

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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ROBERT MAINES and	)	
TERESA McELVAIN,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 01-2636
	)	
WERMAC EXPRESS, INC., and	)	
WILLIE M. ELLIS,	)	
	)	
Defendants.	)	
	)	

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JURY INSTRUCTIONS

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Ladies and gentlemen of the jury, we have now come to the point in the case when it is my duty to instruct you in the law that applies to the case and you must follow the law as I state it to you.

As jurors it is your exclusive duty to decide all questions of fact submitted to you and for that purpose to determine the effect and value of the evidence.

You must not be influenced by sympathy, bias, prejudice or passion.

You are not to single out any particular part of the instructions and ignore the rest, but you are to consider all the instructions as a whole and regard each in the light of all the others.

Now let me outline for you the parts of the charge so that you can follow it more easily. First, I will instruct you as to the burden of proof and upon which party the law places that burden in the case, I will give you some rules to help you as you consider the evidence, and I will set out the stipulations of the parties. Second, I will outline for you the law to apply in determining the legal issues with respect to liability. Third, I will instruct you on the law with respect to damages. Finally, I will explain to you about the form of your verdict.

## I. GENERAL INSTRUCTIONS AND STIPULATIONS

### Burden of Proof

I will now instruct you with regard to where the law places the burden of making out and supporting the facts necessary to prove the theories in the case.

When a defendant denies the material allegations of a plaintiff's claim, the law places upon the plaintiff the burden of supporting and making out his or her claim upon every material issue in controversy by the greater weight or preponderance of the evidence.

Preponderance of the evidence -- means that amount of factual information presented to you in this trial which is sufficient to cause you to believe that an allegation is probably true. In order to preponderate, the evidence must have the greater convincing effect in the formation of your belief. If the evidence on a particular issue appears to be equally balanced, the party having the burden of proving that issue must fail.

You must consider all the evidence pertaining to every issue, regardless of who presented it.

## Credibility and Weighing The Evidence

You as members of the jury are judges of the facts concerning the controversy involved in this lawsuit. In order for you to determine what the true facts are, you are called upon to weigh the testimony of every witness who has appeared before you, and to give the testimony of the witnesses the weight, faith, credit and value to which you think it is entitled.

You will note the manner and demeanor of witnesses while on the stand. You must consider whether the witness impressed you as one who was telling the truth or one who was telling a falsehood and whether or not the witness was a frank witness. You should consider the reasonableness or unreasonableness of the testimony of the witness; the opportunity or lack of opportunity of the witness to know the facts about which he testified; the intelligence or lack of intelligence of the witness; the interest of the witness in the result of the lawsuit, if any; the relationship of the witness to any of the parties to the lawsuit, if any; and whether the witness testified inconsistently while on the witness stand, or if the witness said or did something or failed to say or do something at any other time that is inconsistent with what the witness said while testifying.

These are the rules that should guide you, along with your common judgment, your common experience and your common observations gained by you in your various walks in life, in

weighing the testimony of the witnesses who have appeared before you in this case.

If there is a conflict in the testimony of the witnesses, it is your duty to reconcile that conflict if you can, because the law presumes that every witness has attempted to and has testified to the truth. But if there is a conflict in the testimony of the witnesses which you are not able to reconcile, in accordance with these instructions, then it is with you absolutely to determine which ones of the witnesses you believe have testified to the truth and which ones you believe have testified to a falsehood.

Immaterial discrepancies do not affect a witness's testimony, but material discrepancies do.

The greater weight or preponderance of the evidence in a case is not determined by the number of witnesses testifying to a particular fact or a particular state of facts. Rather, it depends on the weight, credit and value of the total evidence on either side of the issue, and of this you jurors are the exclusive judges.

If in your deliberations you come to a point where the evidence is evenly balanced and you are unable to determine which way the scales should turn on a particular issue, then the jury must find against that party upon whom the burden of proof has been cast in accordance with these instructions.



## Direct and Circumstantial Evidence

There are two kinds of evidence -- direct and circumstantial. Direct evidence is testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact.

You may consider both direct and circumstantial evidence in deciding this case. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

## Statements and Questions of Counsel

You must not consider as evidence any statements of counsel made during the trial. If, however, counsel for the parties have stipulated to any fact, or any fact has been admitted by counsel, you will regard that fact as being conclusively established.

As to any questions to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection, and you must assume that the answer would be of no value to you in your deliberations.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court. Such matter is to be treated as though you had never known it.

You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence. It may be considered only as it supplies meaning to the answer.



Corporation Not to be Prejudiced

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The fact that a corporation is a party must not prejudice you in your deliberations or in your verdict.

You may not discriminate between corporations and natural individuals. Both are persons in the eyes of the law, and both are entitled to the same fair and impartial consideration and to justice by the same legal standards.

Principal and Agent Sued (3.57)

It has been established that Robert D. Hill was the agent of WerMac Express, Inc. Therefore, Robert Hill and WerMac Express, Inc. should be considered as one and the same in determining the issues in this case.

The parties have stipulated that certain matters of fact are true. They are bound by this agreement and in your consideration of the evidence you are to treat these facts as proven.

The following facts have been stipulated by the parties:

1. That on August 12, 2000, Robert D. Hill was an employee of WerMac Express, Inc. and was driving a vehicle owned by WerMac Express with its knowledge and consent and on business for WeMac Express, Inc.
2. On August 12, 2000, Robert Maines was a restrained driver in a vehicle he was leasing to own from M.S. Carriers.
3. The M.S. Carriers rig without trailer was stopped on Cazassa near Brooks and was operated at all times relevant to the accident in a non-negligent manner.
4. Robert Hill was traveling eastbound on Brooks Road approaching Cazassa in the center eastbound lane.
5. Robert Hill was attempting to make a right hand turn from the center of three eastbound lanes.
6. During the right hand turn of Robert Hill, the front right of his truck entered the outside lane of Brooks Road, it collided with the Cadillac driven by Willie Ellis in that lane.

7. The impact on the WerMac Express, Inc. freightliner was at the right front bumper, pulling the end of the bumper out a few feet.
8. The impact on the Cadillac was the area at the end of the driver's door extending to the rear wheel well immediately behind the driver's side rear door.
9. The Cadillac veered right and collided with its entire front under the driver's side door of the 2000 freightliner driven by Robert Maines.
10. Teresa McElvain was in the vehicle with Robert Maines at the time of the accident.
11. The WerMac Express truck came to rest with its front end just on Cazassa and the end of its trailer extending into the inner most lane of traffic on Brooks Road.
12. Robert Maines had a lease and hauling agreement executed on the same day with M.S. Carriers.
13. Robert Maines was 46 years of age at the time of the accident and had a life expectancy of an additional 28.3 years.
14. Robert Maines incurred hotel bills in Memphis in the amount of \$600.00 as a result of this accident.
15. Robert Maines incurred \$3,900.00 plus in damages to his 2000 freightliner.
16. Teresa McElvain incurred \$1,653.18 in medical bills as a result of this accident.

17. The medical bills incurred by Teresa McElvain were reasonable and necessary, are usual and customary for such services, and were causally related to the accident.

## II. THE LAW

### Legal Theories

Turning now to the legal theories in the case, it is my duty to tell you what the law is. If a lawyer or party has told you that the law is different from what I tell you it is, you must, of course, take the law as I give it to you. That is my duty, but it is your duty, and yours alone, to determine what the facts are and after you have determined what the facts are, to apply those facts to the law as I give it to you, free from any bias, prejudice or sympathy, either one way or the other.

The legal theory of the plaintiffs (Mr. Maines and Ms. McElvain) and the cross-plaintiff (Mr. Ellis) is that defendant WerMac Express, Inc. was negligent on August 12, 2000, and that negligence was the proximate cause of the injuries sustained by Mr. Maines, Ms. McElvain, and Mr. Ellis. The burden of proof is on the plaintiffs to prove their cases by the greater weight or preponderance of the evidence.

I will first discuss with you the law as to negligence and I will go over the rules of the road that apply in this case. I will then go over the principles of law setting out how you determine negligence of the parties in the case.

### Negligence (3.05)

The general law that the plaintiffs and cross-plaintiff assert as the basis for liability in this case is negligence.

Negligence is the failure to use ordinary or reasonable care. It is either doing something that a reasonably careful person would not do, or the failure to do something that a reasonably careful person would do, under all of the circumstances in this case.

A person may assume that every other person will use reasonable care, unless a reasonably careful person has cause for thinking otherwise.

I will now give you the rules of the road that apply in this case.

Duty of Driver (5.01)

It was the duty of each of the drivers to operate his vehicle with reasonable care having regard to the actual and potential dangers existing from weather, road, traffic and other conditions.

Each driver was under a duty to maintain a reasonably safe rate of speed; to have his vehicle under reasonable control; to keep a proper lookout under the circumstances then existing; to see and be aware of what was in his view; and to use reasonable care to avoid an accident.



Right of Way (5.02)

The term the "right of way" as used in these instructions means the privilege given by law to one person over another of the immediate use of the same space on a roadway.

The fact that one has the right of way, if that is the fact, does not excuse him from the exercise of ordinary care to avoid an accident.

Waiver of Right of Way (5.03)

A person who has the right of way may intentionally waive it, or may conduct himself in a manner that indicates to a reasonably prudent person that he intends to waive or has waived the right of way.

#### Immediate Hazard (5.04)

An immediate hazard exists whenever a reasonably prudent person in the position of a driver would realize that if another vehicle in or approaching the intersection continued at the same course and speed it would probably collide with his vehicle if he then proceeded to enter or cross the intersection.

## Turning Vehicle (5.07)

A driver is not required to know that there is absolutely no chance of an accident before turning from a direct course or moving to the left or right on a public roadway. A driver is required to use the precaution that would satisfy a reasonably careful person that the turn or movement can be made safely under the circumstances.

Right-Hand Turn at Intersection  
(TCA § 55-8-140)

The driver of a vehicle intending to make a right turn at an intersection shall approach a right turn and make a right turn as close as practicable to the right-hand curb or edge of the roadway.

Turning Movements  
(TCA § 55-8-141)

Traffic laws require that no person turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway, or turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway, unless and until such movement can be made with reasonable safety. No person shall so turn any vehicle without giving an appropriate signal in the event any other traffic may be affected by such movement.

Every driver who intends to start, stop, or partly turn from a direct line, shall first see that such movement can be made in safety, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal plainly visible to the driver of such other vehicle of the intention to make such movement.

## Roadway Defined (5.09)

A roadway is that part of a highway improved, designed, or ordinarily used for vehicular traffic, exclusive of the berm or shoulder.



General Duty and Summary(5.20)

It is the duty of every person using a public highway, to exercise reasonable care at all times to avoid an accident from which an injury might result.

The above are the rules of the road that you may use and apply in deciding this case.

I will now review with you additional principles of the law of negligence that are also to be used in deciding this case.

A plaintiff is entitled to recover compensation for an injury that was legally caused by the negligent conduct of a defendant. In this case, the plaintiffs and cross-plaintiff have the burden of proving:

1. That the defendant was negligent; and
2. That the negligence was a legal cause of injury to the plaintiffs and/or the cross-plaintiff.

As I stated earlier in these instructions, negligence is the failure to use ordinary or reasonable care. It is either doing something that a reasonably careful person would not do, or the failure to do something that a reasonably careful person would do, under all of the circumstances in this case.

A person may assume that every other person will use reasonable care, unless a reasonably careful person has cause for thinking otherwise.

Other's Normal Faculties (3.06)

In the absence of reasonable cause for thinking otherwise, a person who is using ordinary care has a right to assume that other persons are ordinarily intelligent and possess normal sight and hearing.

### Sudden Emergency (3.08)

A person who is faced with a sudden or unexpected emergency that calls for immediate action is not expected to use the same accuracy of judgement as a person acting under normal circumstances who has time to think and reflect before acting. A person faced with a sudden emergency is required to act as a reasonably careful person placed in a similar position. A sudden emergency will not excuse the actions of a person whose own negligence created the emergency.

If you find there was a sudden emergency that was not caused by any fault of the person whose actions you are judging, you must consider this factor in determining negligence.

Negligence Per Se (3.09)

A person who violates a statute or ordinance is negligent. However, a person violating a statute or ordinance is not at fault unless you also find that the violation was a legal cause of the injury or damage for which claim has been made.

Legal Cause (3.20)

A legal cause of an injury is a cause which, in natural and continuous sequence, produces the injury, and without which the injury would not have occurred.

## Legal Cause/Proximate Cause

Legal cause is further defined as proximate cause. Proximate cause means that there must be a sufficient causal connection between the act or omission of a defendant and any injury or damage sustained by the plaintiffs and/or cross-plaintiff. An act or omission is a proximate cause if it was a substantial factor in bringing about or actually causing injury, that is, if the injury or damage was a reasonably foreseeable consequence of the defendant's act or omission. If an injury was a direct result or a reasonably probable consequence of a defendant's act or omission, it was proximately caused by such act or omission. In other words, if a defendant's act or omission had such an effect in producing the injury that reasonable persons would regard it as being a cause of the injury, then the act or omission is a proximate cause.

In order to recover damages for any injury, the plaintiffs and cross-plaintiff must show by a preponderance of the evidence that such loss or injury would not have occurred without the conduct of the defendant. If you find that the defendant has proved, by a preponderance of the evidence, that the plaintiffs and cross-plaintiff complain about an action which would have occurred even in the absence of the defendant's conduct, you must find that the defendant did not proximately cause plaintiffs' and/or cross-plaintiff's injury.

A proximate cause (legal cause) need not always be the nearest cause either in time or in space. In addition, there may be more than one proximate cause of an injury or damage. Many factors or the conduct of two or more people may operate at the same time, either independently or together, to cause an injury or loss.



Summary - Liability Question

If after considering all the evidence in this case, and applying the law as given to you in these instructions, you are convinced by the greater weight or preponderance of the evidence that the plaintiff you are considering has proved that WerMac Express was negligent in this cause and that the negligence was a legal cause of injury to that plaintiff, then you must return a verdict for that plaintiff. If you are not so convinced, then you must return a verdict for defendant WerMac Express as to that plaintiff.

It is my duty to instruct you as to the proper measure of damages to be applied in this case. By instructing you regarding damages, I am not indicating, one way or the other, that I have any opinion regarding whether or not damages should be awarded in this case.

## Compensatory Damages (14.01)

If you decide a party is entitled to damages, you must fix an amount that will reasonably compensate that party for each of the following elements of claimed loss or harm, if you find it was suffered by that party and was caused by the act or omission upon which you base your finding of fault.

Each of these elements of damage is separate. You may not duplicate damages for any element by also including that same loss or harm in another element of damage.

Pain and Suffering (14.10)

Plaintiff shall be awarded the following elements of damages experienced in the past:

1. Physical pain and suffering;
2. Mental or emotional pain and suffering including anguish, distress, fear, humiliation, grief, shame or worry;
3. Loss of wages.

You shall also award compensation for the present cash value of:

1. Physical pain and suffering;
2. Mental or emotional pain and suffering including anguish, distress, fear, humiliation, grief, shame or worry;

reasonably certain to be experienced by a party in the future.

There is no mathematical formula for computing reasonable compensation for physical pain and suffering or mental or emotional pain and suffering, nor is the opinion of any witness required as to the amount of such compensation.

In making an award for such damages, you must use your best judgment and establish an amount of damages that is fair and reasonable in light of the evidence before you.

Medical Expenses (14.11)

The next element of damages that the plaintiffs/cross-plaintiff may recover is for reasonable and necessary expenses for medical care, services, and supplies actually given in the treatment of a party as shown by the evidence.

Loss of Earning Capacity (14.13)

The next element of damages that the plaintiffs/cross-plaintiff can recover is the value of the ability to earn money that has been lost in the past and the present cash value of the ability to earn money that is reasonably certain to be lost in the future.

In deciding what, if any, award should be made for loss of the ability to earn, you should consider any evidence of the party's earning capacity, including among other things, the party's health, age, character, occupation, past earnings, intelligence, skill, talents, experience and record of employment. The loss of the ability to earn money may include, but is not limited to, actual loss of income.

Damages for Permanent Injuries (14.16)

The plaintiff, Robert Maines, claims damages for permanent injury. To recover damages for permanent injury, the plaintiff must prove the future effect of the injury with reasonable certainty. While it is not necessary that the evidence show conclusively or absolutely that the injury is permanent, you may not award damages for a permanent injury based upon a mere conjecture or a possibility.



#### Damage to Personal Property (14.40)

The measure of damage to personal property is as follows:

If the damages have been repaired or the property is capable of repair so that the three factors of function, appearance, and value have been or will be restored to substantially the same value as before the accident, then the measure of damages is the reasonable cost of repairs necessary for the restoration plus any loss of use pending the repairs.

### Determining Damages - Speculation (14.50)

If you are to determine a party's damages, you must compensate that party for loss or harm that is reasonably certain to be suffered in the future as a result of the injury in question. You may not include speculative damages, which is compensation for future loss or harm that, although possible, is conjectural or not reasonably certain.

Duty to Mitigate (14.51)

A person who has been injured has the duty to mitigate damages by using reasonable diligence in caring for an injury and employing reasonable means to accomplish healing. When one does not use reasonable diligence to care for injuries and they are aggravated as a result of that failure, the damages you determine must be limited to the amount of damage that would have been suffered had the injured person used the diligence required.

Property Damage Duty to Mitigate (14.52)

A person whose property has been damaged by the wrongful act of another is bound to use reasonable care to avoid loss and to minimize damages. A party may not recover for losses that could have been prevented by reasonable efforts or by expenditures that might reasonably have been made.

Life Expectancy (14.53)

The life expectancy read to you is not conclusive but is an average life expectancy of persons who have reached a certain age. You should be aware that many persons live longer, and many die sooner, than the average. This figure may be considered by you in connection with other evidence relating to the probable life expectancy of plaintiff Robert Maines including evidence of the plaintiff's health, occupation, habits and other activities.

Present Cash Value Defined (14.54)

I have used the expression "present cash value" in these instructions concerning damages for future losses that may be awarded to the plaintiff Robert Maines.

In determining the damages arising in the future, you must determine the present cash value of those damages. That is, you must adjust the award of those damages to allow for the reasonable earning power of money and the impact of inflation.

"Present cash value" means the sum of money needed now which, when added to what that sum may reasonably be expected to earn in the future when invested, would equal the amount of damages, expenses or earnings at the time in the future when the damages from the injury will be suffered, or the expenses must be paid, or the earnings would have been received. You should also consider the impact of inflation, its impact on wages, and its impact on purchasing power in determining the present cash value of future damages.

Verdict Form

Finally, ladies and gentlemen, we come to the point where we will discuss the form of your verdict and the process of your deliberations. You will be taking with you to the jury room a verdict form that will reflect your findings. The verdict form reads as follows:

[Read Verdict Form]

You will be selecting a foreperson after you retire to the jury room. That person will preside over your deliberations and be your spokesperson here in court. When you have completed your deliberations, your foreperson will fill in and sign the verdict form.

Your verdict must represent the considered judgment of each of you. In order to return a verdict, it is necessary that each of you agree to that verdict. That is, 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 judgments. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine 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.

We will be sending with you to the jury room all of the exhibits in the case. You may have not seen all of these previously and they will be there for your review and consideration. You may take a break before you begin deliberating but do not begin to deliberate and do not discuss the case at any time unless all eight of you are present together in the jury room. Some of you have taken notes. I remind you that these are for your own individual use only and are to be used by you only to refresh your recollection about the case. They are not to be shown to others or otherwise used as a basis for your discussion about the case.





2. Do you find that the negligence of defendant WerMac Express, Inc. was the proximate cause of any injuries or damages of each of the following:

ROBERT MAINES: YES \_\_\_\_\_ NO \_\_\_\_\_

TERESA MCELVAIN: YES \_\_\_\_\_ NO \_\_\_\_\_

WILLIE ELLIS: YES \_\_\_\_\_ NO \_\_\_\_\_

3. As to each individual as to whom you have answered "YES" above, state the amount of damages, if any, that you find were proximately caused by the negligence of WerMac Express, Inc.

ROBERT MAINES: \$ \_\_\_\_\_

TERESA MCELVAIN: \$ \_\_\_\_\_

WILLIE ELLIS: \$ \_\_\_\_\_

\_\_\_\_\_  
DATE

\_\_\_\_\_  
JURY FOREPERSON

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