

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

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**MICHELE R. FABERY, RN, BSN, and )  
CHARLES FABERY, )  
 )  
                  **Plaintiffs,** )  
 )  
**v.** )  
 )  
**MID-SOUTH OB-GYN, P.L.L.C.,** )  
 )  
                  **Defendant.** )**

**No. 06-2136**

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**JURY INSTRUCTIONS**

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Members of the Jury:

You have now heard all of the evidence in the case, as well as the final arguments of the lawyers for the parties.

It becomes my duty, therefore, to instruct you on the rules of law that you must follow and apply in arriving at your decision in the case.

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to determine what testimony and evidence is relevant under the law for your consideration. It is also my duty at the end

of the trial to instruct you on the law applicable to the case.

You, as jurors, are the judges of the facts. But in determining what actually happened in this case -- that is, in reaching your decision as to the facts -- it is your sworn duty to follow the law I am now in the process of defining for you.

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, and I will give you some rules to help you as you consider the evidence. 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.

### **Burden of Proof**

The burden is on the Plaintiffs in a civil action, such as this, to prove every

essential element of her claim by a preponderance of the evidence. If the proof should fail to establish any essential element of the Plaintiffs' claim by a preponderance of the evidence in the case, the jury should find for the Defendant as to that claim.

To "establish by a preponderance of the evidence" means to prove that something is more likely than not to have occurred. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your mind the belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in issue has been proven by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

### **Evidence**

You are to decide this case only from the evidence which was presented at this trial. The evidence consists of:

1. The sworn testimony of the witnesses who have testified, both in person and by deposition;
2. The exhibits that were received and marked as evidence;

3. Any facts to which all the lawyers have agreed or stipulated;
4. Any other matters that I have instructed you to consider as evidence.

### **Ordinary Observations and Experiences**

Although you must only consider the evidence in this case in reaching your verdict, you are not required to set aside your common knowledge. You are permitted to weigh the evidence in light of your common sense, observations and experience.

### **Hypothetical Question**

An expert witness was asked to assume that certain facts were true and to give an opinion based upon that assumption. This is called a hypothetical question. You must determine if any fact assumed by the witness has not been established by the evidence and the effect of that omission, if any, upon the value of the opinion.

### **Credibility of Witnesses**

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' 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 for the Defendant 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.

Direct evidence is simply evidence like the testimony of an eyewitness which, if you believe it, directly proves a fact. If a witness testified that he or she saw it raining outside, and you believed him or her, that would be direct evidence that it was raining.

Circumstantial evidence is simply a chain of circumstances that indirectly proves a fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence

from which you could conclude that it was raining.

It is your job to decide how much weight to give the direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one, or say that one is any better evidence than the other. You should consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves.

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.

### **Deposition Testimony**

Certain testimony has been read into evidence or presented by video from depositions. A deposition is testimony taken under oath before the trial and preserved in writing and/or videotape. You are to consider that testimony as if it had been given in court.

### **Professional Limited Liability Company Not To Be Prejudiced**

The fact that a professional limited liability company is a party must not prejudice you in your deliberations or in your verdict. You may not discriminate between professional limited liability companies 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.

## **Law**

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.

## **Medical Malpractice**

[T.C.A. § 29-26-115]

To establish the claim of Plaintiff Michele Fabery against Defendant Mid-South OB-GYN, P.L.L.C., Michele Fabery has the burden of proving by a preponderance of the evidence and by expert medical testimony all of the following:

1. The recognized standard of acceptable professional practice in the medical profession and in the specialty of obstetrics and gynecology in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred; and

2. That Defendant's employees acted with less than ordinary and reasonable care or failed to act with ordinary and reasonable care in accordance with the standard of acceptable professional practice; and
3. As a proximate result of such negligent act or omission, Plaintiff Michele Fabery suffered injuries which would not otherwise have occurred. This requirement is often referred to as requiring that the Defendant's acts be the "legal cause" of Plaintiff's injuries.

These three requirements are the only three findings you must make to determine if Defendant is liable to Plaintiff for medical malpractice. I will now give you some further information on the law to help you determine whether these three elements are met.

### **Duty of Physician**

[T.P.I--Civil 6.10]

A physician who undertakes to perform professional services for a patient must use reasonable care to avoid causing injury to the patient. The knowledge and care required of the physician is the same as that of other reputable physicians practicing in the same or a similar community and under similar circumstances. A physician not only must have that degree of learning and skill ordinarily possessed by other reputable physicians, but also must use the care and skill ordinarily used in like cases. In applying that skill and learning, a physician is required to use reasonable diligence and best judgment in an effort to accomplish the purpose of the employment. A

failure to have and use such knowledge and skill is negligence.

### **Duty of Specialist**

[T.P.I--Civil 6.11]

The skill, knowledge and care required of a physician who practices a particular specialty is the same as that of other reputable physicians who specialize in the same field and practice in the same or similar community and under similar circumstances.

### **Perfection Not Required**

[T.P.I--Civil 6.12]

By undertaking treatment a physician does not guarantee a good result. A physician is not negligent merely because of an unsuccessful result or an error in judgment. An injury alone does not raise a presumption of the physician's negligence. It is negligence, however, if the error of judgment or lack of success is due to a failure to have and use the required knowledge, care and skill as defined in these instructions.

### **Alternate Methods**

[T.P.I--Civil 6.14]

When there is more than one accepted method of diagnosis or treatment, and no one of them is used exclusively and uniformly by all physicians of good standing, a physician is not negligent for selecting a method of diagnosis or treatment that is an acceptable professional practice that later turns out to be unsuccessful. This is true even if the method is one not favored by certain other physicians.

### **Duty to Not Abandon Patient**

[T.P.I--Civil 6.15]

When the physician begins treating a patient, there is a duty to continue treating and not abandon the patient unless and until the patient discharges the physician or the physician gives the patient notice of intent to discontinue treatment and provides an opportunity to obtain the services of another physician.

### **Standard of Medical Care Determined by Expert Testimony**

[T.P.I--Civil 6.18]

It is your obligation to determine the recognized standard of acceptable professional practice in defendant's profession for this or a similar community. In making this determination, you may consider only the opinions of the physicians, including the Defendant's physicians, who have testified concerning this standard. Consider each opinion and the reasons given for the opinion, as well as the qualifications of the witnesses, giving each opinion the weight you believe it deserves. The testimony of a physician as to what that physician personally would do or would not do or the personal opinion of a physician of what should or could not have been done does not prove the recognized standard of acceptable professional practice.

### **Dr. Shanklin's Testimony**

You have heard testimony from Dr. Shanklin, who testified as to the standard of care for gynecologists in this community. He testified that an incidental appendectomy was required in this case. The Court instructs you to disregard Dr. Shanklin's testimony on the standard of care for gynecologists.

Except for the issue of standard of care, however, you may consider all other testimony by Dr. Shanklin as to all other issues about which he testified.

### **Definition of Legal Cause**

[T.P.I.–CIVIL 3.20]

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

### **Superseding Cause**

[T.P.I.–Civil 3.22]

A cause of an injury is not a legal cause when there is a superseding cause. For a cause to be a superseding cause, all of the following elements must be present:

- 1) The harmful effects of the superseding cause must have occurred after the original negligence;
- 2) The superseding cause must not have been brought about by the original negligence;
- 3) The superseding cause must actively work to bring about a result which would not have followed from the original negligence; and
- 4) The superseding cause must not have been reasonably foreseeable by the original negligent party.

## **Liability of Negligent Physicians for Subsequent Healthcare Made Necessary by Negligence of Original Physicians**

If one is injured by the negligence of another, and these injuries are aggravated by medical treatment (either prudent or negligent), the negligence of the wrongdoer causing the original injury is regarded as the proximate cause of the damage subsequently flowing from the medical treatment.

### **No Presumption of Negligence**

You cannot presume negligence merely from the occurrence of any unfortunate event. The question is whether the event was caused by the Defendant's negligence.

### **Causation Based Upon Probabilities**

A plaintiff in a medical malpractice case must prove that it is more likely than not that the defendant's negligence caused the plaintiff to suffer injuries which would not otherwise have occurred. The mere possibility of a causal relationship is insufficient to sustain the plaintiff's burden of proof. Causation must be based on probabilities and not possibilities.

### **Vicarious Liability**

Mid-South OB-GYN, PLLC is responsible for any injury caused by its physician employees, Dr. Donato or Dr. Stack or Dr. Hamby, for the negligent performance of their duties while acting in the scope of their employment with Mid-South OB-GYN.

Mid-South OB-GYN is the employer of Dr. Donato, Dr. Stack and Dr. Hamby. It is stipulated that Dr. Donato, Dr. Stack, and Dr. Hamby were acting within the course and scope of their employment at Mid-South OB-GYN when they provided medical services to Mrs. Fabery at all times pertinent to this lawsuit. Mid-South OB-GYN can only be liable for damages in this cause based upon the acts and omissions of its physician employees, Dr. Donato or Dr. Stack or Dr. Hamby.

### **Damages**

If the plaintiff has proven her claim against the defendant by a preponderance of the evidence, you must determine the damages to which the plaintiff is entitled. You should not interpret the fact that I have given instructions about the plaintiff's damages as an indication in any way that I believe that the plaintiff should, or should not, win this case. It is your task first to decide whether the defendant is liable. I am instructing you on damages only so that you will have guidance in the event you decide that the defendant is liable and that the plaintiff is entitled to recover money from the defendant.

In this case, if you find for Defendant, you will not be concerned with the question of damages. But if you find in favor of Plaintiff, you will of course be concerned with the questions of damages. It is my duty to instruct you as to the proper measure of damages to be applied in that circumstance.

**Determination of Whether  
Plaintiff Entitled to Recover Verdict**

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 plaintiff has the burden of proving:

1. That the defendant was negligent; and
2. That the negligence was a legal cause of injury to the plaintiff.

**Compensatory Damages**

[T.P.I –CIVIL 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 or will be 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.

**Personal Injury - Pain & Suffering**

[T.P.I.–Civil 14.10]

Plaintiff Michele Fabery may be awarded the following elements of damage experienced in the past:

Physical pain and suffering;  
Mental or emotional pain and suffering;  
Loss of capacity for the enjoyment of life.

You may also award compensation for the present cash value of the following damages reasonably certain to be experienced by Michele Fabery in the future:

Physical pain and suffering;  
Mental or emotional pain and suffering;  
Loss of capacity for the enjoyment of life.

Pain and suffering encompasses the physical discomfort caused by an injury. Mental or emotional pain and suffering encompasses anguish, distress, fear, humiliation, grief, shame, or worry. Damages for loss of capacity for the enjoyment of life compensate the injured person for the limitations placed on the ability to enjoy the pleasures of life. Impairment of physical function prevents a person from living life in comfort by adding inconvenience or loss of physical ability.

There is no mathematical formula for computing reasonable compensation for physical pain and suffering, mental or emotional pain and suffering, loss of capacity for the enjoyment of life, 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.

### **Loss of Earning Capacity**

[T.P.I.–Civil 14.13]

The next element of damages that Plaintiff Michele Fabery 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 Michele Fabery’s earning capacity, including among other things, Michele Fabery’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.

### **Aggravation of Pre-Existing Condition**

[T.P.I.–Civil 14.14]

A person who has a condition or disability at the time of an injury is entitled to recover damages only for any aggravation of the pre-existing condition. Recovery is allowed even if the pre-existing condition made Plaintiff more likely to be injured and even if a normal, healthy person would not have suffered substantial injury.

A plaintiff with a pre-existing condition may recover damages only for any additional injury or harm resulting from the fault you may have found in this case.

If you find that Defendant's negligence aggravated Plaintiff's pre-existing condition you must apportion the amount of disability and pain between that caused by the pre-existing condition and that caused by the incident. If, however, you find that Defendant's negligence aggravated Plaintiff's pre-existing condition and you find that Plaintiff's pre-existing condition had caused Plaintiff no harm, pain or suffering before the incident, or if you find that Defendant's negligence makes it impossible to apportion the amount of disability or pain that pre-existed the incident, then Defendant is responsible for all harm caused by the incident even though it is greater because of the pre-existing condition than it might otherwise have been.

### **Damages for Permanent Injuries**

[T.P.I.–Civil 14.16]

Plaintiff Michele Fabery claims damages for permanent injury. To recover damages for permanent injury, Michele Fabery 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 permanent injury based upon a mere conjecture or a possibility.

### **Disability and Social Security Payments**

You have heard that Mrs. Fabery has received certain payments as a result of a long-term disability insurance policy and the Social Security Administration. I

instruct you that you are to totally disregard whether and, if so, what Mrs. Fabery has received as payments because of either the long-term disability insurance policy or the supplemental Social Security Administration disability payments. That is, you are to make your decisions the same as if Mrs. Fabery never received any payment from a long-term disability insurance policy or from the Social Security Administration for supplemental social security benefits.

**Negligent Infliction of Severe  
or Serious Emotional Injury**

[T.P.I.–Civil 14.17]

Plaintiff Michele Fabery claims damages for serious or severe emotional injury. A serious or severe emotional injury occurs when a reasonable person, normally constituted, would be unable to adequately cope with the mental stress caused and brought about by the circumstances of the case. Such serious or severe emotional injury must be supported by medical or scientific proof.

There is no mathematical formula for computing reasonable compensation for negligent infliction of serious or severe emotional injury, 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.

### **Spouse's Claim for Loss of Consortium**

If you determine that Plaintiff Michele Fabery is entitled to recover damages, then you may also determine whether Plaintiff Charles Fabery is entitled to damages for loss of consortium.

In determining damages for Michele Fabery, you should also determine the damages for her husband, Charles Fabery. Under the law of Tennessee, a husband would be entitled to recover the reasonable value of the services of his wife that he has lost and the value of such services that he may reasonable lose in the future.

The value of services is known by the legal term "loss of consortium." Included within the definition of loss of consortium is the affection, aid, assistance, companionship, comfort and society of Michele Fabery in all those matters in which the wife would have benefitted her husband if she had not been injured. Loss of consortium also includes those duties that and obligations which by marriage each partner takes on themselves towards each other in sickness and health.

Examples of such services might include the ability to care for and play with the minor children, the ability to perform manual labor around the house and in the yard and to assist in household chores. Loss of consortium may also include loss of emotional support and comfort.

If, in accordance with these instructions, you are to determine damages for Mrs. Fabery, you should also determine the damages for Mr. Fabery. Mr. Fabery would be

entitled to recover the following elements of damage if established by the evidence:

1. Expenses reasonably incurred in attending the spouse in the hospital; and
2. The reasonable value of the injured spouse's services that Mr. Fabery has lost and the present cash value of such services plaintiff is reasonably certain to lose in the future; and
3. The reasonable value of the spouse's acts of companionship of love and affection that Mr. Fabery has lost and the present cash value of such acts plaintiff is reasonably certain to lose in the future but would have received in the usual course of the parties' married life.

#### **Meaning of Present Cash Value**

[T.P.I.–Civil 15.01]

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

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.

### **Life Expectancy**

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 Michele Fabery, including evidence of Michele Fabery’s health, occupation, habits and other activities as of the date of her alleged injury.

### **All Instructions Not Necessarily Applicable**

The Court has given you various rules of law to help guide you to a just and lawful verdict. Whether some of these instructions will apply will depend upon what you decide are the facts. The Court’s instructions on any subject must not be taken by you to indicate the Court’s opinion of the facts you should find or the verdict you should return.

## **Deliberations and Verdict**

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 judgment. Each of you must 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 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 the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

### **Requests to Review Witness Testimony**

You have heard the testimony of many witnesses. No transcript of witness testimony is readily available. In your deliberations, you must rely on your individual and collective recollection as to all the proof, including the testimony of witnesses.

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 the case. However, you may not deliberate at any time unless all 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.

You will take the verdict form to the jury room and when you have reached a unanimous agreement as to your verdict, you will have your foreperson fill it in, date and sign it, and then return to the courtroom.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing signed by the foreperson, and pass

the note to the clerk who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should never state or specify the vote of the jury at the time.