Question No. 4 or No. 5, answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 6

Do you find by clear and convincing evidence that the harm to Joan Smelik resulted from gross neglect or fraud?

“Clear and convincing evidence” means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

“Fraud is defined in Question No. 3.

“Gross neglect” means:

- (a) An act or omission by Humana Health Plan of Texas, Inc.:
 - i. Which when viewed objectively from the standpoint of Humana Health Plan of Texas, Inc. at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
 - ii. Of which Humana Health Plan of Texas, Inc. has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Answer “Yes” or “No.”

Answer: Yes

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

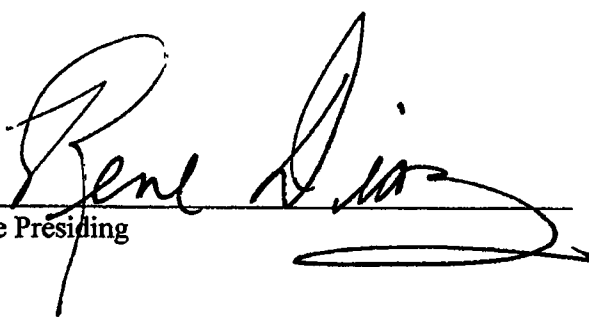
It is the duty of the presiding juror:

- a. to preside during your deliberations;
- b. to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;
- c. to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge;
- d. to vote on the questions;
- e. to write your answers to the questions in the spaces provided; and
- f. to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all the questions you are required to answer under the instructions of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the juror room that you have reached a verdict, and then you will return into court with your verdict.

Signed on
6-28-05


Judge Presiding

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

(To be signed by the presiding juror if unanimous.)

Presiding Juror

(To be signed by those rendering the verdict if not unanimous.)

D. L. Conroy
A. J. White
Ray McManis
Timothy R. Anderson
Cliff A. ...
Raymond ...

Karen Callaghan
Courtney M. ...
Rosalinda M. ...
Darlene ...

