VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF _____

_____, Administrator	:
Of the Estate of _____,	:
Deceased,	:
	:
Plaintiff,	:
	:
v.	:LAW NO.:_____000020
	:
_____,	:
	:
Defendant.	:

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE PLAINTIFF'S GRIEF EXPERT

Procedural Background and Facts

Plaintiff, _____, Administrator of the Estate of _____, Deceased, brought this wrongful death action arising out of a collision that occurred at approximately 4:00 p.m. on September 24, 2004 at the intersection of _____and Route _____ in _____County. In the collision, a Ford Explorer operated by the Defendant, struck a red Pontiac Sunfire driven by _____. In the car with her were her husband and their two young boys. She sustained fatal injuries in the collision and died about 6 hours later at the hospital.

On August 23, 2005, Plaintiffs counsel provided to defense counsel extensive reports from grief expert Mila Ruiz Tecala regarding the grief and mourning process suffered by _____, and his sons. On September 27, 2005, Defendant served her Defendant's Motion to Exclude Plaintiffs Grief Expert.

Argument

A. THE **ADMISSIBILITY OF THE CHALLENGED EVIDENCE MUST BE DETERMINED WITH A VIEW TOWARD** THE **OVERARCHING PRINCIPLE OF ADMISSIBILITY OF ALL RELEVANT EVJDENCE.**

The Virginia Supreme Court has consistently adhered to the broad general principle that all relevant evidence should be admitted unless some rule of evidence requires that it be excluded. The Court has summarized these principles as follows:

> "All facts having rational probative value are admissible unless some specific rule forbids. * * * 1 Wigmore, Evidence (3d ed.), sec. 10**,** p. 293.
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> "Evidence which tends 'in an appreciable degree to sustain a material issue of facts' is admissible. (Lyons v. Fairmont Real Estate Co., 71 W. Va. *754,* 77 SE. *525),* and 'the safer and more satisfactory rule is for the Court to admit whatever is relevant, and leave the question of weight for the jury." Wilson v. Fleming, 89 W. Va. *553,* 562, 109 S.F. 810.
>
> "It is said that all facts having rational probative value are admissible unless some specific rule forbids. However, the weight or probative value is not the criterion or test. If it tends even slightly to prove a fact relevant to any issue in the case and material or forceful in the determination thereof, it is admissible. The criterion of relevancy is whether or not the evidence tends to cast any light upon the subject of the inquiry. There are instances where the circumstances are such that the act in question, while perhaps somewhat remote, is not sufficiently irrelevant to render it inadmissible as a matter of law, and it may have such probative value and legal relevancy that the inferences which may be drawn therefrom are clearly proper for the jury.

McNeir v. Greer-IzIale Chinchilla Ranch, 194 Va. 623, 628-629, 74 S.E.2d 165 (1953) (emphasis added) (cited with approval in *Breeden v. Roberts,* 258 Va. 411, 416, 518 S.E.2d 834 (1999)).

It is well established that no formal training or education is necessary to qualify as an expert. Expertise may be acquired through an avocation or a hobby. Charles E. Friend, *The Law of Evidence in Virginia,* § 215 at 461 (2d Ed. 1983). Knowledge may be the product of home study or experience, or both. *Noll v. Rahal,* 219 Va. 795, 801, 250 S.E.2d 741, 745 (1979). All that is necessary for a witness to qualify as an expert is that he have "sufficient knowledge of his

subject to give value to his opinion," *Norfolk & Western Railway Co. v. Anderson*, 207 Va. *567*, 571, 151 S.E.2d 628, 631 (1966), and that he be better qualified than the jury to form an inference from the facts. Charles F. Friend, *The Law of Evidence in Virginia,* § 215 at 461 (2d Ed 1983).

The Defendant's evidentiary challenge to the Plaintiff's evidence must be tested against this general over-arching principle of admissibility. As will be discussed further below, the testimony and evidence challenged by the Defendant clearly will 'cast light on the subject of inquiry,' and thus should be ruled admissible.

B. THE ADMISSIBILITY OF TESTIMONY OF A GRIEF EXPERT IS GOVERNED BY ORDINARY PRINCIPLES OF VIRGINIA LAW.

The Defendant has failed to establish that any rule of law requires the automatic exclusion of the testimony a grief expert. Rather, it is obvious that this type of expert testimony is admissible if it satisfies the ordinary principles governing expert testimony.

"In general, a witness who by education, training or experience has knowledge beyond that of most lay men, may be qualified before the court as an expert witness and allowed to state an opinion to the fact-finder on matters not within their common knowledge or experience." *Callahan v. Commonwealth,* 8 Va.. App. 135, 138, 379 S.E.2d 476 (1989) (emphasis added). This has long been the standard established by Virginia law:

The knowledge necessary to qualify one to speak as an expert may be derived from study or experience, or both. The witness need not have all the knowledge possible for one in his class to entitle him to speak, but he may testify as an expert if it is shown that he has sufficient

knowledge of his subject to give value to his opinion. 7 Mich. Jur., Evidence, § 167, p. 530; 20 Am. Jur., Evidence, § 814, p. 684; *Swerslty v. Higgins,* 194 Va 983, 76 S.E.2d 200; *Ames Webb, Inc. v. Commercial Laundry Co.,* 204 Va. 616, 133 S.E.2d 547; *Rollins v. Commonwealth,* 207 Va, 575, 151 S.E.2d 622, decided today. *N & W Railway v. Anderson,* 207 Va. 567, 571, 151 S.E.2d 628 (1966) (emphasis added). Thereafter, any argument that an expert witness lacks experience goes to the weight, not the admissibility, of the expert's testimony. *Kern v. Commonwealth,* 2 Va. App. 84, 341 S.E.2d 397 (1986). An expert's opinion is admissible if it will "probably aid the trier in the search for the truth." *Neblett, Administrator v. Hunter,* 207 335, 340, 105 S.E.2d 115, 118 (1966) (emphasis added).

C. MS. TECALA'S TESTIMONY IS ADMISSIBLE BECAUSE SHE HAS EXTENSIVE EXPERT QUALIFICATIONS AND HER TESTIMONY WILL 'PROBABLY AID THE TRIER IN THE SEARCH FOR THE TRUTH.'

Ms. Tecala is a widely-recognized expert regarding grief. Her curriculum vitae attached hereto as Exhibit A establishes her extensive qualifications. She holds a Masters Degree in Social Work. She is a Licensed Clinical Social Worker, being licensed in Virginia, Maryland, and the District of Columbia. She is a member of the Academy of Certified Social Workers, and she is a Diplomate in Clinical Social Work. Grief, grief evaluation, and grief counseling are her areas of specialization. She has lectured and taught extensively in this field.

Ms. Tecala has previously repeatedly been qualified and allowed to testify as a grief expert by state and federal courts in Virginia. For example, she has been qualified and permitted to testify in three cases in Fairfax County Circuit Court in *Edgerton v. Kerrigan,* Law No. 82957, *Falletti v. MA Disposal Service, Inc.*, Law No. 100966, and *May v. Alvie,* Law No. 187839 (Feb. 19, 2001), in four cases in Prince William County Circuit Court (including in *Marler v. Porter,* Law No. 23724), in two cases in Loudon County Circuit Court, in Alexandria Circuit Court, and in the Immigration Court in Arlington, Virginia. She was likewise qualified and permitted to testify as a grief expert in federal court in Virginia in *Kennedy v. Burns Foods, Inc.,* Civil Action No. 98-CV-4 (W.D. Va. March 16, 1999).

Ms. Tecala spent hours interviewing, testing, and evaluating _____, and also observed the two young boys over an extensive time period. Clearly, Ms. Tecala has knowledge regarding grief and grief processes that is beyond that of most laypeople, and thus her testimony will be helpful and should be admitted into evidence. Virginia law provides by statute that in a wrongful death action "[tjhe verdict or judgment of the court trying the case without a jury shall include, but may not be limited to, damages for the following: 1. Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent." *Virginia Code* § *8.01-52.*

Mental anguish is a person's mental reaction to a loss or injury, 22 *Am. Jun. 2d,* Damages, § 251; *accord, Russo v. White*, 241 Va. 23, 400 S.E.2d 160 (1991). Mental anguish may be inferred from the nature of the injury or loss. *See, e.g., Bell v. Kirby*, 226 Va. 641, 645-646, 311 S.E.2d 799 (1984) (personal injury); *Gamble* v. *Hill,* 208 Va. 171, 180, *156* S.E.2d 888

(1967) (wrongful death of young girl without direct proof of mental anguish). “When the case is a proper one for the recovery of damages for mental anguish… any competent evidence which tends to establish or dispute the fact that the plaintiff suffered mental anguish as a result of the defendant’s act is admissible.” 22 *Am. Jur. 2d*, Damages, § 932. “For purposes of proving grief, mental anguish, or suffering of a surviving parent (or statutory beneficiary), the Courts look with favor upon expert psychiatric testimony to provide a reasonably reliable basis for award of such damages, and to prevent the jury from falling into speculation, conjecture, and sympathy: Annotation, Recovery of Damages for Grief or Mental Anguish Resulting from Death of Child - Modern Cases, *45 A.L.R. 4th* 234, 245 (1986).

Ms. Tecala’s extensive training, education, background, and experience as a licensed social worker specializing in grief and mourning amply qualify her to give expert testimony on this subject matter in this case.

Clearly, if this case was a personal injury action expert testimony would be admissible to assist the jury in evaluating and determining the nature and extent of the injury and the associated mental anguish. The Defendant suggests that the Court should apply a different rule of evidence to expert testimony in a wrongful death action. To the contrary, the applicable principles of evidence are the same, and they favor the admission of Ms. Tecala’s testimony. In both personal injury actions and wrongful death cases, the jurors may not have personally experienced the type of loss in question, and expert testimony is helpful. Even if the jurors have experienced the sudden death of a loved one, expert testimony will still be helpful in providing a broader perspective and understanding. In the case at bar, as Ms. Tecala will explain, the death was not only sudden, unexpected, and traumatic, it was avoidable and these factors make its grieving unlike deaths from natural causes.

The Defendant has not disputed the qualifications of Ms. Teeth, and has not questioned that she has an extensive basis for her testimony in this case. Ms. Tecala should be permitted to provide expert testimony regarding the sorrow and mental anguish and the grief suffered by the statutory beneficiaries. Furthermore, based on her extensive education, training, and experience, Ms. Tecala has helpful testimony to give regarding the nature of the grieving process, which she has studied for decades.

The Defendant cannot reasonably argue, nor can she establish, that expert testimony regarding grief can never be admitted into evidence. In *Wilson v. Lund,* 491 P.2d 1287, 80 Wash. 2d 91, 102 (1971), the Washington Supreme Court held: [For purposes of proving grief, mental anguish or suffering], expert psychiatric testimony will often more than useful and proper, it may be necessary to enable the jury to avoid speculation about the grieving process. To the same effect is the decision of the Ohio Supreme Court in *Sharp v. Norfolk & Western Ry. Co.*, 72 Ohio St. 3d 307, 649 N.E.2d 1219 *(1995),* where the court held that the trial court properly admitted the testimony of a grief expert in a wrongful death action.

In *Holiday Inns, Inc. v. Shelburne,* 576 Sold 322 (Fla. 4th District Court of Appeals), *appeal dismissed*, 589 Sold 291 (Fla. 1991), the Court evaluated the testimony of a grief expert under standards which were very similar to those applicable under Virginia law:

"In the present case, the witness's testimony clearly assisted the jury, and appellants' argument that his testimony should have been excluded because the subject matter of the testimony was within the normal, everyday comprehension of jurors is without merit. The expert witness's research over a period of fifteen *years* and the research of others in the field indicate that there are patterns of responses to grief, stages of grief, and factors that exacerbate one's responses to grief. More specifically, he explained that people can now be categorized as falling into either normalized patterns of grief or complicated grief, and he explained those processes. Certain factors affect a person's grief, and the ability

to recover from that grief. The expert interviewed Mr. and Mrs. Rice before trial. Thus, he was able to explain to the jury the Rices' ordeal in working their way though the grief process, where they were in that grief process at the time of trial, what factors had adversely affected their response to their son's death and had affected their ability or inability to recover from their grief, and the pattern their grief was likely to take in the future. **Clearly, the subject of grief and bereavement is not an area within the normal everyday comprehension of jurors, and the expert testimony was properly admitted to aid the jury in its consideration of the effect of David's death on his parents.** (emphasis supplied)

Additionally, the witness was undoubtedly qualified as an expert in the field of grief and bereavement. Having already obtained a Bachelors Degree, a Masters Degree and a Ph.D. in sociology, he was working on his post-doctorate at Harvard University in the field of grief and bereavement. The witness has been researching and studying grief for fifteen years, and has received research grants from the federal and state governments and foundations in order to do so. As the author of several books and publications on death and dying, and grief and bereavement, he has taught at seminars and has provided training as a consultant to different groups including hospital staffs, nurses, physicians, social workers and people who work in facilities for the terminally ill on this subject. Further, he teaches psychologists and counselors so that they can understand grief and bereavement and provide more help to their patients. This is only a partial listing of the witnesses qualifications. Thus, it cannot be said that the court erred in designating him an expert in the field of grief and bereavement."
576 So**.** 2d at 336.

The now well-recognized field of grief therapy became firmly established with the 1969 publication of Elizabeth Kubler-Ross's work entitled, *On Death and Dying* (London,

Collier-Macmillan Ltd. 1969). In the intervening 35 years, a great deal of work has been done in this important field. *See, e.g.,* Judith Viorst, *Necessary Losses* (Ballentine Books 1986). Indeed, there are even journals, such as the journal named *Thanatos,* which are exclusively devoted to publication of research and articles regarding death, grief and the grief process.

The field of grief therapy, and testimony from an expert in that field, can assist the jury in recognizing and understanding the variants in the grief reaction, the role that the patient's pre-existing psychological condition may have on that response, the role that the family as a unit and the individual members of the family have in shaping that response and recovery from its acute and sometimes disabling stages, and the identification of the various stages of grieving that a patient may experience and that patient's prognosis for transition of those stages towards the completion of the active grieving process.

Death of a loved one sets in motion a mourning process involving some of the deepest human feelings, feelings that are not always obvious or readily understandable to the layperson. Even though many of us have experienced the death of a loved one, it is far less common for lay people to have knowledge regarding the sudden, violent death of a loved one. *See) e.g.* Plant, Larry D., "Without Warning: The Impact of Sudden Death," Vol. 10, No. 4 *Thanatos* 18 (Winter 1985) (copy attached hereto as Exhibit B). Moreover, those of us who have experienced the death of a loved one may nonetheless have a limited and incomplete understanding of grief and the grieving process, since we are often simply emotionally overwhelmed by what has occurred.

Much of what has been learned from research and in-depth experience regarding grieving is not intuitively obvious to the layperson. For example, acceptance of a death often requires the grieving person to deal with feelings of betrayal, i.e., that by accepting the death the

survivor has betrayed the deceased loved one. The latter stages of mourning involve the acceptance that the loved one is lost forever. This acceptance, which is required if the survivor is to carry on successfully, feels in some respects like forgetting the loved one's importance and meaning. Laypersons with little, and sometimes no, experience with the grieving process can be assisted by expert testimony in understanding the testimony and evaluating the survivor's sorrow, mental anguish, and grief. *See Wilson v. Lund,* 491 P.2d 1287, 80 Wash. 2d 91(1971), *Sharp v. Norfolk & Western Ry. Co.*, 72 Ohio St. 3d 307, 649 N.E.2d 1219 (1995), *Holiday Inns, Inc. v. Shelburne, 576* So.2d 322 (Fla. 4th District Court of Appeals), *appeal dismissec4* 589 So.2d 291 (Fla. 1991).

Fairfax County Circuit Court Chief Judge F. Bruce Bach stated the following from the bench when addressing this very issue:

"I heard a fellow testify. I think he was from Hood College over in Frederick, Maryland, who was one of the world's leading experts on the grieving process. He was marvelous. I allowed him to testify. I will allow her to testify assuming she is qualified.

I don't think a jury knows any more or a judge knows any more about the grieving process than they know about the process of a rotating cuff injury, say. There is a grieving process that differs between the loss of a parent and the loss of a child. They can say what is going to happen to the same degree that a medical doctor is going to say what is going to happen to a broken bone.

So to that extent, I will allow her to testify, assuming she is qualified, because I don't think the trier of fact understands this process, even if they have been through it themselves."

Fallettie v. AAA Disposal Service, Inc., (Fairfax Co. Cir. Ct., Law No. l00966)(emphasis added).

In *Sperry v. Schuyler Enterprises, Inc.*, 31 Va. Cir. 200 (1993) (copy attached as Exhibit C) (admitting testimony of licensed clinical social worker who counseled wrongful death beneficiaries concerning death of a child), Judge Wetsel specifically held that Mila Tecala could testify concerning the statutory beneficiary's mental anguish arising from the death of a loved one. Judge Wetsel ruled:

"{T]he testimony of psychologist, psychiatrists, or other duly qualified professionals is regularly received by courts in the Commonwealth on the issue of the emotional distress or mental anguish sustained by a party entitled to compensation such as the statutory beneficiaries in this case.

Upon consideration of the argument of counsel, it is adjudged and ordered that Plaintiff's expert, Mila Tecala, who is a licensed clinical social worker in the Commonwealth of Virginia, may testify as to matters within the field of expertise of a licensed clinical social worker in which she is permitted to treat patients in the Commonwealth of Virginia pursuant to her license. The extent to which the expert is permitted to testify will be subject to determination upon her voir dire at trial.

Sperry, 31 Va. at 201, 204."

For other jurisdictions agreeing with this position see: *Angrand v. Key, 657* So.2d 1146, 1148-1149 (Fla. 1995); *St. Mary's Hospital, Inc. v. Brinson,* 1996 WL 267927 (Fla. App. 4th DCA 1996); *Horton v. Channing,* 698 So.2d 865, 868 (Fla *1995); Wilson v. Lund,* 80 Wn.2d 91, 491 P. 2d 1287; *Gaither v. Tulsa,* 664 P.2d 1026, 1031 (1983); *Sharp* v. *Norfolk & Western Ry. Co.,* Ohio St.. 3tL 307, 649 N.E. 2d 1219 (1995). *See also 45* ALR 4th 234, 245 (1986).

Defendant relies on *El Meswari v. Wash. Gas & Light Co.,* 785 F.2d 483 (4th Cir 1986). The case is not persuasive. In *El-Mecwari,* the Fourth Circuit held the trial court had not abused its discretion refusing to allow a neurosurgeon to testify as to a beneficiary's grief. However, the expert excluded was a neurosurgeon, not, as here, a mental health professional specializing in the treatment of those suffering grief following the death of a loved one. In this case, Ms. Tecala does have expertise in the grieving process. The wrongful death statute provides for the recovery of damages, which are fair and just for "sorrow" and "mental anguish." *Virginia Code* § 8.01-52. Grief is a part of mental anguish and is clearly recoverable under the statue. The testimony of Mila Teeala concerning grief and the mourning process is relevant and admissible.

_____'s death was violent, sudden and unexpected. As Ms. Tecala has stated in her report, the more sudden the death the more difficult is the grieving process. While a juror may understand that a person feels sad when a loved one dies, the average juror has no understanding of the extent to which grieving can take on different intensities or be significantly influenced by the manner in which someone dies and by other factors identified by Ms. Tecala. Attached as Exhibit D hereto is a chart which Ms. Tecala is expected to use at trial to testify about the grief process.

Ms. Tecala evaluated _____for nearly 3 hours, providing a substantial basis for her testimony. Ms. Tecala's testimony about grief and this family's sorrow and mental anguish will assist the fact finder in understanding and evaluating their grief and the Motion *in Limine* should be denied.

The Defendant's primary argument in opposition to Ms. Tecala's expert testimony is the Defendant's assertion that grief and mourning are "matters of common knowledge as to which the jury is as competent to form an intelligent and accurate opinion as the witness." Defendant's Motion to Exclude Plaintiffs Grief Expert at 1. To say as much is to establish the fallacy of the Defendant's Motion. It cannot possibly be that jurors know as much about the grief and mourning process as Ms. Tecala, who has studied and dealt with this process for decades with hundreds of survivors of the loss of loved ones. Ms. Tecala's testimony clearly will be helpful to the jury in understanding this process, and that is all the law requires to render it admissible.

Moreover, the Defendant's assertion that the average juror fully understands the grieving process has been explicitly rejected in the professional literature regarding grief. A leading journal in this field of expertise states:

"Despite the prevalence of death as a feature in our society, we have distanced ourselves **from the realities of death and the** experience of grief. For all the changes in our modern, post industrial culture, we have yet to address effectively much of the acute suffering that the

bereaved must confront as they experience the pain of grief."

Many of the beliefs regarding death that are shared in this society have been formed within a context of limited contact with the death experience. If we have isolated ourselves from the realities of death, it is not surprising that we come to the experience of loss unprepared to deal with it.

We encourage the discussion of almost any aspect of human experience with relative openness and candor from growing up to growing old. However, when it comes to grief, such open conversation ceases. Consequently, many Americans maintain a "**number of beliefs about grieving behavior that are distortions of the true nature of human responses to loss. These misconceptions held by the public at large stand in sharp contrast to the harsh realities of the mourning experience shared by those who have suffered the loss of a loved one. This continuing gap between the cultural distortions concerning grief and the private realities shared by the bereaved, has allowed the true face of grief to remain hidden from view."**

Plait, Larry **A., "The Hidden Face of Grief: Private Realities and Public Beliefs,"** *Thanatos* 30 (Spring 1991) (copy attached as Exhibit B) (emphasis added)**.**

The Defendant contends that most if not all of the jurors will know about grief since they will have had some experience with the death of a loved one. Even if that is true, the standard of admissibility is not whether laypeople will have some familiarity with the topic, but rather is whether the expert has knowledge that would be helpful and aid the jurors' understanding of the topic.

The Defendant argues that it would be improper for Ms. Tecala to testify about her observations of _____during her two hour and 40 minute evaluation of him. The Defendant

argues testimony regarding these matters would be cumulative and inadmissible hearsay. Any such contentions are obviously incorrect, since doctors and other healthcare professionals routinely testify regarding their interviews, observations and evaluations of the persons they examine. Statements by parties are routinely admitted as a hearsay exception, particularly when, as in this ease, they relate to a party's mental condition. *See* Charles E. Friend, *The Law of Evidence in Virginia*, § 18-16 (4th Ed 1993).

The Defendant also argues that the Plaintiffs expert disclosure "falls to conform to Rule 4:1(b)(4)(a)(i)," To the contrary, the Plaintiff has provided two reports from Ms. Tecala (attached to Defendant's Motion) months prior to the expert disclosure deadline (which is November 8, 2005), and the information set forth therein is more than sufficient to apprise the Defendant of the subject matter of Ms. Tecala' s testimony, the substance of the facts and opinions to which she is expected to testify, and a summary of the grounds therefore. The Defendant complains that the Ms. Tecala should not be allowed to offer medical opinions with respect to _____. The Plaintiff does not intend to elicit medical opinions from Ms. Tecala, and this objection is thus moot.

Conclusion

Wherefore, for all the foregoing reasons, the Plaintiff respectfully requests that the Court deny the Defendant's Motion to Exclude Plaintiffs Grief Expert. Even if the Court believes that Ms. Tecala's testimony should be limited in some respects or in certain areas, the soundest course is to make particular admissibility determinations as to particular testimony when it is proffered at trial. If necessary, these admissibility determinations can be made out of the presence of the jury. This was the course taken by the Court in the *Sperry* case (Exhibit C).

_____,
Administrator of the
Estate of _____
Deceased.
By: _____
Counsel