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JURISDICTIONAL STATEMENT

This appeal involves a judgment rendered in a jury trial relating to a motor vehicle accident that occurred in Lawrence County, Missouri, and in which Plaintiff-Respondent asserted a claim for injuries and damages sustained as a result of both defendants' alleged negligence in causing the accident. The venue of the underlying proceeding was Jasper County and the Honorable William C. Crawford, Jasper County Circuit Judge, presided over the trial. Appellant Hobbs contends that the trial court erroneously admitted evidence of Plaintiff/Respondent Megan Swartz's need for future surgery. Appellant Hobbs also contends that the trial court improperly instructed the jury by refusing a withdrawal instruction with respect to evidence of respondent Megan Swartz's future surgery. The Missouri Court of Appeals, Southern District, issued its opinion affirming the trial court on all issues. The Southern District then denied Appellant Hobbs' Motion for Rehearing and/or Application for Transfer to Missouri Supreme Court.

The Supreme Court of Missouri has now ordered this appeal transferred from the Missouri Court of Appeals, Southern District, after opinion. Therefore, jurisdiction of this entire appeal now falls within the appellate jurisdiction of the Supreme Court of Missouri pursuant to Missouri Supreme Court Rule 83.03 and Art. V, § 10 of the Missouri Constitution.

POINTS RELIED ON

Point I.

THE TRIAL COURT ERRED IN ADMITTING, OVER OBJECTION, TESTIMONY REGARDING THE POSSIBILITY THAT PLAINTIFF-RESPONDENT MIGHT UNDERGO FUTURE SPINAL SURGERY, INCLUDING THE CONSEQUENCES OF SPINAL SURGERY, REHABILITATIVE THERAPY AND ASSOCIATED COSTS, BECAUSE ALL OF THIS EVIDENCE FAILED TO MEET MISSOURI'S ADMISSIBILITY STANDARD OF REASONABLE CERTAINTY OF FUTURE MEDICAL CONSEQUENCES AND THEREBY IMPERMISSIBLY GAVE THE JURY A ROVING COMMISSION AND ALLOWED IT TO SPECULATE ON DAMAGES, IN THAT:

(A) DR. CLYDE PARSONS SPECIFICALLY ADMITTED THAT HE COULD NOT STATE TO A REASONABLE DEGREE OF MEDICAL CERTAINTY THAT PLAINTIFF-RESPONDENT WOULD NEED SURGERY, THAT HER CHANCES OF NEEDING FUTURE SURGERY WERE NO BETTER THAN 50/50 AND THAT IT WAS SPECULATION AS TO WHETHER SHE WOULD EVER NEED THE SURGERY; AND

(B) DR. BRETT BOWLING'S TESTIMONY THAT THE LIKELIHOOD OF FUTURE SPINAL SURGERY WAS 25-50% DOES NOT CONSTITUTE A FUTURE RISK THAT PLAINTIFF-RESPONDENT WAS REASONABLY CERTAIN TO FACE AND WAS INADMISSIBLE SPECULATION.

Hahn v. McDowell, 349 S.W.2d 479 (Mo. App. 1961).

Kramer v May Lumber Company, 432 S.W.2d 617 (Mo. App. W.D. 1968).

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ARGUMENT

Point I.

THE TRIAL COURT ERRED IN ADMITTING, OVER OBJECTION, TESTIMONY REGARDING THE POSSIBILITY THAT PLAINTIFF-RESPONDENT MIGHT UNDERGO FUTURE SPINAL SURGERY, INCLUDING THE CONSEQUENCES OF SPINAL SURGERY, REHABILITATIVE THERAPY AND ASSOCIATED COSTS, BECAUSE ALL OF THIS EVIDENCE FAILED TO MEET MISSOURI'S ADMISSIBILITY STANDARD OF REASONABLE CERTAINTY OF FUTURE MEDICAL CONSEQUENCES AND THEREBY IMPERMISSIBLY GAVE THE JURY A ROVING COMMISSION AND ALLOWED IT TO SPECULATE ON DAMAGES, IN THAT:

(A) DR. CLYDE PARSONS SPECIFICALLY ADMITTED THAT HE COULD NOT STATE TO A REASONABLE DEGREE OF MEDICAL CERTAINTY THAT PLAINTIFF-RESPONDENT WOULD NEED SURGERY, THAT HER CHANCES OF NEEDING FUTURE SURGERY WERE NO BETTER THAN 50/50 AND THAT IT WAS SPECULATION AS TO WHETHER SHE WOULD EVER NEED THE SURGERY; AND

(B) DR. BRETT BOWLING'S TESTIMONY THAT THE LIKELIHOOD OF FUTURE SPINAL SURGERY WAS 25-50% DOES NOT CONSTITUTE A FUTURE RISK THAT PLAINTIFF-RESPONDENT WAS REASONABLY CERTAIN TO FACE AND WAS INADMISSIBLE SPECULATION.

Missouri Law

This Court has held that speculation as to future medical consequences is inadmissible testimony. See *Hahn v. McDowell*, 349 S.W.2d 479, 482 (Mo. App. 1961) (stating that consequences which are contingent, speculative or merely possible are not to be considered by a jury in determining damages). That has long been the law in Missouri. There is no better or more appropriate application of our rule against allowing a jury to consider speculative testimony than in the instant case, where the treating surgeon admitted that the plaintiff's need for a future consequence, i.e., potential spine surgery, is speculative. If Missouri is going to continue its long-standing rule, then the instant testimony was inadmissible. Appellant submits that there is effectively no barrier to speculative testimony going before a jury if this Court does not enforce the rule under the current facts.

The rule forbidding a jury from considering speculation as to future medical consequences and forbidding expert testimony on future consequences that are not reasonably certain to occur, represents but one of our many rules of admissibility of evidence. However, it is of critical importance. It serves as a safeguard against a jury's potentially irresponsible guesswork as to whether an injured plaintiff will need surgery and whether it is compensable. If a jury is allowed to hear speculative testimony that a plaintiff may possibly need future surgery, and is allowed to hear evidence of its cost, then the jury, without further instruction, is very likely to award the surgery cost even if it is never needed. The jury is constrained only by the court's instructions.

The jury instruction on damages given in this case was MAI 4.01. That instruction provides:

“If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained *and is reasonably certain to sustain in the future* as a direct result of the occurrence mentioned in the evidence.” (Emphasis added)

The instruction clearly contemplates an award for future damage only if Ms. Swartz was reasonably certain to suffer those damages in the future. Relating to future spine surgery, the instruction and the law of Missouri do not allow for future damages to be awarded unless Plaintiff-Respondent was reasonably certain to need that future surgery and thus “reasonably certain to sustain” the expense and pain related to it.

Plaintiff-Respondent and MATA argue that Ms. Swartz has a now-existing condition, in other words, a current injury, in the form of the *increased risk* of future surgery. However, it is illogical to think the Plaintiff-Respondent’s need for future surgery is really not an element of future damage. The surgery, with its associated therapy and costs, are all to occur in the future if at all. The surgical expense would not be realized until the future. The future surgery, even if she’s currently at an increased risk, is clearly a future damage which Plaintiff-Respondent had the burden of proof under MAI 4.01 to show was reasonably certain to occur. Her worst-case expert testimony was that the future surgery was no more than 50% likely to occur, which is not a “reasonable certainty” under any case law that this Appellant’s counsel has seen in Missouri or

elsewhere. That evidence was inadmissible, and the jury should not have been allowed to consider future jury in its deliberations.

The “future consequence” at issue is the “need for surgery” rather than, as Plaintiff-Respondent contends, the current consequence of being “at an increased risk” for needed future surgery. If we are going to allow recovery simply for the “increased risk” of any future medical consequence, then the Court should adopt an MAI instruction separately from what is currently used. That instruction should be consistent with the “loss of a chance” instruction as set forth in Appellant’s principal Brief herein whereby the jury is required to quantify the amount of increased risk it believes the plaintiff has suffered as a result of the defendant’s conduct.

Plaintiff-Respondent and MATA are suggesting that Missouri should essentially adopt a new form of damages, for “increased risk.” Missouri has never recognized such a category of damages in the past nor is there an instruction for that. Current MAI instructions require a plaintiff to either prove that the need for future surgery represents such an increased risk as to be a reasonable certainty, or the evidence is otherwise not admissible. The instructions and the law do not, and should not, provide that any currently-existing “increased risk” constitutes current damage for which a plaintiff may receive damages. Further, increased risk that puts a plaintiff at a less than reasonably certain chance for future surgery should not support an award for future surgery.

Even if the position of Plaintiff-Respondent and MATA were correct, i.e., that Missouri should allow recovery for *any* amount of increased risk of future surgery, then presenting the jury with the cost of surgery provides jurors with a roving commission.

The cost of future surgery in this case was \$25,000. Under current MAI instructions, if the cost of the surgery were presented to the jury and the jury were allowed to award the cost of surgery for any amount of increased risk of future surgery, the jury is without further instructional guidance on its award. At least under the lost chance instructions, the jury quantifies the amount of lost chance (i.e., increased risk) and finds the total damages to the plaintiff, and the plaintiff's award is the lost chance percentage of the total damages found by the jury. Lost chance instructions allow the jury to quantify the lost chance and the plaintiff's final award increases with the amount of lost chance. It is a proportional recovery and, with proper instructions, is a better approach than that urged by plaintiff and MATA whereby any amount of increased risk is admissible with the surgery cost and the jury has the option to give any amount or no amount for the cost of a surgery that may, depending upon the circumstances, be only a small possibility.

Plaintiff-Respondent's brief states at page 24: "Appellant seizes upon Parson's testimony that he cannot testify to a reasonable degree of medical certainty that Megan *will have surgery*. That is true. That is not the issue." (Emphasis in original) The issue, as Appellant Hobbs has always contended, is the amount of risk the Plaintiff-Respondent faces. If the doctors testified that she was at a 75% or 80% chance of surgery or even a 55% chance of surgery, that probability constitutes a reasonable certainty for a potential surgery. While a physician may put a particular patient into a statistical risk category, the law of Missouri is that such evidence is not admissible unless the plaintiff is in a statistical category greater than 50/50.

Plaintiff-Respondent uses a coin-flipping analogy. If Dr. Parsons believed that Ms. Swartz was 75% likely to need future surgery, that testimony is admissible because it represents a reasonably certain likelihood of surgery. Even under that scenario, Dr. Parsons could not say with reasonable certainty whether she *would need* the surgery; but, using the coin-flipping analogy, he could say that the flip of the coin will be in favor of surgery three out of every four times and that represents reasonable certainty. The certainty required in Missouri is not the certainty of whether she will actually need the surgery, it is the certainty that she's more likely than not to need it. The physician testimony in this case is that Plaintiff-Respondent is not in a greater than 50/50 statistical category.

The Missouri Supreme Court cases cited in the Substitute Brief of Respondent can be distinguished. One such case cited by Plaintiff-Respondent is *Bynote v. National Supermarkets, Inc.*, 891 S.W.2d 117 (Mo. Banc 1995). In that case, a physician testified that plaintiff would need future surgery if he ever suffered a "locked back." The plaintiff also presented the cost of the future surgery to the jury. Critically, however, the defendant's attorney at trial made an improper objection. The objection was to the physician's qualifications to discuss the cost of a future surgery with the jury. The physician was not an orthopedic surgeon. The trial court allowed the physician to tell the cost of the orthopedic surgery, even though he was not a surgeon. There was no objection or challenge to the physician's opinions about the certainty of the need for future surgery. Defendant's attorney did not object or challenge on cross examination the speculative need for future surgery. In the instant case, the proper objection was made

that the testimony was speculative and not reasonably certain as to future consequences; however, there is no challenge to the sufficiency of objections made in the instant case. There is no issue at bar as to the surgeon's qualifications to describe what a surgery might cost. Therefore, *Bynote* is not controlling in the instant case.

A second case cited by Plaintiff-Respondent is *Emery v. Wal-Mart*, 976 S.W.2d 439 (Mo. Banc 1998). That was a slip and fall in a Wal-Mart store. Plaintiff suffered low back and bulging disk problems. Plaintiff's expert testified that the disk *was operable* and might get rid of the pain. Defendant's expert agreed that the surgery would be helpful. There was obviously a then-existing medical condition at trial that both physicians deemed worthy of surgical repair. There was not even a contingency for conservative treatment to fail before surgery was needed. Both experts agree that plaintiff's existing condition was operable at the time of trial and both agreed it would help the plaintiff.

Emery v. Wal-Mart clearly differs from the instant case, where there was no operable condition at the time of trial and the physician testimony was that it was speculation as to whether would ever develop a condition requiring future surgery. There was no testimony in the instant case that surgery was needed at the time of trial and in fact the need for future surgery may not ever develop.

The final two Missouri Supreme Court cases cited by Plaintiff-Respondent are *Breeding v. Dodson Trailer Repair, Inc.*, 679 S.W.2d 281 (Mo. Banc 1984) and *Seabaugh v. Milde Farms, Inc.*, 816 S.W.2d 202 (Mo. Banc 1991). Both of these cases involved a future surgery contingent on the failure of a more conservative treatment. In

the instant case, however, the testifying physicians did not treat the surgery as being contingent on any other spine treatments. Rather, the surgery might be necessary if it develops that Ms. Swartz's spine has not fused in ten to twenty years down the road. There was no treatment that would solve the problem of a spine that failed to fuse which the physicians felt would take the place of surgery, other than waiting over time and watching the spine's progression. In short, the instant case and the issue of future surgery are not about contingencies of treatment.

Further, in *Seabaugh*, the facts are certainly distinguishable. In response to a hypothetical question that if the plaintiff returned to him a year later complaining of no improvement in the pain and requesting surgery, whether it would be more likely than not that she would need surgery, the testifying physician said that she would. In our case, there is no such reasonable certainty as to whether Plaintiff-Respondent would need surgery.

A critical point in analyzing both *Seabaugh* and *Breeding* is the fact that in those cases the physicians never outright admitted that the plaintiff's need for a future surgery was speculative. Dr. Parsons admitted that he could not say with any reasonable medical certainty that Ms. Swartz would need any future surgery. Dr. Parsons went on to admit that it would be speculation as to whether she might require a future surgery. Given these admissions, there is little room for analysis as to whether the need for future surgery is speculative. The more important question may be whether Missouri will continue to apply its long-standing rule of the non-admissibility of speculative testimony on future medical consequences.

Law from Other Jurisdictions Supporting Appellant Hobbs:

Missouri's Traditional Approach Represents the 'Majority View'

The current Missouri approach to damages for future medical consequences, requiring testimony reflecting a reasonable certainty that the future consequence will occur before the testimony is admissible, is the traditional American rule and represents the majority rule in U.S. jurisdictions. See *Dillon v. Evanston Hospital*, 771 N.E.2d 357, 367 (Ill. 2002) (quoting *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 119 (D.C. Cir. 1982), noting that prior Illinois cases using reasonable certainty of future consequences as the admissibility standard for evidence of future damages, represent the “majority view” and stating:

“The traditional American rule is that recovery of damages based on future consequences may be had only if such consequences ‘are reasonably certain.’ Recovery of damages for speculative or conjectural future consequences is not permitted. To meet the ‘reasonably certain’ standard, courts have generally required plaintiffs to prove that it is more likely than not (a greater than 50% chance) that the projected consequence will occur. If such proof is made, the alleged future effect may be treated as certain to happen and the injured party may be awarded full compensation for it; if the proof does not establish a greater than 50% chance, the injured party’s award must be limited to damages for harm already manifest.”

This traditional American approach is occasionally referred to in the cases as the “all-or-nothing” approach, that is, if a plaintiff’s expert testimony shows she is reasonably certain (51% or more) to suffer a future consequence, then evidence of that future consequence and its cost is admissible and the jury may award damages. If a plaintiff’s evidence shows that a future medical consequence is not reasonably likely, then the jury is not entitled to hear evidence on that point. Such evidence reflecting future consequences that are not reasonably certain to occur is inadmissible.

West Virginia is but one example of the jurisdictions that continue to follow Missouri’s approach to the admission of evidence of future consequences. See *Bennett v. Walton*, 294 S.E.2d 85 (W.Va. 1982). In *Bennett*, the plaintiff was injured in an auto accident. On appeal, she challenged the exclusion of her physician’s testimony regarding permanent consequences of his injuries. The West Virginia Supreme Court noted that the physician testimony amounted to the possibility of a future permanent consequence of her injuries. The court emphasized that in order to form a legal basis for recovery of future permanent consequences of the negligent infliction of a personal injury, it must appear with reasonable certainty that such consequences will result from the injury; contingent or merely possible future injurious effects are too remote and speculative to support a lawful recovery. *Id.* at 90. (Emphasis added) Reasonable certainty, the court reminded, is the standard which must be applied to medical opinion evidence offered as to future permanent consequences of a personal injury. *Id.* (Emphasis added) The court held that the trial court had followed this admissibility standard and had thereby properly refused to admit certain medical opinions which amounted to speculation. *Id.*

Missouri's traditional rule of reasonable certainty of future medical consequences, like that of West Virginia, is a rule of admissibility. Contrary to what the Plaintiff-Respondent and MATA urge, the rule is not one of weight. The trial judge must scrutinize the proposed testimony of future consequences which are not reasonably certain to occur, and must refuse to admit portions which fall short of reasonable certainty. Missouri's rule exists for an important reason: to prevent a jury from simply considering any increased risk that a plaintiff may face, whether 1% or 0.1%, and simply allowing the jury to weigh both the certain and the wildly speculative testimony alike. Reasonable certainty strikes a balance: it allows a jury to award future damages that are probable enough that such an award is not unfair to the defendant, and simultaneously protects a defendant from a future damages award representing a more-probable-than-not windfall to the plaintiff whose future surgery is unlikely.

For other cases using Missouri's traditional rule on admissibility of future consequences testimony, see *Wilson v. Johns-Manville Sales Corp*, 684 F.2d 111 (D.C. Cir. 1982); *Thompson v. Underwood*, 407 F.2d 994, 997 (6th Cir. 1969) (applying Tennessee law). See also *Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315 (5th Cir. 1986). In *Hagerty*, the plaintiff sought future damages for his increased risk of contracting cancer in the future because of a toxic exposure. The court noted that certain recent commentators have argued for recognition of a claim for "increased risk," whether that risk is greater or less than fifty percent. This is the position which Plaintiff-Respondent and MATA have urged in the instant case. However, the Fifth Circuit Court of Appeals in *Hagerty* concluded that the plaintiff could recover only where he could

show that the toxic exposure more probably than not *will* lead to cancer. The court rejected the very argument of admitting evidence of any amount of increased risk, regardless of whether it is less than 50%, in favor of the traditional standard where the plaintiff must prove that a future consequence will occur more probably than not, i.e., more than 50%. This is equivalent to the reasonable certainty standard that Appellant Hobbs urges this Court to continue recognizing in Missouri. Other cases which are in accord with the principle of admissibility set forth in *Hagerty* include *Dartez v. Fibreboard Corp.*, 765 F.2d at 456, 467 (5th Cir. 1985); *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1137-38 (5th Cir. 1985); *Laswell v. Brown*, 683 F.2d 261, 269 (8th Cir. 1982); *Ayers v. Township of Jackson*, 461 A.2d 184 (N.J. Superior Ct. 1983), *Mink v. Univ. of Chicago*, 460 F.Supp. 713, 719 (N.D. Ill. 1978).

Non-Missouri Cases Cited by Plaintiff-Respondent

Plaintiff-Respondent cites cases from other jurisdictions for the proposition that reasonable certainty as to future medical consequences is not required for the admission of the expert testimony, and that a doctor may testify as to possibilities and probabilities that fall short of reasonable certainty. Many of those cases, however, are simply inconsistent with Missouri's long-standing rule of reasonable certainty and their holdings and legal reasoning should not be adopted. For example, *Illinois Cent.R. Co. v. Clinton*, 727 So.2d 731 (Miss. App. 1998). That was a FELA case where the plaintiff was injured while working for the railroad. The physician treating his knee was questioned regarding the plaintiff's future knee problems. The Mississippi appellate court affirmed that the doctor's testimony was admissible when he only testified that it was *possible* the plaintiff

would have problems with his knee. The court stated that “absolute” certainty was not required for the testimony to be admissible.

In Missouri, too, absolute certainty has never been the rule. Reasonable certainty has always been the rule. Our courts have consistently held that consequences which are contingent, speculative or merely possible are not to be considered by the jury in determining damages. *Stuart v State Farm Mutual Automobile Insurance Company*, 699 S.W.2d 450, 455 (Mo. App. W.D. 1985) (emphasis added) (Citing *Hahn v McDowell*, 349 S.W.2d 479, 482 (Mo. App. 1961)). See also *Kramer v May Lumber Company*, 432 S.W.2d 617, 621 (Mo. App. W.D. 1968), in which the court of appeals, addressing the admissibility of evidence of future medical consequences, stated that to justify a recovery for apprehended future consequences, there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury. Applied to the instant case, the testimony regarding the possibility, admittedly speculative, that Plaintiff-Respondent would require future surgery, lacked the requisite certainty to meet our minimum admissibility threshold.

Plaintiff-Respondent also cites *Regenold v. Rutherford*, 679 P.2d 833 (N.M. App. 1984) for the proposition that medical expert testimony on future consequences is admissible regardless of whether the testimony reflects that the future consequences are reasonably certain to occur. In *Regenold*, the plaintiff had a spine injury but the treating physician could not say with any reasonable medical certainty that the plaintiff’s need for future surgery was reasonably probable. The court undertook a tortured analysis of the statutory and dictionary definitions of the term “probable” as it would relate to a

“reasonably probable” need for future surgery. The court concluded that testimony reflecting future surgery was “reasonably probable” was the same as “reasonable certainty.” *Id.* at 837. Just as in Missouri, the courts of New Mexico have thus held that the standard for future consequences is reasonable certainty. The New Mexico Supreme Court visited this rule when it addressed facts similar to the instant facts in *Michael v. West*, 412 P.2d 549 (N.M. 1966).

In *Michael*, just as in the instant case, the treating doctor testified that the plaintiff “may” need a future surgery. The doctor testified, as Dr. Parsons testified at bar, that he hoped an operation would be unnecessary and that a decision on any future surgery could not be made until a lapse of a period of time into the future beyond the date of his testimony. The New Mexico Supreme Court held that this physician testimony failed to establish the need for future surgery as a medical probability. *Id.* at 121. Applied here, the testimony of Dr. Bowling and Dr. Parsons, even if taken as a whole as urged by Ms. Swartz, do not represent a reasonably probable or reasonably certain need for future surgery.

Finally, in many of the non-Missouri cases cited in the Substitute Brief of Respondent, the plaintiff’s experts have testified that the plaintiff is at risk of developing a certain condition in the future. The courts have sometimes affirmed the admission of that physician testimony, even if less than a 50% chance of developing the condition. For example, in *Rainey v. City of Salem*, 568 N.E.2d 463 (Ill. App. 5 Dist. 1991), the plaintiff’s physician testified that the plaintiff had a possibility of developing avascular

necrosis. Appellant suggests that these cases are materially different from the instant facts because of the added issue of the surgery cost presented in the instant case.

At bar, the testimony was that Ms. Swartz was, at worst, in a 50/50 category of possibly needing a future spine surgery. Dr. Parsons also presented the jury with a surgical cost of \$25,000. If a jury is only presented with a plaintiff's risk of developing a future condition, there is no concrete number in front of that jury upon which to base its award for the plaintiff's future consequences. If a plaintiff may develop arthritis, for example, a jury that is presented with this evidence and allowed to make an award for it, may give an award for future pain or suffering. Critically, though, there is not a numerical figure for the jury to cling to. In our case, however, the \$25,000 surgery cost figure was presented to the jury for a reason.

Plaintiff-Respondent argues that she did not ask the jury in closing argument for an award for future surgery. As we well know, jurors don't always do what they are "asked" by the lawyers in a case. That is why the instructions and the rules of admission of evidence are so important. There was no reason to present that surgery cost to the jury unless the jury was to use that amount in contemplating its verdict and as opposing counsel urges, to show the jury what she faced. What Megan Swartz faced was a surgery that was just as likely not to occur as to occur. The testimony that Plaintiff-Respondent would possibly need surgery, and the cost of the surgery, were thereby inadmissible. Given their admission into evidence and the jury's general verdict in which it is impossible for this Court to redact or order remitted the surgery cost along with unknown

amounts for pain and suffering related to the surgery, reversal and remand for a new trial is required.

CONCLUSION

Appellant Christopher Hobbs respectfully requests an Order of this Court directing the following:

a. That the case is reversed and remanded for new trial on all issues, or in the alternative, a new trial on the issue of damages; and,

b. That the evidence regarding Megan Swartz's potential need for a future surgery was inadmissible for lack of reasonable certainty as to that potential surgery and it was reversible error for the trial court to admit that evidence, and further, that once the evidence was before the jury, it was reversible error for the trial court to refuse a withdrawal instruction to remove that evidence; and,

c. That the trial court on remand shall conduct the trial consistent with the Opinion of this Court; and

d. For such other and further relief that this Court deems just and proper.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

Appellant Christopher Hobbs hereby certifies that this Brief complies with the word limitation set forth in Rule 84.06 and contains 5140 words and 607 lines of monospaced type. Appellant further certifies, pursuant to Rule 84.06(g), that the disk copy of this brief has been scanned for viruses and is virus free.

Attorney for Appellant Christopher Hobbs

CERTIFICATE OF SERVICE

Comes now appellant Christopher Hobbs in the above styled cause and certifies to the Court that on the 24th day of October, 2006, said party served his Appellant's Reply Brief, in this cause by depositing said documents and disk in a postage paid envelope in the United States Mail, addressed to the following attorneys of record:

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