810.24 PERSONAL INJURY DAMAGES – DEFENSE OF MITIGATION.[1]

The (state number) issue reads:

"By what amount, if any, should the plaintiff's actual damages be reduced because of his unreasonable failure to avoid or minimize his injuries?"

You are to answer this issue only if you have answered the (state number) issue in any amount of actual damages in favor of the plaintiff.

On this issue the burden of proof is on the defendant.[2] This means the defendant must prove, by the greater weight of the evidence, the amount, if any, by which the plaintiff's actual damages should be reduced because of the plaintiff's unreasonable failure to avoid or minimize his injuries.

A person injured by the [negligent] [wrongful] conduct of another is nonetheless under a duty to use that degree of care which a reasonable person would use under the same or similar circumstances to seek treatment, to get well and to avoid or minimize the harmful consequences of his injury.[3] A person is not permitted to recover for injuries he could have avoided by using means which a reasonably prudent person would have used to cure his injury or alleviate his pain. However, a person is not prevented from recovering damages he could have avoided unless his failure to avoid those damages was unreasonable.[4]

(If you find that a health care provider advised the plaintiff to [submit to an operation] [(describe other treatment)], you would not necessarily conclude that the plaintiff acted unreasonably in declining such [operation] [treatment]. In determining whether the plaintiff's conduct was reasonable, you must consider all of the circumstances as they appeared to the plaintiff at the time he

chose not to follow the health care provider's advice. These may include [the financial condition of the plaintiff] [the degree of risk involved] [the amount of pain involved] [the likelihood of success] [the benefits to be obtained from the procedure] [the availability of alternate procedures] [whether (name applicable types of health care providers) agree among themselves as to the advisability of the procedure] [the knowledge or lack of knowledge of the plaintiff] [describe any other factor supported by the evidence].)

Finally, as to this (state number) issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the plaintiff's actual damages should be reduced because of his unreasonable failure to avoid or minimize his injuries, then it would be your duty to answer this issue by writing the amount by which the plaintiff's actual damages are to be reduced in the blank space provided.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue by writing "None" in the blank space provided.

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1 *Note Well: It remains within the trial court's sound discretion to determine, after the verdict has been reached, that the evidence presented is insufficient to justify the mitigation of damages, notwithstanding the fact that this instruction is not challenged prior to its submission to the jury. Justus v. Rosner, ___ N.C. App. ___, ___, 802 S.E.2d 142, 148-49 (2017).*

2 "The burden is on defendant of showing mitigation of damages. Therefore, while the duty is imposed upon the injured party to use ordinary care and prudence to minimize his damages, nevertheless the burden is upon the injuring party to offer evidence tending to show such breach of duty or failure to exercise the requisite degree of care and prudence to reduce and minimize the loss complained of." First Nat'l Pictures Distrib. Corp. v. Sewell, 205 N.C. 359, 360, 171 S.E. 354, 355 (1933) (citation omitted); Thermal Design, Inc. v. M&M Builders, Inc., 207 N.C. App. 79, 89, 698 S.E.2d 516, 524 (2010).

3 Rose v. Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973); First Nat'l Pictures Distrib. Corp. v. Sewell, 205 N.C. 359, 171 S.E. 354 (1933); Gibbs v. Telegraph Co., 196 N.C. 516, 146 S.E. 209 (1929); Lowery v. Love, 93 N.C. App. 568, 378 S.E.2d 815 (1989).

4 Where the plaintiff has not been medically cleared to return to work or seek new employment, the plaintiff does not act unreasonably so long as he does "everything he was asked to do by his [treating] doctor." See Lloyd v. Norfolk S. Ry. Co., 231 N.C. App. 368, 372, 752 S.E.2d 704, 706 (2013).