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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.

STATEMENT OF FACTS

On September 20, 2000 an automobile accident occurred in Lawrence County, Missouri involving a 1990 Nissan operated by Christopher Hobbs and a school bus owned by Gale Webb Transportation and operated by its employee Roberta Morris. (LF 18) It occurred at or near the intersection of County Road 1090 and County Road 225. (LF 18) At the time of the accident, Megan Swartz was a passenger in the Hobbs automobile. (LF 18)

A four day jury trial on Megan Swartz's claim for personal injuries was held beginning September 13, 2004. (LF 11-12) At trial, there was no dispute that Megan Swartz had sustained injuries in the accident that required medical care and treatment. (TR 226) Damage issues to be decided by the jury included the nature and extent of those injuries. Dr. Brett Bowling, a Family Practice Physician and Dr. Clyde Parsons, an Orthopedic Surgeon, were two of the physicians who treated Megan Swartz for her accident-related injuries. (TR 397)

Both of these physicians testified at trial via videotaped deposition. (TR 449-450).¹ Over defendants' objections (LF 158, 160-163, TR 488), Dr. Parsons was allowed to testify regarding the possibility of future surgical intervention, the type of surgery that would be required, surgical morbidity and the \$25,000 cost of surgery. (Exhibit 22, p. 35 at line 25; p. 36 at line 25; p. 37 at line 22; p. 39 at line 9; and p. 40 at lines 18-21) On direct exam, Dr. Parsons testified that Ms. Swartz

¹ Copies of both physicians' depositions are included in the separately-bound Appendix.

was definitely at an “increased risk” for surgery. (Exhibit 22, p. 38) However, as to the possibility of future surgery, his testimony was that she was in the “50/50” category. (Exhibit 22, p. 38 at lines 20-25) He specifically admitted that he could not say with a reasonable degree of medical certainty that she would ever need surgery, and he agreed on cross examination that whether she was going to need the future surgery was speculation (Exhibit 22, p. 41 at lines 12-25).

On direct exam, Dr. Bowling testified, over objection, (LF at page 151, 153-154; TR page 448) that Megan Swartz was at risk for future surgery and that the risk was in the 25-50% range (Exhibit 24 p. 28 lines 12-25, p. 29 lines 1-17) .

At the close of all evidence at trial, defendant Hobbs submitted a withdrawal instruction, Instruction A, which read as follows: “The issue of plaintiff’s future surgery is withdrawn from the case and you are not to consider such issue in arriving at your verdict.” (LF 185, TR 593) The trial court refused the instruction (LF 185, TR 593). The jury returned a verdict in favor of plaintiff and against both defendants in the total amount of \$335,000.00, assessing 25 % of the fault to defendant Hobbs and 75 % of the fault to defendant Gale Webb Transportation. (LF 191-192)

Following the trial court’s October 5, 2004 entry of its Judgment, defendant Hobbs filed his *Motion for New Trial, Or In the Alternative, Judgment Not Withstanding the Verdict, Or In the Alternative Remittitur* on October 8, 2004. (LF 12, 199-203) Christopher Hobbs filed his Suggestions in Support of this Motion on December 3, 2004. (LF 13, 348-422) Among other alleged errors,

Hobbs alleged that the trial court had erred in overruling defendant Hobbs' objections to Dr. Parsons' and Dr. Bowling's testimony regarding future surgery because it allowed the jury to speculate and gave them a roving commission on the issue of damages. (LF 374) Hobbs also alleged that the trial court had erred in refusing to submit its withdrawal instruction, Instruction A, to the jury because there was insufficient evidence presented on the issue of plaintiff's need for future surgery, and that it gave the jury a roving commission. (LF 348-352)

The Court held a hearing on all post-trial motions on December 8, 2004, and subsequently overruled all post-trial motions including Christopher Hobbs' *Motion for New Trial, Or In the Alternative, Judgment Not Withstanding the Verdict, Or In the Alternative Remittitur*. (LF 13, 423-424) Christopher Hobbs took this appeal on December 17, 2004. (LF 14, 429)

On June 26, 2006 the Missouri Court of Appeals, Southern District, affirmed the judgment and subsequently denied rehearing and transfer. Application for transfer to this Court was filed August 2, 2006 and this Court ordered transfer on August 22, 2006.

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. E.D. 1961).

Stuart v State Farm Mutual Automobile Insurance Company,
699 S.W.2d 450 (Mo. App. W.D. 1985)

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

Point II.

**THE TRIAL COURT ERRED IN REFUSING DEFENDANT-
APPELLANT HOBBS' PROPER WITHDRAWAL INSTRUCTION (A) ON
THE ISSUE OF PLAINTIFF-RESPONDENT'S NEED FOR FUTURE
SURGERY AFTER THE TRIAL COURT HAD ERRONEOUSLY
ADMITTED DR. BOWLING'S AND DR. PARSONS' SPECULATIVE
TESTIMONY ON FUTURE SURGERY, BECAUSE THAT EXPERT
TESTIMONY REGARDING HER NEED FOR FUTURE SURGERY AND
REHABILITATION AND ITS ATTENDANT COSTS DID NOT
CONSTITUTE EVIDENCE OF FUTURE CONSEQUENCES THAT WERE
REASONABLY CERTAIN TO OCCUR IN THE FUTURE AND
THEREFORE WAS AN INSUFFICIENT BASIS FOR ALLOWING THE
JURY TO CONSIDER THE NEED FOR FUTURE SURGERY IN
ARRIVING AT ITS DAMAGES AWARD AND IT THEREBY GAVE THE**

**JURY A ROVING COMMISION ON DAMAGES, IN THAT THERE WAS
NO EXPERT MEDICAL TESTIMONY REFLECTING THAT THE
PLAINTIFF-RESPONDENT WAS REASONABLY CERTAIN TO NEED
THE FUTURE SURGERY NOR WAS THERE ANY EXPERT MEDICAL
TESTIMONY TO A REASONABLE DEGREE OF MEDICAL
CERTAINTY THAT SHE WOULD NEED THE FUTURE SURGERY.**

Arnold v. Ingersoll-Rand Co., 908 S.W.2d 757, 764 (Mo. App. 1995).

Klaus v. Deen, 883 S.W.2d 904, 905 (Mo. App. 1994).

Harris v. Washington, 654 S.W.2d 303, 307 (Mo. App. 1983).

Suhr v Okorn, 83 S.W.3d 119(Mo. App. W. D. 2002).

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.**

Appellant respectfully suggests that the ultimate issue in this case is whether a jury may properly consider evidence of an increased risk of future medical damages absent testimony that such risk is reasonably certain to occur.

A. The Testimony At Issue

There is no question that two of the doctors who had treated Plaintiff-Respondent for her injuries following the accident testified, over objection, that she (a) was at an increase risk for future spinal surgery, its consequences and cost, and (b) that the risk was 50% or less. It is Appellant Hobbs' position that this testimony should not have been admitted because as a matter of law it did not constitute evidence that the future medical consequences were reasonably certain to occur.

Plaintiff-Respondent's evidence at trial of the possibility and/or risk of future medical damages came from Dr. Clyde Parsons and Dr. Brett Bowling. Dr. Parsons testified regarding possible future medical consequences of her spinal injury, including the particular surgery that might be required along with the potential surgical morbidity and the cost of the surgery. His testimony with regard to the "risk" was as follows:

Q. She's certainly at an increased risk for those types of procedures?

A. Absolutely.

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

A. That's correct.

Q. Can you give us any range whatsoever?

A. 50-50, 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"--

Q. Yeah

A. --"but the people in your group are way out in front as far as their concerns"

Q. Those are the things—those are the issues and things that you've discussed with Megan, that is, that she's in the 50-50 category now?

A. Correct.

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

A. Correct.

(Exhibit 22, pgs 38-39).

On cross examination, Dr. Parsons' opinion was further investigated and clarified:

Q. As to whether or not she is going to require any future surgical intervention, would you agree at this point that you cannot say that she will any - with a reasonable degree of medical certainty?

A. That's correct.

Q. So it will be speculation as to whether she's going to require any future surgery?

A. Yes.

(Exhibit 22, pgs 41-42). At best, Dr. Parsons' testimony was that the probability of future surgery was 50% or less and speculative in nature.

Dr. Bowling testified as follows when asked his opinion as to the likelihood of future surgery:

Q. And are you able to tell this jury what the likelihood is that Megan will require some surgical intervention over the course of her life?

A. I would say there's about a 25 to 50 percent chance that she'll eventually need surgery on her lower spine.

(Exhibit 24, pg 29).

B. Admissibility Standard

There is no question or dispute that any evidence the Plaintiff-Respondent wanted to present regarding future medical damages required expert testimony. *Kramer v. May Lumber Company*, 432 S.W.2d 617, 621 (Mo. App. W.D. 1968); *Smith v. Sayles*, 637 S.W.2d 714, 718 (Mo. App. W. D. 1982); *McKersie v. Barnes Hospital*, 912 S.W.2d 562, 566 (Mo. App. E.D. 1995). However, any testimony admitted into evidence with regard to future surgery, its consequences, rehabilitative therapy and attended costs was required to be to *a reasonable degree*

of medical certainty or a reasonable certainty. This standard is the law in the State of Missouri as stated by the Western District Court of Appeals in the case of *Stuart v State Farm Mutual Automobile Insurance Company*, 699 S.W.2d 450, 455 (Mo. App. W.D. 1985):

“Consequences which are contingent, speculative or merely possible are not to be considered by the jury in determining damages.”

(Citing *Hahn v McDowell*, 349 S.W.2d 479, 482 (Mo. App. 1961))

Further, the Kansas City Court of Appeals in the 1968 case of *Kramer v May Lumber Company* 432 S.W.2d 617, 621 (Mo. App. Western District 1968), addressed the admissibility of evidence of future consequences, stating:

“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.”

To allow recovery for “increased risk” as plaintiff sought and received in this case amounts to giving the jury a roving commission on damages because the evidence did not rise to the standard of reasonable certainty. Plaintiff-Respondent takes the position that the jury was entitled to consider damages simply for the fact that she was now at an ‘increased risk’ of needing future surgery. It is a distinction without a difference. Any evidence of future surgery short of that which would reflect the surgery was “reasonably certain” to be needed, including evidence of ‘increased risk,’ was inadmissible.

C. **Damages Based Upon “Increased Risk” Should Follow The MAI**

Instructions For Loss Of A Chance Cases

The concept of seeking recovery for “increased risk” as plaintiff sought here is similar to a cause of action for a loss of chance of survival/recovery. Missouri recognizes such causes of action. See *Woolen v. DePaul Health Center*, 828 S.W.2d 681 (Mo. Banc 1992).

Critically important, however, is that in these so-called “loss of a chance” cases, there are specific MAI verdict directing and damage instructions approved by this Court. See MAI 21.08-21.15. To make a submissible case, one has to *quantify* the amount of loss and it would seem logical, if Missouri is going to recognize as an item of future damage the potential ‘increased risk’ standing alone, that it should be subject to the same requirements of admissibility as a loss of chance case. In other words, the ‘lost chance’ is analogous to the amount of ‘increased risk.’ The plaintiff theoretically should be entitled to damages, lesser or greater, proportionate to the amount of increased risk she now faces.

Plaintiff-Respondent’s evidence of “increased risk” would fall short even under the “loss of a chance” instructions. The problem with simply stating she is at an “increased risk” and giving her current risk at no more than 50% is that it does not reflect what her chances were for future surgery *before* the accident. That is, there is no baseline number that allows a jury to quantify risk and evaluate

the loss. It is increased *to* 50%, but what was her risk before the accident? Even under the “loss of a chance” instructions, Plaintiff-Respondent’s expert testimony falls short. However, even if for argument sake one assumes that she started with zero chance for future surgery, under the current MAI instruction on future damages, 50% chance of surgery is not reasonable certainty as required by the instruction.

Again, our courts have emphasized that defendants should not be subjected to paying damages for events which may or may not happen. Under the current MAI damage instruction and the Plaintiff-Respondent’s position that the law supports future damages for any increase in risk, then it is an “all or nothing” situation whereby the plaintiff gets to present surgery costs even if the increased risk represents no more than a 50/50 proposition. Fundamental notions of fairness and justice don’t support that proposition.

This Court in an En Banc decision, *Seabaugh v. Milde Farms, Inc.*, 816 S.W.2d 202 (Mo. Banc 1991), stated:

“The standard for future recovering for future consequences requires evidence of such a degree of probability of those future events occurring as to amount to reasonable certainty.”

It would seem crystal clear that in applying this reasonable certainty requirement to the testimony in the instant case, Plaintiff-Respondent did not make a case which would allow the jury to consider as damages the future surgery and the attended consequences and cost.

D. Missouri Case Law Supports Appellant Hobbs' Interpretation of the Admissibility Standard

Appellant Hobbs is unable to find any cases directly on point with the instant fact situation. The closest case is *Kramer v May Lumber Company*, 432 S.W.2d 617 (Mo. App. W.D. 1968). In that case the plaintiff (much as with Plaintiff-Respondent) was injured, treated and had been released from care from the treating surgeon. Evidence was presented at trial regarding the future contingencies of leg screws having to be removed. As in the instant case, the testimony from plaintiff's expert in *Kramer* was that it was at best a 50-50 proposition. The court in the *Kramer* case held that this testimony did not show a likely probability that the additional expenses would be incurred and that the award of future damages for a potential surgery was inappropriate. *Kramer* at 622. The damages award was reversed.

E. Standard of Review

The admission of evidence at trial, including expert testimony, is a matter within the discretion of the trial court. *Eagan v. Duello*, 173 S.W.3d 341, 346 (Mo. App. W.D. 2005). This Court reviews the trial court's admission of trial evidence for an abuse of discretion. *Id.* As set forth herein, the trial court's admission of speculative future medical testimony constituted an abuse of the trial court's discretion, was reversible error, and entitles Christopher Hobbs to a new trial.

Point II

THE TRIAL COURT ERRED IN REFUSING DEFENDANT-APPELLANT HOBBS' PROPER WITHDRAWAL INSTRUCTION (A) ON THE ISSUE OF PLAINTIFF-RESPONDENT'S NEED FOR FUTURE SURGERY AFTER THE TRIAL COURT HAD ERRONEOUSLY ADMITTED DR. BOWLING'S AND DR. PARSONS' SPECULATIVE TESTIMONY ON FUTURE SURGERY, BECAUSE THAT EXPERT TESTIMONY REGARDING HER NEED FOR FUTURE SURGERY AND REHABILITATION AND ITS ATTENDANT COSTS DID NOT CONSTITUTE EVIDENCE OF FUTURE CONSEQUENCES THAT WERE REASONABLY CERTAIN TO OCCUR IN THE FUTURE AND THEREFORE WAS AN INSUFFICIENT BASIS FOR ALLOWING THE JURY TO CONSIDER THE NEED FOR FUTURE SURGERY IN ARRIVING AT ITS DAMAGES AWARD AND IT THEREBY GAVE THE JURY A ROVING COMMISION ON DAMAGES, IN THAT THERE WAS NO EXPERT MEDICAL TESTIMONY REFLECTING THAT THE PLAINTIFF-RESPONDENT WAS REASONABLY CERTAIN TO NEED THE FUTURE SURGERY NOR WAS THERE ANY EXPERT MEDICAL TESTIMONY TO A REASONABLE DEGREE OF MEDICAL CERTAINTY THAT SHE WOULD NEED THE FUTURE SURGERY.

Defendant-Appellant Christopher Hobbs tendered the following Withdrawal Instruction, Instruction A, to the trial court for submission to the jury, which the trial court refused:

“The issue of Plaintiff’s future surgery is withdrawn from the case and you are not to consider such issue in arriving at your verdict.”

The court refused the instruction, and the jury was allowed to consider the issue of Ms. Swartz’s possible need for future surgery. Her attorney addressed her need for future fusion surgery in his closing. (TR 613-614) The jury subsequently returned a verdict against Christopher Hobbs.

A. Plaintiff-Respondent Failed To Sustain Her Burden of Proof

As a matter of law, Plaintiff-Respondent did not sustain her burden of proof on the issue of whether she would in the future need to undergo additional surgery, its consequences and costs. Plaintiff-Respondent had the burden of proof at trial to establish that she would require future medical treatment by a “preponderance of the evidence.” The Western District Court of Appeals defined that term in *Suhr v Okorn*, 83 S.W.3d 119, 121 (Mo. App. W. D. 2002):

“Preponderance of the evidence” is defined as that degree of evidence that is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be

more probable than not. See publication Words and Phrases for other judicial constructions and definitions.

Therefore, to recover damages for possible future surgeries, rehabilitative therapy and the associated expenses, plaintiff-Respondent was required to present evidence that those future medical consequences were “more probable than not.” If the evidence was, as a matter of law, not sufficient to support a jury verdict for future surgery, then it should not have been admitted in the first place. Once erroneously admitted, the withdrawal instruction was appropriate.

B. Withdrawal Instruction Was Appropriate After Plaintiff Failed To Make A Submissible Case On Future Surgery Damages

Instruction 11 (MAI 4.01) directed the jury in the instant case that it should only award such future damages that Plaintiff-Respondent “... is reasonably certain to sustain in the future.” See MAI 4.01. See also *Hobbs v. Harken*, 969 S.W.2d 318, 329 (Mo. App. W.D. 1998) (an expert witness may only testify as to future consequences of an injury if those future consequences are reasonably certain to occur); *Greer v. Continental Gaming Co.*, 5 S.W.3d 559, 565-567 (Mo. App. W.D. 1999). The argument under Point I clearly shows that the Plaintiff-Respondent failed to present sufficient expert testimony to show her need for surgery to be reasonably certain. Therefore she should not have been allowed a damage award including future surgery damages.

The withdrawal instruction that Christopher Hobbs submitted was the proper method to remove the issue of future surgery from the jury once the trial

court had erroneously admitted the speculative testimony. A withdrawal instruction may be given when evidence on an issue has been received, but there is inadequate proof given for final submission of the issue to the jury. *Arnold v. Ingersoll-Rand Co.*, 908 S.W.2d 757, 764 (Mo. App. 1995); *Missouri Highway & Transportation Commission v. Rockhill Development Corporation*, 865 S.W.2d 765, 767 (Mo. App. W.D. 1993). Withdrawal instructions should also be given when there is evidence which might mislead the jury in its consideration of the case as pleaded and submitted. *Klaus v. Deen*, 883 S.W.2d 904, 905 (Mo. App. 1994). It is error for the trial court to fail to give an instruction withdrawing such evidence from the jury's consideration. *Harris v. Washington*, 654 S.W.2d 303, 307 (Mo. App. 1983).

As set forth in the argument under Point I, there was insufficient foundation to present testimony to the jury regarding the future surgery issue. There was no testimony whatsoever to a reasonable degree of medical certainty that Plaintiff-Respondent would ever develop a need for future spinal surgery. Thus, taking guidance from the appellate cases cited above, it was reversible error for the trial court not to remove the speculative testimony of Dr. Parsons and Dr. Bowling from the jury's consideration with a withdrawal instruction after it had been erroneously presented via videotape. The jury was given a roving commission to award damages for future surgery. The withdrawal instruction would have prevented the jury from making an award based on damages that were impossible to predict and not reasonably certain to occur. Christopher Hobbs was unduly

prejudiced when the jury was allowed to consider speculative testimony regarding plaintiff's possible need for future surgery as an issue of her damages, and is entitled to an Order of this Court remanding the case for a new trial.

Finally, the giving or refusing to give a withdrawal instruction is discretionary by the trial court and is reviewed by this Court for an abuse of the trial court's discretion. *Shady Valley Park & Pool, Inc. v. Fred Weber, Inc.*, 913 S.W.2d 28 (Mo. App. E.D. 1995). As set forth above, the trial court erroneously admitted speculative medical testimony on the issue of future surgery, and the trial court's failure to give the Hobbs withdrawal instruction constituted an abuse of the trial court's discretion. This Court should reverse and remand the case for a new trial.

CONCLUSION

Two physicians testified in this case. Neither could quantify the Plaintiff-Respondent's risk of facing future surgery in terms other than odds that are 50/50 at most. That constitutes inadmissible speculation because it does not represent a future medical scenario that is reasonably certain to occur.

Missouri law has long held that future medical consequences must be reasonably certain to occur in order for evidence of those consequences to be admissible. Plaintiff-Respondent has failed to meet the admissibility threshold. In addition, the future damages jury instruction directs the jury to award plaintiff only those future damages she is 'reasonably certain' to incur. Where the Plaintiff-Respondent's only medical testimony failed to state that her chances for surgery were more than 50/50, as a matter of law she has failed to carry her burden of proof on future damages relating to surgery.

Even after the trial court erroneously admitted the speculative evidence of Plaintiff-Respondent's need for future surgery, it could have corrected its own error. Appellant Hobbs submitted a proper withdrawal instruction which the trial court should have given to the jury. The trial court refused the instruction, and after the jury deliberated and arrived at its verdict after having received the inadmissible future medical testimony, this Court must now reverse for a new trial.

Based upon one or more of the foregoing reasons identified herein, 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.

**BLANCHARD, ROBERTSON, MITCHELL
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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

Appellant Christopher Hobbs hereby certifies that this Substitute Brief complies with the word limitation set forth in Rule 84.06(b) and contains 4,866 words and 610 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 _____ day of September, 2006, said party served his Substitute Appellant's Brief, in this cause by depositing two copies of said documents and disk in a postage paid envelope in the United States Mail, addressed to each of the following attorneys of record:

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