

IN THE SUPREME COURT OF MISSOURI

Appeal No. SC87891

MEGAN SWARTZ
Plaintiff/Respondent,

vs.

GALE WEBB TRANSPORTATION COMPANY,
Defendant/Appellant,

and

CHRISTOPHER HOBBS,
Defendant.

Transfer from the Southern District Court of Appeals
Case No. SD 26722

On appeal from the Circuit Court of Jasper County, Missouri
Honorable William C. Crawford, Circuit Judge
Case No. 03CV680159

**SUBSTITUTE REPLY BRIEF OF APPELLANT
GALE WEBB TRANSPORTATION COMPANY**

BLACKWELL SANDERS PEPER MARTIN, LLP

Randy P. Scheer Mo. Bar # 37214

S. Jacob Sappington Mo. Bar # 51810

901 St. Louis Street, Suite 1900

Springfield, Missouri 65806

Telephone: 417-268-4000

ATTORNEYS FOR DEFENDANT/APPELLANT GALE WEBB
TRANSPORTATION COMPANY

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POINTS RELIED ON

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STANDARD OF REVIEW

Respondent incorrectly asserts in her Substitute Brief that “[t]he Appellant Transportation Company has failed to include the standard of review for any of its claims of error.” Substitute Brief of Respondent, page 20. On page 16 of its Substitute Brief, Appellant stated: “All three points of error raised in this appeal relate to the trial court’s decision to admit the speculative testimony of Respondent’s treating physicians. Therefore, an abuse of discretion standard of review applies to all points of error. *See Nelson v. Waxman*, 9 S.W.3d 601, 603 (Mo. 2000) (*stating* “[t]he admissibility of evidence lies within the sound discretion of the trial court and will not be disturbed absent abuse of discretion.”).”

ARGUMENT

1. The trial court erred in overruling Appellant’s motion for new trial because the trial court erred in admitting testimony and argument, over Appellant’s objections, regarding Respondent’s potential future difficulties or inability for natural childbirth, and in refusing Appellant’s withdrawal instruction on the same, in that such evidence was purely speculative, was not based on a reasonable degree of medical certainty, was unduly prejudicial, and was therefore inadmissible.

In the first point of error in this appeal, Appellant maintains that the trial court’s decision to admit evidence regarding Respondent’s potential future difficulties or inability for natural child birth was an abuse of the trial court’s discretion. The trial court abused its discretion in allowing Respondent to present evidence from Dr. Parsons regarding Respondent’s potential difficulty for natural child birth because the doctor’s

own testimony establishes that it is not “reasonably certain” that Respondent will suffer the future consequence of having difficulty with natural child birth.

While Appellant will not rehash the entire substance of Dr. Parsons’ testimony regarding this issue, Appellant reiterates that Dr. Parsons specifically testified:

Q. So whether or not she’s going to have **any problem** with the birthing process at this point **is speculation**?

A. **That’s correct.**

Dr. Parsons’ Deposition, pages 55 – 56, lines 14 – 1 (emphasis added). From this testimony, it is clear that Dr. Parsons did not testify that Respondent is reasonably certain to have problems delivering a child naturally. In fact, Dr. Parsons testified that any future problems are purely speculative.

In her Substitute Brief, Respondent does not dispute the well-settled and undisputed Missouri law that evidence regarding a potential future consequence of an injury is inadmissible unless the consequence is “reasonably certain” to occur. *See generally* Substitute Brief of Respondent. Neither does Respondent dispute that Dr. Parsons testified that any possible future difficulty with natural child birth is speculative. Instead, Respondent argues the trial court did not abuse its discretion in admitting the speculative testimony regarding her potential future difficulties with child birth because “the **uncertainty** she faces in the future” regarding her ability to have children naturally “was all that was necessary to make the testimony admissible.” *See* Substitute Brief of Respondent, page 22 (emphasis added).

The two cases cited by Respondent in her brief do not support her blanket assertion that Dr. Parsons' testimony was admissible, even though it was purely speculative, simply because Dr. Parsons is uncertain Respondent will be able to have a child naturally. Respondent cites to the Gage v. Morse decision for support of the proposition that "[Respondent's pelvic fractures sustained in the accident] were the proximate cause of the change in her birthing canal and the uncertainty she faces in the future and that was all that was necessary to make [Dr. Parsons'] testimony admissible." Substitute Brief of Respondent, page 22 (*citing Gage v. Morse*, 933 S.W.2d 410 (Mo. Ct. App. S.D. 1996)). Respondent misinterprets the Gage decision to hold that evidence regarding a future potential medial complication is admissible as long as a doctor cannot testify that the complication is certain not to occur. That is not the holding of Gage.

The relevant holding of the Gage decision is that the plaintiff made a submissible case on the element of **causation** where her medical expert testified that the defendant's choice of operative procedures meant that the plaintiff no longer had an opportunity to use a "resurfacing" knee prosthesis. *See Gage*, 933 S.W.2d at 414-417. Ultimately, the court merely decided that the plaintiff's evidence was sufficient to support a finding that the defendant's actions were the proximate cause of the plaintiff's "lost opportunity to have successive replacement knees...." *Id.* at 416.

The doctor's testimony in Gage differs from Dr. Parsons' testimony because Ms. Gage's physician testified unequivocally that successive knee replacement prostheses of the type he preferred were no longer an option for the plaintiff. In this case, Dr. Parsons never once testified that Respondent's injuries deprived Respondent of a chance to have a

child naturally. Instead, the trial court allowed him to speculate that Respondent's injuries **may** affect her ability to carry and deliver a child naturally. This testimony, however, did not establish with "reasonable certainty" that Respondent could not deliver a child naturally, and the trial court therefore abused its discretion in allowing the testimony to be presented to the jury.

Respondent further argues that a doctor is allowed to give a medical opinion in a case "even when [the opinion] is not based on a reasonable degree of medical certainty". Substitute Brief of Respondent, page 22 (*citing Johnson v. Creative Rest. Mgmt.*, 904 S.W.2d 455, 459 (Mo. Ct. App. 1995)). However, the relevant holding of the Johnson decision merely states that the "testimony of a physician **concerning a diagnosis of a patient**" is admissible even when not based on a reasonable degree of medical certainty. Johnson, 904 S.W.2d at 459 (emphasis added).

As the testimony in question from Dr. Parsons does not concern a diagnosis of Respondent, the Johnson case is inapplicable to the issue before this Court. Moreover, nothing in the Johnson decision detracts from the undisputed proposition that Dr. Parsons' testimony was inadmissible unless it demonstrated that Respondent was reasonably certain to have difficulties with natural child birth.

Contrary to Respondent's assertion, evidence regarding this **potential** future consequence from Respondent's injury is not admissible simply because there is a risk the consequence might occur. While there is no magic language or number for a trial court to rely upon when determining whether medical testimony demonstrates a future medical complication is reasonably certain, this standard, in and of itself, clearly

establishes that there is a threshold requirement for the admission of such evidence.

Under Respondent's argument, it was proper to put the issue of her potential difficulty for natural child birth before the jury simply because of a mere possibility (speculative or otherwise) that she will not be able to deliver a baby naturally. Respondent's argument, however, would effectively abrogate the requirement of reasonable medical certainty.

Because Dr. Parsons' testimony did not approach satisfying the "reasonably certain" standard of admissibility, the trial court abused its discretion in allowing the testimony and refusing Appellant's withdrawal instruction regarding the same. This Court should therefore reverse the trial court's judgment and remand the case for a new trial.

2. The trial court erred in overruling Appellant's motion for new trial because the trial court erred in admitting testimony and argument, over Appellant's objections, regarding Respondent's potential need for future surgery, including fusion surgery in the pelvic area, and in refusing Appellant's withdrawal instruction on the same, in that such evidence was purely speculative, was not based on a reasonable degree of medical certainty, was unduly prejudicial, and was therefore inadmissible.

In response to Appellant's argument that the trial court abused its discretion by admitting testimony regarding Respondent's potential need for future back surgery, Respondent admits that an expert witness can only testify to the future consequences of an injury if they are "reasonably certain" to occur. Substitute Brief of Respondent, page 25. Respondent (and MATA) then, however, take a contrary position and argues

(incorrectly) that evidence regarding a potential future medical complication is admissible as long as a plaintiff faces an increased risk, no matter how small the risk may be, of suffering the complication because of injuries proximately caused by a defendant's negligence. *See* Substitute Brief of Respondent, page 25. In support of this argument, Respondent cites to the Missouri Court of Appeals' decision in Stuart v. State Farm Mut. Auto. Ins. Co. *See* Substitute Brief of Respondent, page 25.

Without reference to the portions of the Stuart opinion that discuss inadmissible medical testimony regarding potential future medical complications, Respondent focuses and relies on that portion of the Stuart opinion which holds that a doctor's testimony was admissible when the doctor testified that the plaintiff faced an increased risk of paralysis **if the injuries he sustained in an accident went untreated**. *See* Substitute Brief of Respondent, page 25; *see also* Stuart, 699 S.W.2d 450, 456 (Mo. Ct. App. W.D. 1985).

In reaching this particular holding, however, the Stuart court noted that:

[the testifying doctor] described only the dangers that plaintiff's existing condition posed to him without treatment. The fact that the danger [of paralysis] exists is not speculative. Therefore, the testimony was admissible.

Id. at 456 (emphasis added).

The practical problem with Respondent's reliance on this holding is that, as read by Respondent, the Stuart decision would allow a personal injury plaintiff to present evidence of every possible complication or consequence of an injury, no matter how remote or speculative the possibility of the consequence, as long as a doctor testified that

the consequence was at all possible. This proposed standard really is no standard at all, however, and it would effectively obliterate the “reasonably certain” standard.

Another problem with Respondent’s reasoning is that, in this case, Respondent went beyond merely describing “only the dangers that [her] condition posed....” It is not as if Respondent’s counsel casually threw out the idea that Respondent may need future back surgery at trial. Instead, Respondent’s counsel purposefully elicited testimony from Respondent’s treating physician, over Appellant’s objection, regarding the likely cost of such surgery with the intent of seeking that amount in a damage award from the jury. *See Dr. Parsons’ Deposition*, page 39, lines 2-9; Tr. 627-628, lines 22-25, 1-21. While this would be a perfectly permissible strategy with adequate foundational testimony which established that Respondent was reasonably certain to need the surgery in the future, Respondent’s doctor noted on two separate occasions that it would require speculation to say whether she will need future fusion surgery. *Dr. Parsons’ Deposition*, pages 37-38, lines 14-25, 1-5; page 41, lines 17-25.

Respondent further argues in support of her proposed “increased risk” standard that several Missouri Supreme Court cases dictate an affirmation of the trial court’s ruling in this case. These cases, however, are easily distinguished from the case at hand.

In *Breeding v. Dodson Trailer Repair, Inc.*, for example, the plaintiff’s treating physician testified that the plaintiff’s injuries and symptoms would continue indefinitely and require surgical treatment if conservative treatment failed. 679 S.W.2d 281, 283 (Mo. 1984) (en banc). The treating physician, Dr. Luebbert, specifically testified:

Q. Do you feel in your medical opinion that Mr. Breeding will be in the need of future treatment?

A. I do.

Q. And what form would that take, Doctor? Of what form would that be?

A. I feel that he will need continued conservative treatment as we've given him in the past. I feel that if this is successful that that is all that he will need. If he progresses to the point that the conservative treatment does not control him he will need surgery on his neck.

Id. In Breeding, unlike this case, the defendants' only objection to Dr. Luebbert's testimony was that it was conditional. Id. (*stating* "[t]he gravaman of defendants' complaint is that future surgery and attendant expenses were contingent upon the failure of conservative treatment.") After considering the defendants' objection, this Court determined that Dr. Luebbert's testimony did not "reach the arena of conjecture and speculation condemned in Hahn." Id. at 284.

Breeding, however, is readily distinguishable from the case at bar. In Breeding, there was no testimony or evidence that called into question the certainty of the need for future treatment for the plaintiff. Dr. Luebbert unequivocally testified that the plaintiff would need future treatment. Id. Moreover, when the topic turned to possible future surgical treatment for Mr. Breeding, there was no testimony concerning the likelihood of the surgery. Id.

In this case, the "gravaman" of Appellant's objection to Dr. Bowling and Dr. Parsons' testimony is not that the testimony is conditional. Instead, Dr. Bowling and Dr.

Parsons' testimony failed to meet the "reasonably certain" standard because whether Respondent will need future fusion surgery is admittedly a matter of speculation. Unlike Dr. Luebbert's testimony, Dr. Bowling and Dr. Parsons' testimony **does** rise to the level of speculation condemned in Hahn because the doctors expressly admitted they were speculating about Respondent's need for future surgery. Further, unlike Dr. Luebbert, Dr. Parsons and Dr. Bowling actually quantified the chance that Respondent will need surgery. Neither doctor placed the risk that Respondent will need future surgery over 50%. For these reasons, there is no basis on the record for concluding that Respondent is "reasonably certain" to require the future surgery. The jury therefore should not have been allowed to consider testimony regarding the possible future surgery, and Respondent's counsel certainly should not have been allowed to argue for the recovery of the costs of the surgery.

The Seabaugh v. Milde Farms, Inc. decision that Respondent cites is also readily distinguishable from this case. In Seabaugh, the relevant point of alleged error concerned the testimony of Dr. Costen. *See* 816 S.W.2d 202, 209-210 (Mo. 1991) (en banc). Dr. Costen testified that he recommended injections for the plaintiff's foot injury, and possible surgical intervention if the injections failed to alleviate the plaintiff's pain. Id. at 209. Dr. Costen also testified that if the plaintiff had come to him at the time of his deposition complaining of no improvement in the pain, he believed it was more likely than not that she would need surgery based on his expert opinion. Id. at 209-210.

Although the defendant raised a question about the admissibility of Dr. Costen's testimony on appeal, this Court decided the alleged point of error on the ground that the

defendant waived the right to object to the testimony on appeal by failing to properly preserve an objection before the appeal. *Id.* at 210. The Court then went further, and based on the precedent set in Breeding, stated in dicta that “there mere fact that the course of treatment [Dr. Costen] recommended depended upon the results of a more conservative treatment prior to surgery does not render the evidence of future surgery inadmissible” *Id.* at 210 (*citing Breeding*, 679 S.W.2d at 284).

Seabaugh is distinguishable from this case because, unlike the defendant in Seabaugh, Appellant properly preserved the objection to Dr. Parson and Dr. Bowling’s testimony regarding the possible future consequences of Respondent’s injuries. *See* LF 62-66; 151-164; *see also* Tr. 448-450. Moreover, as with Breeding, this case is distinguishable from Seabaugh because Dr. Costen did not admit that Ms. Seabaugh’s potential need for future surgery was speculative. *See Seabaugh*, 816 S.W.2d at 209-210.

This Court’s decision in Bynote v. National Supermarkets, Inc. is very similar to the Seabaugh decision, and is distinguishable from this case for the same reasons. In particular, National Supermarkets argued on appeal that a doctor’s testimony regarding Ms. Bynote’s potential need for future surgery was inadmissible because the doctor never testified that his opinion regarding the need for future surgery was given within a reasonable degree of medical certainty. *See Bynote*, 891 S.W.2d 117, 125 (Mo. 1995) (en banc). As was the case in Seabaugh however, this Court found that National Supermarkets failed to properly preserve an objection to the testimony at the trial court level. *Id.* The Court then went on to determine, as it did in Seabaugh, that the conditional nature of the doctor’s testimony did not render it speculative. *Id.*

Once again, the Bynote decision is distinguishable from this case because Appellant properly preserved the objections to Dr. Bowling and Dr. Parsons' testimony. Furthermore, as was the case in Breeding and Seabaugh, the doctor in the Bynote case did not admit that he was speculating about the Ms. Bynote's potential need for future surgery. Id. at 124-125.

Finally, this case is distinguishable from the Emery v. Wal-Mart Stores, Inc. case. In Emery, the relevant controversy involved the testimony of two physicians regarding the plaintiff's potential need for future back surgery. *See* 976 S.W.2d 439, 446-447 (Mo. 1998) (en banc). One of the two doctors was Wal-Mart's own expert who testified that "I think probably as surgery would be helpful" Id. at 447. In affirming the decision to admit the testimony concerning the potential future surgery, this Court noted "**both experts agreed plaintiff's condition was operable as it existed at the time of trial.** Both agreed a surgery would probably help plaintiff, and plaintiff's expert said he would not recommend one at this time, although that possibility was not discounted." Id. (emphasis added).

Once again, this case is distinguishable from Emery. Unlike the present case, Wal-Mart's own expert admitted that Mr. Emery would benefit from a future surgery. Id. at 447. Furthermore, unlike Dr. Parsons and Dr. Bowling, Mr. Emery's doctor placed the possibility of Mr. Emery's future surgery at 51% or more. Id. Even then, though, this Court found Wal-Mart's challenge to lack merit "primarily because the record discloses several other questions and answers, some to and from Wal-Mart's own expert, which

remove plaintiff's need for surgery from the realm of speculation." Id. What is undisputed and binding precedent is the "reasonably certain" standard.

In this case, the issue of Respondent's potential need for future is squarely in the realm of speculation, and it was placed there by Respondent's own experts. Further, Appellant had no expert witness that took the issue out of the realm of speculation. The Emery case is therefore inapposite, and should not be considered binding precedent in this case.

Respondent next argues that case law from other jurisdictions supports her proposed "increased risk" standard. *See* Substitute Brief of Respondent, pages 33-38. Notwithstanding that the foreign cases cited by Respondent are in no way binding on this Court, the foreign cases Respondent relies on do not and should not serve to abrogate the well-settled law **in Missouri** that testimony regarding possible future consequences from an injury must establish that the consequences are reasonably certain to occur.

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 the United States. *See* Dillon v. Evanston Hospital, 771 N.E.2d 357, 367 (Ill. 2002) (internal citation omitted) (*stating* that prior Illinois cases using reasonable certainty of future consequences as the admissibility standard for evidence of future damages represent the "majority view"). The Dillon court stated the majority rule as follows:

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. As one court has explained: “In evaluating damages in a tort action, a trier is concerned with reasonable probabilities, **not possibilities.**” “[A] consequence of an injury which is possible, which may possibly ensue, is a risk which the injured person must bear because the law cannot be administered so as to do reasonably efficient justice if conjecture and speculation are to be used as a measure of damages. On the other hand, a consequence which stands on the plane of reasonable probability, although it is not certain to occur, may be considered in the evaluation of the damage claim against the defendant. In this way, to the extent that men can achieve justice through general rules, a just balance of the warring interests is accomplished.

Dillon, 771 N.E.2d at 367. 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); Hagerty v. L & L Marine Services, Inc., 788 F.2d 315 (5th Cir. 1986); and Ayers v. Township of Jackson, 461 A.2d 184 (N.J. Sup. Ct. 1983).

Respondent's final argument regarding the issue of her potential need for future back surgery is that it is "disingenuous" for Appellant to claim prejudice from the admission of the evidence regarding the back surgery when Appellant argued in closing that she could be compensated for the future surgery. Respondent conveniently overlooks the fact, however, that Appellant's counsel would not have been forced to argue the cost of fusion surgery in a capped damages calculation if the trial court had not abused its discretion and allowed evidence regarding surgery to be placed before the jury in the first instance. It was only after the trial court allowed the evidence to be put before the jury that Appellant argued that the maximum Respondent could be awarded for such surgery, if the jury believed she should receive an award at all, was \$25,000.00.

Indeed, Respondent's argument demonstrates the exact nature of the prejudice Appellant suffered because the trial court allowed into evidence the testimony regarding Respondent's potential need for fusion surgery. The admission of the evidence placed Appellant in a catch-22 of either ignoring the issue or addressing it head-on. Either way, Respondent could claim the "high road" on appeal and question Appellant's strategic decision just as she did by claiming Appellant is disingenuous. The fact remains, Appellant suffered prejudice because the trial court admitted the evidence regarding Respondent's potential need for future surgery in that the issue should never have been

placed before the jury without the requisite foundation of testimony that Respondent was “reasonably certain” to require the surgery. Because Dr. Bowling and Dr. Parsons’ testimony regarding this issue was purely speculative, the trial court abused its discretion in admitting the evidence and Appellant is entitled to a new trial.

3. The trial court erred in overruling Appellant’s motion for new trial because the trial court erred in admitting testimony and argument, over Appellant’s objections, regarding Respondent’s potential for developing adverse results from taking pain medication and anti-inflammatories, and in refusing Appellant’s withdrawal instruction on the same, in that such evidence was purely speculative, was not based on a reasonable degree of medical certainty, was unduly prejudicial, and was therefore inadmissible.

The issue of Respondent’s potential for developing gastric bleeding from taking anti-inflammatory medications is perhaps the best illustration of why Missouri courts require evidence that a future medical consequence is “reasonably certain” to occur before it may be placed before a jury. Both Respondent and Appellant agree that the only evidence regarding Respondent’s likelihood of developing “gastric bleeding” in the future because of this accident was the testimony of Dr. Bowling. This testimony indicated Respondent only has a 5% chance of developing this potential future consequence from taking medications necessitated by the accident.

Although consistent with Respondent’s (and, apparently MATA’s) theory that evidence of a future medical complication is admissible as long as a doctor will testify that there is **any** risk the complication will occur, Respondent’s argument that Dr.

Bowling's testimony was admissible poignantly demonstrates the consequences of such a proposition. Under this theory, a personal injury plaintiff would be allowed to stand before a jury and argue that she should be compensated for every potential side effect of every medication which she took because she was in an accident. Under Respondent's theory, it would be irrelevant that a particular side effect has only a .001% chance of occurring in the personal injury plaintiff. This theory, however, clearly conflicts with the well-established (and undisputed) law that a potential future medical consequence of an injury must be "reasonably certain" to occur before it may be placed into issue before a jury.

As with the evidence regarding Respondent's potential need for fusion surgery or potential difficulties with natural child birth, the trial court abused its discretion and erred in admitting the testimony regarding Respondent's potential for developing gastric bleeding. Although the trial court clearly had discretion in deciding whether to admit this evidence, this discretion was limited by the rule that such evidence is inadmissible unless supported by testimony that the gastric bleeding is reasonably certain to occur. Here, the record is completely devoid of any testimony to support a claim that Respondent is reasonably certain to develop gastric bleeding as a result of taking anti-inflammatory medications because of this accident. In the absence of such foundational testimony, the trial court exceeded its authority in admitting the evidence. This Court should therefore overturn the trial court's judgment, and grant Appellant a new trial in this matter.

Conclusion

The trial court abused its discretion by allowing Respondent to introduce the admittedly speculative testimony of Dr. Parsons and Dr. Bowling regarding the potential future consequences of Respondent's injuries into evidence. Undisputed Missouri law holds that such evidence is inadmissible, and the prejudice suffered by Appellant due to the admission of the evidence goes well beyond the dollar figure Respondent assigned to the cost of her speculative future surgery. The trial court's decision to allow testimony regarding Respondent's potential future difficulties with natural childbirth, for example, allowed Respondent's counsel to make superlative arguments such as:

[W]e don't know if [Respondent] is going to be able to carry a child to term and bear that child naturally, because the birthing inlet is altered and changed. **And [Respondent] comes from love**, she comes from a family and she wants to have kids. She's got a sister and two nieces that live with her. She's always wanted to have kids. She wants to have them someday. And that's kind of another issue that she is going to have to live with.

(Tr. 199, lines 11-21) (emphasis added).

The prejudicial effect of such impassioned pleas goes well beyond measurement in dollars and cents. Remittur is not a remedy that rectifies the prejudice suffered by Appellant due to the trial court's decision to allow Respondent's counsel to make such arguments regarding Respondent's potential inability for natural childbirth, potential need for future surgery, and potential for developing gastric bleeding. This Court should therefore reverse the trial court's judgment and remand the case for a new trial.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument of the issues herein.

Respectfully submitted,

BLACKWELL SANDERS PEPER MARTIN LLP

Randy P. Scheer #37214
S. Jacob Sappington #51810
901 East St. Louis Street, Suite 1900
Springfield, Missouri 65804
Telephone: (417) 268-4000
Facsimile: (417) 268-4040
**Attorneys for Defendant/Appellant Gale Webb
Transportation Company**

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 5, 259 words, excluding the cover and this Certification as determined by Microsoft Word 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
3. That two true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 26th day of October, 2006, to:

Brad Bradshaw
Eric Belk
1736 East Sunshine, Suite 600
Springfield, Missouri 65804
Telephone: (417) 889-1992
Facsimile: (417) 889-9229
Attorneys for Plaintiff

Karl Blanchard, Jr.
320 W. 4th Street
P.O. Box 1626
Joplin, Missouri 64802
Telephone: (417) 623-1515
Facsimile: (417) 623-6865
**Attorney for Defendant Christopher
Hobbs**

BLACKWELL SANDERS PEPER MARTIN LLP

Randy P. Scheer #37214
S. Jacob Sappington #51810
901 East St. Louis Street, Suite 1900
Springfield, Missouri 65804
Telephone: (417) 268-4000
Facsimile: (417) 268-4040
**Attorneys for Defendant/Appellant Gale Webb
Transportation Company**