

IN THE SUPREME COURT OF MISSOURI

MEGAN SWARTZ,)
)
 Plaintiff/Respondent,)
)
 v.)
)
 GALE WEBB TRANSPORTATION)
 COMPANY,)
)
 Defendant/Co-Appellant,)
)
 and)
)
 CHRISTOPHER HOBBS,)
)
 Defendant/Appellant.)

Appeal No. SC 87890

On Appeal from the Circuit Court of Jasper County
Honorable William C. Crawford, Judge

BRIEF OF AMICUS CURIAE
MISSOURI ASSOCIATION OF TRIAL ATTORNEYS

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INTEREST OF THE AMICUS CURIAE

The issues raised by this appeal are of vital importance and interest to others besides the immediate parties, including the Missouri Association of Trial Attorneys (“MATA”). MATA is a non-profit, professional organization consisting of approximately 1,400 trial attorneys in Missouri, most of whom represent citizens of the state of Missouri. For over fifty years, MATA lawyers have vigilantly worked to protect their clients and Missouri citizens from injustice. In doing so, MATA strives to promote the administration of justice, to preserve the adversary system, and to apply its knowledge and experience in the field of law to advance the interests and protect the rights of individuals. MATA’s members and their clients will be directly affected by the Court’s decision in this case.

MATA members regularly represent clients who suffer personal injuries at the hands of individual and corporate tortfeasors. For many, the increased risk of future medical complications, injuries or damages as a result of an initial injury is an additional element of damage. In their respective briefs, appellants argue that all evidence of this type of increased risk damage is inadmissible because it is speculative. This Court’s acceptance of appellants’ position would have a significant impact upon MATA members and their clients in future litigation in Missouri courts. Thus, MATA presents this amicus brief to address these issues on behalf of MATA’s members and their clients.

STATEMENT OF FACTS

Amicus Curiae Missouri Association of Trial Attorneys adopts Respondent's Statement of Facts.

ARGUMENT

- I. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF PLAINTIFF'S INCREASED RISK OF FUTURE MEDICAL COMPLICATIONS, INJURY AND DAMAGE AND REFUSING APPELLANT'S WITHDRAWAL INSTRUCTIONS BECAUSE THE ADMISSION OF SUCH EVIDENCE IS CONSISTENT WITH THE LAW OF MISSOURI AND OTHER JURISDICTIONS IN THAT THE ADMMISSION OF SUCH EVIDENCE IS NECESSARY TO ILLUSTRATE A COMPENSABLE ELEMENT OF PLAINTIFF'S DAMAGES FOR THE JURY.**

A. This Court Should Affirm the Trial Court's Admission of Testimony Regarding Increased Risk of Future Medical Complications and Surgery and Refusal to Submit Appellant's Withdrawal Instructions Because the Trial Court's Actions Were Consistent With Existing Missouri Law.

When a qualified physician testifies to a reasonable degree of medical certainty that a plaintiff is at an increased risk for future medical complications, injuries or damages due to the negligent conduct of a defendant, such testimony is proper and admissible under Missouri law. Appellant attempts to confuse and convince this Court otherwise by improperly comparing the possibility of the increased risk with the

“reasonable degree of medical certainty” standard. By doing so, appellant seeks to evade responsibility for a portion of the damages he has caused. As will be discussed throughout this brief, appellant’s arguments lack merit and fly in the face of logic and the interest of fairness.

MATA concedes for purposes of this brief that medical testimony must be to a reasonable degree of medical certainty in order to be admissible in Missouri courts. As was pointed out in Respondent’s brief, the disputed testimony that plaintiff is at an increased risk of future medical complications and surgery was given by the physician to a reasonable degree of medical certainty. The fact that the physician did not state the increased risks had more than a 50% possibility of actually manifesting themselves does not make the testimony inadmissible. Regardless of their exact possibilities of occurring, evidence of the increased risk of future medical complications and surgery was admissible to illustrate the nature and extent of plaintiff’s current injuries and damages for the jury.

Missouri courts have recognized the admissibility of similar testimony on several occasions. In Breeding v. Dodson Trailer Repair, Inc., 679 S.W.2d 281 (Mo. banc 1984), this Court affirmed the admission of testimony from a physician who testified that plaintiff’s condition would require future surgery if more conservative treatment was ultimately unsuccessful. Defendant seized on this testimony and argued the testimony was “incompetent” in that the surgery “was no more than a mere possibility” and was not “a future consequence with reasonable certainty.” Id. at 283. The Court held that the

physician's testimony "does not reach the arena of conjecture and speculation" and that the jury was entitled to consider the possible need for future surgery. Id. at 284.

This Court addressed a similar issue in Seabaugh v. Milde Farms, Inc., 816 S.W.2d 202 (Mo. banc 1991). In that case, defendant argued that the admitted testimony of two physicians regarding possible future events or conditions "was conjectural and speculative, and not based on reasonable certainty." Id. at 209. In upholding the admissibility of the physicians' testimony, the Court stated:

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.

Id. at 210; See also Bynote v. National Super Markets, Inc., 891 S.W.2d 117 (Mo. banc 1995).

Finally, this Court recognized the admissibility of similar testimony in Emery v. Wal-Mart Stores, Inc., 976 S.W.2d 439 (Mo. banc 1998). In Emery, defendant argued that a physician's testimony regarding plaintiff's possible need for future back surgery "was too speculative." Id. at 447. In upholding the admissibility of plaintiff's increased risk for future surgery, the Court stated:

At the outset we note it its not improper to ask an expert witness if something might, could, or would produce a certain result. An expert's view of possibility or probability is often helpful and proper.

Id (internal citations omitted). The Court also found that the physician’s testimony was “no more speculative than that in other cases where surgery is possible in the future but has not yet been recommended to the patient.” Id.

B. This Court Should Affirm the Trial Court’s Admission of Testimony Regarding Increased Risk of Future Medical Complications and Surgery and Refusal to Submit Appellant’s Withdrawal Instruction Because the Trial Court’s Actions Were Consistent With Case Law From Other Jurisdictions Throughout the Country.

In addition to Missouri, numerous other jurisdictions around the country have addressed this issue and recognize that evidence of a plaintiff’s increased risk of future injury, surgery or other medical complications is admissible. Petriello v. Kalman, 576 A.2d 474 (Conn. 1990); Anderson v. Golden, 664 N.E.2d 1137 (Ill. App. Ct. 1996); Dillon v. Evanston Hospital, 771 N.E.2d 357 (Ill. 2002); Kamp v. Preis, 774 N.E.2d 865 (Ill. App. Ct. 2002); United States v. Anderson, 669 A.2d 73 (Del. 1995); Vitt v. Ryder Truck Rentals, Inc., 340 So.2d 962 (Fla. Dist. Ct. App. 1977); White v. Westlund, 624 So.2d 1148 (Fla. Dist. Ct. App. 1993); Schwegel v. Goldberg, 228 A.2d 405 (Pa. Super. Ct. 1967); Pearson v. Bridges, 544 S.E.2d 617 (S.C. 2001); Leenders v. California Hawaiian Sugar, 139 P.2d 987 (Cal. Dist. Ct. App. 1943); Khan v. Southern Pacific Company, 282 P.2d 78 (Cal. Dist. Ct. App. 1955); Sarzynski v. Stern, 163 N.W.2d 641 (Mich. Ct. App. 1969); Cincinnati Insurance Company v. Samples, 192 S.W.3d 311 (Ky. 2006); Feist v. Sears, Roebuck & Company, 517 P.2d 675 (Or. 1973).

Illinois courts have carefully analyzed this issue and have decided in favor of the admissibility of evidence regarding increased risk of future medical complications. Illinois first recognized such evidence was properly admissible in Anderson. The court noted in that case:

Case law from other jurisdictions evinces a trend toward allowing compensation for increased risk of future injury as long as it can be shown to a reasonable degree of certainty that the defendant's wrongdoing created the increased risk. These courts have found that the increased risk is itself a present injury which should be compensable as any other present injury.

We are of the opinion that Illinois should follow this trend. Where a defendant's negligence causes a plaintiff to suffer a present injury, the plaintiff is entitled to compensation for the full extent of the injury. If a defendant's negligence places a plaintiff at greater risk of sustaining future injuries than if the negligence had not occurred, we, like the Supreme Court of Connecticut, see no legitimate reason why the plaintiff should not receive present compensation based upon the likelihood of the risk becoming a reality.

Anderson, 664 N.E.2d at 1139 (internal citations omitted).

The Illinois Supreme Court resolved an apparent split of Illinois authority on the issue of increased risk damages in Dillon. The court noted the trend toward admissibility of increased risk evidence stating:

Our review of cases from other jurisdictions indicates a trend toward allowing compensation for increased risk of future injury as long as it can be shown to a reasonable degree of certainty that the defendant's wrongdoing created the increased risk. This reasoning shows that the primary motivation of the courts for permitting damages for such an injury is fairness.

Dillon, 771 N.E.2d at 368 (internal citations omitted). The court accepted the Anderson court's approach, stating:

Like the court in Anderson, we also believe that the Connecticut court's approach to this issue better comports with this state's principle of a single recovery. An entire claim arising from a single tort cannot be divided and be the subject of several actions, regardless of whether or not the plaintiff has recovered all that he or she might have recovered. This is true even as to prospective damages. There cannot be successive actions brought for a single tort as damages in the future are suffered, but the one action must embrace prospective as well as accrued damages.

Id. at 369. In conclusion, the Dillon court held:

Accordingly, we hold simply that a plaintiff must be permitted to recover all demonstrated injuries. The burden is on the plaintiff to prove that the defendant's negligence increased the plaintiff's risk of future injuries. A plaintiff can obtain compensation for a future injury that is not reasonably certain to occur, but the compensation would reflect the low

probability of occurrence. This fits comfortably within traditional damage calculation methods. The defendant's proper remedy lies in objecting to the excessiveness of the verdict in an appropriate case.

Id. at 370 (internal citations omitted).

These points were hammered home one final time by an Illinois court of appeals in Kamp. In upholding the admissibility of expert medical testimony that the plaintiff might develop osteomyelitis in the future, the Kamp court stated:

If the defendant's negligence caused a plaintiff to suffer an injury, that plaintiff should be entitled to full compensation for that injury. If the defendant's negligence places the plaintiff at greater risk for future damages, the plaintiff is entitled to recover for those damages. To hold otherwise would mean that the plaintiff could not be made whole. [Defendant]'s argument – that future damages must be supported by testimony that the injury is at least 51% likely to occur – is not acceptable. So long as the increased risk of future injury is proven within a reasonable degree of certainty and is proximately caused by defendant's negligence, evidence of that possibility is not speculative.

Kamp, 774 N.E.2d at 871-872.

In Petriello, the Connecticut Supreme Court was called upon to determine whether a trial court erred in allowing expert testimony concerning the plaintiff's increased risk of future bowel obstruction as a result of defendant's negligence. Petriello, 576 A.2d at 480. Plaintiff's expert testified that the risk of the plaintiff suffering a future bowel obstruction

was somewhere between 8 and 16 percent. Id. at 482. In upholding the admissibility of this evidence, the court noted that the increased risk of future bowel obstruction was a present risk and injury, not a future event:

If this increased risk was more likely than not the result of the bowel resection necessitated by the defendant's actions, we conclude that there is no legitimate reason why she should not receive present compensation based upon the likelihood of the risk becoming a reality. When viewed in this manner, the plaintiff was attempting merely to establish the extent of her present injuries. She should not be burdened with proving that the occurrence of a future event is more likely than not, when it is a present risk, rather than a future event for which she claims damages.

Id. at 483. In so holding, the court emphasized that the law affords a plaintiff only one opportunity for relief:

In seeking to enforce their right to individualized compensation, plaintiffs in negligence cases are confronted by the requirements that they must claim all applicable damages in a single cause of action...Our legal system provides no opportunity for a second look at a damage award so that it may be revised with the benefit of hindsight.

Id. In conclusion, the Petriello court stated:

We hold, therefore, that in a tort action, a plaintiff who has established a breach of duty that was a substantial factor in causing a

present injury which has resulted in an increased risk of future harm is entitled to compensation to the extent that the future harm is likely to occur.

Id. at 484.

Pennsylvania reached the same conclusion in Schwegel. In that case, a four year old was hit by a car and suffered a skull fracture and a contusion on the brain. Schwegel, 228 A.2d at 408. On appeal, the defendant argued the trial court erred when it allowed plaintiff's expert neurosurgeon to testify regarding the possible future complications of plaintiff's injuries. Id. Specifically, the neurosurgeon testified plaintiff had "one chance in twenty of developing seizures at some time in the future up to 15, 20 years from now." Id. In upholding the admissibility of the neurosurgeon's testimony regarding possible future complications, the court emphasized there was "no speculation or guessing" that the possible future complications stemmed from injuries sustained in the accident caused by the defendant. Id. at 409. The court also noted the "the probability of this child's getting epileptic seizures is low and it should be weighed by the jury accordingly." Id.

Kentucky and Oregon have followed this line of reasoning and affirmed the admissibility of testimony regarding the increased risk of future medical complications. In Cincinnati Insurance Company, the Kentucky Supreme Court recently affirmed a trial court's decision to permit plaintiff's doctor to testify that 15 to 20% of his patients with injuries similar to those sustained by plaintiff would require future surgery. Cincinnati Insurance Company, 192 S.W.2d at 318 (Noting "there is always some degree of speculation with respect to a verdict awarding damages for future complications."), citing Davis v. Graviss, 672 S.W.2d 928, 932 (Ky. 1984)(overruled on other grounds).

In Feist, the Oregon Supreme Court affirmed a trial court's decision to permit medical testimony from a doctor that the minor plaintiff was at an increased risk of developing meningitis in the future due to a skull fracture admittedly caused by the defendant. Feist, 517 P.2d at 404-407, 410. Specifically, the court held:

[T]he trial court in the case did not err in receiving the testimony of Dr. Johnson relating to the susceptibility to meningitis of a child with an injury of this nature, even though meningitis was not probable, but was no more than a possibility.

Id. at 410.

C. Evidence of Increased Risk of Future Medical Complications or Injury is Admissible Because it Illustrates an Aspect of Plaintiff's Present Condition and Injuries for the Jury.

An increased risk of future medical complications as a result of a defendant's tortious conduct is, and should be considered, a present condition and injury, not a future event. Anderson, 664 N.E.2d at 1139; Petriello, 576 A.2d at 483; Vitt, 240 So.2d at 965; United States, 669 A.2d at 78. In a case such as this, a plaintiff is not attempting to prove that the future medical complications will happen, but only that the plaintiff is at an increased risk for such complications as a result of the defendant's conduct. United States, 669 A.2d at 77-78. While attempts to predict the actual manifestation of future medical complications may be speculative, the increased risk to plaintiff of those future medical complications occurring is not. The possibility or probability assigned to the increased risk of future medical complications goes to the weight of the evidence

presented, not its admissibility. Pearson, 544 S.E.2d at 620; White, 624 So.2d at 1151; Schwegel, 228 A.2d at 409. In any event, it is evidence which the jury should have in giving plaintiff's condition a dollar value. Vitt, 340 So.2d at 965.

D. Plaintiff Has Only One Opportunity to Recover from the Defendants and Should Be Fully Compensated for All of the Injuries and Damages She Has Sustained, Whether or Not Such Injuries or Damages Have Already Come to Fruition.

The primary reason for the admissibility of increased risk evidence is fairness. Dillon, 771 N.E.2d at 368. It is fundamental that a plaintiff only gets one opportunity to recover from the negligent tortfeasor who inflicts injury and causes damages. As such, logic dictates that a plaintiff should be entitled to present evidence of all injuries and damages he or she has sustained, not just those which have already manifested themselves. Id. at 369; Petriello, 576 A.2d at 483; Schwegel, 228 A.2d at 409. Permitting a defendant to permanently escape responsibility for damages it has caused is fundamentally unfair, leaves an injured plaintiff without recourse and fails to adequately deter the conduct which caused plaintiff's injuries. The court in United States v. Anderson illustrated this by way of an example:

Consider, for instance, a doctor who treats 100 patients negligently.

In the absence of negligence, none would have died, but as a result of the negligence, 15 will die. Since any given patient is more likely than not to survive, the all-or-nothing approach would allow the doctor to escape all liability for the future 15 deaths. Since the risk created by the negligence

did not rise to more than 50%, the doctor would claim that his negligence did not cause the deaths.

United States, 669 A.2d at 77.

In the jurisdictions where increased future risk evidence has been held admissible, courts have required proof to a higher degree of certainty that the increased future risk was caused by the negligent conduct of the defendant. Id. (Holding plaintiff must prove that the negligence “more probably than not” caused the plaintiff to suffer an increased risk of contracting the disease); Kamp, 774 N.E.2d at 871-872 (Holding plaintiff must prove “within a reasonable degree of certainty” that defendant’s negligence caused the increased risk of future injury); Petriello, 576 A.2d at 484 (Holding plaintiff must prove defendant’s conduct was a “substantial factor” in causing plaintiff increased risk of future harm). Such an approach eliminates any potential prejudice to the defendant.

CONCLUSION

Courts in both Missouri and other jurisdictions across the country have recognized the admissibility of evidence and testimony regarding the increased risk of future medical complications, injuries or damages. The admissibility of this evidence is necessary for a plaintiff to prove the nature and extent of her present condition and injuries. To deprive plaintiff of the opportunity to present this type of evidence to the jury in the only case she will ever be permitted to maintain against these defendants leaves the plaintiff without recourse for a portion of her injuries and violates fundamental principles of fairness. By requiring proof to a reasonable degree of medical certainty that the increased risk of future medical complications, injuries or damages was caused by the defendants’

negligent conduct, any potential prejudice to the defendants is eliminated. Accordingly, MATA respectfully requests that this Court: (1) affirm the judgment of the trial court entered in accordance with the jury's verdict; or (2) expand on its previous decisions and adopt as law in this state the legal principle that evidence of increased risk of future medical complications, injuries or damages is admissible, so long as the increased risk was caused, to a reasonable degree of certainty, by the defendants' negligent conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document and accompanying disk was sent this ____ day of October, 2006, via regular U.S. Mail, postage prepaid, to:

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