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

CHARLES MARK McDANIEL,
and his wife, MELODY McDANIEL,

Plaintiffs,

v. No. 2:16-cv-02895-tmp

UT MEDICAL GROUP, INC.,

Defendant.

JURY INSTRUCTIONS

INSTRUCTION NO. 1

RESPECTIVE DUTIES OF JUDGE AND JURY

Members of the jury, now that you have heard all of the evidence and the arguments of the lawyers, it is my duty to instruct you on the law that applies to this case. You will be provided with a written copy of these jury instructions.

It is your duty to find the facts from all the evidence in the case. After you determine the facts, you must apply the law that has been given to you, whether you agree with it or not.

You must not be influenced by any personal likes or dislikes, prejudice or sympathy. You must decide the case solely on the evidence before you and according to the law given to you.

INSTRUCTION NO. 2

CORPORATION NOT TO BE PREJUDICED

The fact that a corporation is a party must not influence you in your deliberations or in your verdict. Corporations and persons are equal in the eyes of the law. Both are entitled to the same fair and impartial treatment and to justice by the same legal standards.

INSTRUCTION NO. 3

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; and
4. Any other matters that I have instructed you to consider as evidence.

INSTRUCTION NO. 4

DIRECT AND CIRCUMSTANTIAL EVIDENCE

There are two kinds of evidence; direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of a witness about what the witness personally observed.

Circumstantial evidence is indirect evidence that gives you clues about what happened. Circumstantial evidence is proof of a fact, or a group of facts, that causes you to conclude that another fact exists. It is for you to decide whether a fact has been proved by circumstantial evidence. If you base your decision upon circumstantial evidence, you must be convinced that the conclusion you reach is more probable than any other explanation.

For example, if a witness testified that the witness saw it raining outside, that would be direct evidence that it was raining. If a witness testified that the witness saw someone enter a room 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.

You are to consider both direct and circumstantial evidence. 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.

In making your decision, you must consider all the evidence in light of reason, experience and common sense.

INSTRUCTION NO. 5

WEIGHING CONFLICTING TESTIMONY

Although you must consider all of the evidence, you are not required to accept all of the evidence as true or accurate.

You should not decide an issue by the simple process of counting the number of witnesses who have testified on each side. You must consider all the evidence in the case. You may decide that the testimony of fewer witnesses on one side is more convincing than the testimony of more witnesses on the other side.

INSTRUCTION NO. 6

DEPOSITION TESTIMONY

Certain testimony has been presented by deposition. A deposition is testimony taken under oath before the trial and preserved in writing or by video. You are to consider that testimony as if it had been given in Court.

INSTRUCTION NO. 7

EXPERT TESTIMONY – DETERMINATION OF WEIGHT

Usually witnesses are not permitted to testify as to opinions or conclusions. However, a witness who has scientific, technical, or other specialized knowledge, skill, experience, training, or education may be permitted to give testimony in the form of an opinion. Those witnesses are often referred to as "expert witnesses."

You should determine the weight that should be given to each expert's opinion and resolve conflicts in the testimony of different expert witnesses. You should consider:

1. The education, qualifications, and experience of the witnesses; and

2. The credibility of the witnesses; and

3. The facts relief upon by the witnesses to support the opinion; and

4. The reasoning used by witnesses to arrive at the opinion.

You should consider each expert opinion and give it the weight, if any, that you think it deserves. You are not required to accept the opinion of any expert

INSTRUCTION NO. 8

CREDIBILITY OF WITNESSES

You are the sole and exclusive judges of the credibility or believability of the witnesses who have testified in this case. You must decide which witnesses you believe and how important you think their testimony is. You are not required to accept or reject everything a witness says. You are free to believe all, none, or part of any person's testimony.

In deciding which testimony you believe, you should rely on your own common sense and everyday experience. There is no fixed set of rules to use in deciding whether you believe a witness, but it may help you to think about the following questions:

1. Was the witness able to see, hear, or be aware of the things about which the witness testified?

2. How well was the witness able to recall and describe those things?

3. How long was the witness watching or listening?

4. Was the witness distracted in any way?

5. Did the witness have a good memory?

6. How did the witness look and act while testifying?

7. Was the witness making an honest effort to tell the truth, or did the witness evade questions?

8. Did the witness have any interest in the outcome of the case?

9. Did the witness have any motive, bias or prejudice that would influence the witness' testimony?

10. How reasonable was the witness' testimony when you consider all of the evidence in the case?

11. Was the witness' testimony contradicted by what that witness has said or done at another time, by the testimony of other witnesses, or by other evidence?

12. Has there been evidence regarding the witness' intelligence, respectability, or reputation for truthfulness?

13. Has the witness' testimony been influenced by any promises, threats, or suggestions?

14. Did the witness admit that any part of the witness' testimony was not true?

INSTRUCTION NO. 9

DISCREPANCIES IN TESTIMONY

There may be discrepancies or differences within a witness' testimony or between the testimony of different witnesses. This does not necessarily mean that a witness should be disbelieved. Sometimes when two people observe an event they will see or hear it differently. Sometimes a witness may have an innocent lapse of memory. Witnesses may testify honestly but simply may be wrong about what they thought they saw or remembered. You should consider whether a discrepancy relates to an important fact or only to an unimportant detail.

INSTRUCTION NO. 10

WITNESS WILFULLY FALSE

You may conclude that a witness deliberately lied about a fact that is important to your decision in the case. If so, you may reject everything that witness said. On the other hand, if you decide that the witness lied about some things but told the truth about others, you may accept the part you decide is true and you may reject the rest.

INSTRUCTION NO. 11

IMPEACHMENT OF WITNESSES

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something that is inconsistent with the witness's present testimony.

If you believe any witness has been impeached and thus discredited, you may give the testimony of that witness such credibility, if any, you think it deserves.

If a witness is shown knowingly to have testified falsely under oath about any material matter, you have a right to distrust such witness's other testimony and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or omission is "knowingly" done, if voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

INSTRUCTION NO. 12

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.

INSTRUCTION NO. 13

BURDEN OF PROOF

A person who begins a lawsuit is called a plaintiff. A plaintiff always seeks some kind of relief against the other party or parties, called the defendant or defendants. In this case, the Plaintiffs, Charles Mark McDaniel and Melody McDaniel seek to recover money damages from the Defendant, UTMG.

In order to be entitled to the relief they seek, the Plaintiffs are required to prove their case by the required weight of evidence known as the burden of proof. This broad, general burden continues upon the Plaintiffs, and the Plaintiffs must maintain it in order to be entitled to a verdict.

The Plaintiffs have the burden of proving each of the required elements in order to recover a verdict. If you find that the credible evidence on a given issue is evenly divided between the parties – that it is equally as probable that one side is correct as it is that the other side is correct – then you must find for UTMG.

INSTRUCTION NO. 14

PREPONDERANCE OF EVIDENCE

It is the Plaintiffs' burden to prove each and every element of their claim by a preponderance of the evidence. If the Plaintiffs should fail to establish any element of their claim by a preponderance of the evidence, you should find for UTMG.

Establish by a "preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with the evidence opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This standard does not 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 proved by a preponderance of the evidence you 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.

INSTRUCTION NO. 15

HEALTH CARE LIABILITY – TENNESSEE CODE ANNOTATED § 29-26-115

To establish Plaintiff's claim for a health care liability action against UTMG, the Plaintiffs have 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 profession and specialty thereof, if any, that Dr. Behrman practices in the community in which Dr. Behrman practices or in a similar community at the time the alleged injury or wrongful action occurred; and

2. That Dr. Behrman acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and

3. As a proximate result of Dr. Behrman's negligent act or omission, Plaintiffs suffered injuries which would not otherwise have occurred.

These three requirements are the three findings you must make to determine if UTMG is liable to Plaintiffs for health care liability.

There shall be no presumption of negligence on the part of Dr. Behrman.

Additionally, injury alone does not raise a presumption that Dr. Behrman was negligent.

INSTRUCTION NO. 16

CAUSATION

A negligence claim requires proof of two types of causation: cause in fact and legal cause. Cause in fact and legal cause are distinct elements of a negligence claim and both must be proven by the plaintiff by a preponderance of the evidence.

INSTRUCTION NO. 17

CAUSE IN FACT

The defendant's negligent conduct is a cause in fact of the plaintiff's injury if, as a factual matter, it directly contributed to the plaintiff's injury and without it plaintiff's injury would not have occurred. It is not necessary that a defendant's act be the sole cause of plaintiff's injury, only that it be a cause.

INSTRUCTION NO. 18

LEGAL CAUSE

Once you have determined that a defendant's negligence is a cause in fact of the plaintiff's injury, you must decide whether the defendant's negligence was also a legal cause of the plaintiff's injury.

The law in Tennessee sets out two requirements to determine whether an act or omission was a legal cause of the injury or damage.

1. The conduct must have been a substantial factor in bringing about the harm being complained of; and

2. The harm giving rise to the action could have been reasonably foreseen or anticipated by a person of ordinary intelligence and care.

To be a legal cause of an injury there is no requirement that the cause be the only cause, the last act, or the one the nearest to the injury, so long as it is a substantial factor in producing the injury or damage.

The foreseeability requirement does not require the person guilty of negligence to foresee the exact manner in which the injury takes place or the exact person who would be injured. It is enough that the person guilty of negligence could foresee, or through the use of reasonable care, should have foreseen the general manner in which the injury or damage occurred.

INSTRUCTION NO. 19

DUTY OF PHYSICIAN

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.

INSTRUCTION NO. 20

DUTY OF SPECIALIST

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 a similar community and under similar circumstances.

INSTRUCTION NO. 21

PERFECTION NOT REQUIRED

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.

INSTRUCTION NO. 22

STANDARD OF MEDICAL CARE DETERMINED BY EXPERT TESTIMONY

It is your obligation to determine the recognized standard of acceptable professional practice in Dr. Behrman's profession, and the specialty thereof, if any, for this or a similar community. In making this determination, you may consider only the opinions of the physicians, including Dr. Behrman, 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 standard of medical practice.

INSTRUCTION NO. 23

PATIENT'S DUTY TO FOLLOW INSTRUCTIONS

A patient must follow all reasonable instructions given by the physician regarding the patient's care, activities and treatment. A physician is not liable for any injury caused by the patient's failure to follow those instructions. The physician remains responsible for any injury caused by the physician's own negligence.

INSTRUCTION NO. 24

HABIT; ROUTINE PRACTICE

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

INSTRUCTION NO. 25

PRINCIPAL AND AGENT – DEFINITION

A principal can be held responsible for the acts or omissions of the principal's agent.

A person who is authorized to act for another person or in place of another person is an agent of that person.

For purposes of this case, the term "agent" includes an employee.

The person who authorizes the agent to act is called a principal. For purposes of this case, the term “principal” includes an employer.

INSTRUCTION NO. 26

DIRECTED IMPUTATION

It has been established that Dr. Behrman is the agent of UTMG. Any act or omission of Dr. Behrman is in law the act or omission of UTMG. If you find that the agent is at fault, you also must find that the principal is at fault.

INSTRUCTION NO. 27

COMPENSATORY DAMAGES

If, under the Court's instructions, you find that the Plaintiffs are entitled to damages then you must award the Plaintiffs damages that will reasonable compensate them for claimed loss or harm which has been proven by a preponderance of the evidence, provided you also find it was suffered by the Plaintiffs and was legally caused by the act or omission upon which you base your finding of liability.

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. In determining the amount of damages, you should consider the following elements:

Medical expenses. Medical expenses are the cost of medical care, services and supplies reasonably required and actually given in the treatment of the plaintiff as shown by the evidence.

Pain and suffering. Pain and suffering is reasonable compensation for any physical pain and discomfort and for any mental pain and discomfort suffered by the Plaintiff. Mental discomfort includes anguish, grief, shame, or worry.

Loss of enjoyment of life. Loss of the enjoyment of life takes into account the loss of the normal enjoyments and pleasures in life in the future as well as limitations on the person's lifestyle resulting from the injury.

Pain and suffering and loss of enjoyment of life are separate types of losses. A plaintiff is entitled to recover for these losses if the plaintiff proves by a preponderance of the evidence that each was caused by the defendant's fault.

No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for pain and suffering and loss of enjoyment of life. Nor is the opinion

of any witness required as to the amount of such reasonable compensation. In making an award for pain and suffering and/or loss of enjoyment of life, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

INSTRUCTION NO. 28

LOSS OF CONSORTIUM - SPOUSE

If, in accordance with these instructions, you are to determine damages for the Plaintiff Charles Mark McDaniel you should also determine the damages for the Plaintiff Melody McDaniel. Melody McDaniel would be entitled to recover the reasonable value of her spouse's companionship and acts of love and affection she has lost if established by the evidence.

INSTRUCTION NO. 29

PERSONAL INJURY – DUTY TO MITIGATE

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.

INSTRUCTION NO. 30

INSTRUCTIONS TO BE CONSIDERED AS A WHOLE

All of the instructions are equally important. The order in which these instructions are given has no significance. You must follow all of the instructions and not single out some and ignore others.

INSTRUCTION NO. 31

STATEMENTS OF COUNSEL – EVIDENCE STRICKEN OUT –

INSINUATIONS OF QUESTIONS

In reaching your verdict you may consider only the evidence that was admitted. Remember that any questions, objections, statements or arguments made by the attorneys during the trial not evidence. If the attorneys have stipulated or agreed to any fact, however, you will regard that fact as having been proved.

Testimony that you have been instructed to disregard is not evidence and must not be considered. If evidence has been received only for a limited purpose, you must follow the limiting instructions I have given you. You are to decide the case solely on the evidence received at trial.

INSTRUCTION NO. 32

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 the light of your common sense, observations and experience.

INSTRUCTION NO. 33

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, including instructions on damages, must not be taken by you to indicate that the Court's opinion of the facts you should find or the verdict you should return.

INSTRUCTION NO. 34

USE OF JUROR NOTES

Some of you have taken notes during the trial. Once you retire to the jury room you may refer to your notes, but only to refresh you own memory of the witnesses' testimony. You are free to discuss the testimony of the witnesses with your fellow jurors, but each of you must rely upon your own individual memory as to what a witness did or did not say.

In discussing the testimony, you may not read your notes to your fellow jurors or otherwise tell them what you have written. You should never use your notes to persuade or influence other jurors. Your notes are not evidence. Your notes should carry no more weight than the unrecorded recollection of another juror.

INSTRUCTION NO. 35

HOW JURORS SHOULD APPROACH THEIR TASK

Your attitude and conduct at the beginning of your deliberations are very important. It is rarely productive for any juror to immediately announce a determination to hold firm for a certain verdict before any deliberations or discussions take place. Taking that position might make it difficult for you to consider the opinions of your fellow jurors or change your mind, even if you later decide that you might be wrong. Please remember that you are not advocates for one party or another. You are the judges of the facts in this case.

INSTRUCTION NO. 36

EACH JUROR SHOULD DELIBERATE AND VOTE ON EACH ISSUE TO BE DECIDED

Each of you should deliberate and vote on each issue to be decided.

Before you return your verdict, however, each of you must agree on the verdict and agree on the answer to each question so that each of you will be able to state truthfully that the verdict is yours.

INSTRUCTION NO. 37

INSTRUCTIONS AS TO UNANIMOUS VERDICT

The verdict you return to the Court must represent that considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to that verdict, and agree to each answer. Your verdict must be unanimous.

It is your duty to consult with one another and to reach an agreement if you can do so without violence to individual judgment. 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 to change your opinion if you are convinced that it is not correct. 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.

INSTRUCTION NO. 38

CHANCE OR QUOTIENT VERDICT PROHIBITED

The law forbids you to determine any issue in this case by chance. If you decide that a party is entitled to recover damages, you must not arrive at the amount of those damages by agreeing in *advance:* 1) to use each juror's independent estimate of the amount to be awarded; 2) to total those amounts; 3) to divide the total by eight; and 4) to make the resulting average the amount that you award.

INSTRUCTION NO. 39

QUESTIONS DURING DELIBERATIONS

If a question arises during deliberations and you need further instructions, please print your question on a sheet of paper, knock on the door of the jury room, and give the question to my court officer.

I will read your question and I may call you back into the courtroom to try to help you. Please understand that I may only answer questions about the law and I cannot answer questions about the evidence.

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 that time.

INSTRUCTION NO. 40

PROHIBITED RESEARCH AND COMMUNICATION

I remind you that you are to decide this case based only on the evidence you have heard in Court and on the law I have given you. You are prohibited from considering any other information and you are not to consult any outside sources for information. You must not communicate with or provide any information, photographs or video to anyone by any means about this case or your deliberations. You may not use any electronic device or media, such as a telephone, cell phone, smart phone or computer; the Internet, any text or instant messaging service; or any chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate with anyone or to conduct any research about this case.

INSTRUCTION NO. 41

CONCLUDING INSTRUCTION

You will now retire and select one of you to be the foreperson for your deliberations. As soon as all of you have agreed upon a verdict, the foreperson will complete and sign the verdict form and you will return with it to this room.

You may deliberate only when all of you are present in the jury room. You may not resume your deliberations after any breaks until all of you have returned to the jury room.