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JURISDICTIONAL STATEMENT

Respondent adopts the Appellant Christopher Hobbs' jurisdictional statement.

STATEMENT OF FACTS

Appellant's Statement of Facts leaves out facts necessary to the issues presented on appeal.

Megan's Injuries

Before September 20, 2000, Megan was eighteen years old and suffering from no physical handicap, limitation or disability of any kind. ("Transcript" Tr. 344 - 347). From the collision scene, Megan was air lifted to Cox South Hospital in Springfield, Missouri, where she remained hospitalized for six days. (Tr. 356-358). When she arrived to Cox Hospital, Megan came under the immediate care of, among other doctors and healthcare providers, trauma surgeon Randy Mullins, M.D. and orthopedic surgeon, Clyde Parsons. (Exhibit 22, Transcript of Clyde Parsons, M.D. (hereinafter "CP" 8). Megan was diagnosed as having suffered multiple contusions, lacerations and bruises all over her body, including road rash. The road rash or road burn was so severe that she now has permanent scarring on her face, arms, stomach, left leg and back. (Tr. 385-386). Upon her admission to the hospital, her right eye was swollen shut. (Tr. 385, CP 10). She had a fat lip on one side that was punctured, where she had bitten all the way through it (Tr. 375). Her entire face was swollen, discolored and she suffered from nerve damage (loss of feeling) in her lip and chin. Her face required suturing. (Tr. 375 - 377). A piece of glass embedded into her ulnar nerve in her elbow required surgical removal. (CP 27 - 29).

As a result of the collision, Megan was also diagnosed with a fracture of her right temporal bone and right jaw. Upon physical examination, her physicians found generalized tenderness all over her lower back and pelvis. So, upon x-ray, it was determined that in the collision she had sustained multiple fractures of her pelvis and lumber spine. (CP 10-16). Clyde Parsons testified at trial via video taped deposition. He gave the following opinions to a reasonable degree of medical certainty. (CP 4)

The x-rays of Megan's lumbar spine and pelvic areas showed a diastasis or separation of her right sacroiliac joint, which is the back part of her pelvis. Where the tail bone or sacrum and the pelvis come together is made up of three bones, the iliac, ilium and iliac wing and the sacrum is the tail bone. The sacroiliac joint or the SI joint is where the bones come together. (CP 13-14). The SI joint is that part of the anatomy that supports the weight of the upper torso. It is affected by most any type of movement. (CP 13-14, 31). Megan had a separation/fracture of this joint from lateral compression as a result of the collision. (CP 13-14). Megan also sustained other fractures in her pelvis. She fractured her left sacral wing on the inside of the iliac wing and fractured her right superior and inferior pubic rami or ramus, that is the front part of her pelvis, where it comes together to form the pubic symphysis. (CP 15-16) Megan also sustained fractures of her lumbar one and lumbar two transverse processes (L1 and L2). (CP 15-16).

To stabilize these fractures to Megan's spine and pelvis, she was instructed to remain non-weight bearing for a period of months following the wreck. (CP 23). As far as the future is concerned, from a medical standpoint, according to Dr. Parsons, to a

reasonable degree of medical certainty, under the best case scenario Megan is going to be under the care of an orthopedic surgeon the rest of her life and require anti-inflammatory medications to manage her condition. (CP 4-5, 32-33, 37-38). And under the worst case scenario Megan will develop disabling arthritis in her SI joint, which may or may not go on to fuse itself. (CP 4-5, 33-35, 37-39).

Future Back Surgery

According to Parsons, the SI joint is a "hard joint to surgically fuse, and you don't necessarily want to do that....the joint may fuse itself, basically...[or] it may get so arthritic and it may form enough bone spurs and enough heterotrophic bone or new bone... from just being damaged, it may go ahead and solidify itself and not provide any motion....which would help the pain in that joint," but it will, according to Parsons, "obviously stress those motions... they don't go away.... so that puts more stress on the lumbar spine (directly above the SI joint) and puts more stress on her SI joint, and to a certain extent the symphysis pubis... and also the posterior part of her back or lower lumbar spine... her joint may or may not go on to fuse itself... there's some surgical morbidity involved and basically you have to decide what to subject the patient to as oppose to just giving her anti-inflammatory medications and physical therapy"... [Parsons] would "hope to put off surgery or fusion, probably fusion of the SI joint or depending on what her lumbar spine (the area above the SI joint that is under additional stress because of the injury to the SI joint) does... some sort of procedure there... but that [meaning which of the those types of surgeries] would probably be speculation." (CP 33-

38). She has already developed arthritis at site of the injury, causing her significant pain. (CP 31-32). Dr. Parsons was then asked the following questions and gave the following responses to a reasonable degree of medical certainty:

> "Q: She's certainly at increased risk for those types of procedures [referring to the surgical intervention of some sort]?
>
> A: Absolutely.
>
> Q: And as to the amount of that increased risk, that's difficult for you to quantify?
>
> A: That's correct.
>
> Q: Can you give us a range whatsoever?
>
> A: 50/50. I mean, I probably told her, and I tell patients [like Megan] ...you are in a group that is now at definite increased risk. It doesn't mean it will happen to you, but the people in your group are way out in front as far as their concerns.
>
> Q: [Are] those the ...issues and things that you've discussed with Megan, ...that she's in the 50/50 category now?
>
> A: Correct.
>
> Q: And you're talking about a 50/50 category for the surgical fusion or lumbar fusion?
>
> A: Correct." (CP 38-39, ll 6-1). (Emphasis added)

Parsons testified that Megan was already developing arthritis at the site of the SI joint. (CP 31). He also testified that an SI fusion would be somewhere in the range of $25,000. (CP 39).

The pain in Megan's low back is permanent (Exhibit 25, Transcript of Bret Bowling, (hereinafter "BB"p. 27, ll 23-24; CP 29) and because she continued to suffer pain in her lumbar spine, her family doctor, Bret Bowling ordered Magnetic Resonance Imaging of her lumbar spine. (Tr. 379-381; BB 15-17). The MRI revealed Megan also sustained central disc bulging between lumbar L4 and L5 and then also at L5 and S1. These are the discs directly above where Megan's SI joint separated and the location where Parsons testified she would suffer additional wear and tear. (CP 35-36). These bulging discs were caused by the collision. (BB p. 22-23, ll 24-2). These bulging discs resulted in pressure on the thecal sac, which is the sac that surrounds her spinal cord. This pressure represents irritation to the nerves and muscles' "connective tissues" in Megan's lower back and causes her pain and inflamation. (BB 18-21). The result of these injuries from this collision to Megan's lumbar spine and pelvis are that her spine basically aged to that of a fifty year old person who had done hard labor for twenty or thirty years, instead of that of a young healthy eighteen year old. (BB 19 - 22). Bowling testified that physiologically the condition of Megan's spine means that she is going to suffer more discomfort in her lower back than someone her age. She will not be as physically active as someone who does not have bulging discs in her low back. (BB p. 25, ll 8 - 23). To manage her condition, she is going to have to be careful how she exercises, how she takes care of herself, the way she bends, lifts and she will just have to take really good care of herself so that she doesn't suffer a lot more discomfort. (BB 25-26).

Although placing Megan on no specific restrictions, Bowling prescribes her anti-inflammatory medication to take on a daily basis, and also prescribes an occasional muscle relaxer and pain pill when her pain gets really bad. Bowling also advised Megan on stretching and strengthening and standard back care. (BB 26-27). She is at increased risk for the discs bulging even more or rupturing and possibly requiring surgery to remove a ruptured disc. Bowling testified to a reasonable degree of medical certainty that because of her injuries, Megan's increased likelihood of a need for surgical intervention is now between 25% and 50%. (BB 4, 28-29). (Emphasis added)

Megan Suffered Post Traumatic Stress and

Anxiety Because of Her Injuries and Uncertainty for the Future

As a result of this collision, Megan was also diagnosed with post traumatic stress disorder and adjustment disorder. (Tr. 496-511). Megan struggled to cope with her injuries, the limitations from those injuries and uncertainty for the future. (Tr. 382-384)

At the time of trial, Megan also described significant limitations. She testified that she could no longer keep up with girls her age and that her body just seemed to wear down faster. (Tr. 372). Her back continues to cause her problems. She suffers from difficulty sleeping and almost constant aching and pain in her back. (Tr. 378-379). She now relies on anti-inflammatory medication, muscle relaxers and pain pills, in spite of her efforts to do exercises for her back every day. (Tr. 380). Following the wreck, there are difficulties and changes in her ability to cope with life's problems. She cries a lot and has noticed changes in her attitude towards her friends and the way she perceives herself.

(Tr. 381-382). Megan testified that because of the injury to her back, she could not lift a full load of laundry. Her gait is altered. Many days she can't get comfortable and has to adjust the way she bends, stoops and twists. She described to the jury how she can no longer play or interact with her nieces or her younger sister the way she did before the collision. (Tr. 386-389). On a bad day, she is uncomfortable all day and can't make it through an entire day at work. She must leave work early and go home, and lie on a heating pad in front of the television. On a good day, she makes it through the entire day at work, and makes it home, without having to sit and takes breaks between washing dishes and picking up around the house. (Tr. 391-393). She has never considered herself without symptoms from her injuries in the wreck. (Tr. 417-418).

In closing it was argued that Megan should receive compensation for the risk of her future back surgery, not the cost of it. It was argued that Megan should be compensated because she has to worry about the risks that she is now exposed because of her condition. Part of Megan's damages were for the emotional post traumatic anxiety issues that she was diagnosed with as a result of the collision and her injuries. (Tr. 627-628).

Neither Appellant called a doctor or witness to rebut the testimony of Drs. Parson, Bowling or Halfacre or Megan concerning her limitations or the doctors' opinions concerning Megan's future. In closing argument, the attorney for the Transportation Company argued as follows:

"Now the undisputed evidence is that [Megan] is going to develop arthritis. We're

not disputing that. I'll tell you that's more likely true than not true. So give her something for future damages. She's likely going to get arthritis quicker than she normally would have, and that's what Dr. Parsons testified. So I say give her $25,000 that's the cost of the surgery that he [Parsons] testified to. If you want to do that, I think that's reasonable." (Tr. 682).

In closing, it was never argued that by plaintiff's counsel that Megan should be compensated for the actual cost of the future surgery. It was argued that the jury should only award economic damages for her future medications, not the cost of any future surgery. (Tr. 626). The jury was asked by plaintiff's counsel to award future medical based on the most conservative future medical, not the worst case scenario. (p. 213, 625-626).

RESPONSE TO POINTS I AND II AND AUTHORITIES RELIED ON I & II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING APPELLANT'S WITHDRAWAL INSTRUCTION "A" OR ADMITTING THE TESTIMONY OF DRS. BRET BOWLING, M.D. AND CLYDE PARSONS, M.D. CONCERNING FUTURE SURGERY BECAUSE THESE TREATING PHYSICIANS TESTIFIED TO A REASONABLE DEGREE OF MEDICAL CERTAINTY THAT BECAUSE OF THE MULTIPLE FRACTURES TO MEGAN'S LUMBAR SPINE, SACRUM AND INJURY

TO HER LUMBAR DISCS CAUSED BY THE COLLISION SHE IS (1) "ABSOLUTELY" AND "DEFINITELY" AT AN INCREASED LIKELIHOOD FOR SOME TYPE OF SURGICAL INTERVENTION IN THE FUTURE IN THE AREA OF HER INJURIES AND BECAUSE (2) THE COLLISION CAUSED HER INCREASED LIKELIHOOD FOR SURGERY AND PUT HER WAY OUT IN FRONT OF OTHER PEOPLE WHO HAVE NOT SUFFERED INJURY AND (3) MEGAN IS NOW IN A CATEGORY OF PEOPLE WHO ARE AT AN INCREASED RISK OF BETWEEN TWENTY FIVE AND FIFTY PERCENT FOR SURGICAL INTERVENTION, AS OPPOSED TO HER PRE-ACCIDENT CONDITION OF A HEALTHY YOUNG EIGHTEEN YEAR OLD WITH NO LIMITATIONS AND (4) UNDER THE WELL ESTABLISHED LAW IN MISSOURI AND OTHER STATES, RECOVERY FOR THE ENHANCED RISK OF HARM IS PROPER CONSIDERATION OF THE JURY BECAUSE IT IS A WELL-ESTABLISHED PRINCIPLE THAT A PLAINTIFF IS ENTITLED TO COMPENSATION FOR THE FULL EXTENT OF HER INJURIES AND IT SHOULD BE THE DEFENDANT, NOT THE INNOCENT PLAINTIFF, THAT BEARS THE INCREASED RISK OF THE HARM CAUSED BY THOSE INJURIES.

McKersie v. Barnes Hospital, 912 S.W.2d 562 (Mo.App.E.D. 1995);

***Restatement of Torts,* 2nd** sect. 912 comment e (1979);

Seabaugh v. Milde Farms, Inc., 816 S.W.2d 202 (Mo. banc 1991);

Stuart v. State Farm Mut. Auto. Ins. Co., 699 S.W.2d 450, 455

(Mo.App.W.D. 1985).

ARGUMENT

I & II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING APPELLANT'S WITHDRAWAL INSTRUCTION "A" OR ADMITTING THE TESTIMONY OF DRS. BRET BOWLING, M.D. AND CLYDE PARSONS, M.D. CONCERNING FUTURE SURGERY BECAUSE THESE TREATING PHYSICIANS TESTIFIED TO A REASONABLE DEGREE OF MEDICAL CERTAINTY THAT BECAUSE OF THE MULTIPLE FRACTURES TO MEGAN'S LUMBAR SPINE, SACRUM AND INJURY TO HER LUMBAR DISCS

CAUSED BY THE COLLISION SHE IS (1) "ABSOLUTELY" AND "DEFINITELY" AT AN INCREASED LIKELIHOOD FOR SOME TYPE OF SURGICAL INTERVENTION IN THE FUTURE IN THE AREA OF HER INJURIES AND BECAUSE (2) THE COLLISION CAUSED HER INCREASED LIKELIHOOD FOR SURGERY AND PUT HER WAY OUT IN FRONT OF OTHER PEOPLE WHO HAVE NOT SUFFERED INJURY AND (3) MEGAN IS NOW IN A CATEGORY OF PEOPLE WHO ARE AT AN INCREASED RISK OF BETWEEN TWENTY FIVE AND FIFTY PERCENT FOR SURGICAL INTERVENTION, AS OPPOSED TO HER PRE-ACCIDENT CONDITION OF A HEALTHY YOUNG EIGHTEEN YEAR OLD WITH NO LIMITATIONS AND (4) UNDER THE WELL ESTABLISHED LAW IN MISSOURI AND OTHER STATES, RECOVERY FOR THE ENHANCED RISK OF HARM IS PROPER CONSIDERATION OF THE JURY BECAUSE IT IS A WELL-ESTABLISHED PRINCIPLE THAT A PLAINTIFF IS ENTITLED TO COMPENSATION FOR THE FULL EXTENT OF HER INJURIES AND IT SHOULD BE THE DEFENDANT, NOT THE INNOCENT PLAINTIFF, THAT BEARS THE INCREASED RISK OF THE HARM CAUSED BY THOSE INJURIES.

Standard of Review

Determining whether to give a withdrawal instruction is a matter that is within the trial court's discretion. ***Stevens v. Craft,*** 956 S.W.2d 351, 355 (Mo.App. S.D. 1997);

citing, ***Hefner v. Synergy Gas Corp.,*** 883 S.W.2d 29, 34 (MoApp. 1994). See above.

Argument

Appellant Hobbs argues that the testimony of Dr. Parsons and Dr. Bowling was speculative concerning the need for further surgical procedures and does not meet the reasonable medical certainty requirement of Missouri Law. However, this misconstrues the issue about that which the doctors testified. First, the doctors both testified concerning an increased risk or an ***increased likelihood of a need for a surgery because of injuries there is no question she sustained as a direct result of this collision.*** There were no other factors submitted to the doctors as the possible or probable causative factor for the current condition of Megan's spine or the need for surgery in the future.

Respondent agrees with the premise set out in ***Stuart v. State Farm Mut. Auto. Ins. Co.***, 699 S.W.2d 450, 455 (Mo.App.W.D. 1985), that an "expert witness can only testify to the future consequences of an injury if they are reasonably certain to occur."

In ***Stuart***, the court addressed, *among other things,* testimony by one of the treating doctors that the plaintiff faced a risk of paralysis if his condition went untreated. The doctor did not testify that the plaintiff was certain to suffer paralysis or even that it was reasonably certain that the plaintiff would suffer from paralysis. However, the court rejected the defendant's argument that the doctor's testimony should not have been allowed, explaining: "[The doctor] described only the dangers that plaintiff's existing condition posed to him without treatment. ***The fact that the danger exists is not speculative***." (Emphasis added) ***Id.*** at 456.

Here, the situation is the same. Drs. Parsons and Bowling both testified to a reasonable degree of medical certainty that as a result of the injuries Megan sustained in the accident, she has an increased chance of needing surgery to her spine in the future. (CP 31-38 and BB 25-30).

"Q: She's certainly at increased risk for those types of procedures?

A: Absolutely.

Q: And as to the amount of that increased risk, that's difficult for you to quantify?

A: That's correct.

Q: Can you give us a range whatsoever?

A: 50/50. I mean, I probably told her, and I tell patients [like Megan] ...you are in a group that is now at definite increased risk. It doesn't mean it will happen to you, but the people in your group are way out in front as far as their concerns.

Q: [Are] those the ...issues and things that you've discussed with Megan, ...that she's in the 50/50 category now?

A: Correct.

Q: And you're talking about a 50/50 category for the surgical fusion or lumbar fusion?

A: Correct." (CP 38-39, ll 6-1) (Emphasis added).

According to her treating doctors, Megan's back condition is permanent. (BB 26, ll 23-25; CP 29, ll 19-22). She is at increased risk for the discs bulging even more or rupturing and possibly requiring surgery to remove a ruptured disc. Bowling testified that because

of her injuries, Megan's increased likelihood of a need for surgical intervention is now between 25% and 50%. (BB 28-30).

As in ***Stuart***, the risk "exists and is not speculative." During his deposition, Dr. Parsons was asked to provide his opinions to a reasonable degree of medical certainty, and he agreed to advise Megan's counsel if he was not able to do so. (CP 4-5) As to whether Megan was at an increased risk for further treatment of her back, including a fusion, Dr. Parsons responded, "Absolutely." (CP 37-38). Dr. Parsons explained the need for further surgery during his deposition as he explained it to Megan: ". . . I mean, I probably told her, and I tell patients, that, you know, 'You are in a group that now is at a definite increased risk. It doesn't mean it will happen to you . . . but the people in your group are way out in front as far as these concerns.'" (CP 38). The potential need for surgery in the future is indistinguishable from the possibility of paralysis faced by the plaintiff in ***Stuart***: it is a danger posed by her existing condition. The existence of the risk of future surgery was not speculative; Dr. Parsons testified she was absolutely at an increased risk. Megan's injuries to her spine are certain. The increased risk she suffered because of these injuries is also certain.

Likewise, in ***McKersie v. Barnes Hospital***, 912 S.W.2d 562 (Mo.App.E.D. 1995) the court noted that medical expert testimony that the plaintiff's ability to get pregnant was diminished as a result of the defendant's negligence was sufficient, despite the fact that the plaintiff's expert testified that she could more probably than not conceive with her remaining ovary and fallopian tube. In ***McKersie***, an intern at the defendant's

emergency room negligently failed to diagnosis appendicitis. As a result, the plaintiff's appendix later ruptured, requiring her right ovary and fallopian tube to be removed as well as the ruptured appendix. ***Id***. at 563-64. The plaintiff offered expert medical testimony that she "'would have a diminished chance of reproducing, of having another child.'" Although her expert conceded on cross examination that "plaintiff was still 'more likely than not' capable of conceiving with the remaining ovary and fallopian tube, and agreed nothing indicated an 'extra problem' as to conception." ***Id***. at 565.

The court found that the testimony of plaintiff's expert was sufficient to support future damages. Even though the plaintiff's own expert testified that she more likely than not was still capable of having more children, "[t]here was expert testimony from Dr. Schwartz that plaintiff's capacity for conceiving another child was diminished due to the loss of her ovary and fallopian tube." ***Id***. at 566.

What the Missouri appellate courts have recognized in both ***McKersie*** and ***Stuart*** is that the plaintiffs, to a reasonable degree of medical certainty, faced an increased risk of future problems, there is no requirement that the likelihood meet an arbitrary mathematical percentage. The certainty of the increased risk due to the injuries caused by the defendants' negligence was sufficient to support the future damages.

Appellant Hobbs is arguing that because Megan's treating doctors could not testify that Megan's likelihood of future surgery is 51%, then any reference to risks imposed upon innocent plaintiffs 1% to 50% should never be heard nor considered by the jury and the defendant should not be burdened with the cost of these risks, rather the risk should be

saddled on the shoulders of the innocent victim. No court in Missouri has applied such a strict line of demarcation, but rather have left evidence of the degree of likelihood of a future event as a proper subject for the jury to consider.

Missouri Supreme Court Cases

The Missouri Supreme Court has consistently held that testimony concerning the increased likelihood of a future event, even though it may not reach a 51% threshold is proper and admissible. ***Emery v. Wal-Mart Stores, Inc.,*** 976 S.W.2d 439, 447 (Mo. banc 1998), experts testified that the plaintiff had an operable condition and future surgery on his back might be needed, but experts did not recommend surgery at the present time. The Missouri Supreme Court found the testimony admissible, stating that it is not improper to ask an expert if something might, could or would produce a certain result since experts view of possibility and probability is often helpful and proper. ***Id.***

In ***Breeding v. Dodson Trailer Repair, Inc.,*** 679 S.W.2d 281 (Mo. banc 1984), a doctor testified that the plaintiff would need surgery if conservative treatment was not successful, and he also gave the projected costs of surgery. ***Id.*** at 283. The defendant relied on ***Hahn v. McDowell,*** 349 S.W.2d 479 (Mo. App. E.D. 1961) in arguing that the testimony showed nothing more than a mere possibility of future surgery. ***Id.*** The Court distinguished ***Hahn*** by noting that the testimony concerning the possible development of cancer at a burn site related to the possibility of a new disability unrelated to the existing ailment. ***Id.*** at 284. In finding no reversible error, the court said that the doctor's suggestion of surgery was a "legitimate medical alternative to the conservative treatment

that the plaintiff was receiving," and that it was evidence that the testimony did "not reach the arena of conjecture and speculation condemned in ***Hahn.*** Inasmuch as the jury was entitled to consider the possible need for surgery, the estimated cost was also appropriate for its consideration." ***Id.***

In ***Seabaugh v. Milde Farms, Inc.,*** 816 S.W.2d 202 (Mo. banc 1991), the plaintiff sustained a break in her ankle bone and also discomfort and limitation of motion in the joint between her foot and ankle. ***Id.*** at 204. An orthopedic surgeon testified by way of deposition that because the plaintiff continued to have pain in her foot, further treatment was indicated because of the failure of the bone to heal properly. ***Id.*** at 209. He testified that he recommended steroid and cortisone injections which, if unsuccessful in alleviating the pain, would be followed by surgery to fuse the joint. ***Id.*** 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 was more likely than not that she would need surgery, he said that she would. ***Id.*** at 209-210. Another physician testified by deposition that it was more likely that her ankle would get worse and more painful as time went on. ***Id.*** at 210. Notwithstanding the fact that none of that testimony was objected to at the time of the deposition, but rather was objected to when offered at trial and thus was waived, the ***Seabaugh*** court said:

"Assuming a timely objection was interposed, the testimony of [the two doctors] was admissible. With regard to [the first doctor's] testimony he specifically testified that his opinions were based upon reasonable medical certainty. The mere fact that the course

of treatment he recommended depended upon the results of a more conservative treatment prior to surgery does not render the evidence of future surgery inadmissible speculation and conjecture, or deprive such evidence of its probative value.

Defendant concedes that in the depositions of [the two doctors], each stated that his opinions were based on reasonable medical certainty. Nevertheless, defendant points to cross-examination testimony by [the first doctor] stating the need for the surgery was dependent upon the outcome of the cortisone treatments, and testimony of [the second doctor] that he did not know if the ankle injury would get worse. These statements by the physicians are nothing more than the obvious truism that no one can predict the future with absolute certainty. That, of course, is not and has never been the standard for determining whether evidence is admissible and sufficient to support submission of future damages. The standard for recovering for future consequences requires evidence of such a degree of probability of those future events occurring as to amount to reasonable certainty. The testimony of the two physicians in this case meets that standard." ***Id.*** at 210-211 (citations omitted).

The contention that medical testimony about future medical treatment and damages were based on speculation and conjecture was again visited in ***Bynote v. National Super Markets, Inc.,*** 891 S.W.2d 117 (Mo. banc 1995). There, a doctor testified that the plaintiff's prognosis was poor and that she would require surgery "if she suffered a locked back," but in the meantime he recommended a more conservative, non-surgical approach. ***Id.*** at 125. As in ***Breeding,*** the doctor also gave his opinion as to the cost of

such surgery. ***Id.*** Another witness testified that the plaintiff should tolerate the pain as long as possible because eventually she would have to have surgery. ***Id.*** One of the defendant's contentions on appeal was that the witnesses' testimony relating to the likelihood of future surgery failed to meet the "reasonably certain" standard. ***Id.*** The Court relied on ***Seabaugh*** in holding that the fact that recommended treatment depended on the results of more conservative treatment did not render the evidence of future surgery inadmissible speculation and conjecture or deprive it of probative value. ***Id.***

See, also: ***Bynote v. National Super Markets, Inc.***, 891 S.W.2d 117, 124-25 (Mo. banc.) (testimony regarding cost of back surgery admissible although not recommended unless plaintiff suffered a locked back); ***Stephens v. Guffey***, 409 S.W.2d 62, 70 (Mo.1966) (finding evidence of cost of surgery admissible where diagnosis of condition was tentative and surgery not yet recommended).

Appellant seizes upon Parsons' testimony that he can not testify to a reasonable degree of medical certainty that Megan *will have surgery*. That is true. That is not the issue. And the same would be analogous as to the flipping of a coin. Parsons could not be intellectually honest and testify that the flip of a coin was going to be heads, but he could, as he did in this case, testify that the flip of the coin will statistically be heads 50% of the time. Further, treating physicians are entitled to explain the future risks that have been imposed on a patient as a result of an injury or condition proximately caused by the negligence of the appellants. ***Johnson v. Creative Restaurant Mgmt.,*** 904 S.W.2d 455, 459 (Mo.App. 1995). The terms "think", "guess", or "suggest" do not render the treating

doctor's opinions inadmissible if he intended to express his opinion or judgment. ***Id.***, *citing* ***Lindberry v. Shull,*** 695 S.W.2d 132, 136 (Mo.App. 1985).

Defense strategy nearly always includes questions of the doctors and plaintiff as to other possible causes for their condition and need for future treatment. For example, degenerative changes, other injuries, other accidents, the aging process, etc... that contributed to cause the conditions about which the physicians are testifying. In instant case, these issues were explored during extensive cross-examination of Megan and her doctors. It is axiomatic that the jury, as the finder of fact, is entitled to consider the totality of the medical evidence. Many times physicians will testify that they cannot state the percentage of increased likelihood of treatment for condition and often will testify that it would be mere guess work to try and speculate as to the increased likelihood. In this case, however, Megan's treating doctors testified that Megan definitely has injuries to her spine caused by the collision. The increased likelihood of treatment for those injuries is not speculative. Her treating doctors testified to far more than a mere reasonable degree of medical certainty as to what the increased percentages for future surgery she is exposed. The evidence was proper for the jury to consider.

Other States Following Missouri Law

Kansas

The Kansas Supreme Court faced nearly the same argument, where the defendant argued expert testimony as to potential consequences is inadmissible because "speculation concerning the dire nature of remote possibilities is insufficient…to support

a pecuniary award for the presumed actual occurrence of those consequences." ***Cott v. Peppermint Twist Management Co., Inc.***, 253 Kan. 452, 465 (1993). The court allowed the expert testimony concerning possible future consequences of the plaintiff's permanent injuries, holding that "…the inability to calculate damages with absolute exactness does not render them too uncertain to preclude their award." ***Id.*** at 465-66.

In ***Cott***, the treating physician performed an endoscopy and found active bleeding in the victim's esophagus, concluding that the plaintiff faced an increased risk of strictures and dilation. ***Id.*** at 461, 467-68. Further, the treating physician estimated the need for surgery at less that one percent. ***Id.*** at 460. The Kansas Supreme Court allowed the treating physician's testimony regarding future consequences, citing the trial court's determination that the evidence supported award because "of the **potential** exhibited by all the medical testimony of reoccurrences, **potential** replacements of the esophagus on numerous occasions, the cost of this, [and] the potential of cancer." ***Id.*** (emphasis added).

Mississippi

In ***Illinois Cent.R. Co. v. Clinton,*** 727 So.2d 731 (Miss.App. 1998), Clinton injured his knee while performing job duties for his employer, Illinois Central Railroad. He eventually filed suit against Illinois Central Railroad under the Federal Employers' Liability Act (FELA). The defense argued on appeal that the trial court erred in allowing deposition testimony of plaintiff's treating physician Dr. Turnbull, claiming that his opinions were not based on a reasonable degree of medical certainty. During cross examination, defense counsel asked Dr. Turnbull to give his opinion as to whether

plaintiff would continue having problems with his knee in the future. Dr. Turnbull responded that plaintiff could potentially continue to have problems with his knee, but it was also possible that he would not have problems with his knee in the future. The court allowed the testimony of Dr. Turnbull, and quoted the Mississippi Supreme court that "absolute certainty is not required . . . and where facts are in dispute, or the evidence is such that fairminded men may draw different inferences, a measure of speculation and conjecture is allowed." ***Id*** at 737 (citing ***Pittman v. Hodges***, 462 So.2d 330, 334 (Miss. 1984).

Illinois

In ***Rainey v. City of Salem***, 568 N.E.2d 463 (Ill.App. 5 Dist. 1991), Plaintiff filed a personal injury suit after she collided with a city street cleaning vehicle. Plaintiff suffered broken ankles as well as other injuries. Defendant appealed the amount that the jury awarded for future medical costs stating that plaintiff's orthopedic surgeon, Dr. Coss, gave testimony that was "based on mere surmise or conjecture, and not a reasonable degree of medical certainty." ***Id*** at 469. In his video deposition, Dr. Coss stated, among other things, that due to Plaintiff's fractured ankles, "there was a possibility that she might develop avascular necrosis." He also stated that plaintiff was "at major risk for the development of post-traumatic arthritis in the right ankle," and "the expectation of some degree of post-traumatic arthritis . . . is inevitable." The court pointed out that the defendant did not object to Dr. Coss' testimony at the time and did not offer their own testimony to refute his. Defense argued that the testimony should not have been allowed

because it was based on surmise or conjecture. However, the court disagreed and pointed out that plaintiff's counsel specifically instructed Dr. Coss to only render his answers and opinions "to a reasonable degree of medical certainty." ***Id.*** at 469.

And then recently in ***Dillon v. Evanston Hospital***, 199 Ill.2d 483 (Ill. 2002), the Illinois Supreme Court held a plaintiff could recover with respect to any possible future damage if he can prove that it is a possibility and also prove, through expert testimony, what the likelihood is. The Court found instructive the **Restatement of Torts, 2nd** sect. 912 comment e (1979), that provides: "**The theory to allow recovery for an enhanced risk claim that seeks compensation for the anticipated harm or the increased apprehension of such harm is sound given the well-established principle that a plaintiff is entitled to compensation for the full extent of the injury. It is also consistent with tort law that embraces the notion that it is the defendant, rather than the innocent plaintiff, who should bear the risk of harm.**" ***Id.***

New Mexico

In the state of New Mexico, a jury is allowed to hear the testimony of a physician, even if the physician will not state that an operation is medically probable. As long as the physician states that the operation is "fairly likely" and that his testimony as a whole represents that future medical treatment is medically probable (he is not required to use the phrase medically probable). ***Regenold v. Rutherford,*** 679 P.2d 833 (N.M. App. 1984). In ***Regenold***, the Plaintiff injured the disc space at her L2-L3 as a result of a motor vehicle accident. At trial, plaintiff introduced testimony of a physician who stated,

among other things, “I can’t say for sure that Sherry [plaintiff] is going to end up with this operation. It is somewhere in the area of likely, or approaching 50-50.” The court allowed the physician’s testimony and ruled “[t]he fact that the physician declined to use the word ‘probable’, because of the physician’s meaning of probable, does not show that a future spinal fusion was not a reasonable probability.” The court looked to the physician’s testimony “as a whole”. ***Id*** at 838.

Texas

In the state of Texas, the Court of Appeals overruled the trial court on its decision to exclude a physician’s testimony regarding the likelihood of future surgery. ***Thrailkill v. Montgomery Ward and Co.***, 670 S.W.2d 382 (Tex.App. 1 dist. 1984). In ***Thrailkill***, plaintiff was injured by the store’s elevator and suffered injuries to her cervical spine. In the videotaped deposition of expert witness Dr. Moeil, who was plaintiff’s treating doctor, he testified to the likelihood of future surgery as a “strong possibility” and that it was dependent on whether plaintiff continued to have pain; however, the trial court sustained the defendant’s objection and excluded the testimony on the grounds that it was “speculative because surgery was not shown, by reasonable medical probability, to be necessary in the future.” ***Id*** at 384. The court of appeals reversed the trial court stating, “[w]e hold that the testimony of Dr. Moiel was admissible because it explained the plaintiff’s present and future medical condition, and that the excluded testimony concerning prospects for future surgery when taken in context and considered as a whole, amounted to a reasonable probability.” ***Id*** at 386.

Oregon

Plaintiff suffered injuries while on an amusement park ride. ***Pelcha v. United Amusement Company,*** 606 P.2d 1169 (Or.App.). Plaintiff's treating physician diagnosed her as having a chronic condition regarding her dislocated jaw and also stated that, "[t]he possibility that plaintiff's condition would deteriorate to the point that corrective surgery would be required was estimated at 30 to 45%." ***Id*** at 1169. Defendant argued that the expert testimony should not have been allowed because it was less than 50%; therefore, not reasonably certain. The court disagreed with defendant. "In this case, however, the possibility of future surgery with all its resultant cost, pain and distress, is more than merely conceivable. The degree of likelihood was the subject of evidence and was properly a subject for the jury to consider." ***Id.*** at 1169.

No Prejudice to Appellants

Finally, Respondent never requested the jury award Megan for the cost of future surgery, rather it was argued that she is entitled to recover and the jury, as fact finder, is entitled to determine what is reasonable compensation for suffering the increased risk and worry associated with the increased risk. This is consistent with the concept that the wrongdoer, not the innocent victim, should bear the cost of the increased or enhanced risk caused by the injury. **Restatement of Torts, 2nd**, sect. 912 comment e (1979). This is also consistent with Missouri's adoption of the Loss of Chance Doctrine. ***Woolen v. DePaul Health Center***, 828 S.W.2d 681 (Mo. Banc 1992). In opening and closing, respondent's attorney requested the jury compensate Megan for her future medical bills

related to her prescription medications, not the cost of the future surgery. (Tr. 213 and Tr. 625-626).

Megan's doctors discussed the increased likelihood and risk of future surgery with her and the increased risk and as a result they were part of Megan's fear and anxiety for the future. Therefore, the increased likelihood for future surgery is also admissible because it was the proximate cause of the negligence of the appellants' conduct, and that is all that is required for its admission into evidence. ***Gage v. Morse***, 933 S.W.2d 410 (Mo.App. S.D. 1996). Further, it was the appellant Gale Webb's attorney that argued Megan should be compensated for the cost of future surgery and therefore disingenuous that appellants should now claim prejudice. (Tr. 682).

CONCLUSION

This Court should overrule Appellant's Points Relied On because they are not supported by either the evidence at trial or the law. In any event, other courts have analyzed the proper remedy in circumstances where medical bills are a relatively small part of the damages. In ***Begley v. Adaber Realty & Investiment Co.,*** 358 S.W.2d 785 (Mo. 1962), the court found that certain medical bills had been improperly admitted. As a remedy, the court ordered a remittur of the amount of the medical bills in question and affirmed the balance of the judgment. At most, a remedy such as the court fashioned in ***Begley*** is all appellants should receive. The amount of the cost of future surgery was $25,000, and constituted, if anything only a small fraction of the total damages awarded.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief (a) includes the information required by Rule 55.03, and (b) complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and

contains 7,017 words and 678 lines, excluding the cover, this Certification , the signature block and the Appendix, as determined by WordPerfect Office 12 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus free; and

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