

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 BRIEF OF APPELLANT
GALE WEBB TRANSPORTATION COMPANY**

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES..... 4

JURISDICTIONAL STATEMENT 5

STATEMENT OF FACTS 6

POINTS RELIED ON 13

I. 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 13, 16

II. 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 INADMISSIBLE14, 23

III. 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 INADMISSIBLE15, 28

STANDARD OF REVIEW16

ARGUMENT16

REQUEST FOR ORAL ARGUMENT31

CERTIFICATE OF COMPLIANCE AND SERVICE32

TABLE OF AUTHORITIES

Missouri Cases

<u>Breeding v. Dodson Trailer Repair, Inc.</u> , 679 S.W.2d 281 (Mo. 1984) (en banc).....	26
<u>Bynote v. National Supermarkets, Inc.</u> , 891 S.W.2d 117 (Mo. 1995) (en banc)	26
<u>Emery v. Wal-Mart Stores, Inc.</u> , 976 S.W.2d 439 (Mo. 1998) (en banc)	26, 27
<u>Haggard v. Mid-States Metal Lines, Inc.</u> , 591 S.W.2d 71 (Mo. Ct. App. 1979)	29
<u>Hahn v. McDowell</u> , 349 S.W.2d 479 (Mo. Ct. App. 1961)	19, 20
<u>Hobbs v. Harken</u> , 969 S.W.2d 318 (Mo. Ct. App. W.D. 1998)	16, 17, 29
<u>Kramer v. May Lumber Co.</u> , 432 S.W.2d 317 (Mo. Ct. App. 1968)	17, 20, 21
<u>Nelson v. Waxman</u> , 9 S.W.3d 601 (Mo. 2000)	16
<u>Seabaugh v. Milde Farms, Inc.</u> , 816 S.W.2d 202 (Mo. 1991).....	26, 27
<u>State of Missouri ex rel. State Hwy. Comm. v. Offutt</u> , 488 S.W.2d 656 (Mo. 1972).....	21
<u>Stuart v. State Farm Mut. Auto. Ins. Co.</u> , 699 S.W.2d 450 (Mo. Ct. App. W.D. 1985)..
.....	17, 25, 26
<u>Thienes v. Harlan Fruit Co.</u> , 499 S.W.2d 223 (Mo. Ct. App. 1973).....	17

Other Authorities

MO. CONST. ART. V § 10.....	5
MO. S.CT. R. 83.03	5

JURISDICTIONAL STATEMENT

This case involves an appeal from the judgment of the Circuit Court of Jasper County, Missouri in favor of Plaintiff/Respondent Megan Swartz against Defendant/Appellant Gale Webb Transportation Company. The underlying case involved Respondent's claim against Appellant for personal injuries stemming from an automobile accident. The issues on appeal involve errors regarding the admission of evidence concerning Respondent's claims for possible future medical consequences and alleged damages related thereto.

On August 2, 2006, Appellant filed its Application for Transfer with this Court. On August 22, 2006, the Court granted Appellant's Application for Transfer. This Court therefore has jurisdiction over this appeal pursuant to Missouri Supreme Court Rule 83.03 and Art. V, § 10 of the Missouri Constitution.

STATEMENT OF FACTS

On September 20, 2000, Respondent Megan Swartz (“Respondent”) was a passenger in a 1990 Nissan 300ZX driven by Mr. Christopher Hobbs. (*See generally* Transcript (“Tr.”) 185-186; Tr. 555). At the same time, Ms. Roberta Morris approached the intersection of County Road 2225 and County Road 1090 near Monett, Missouri in a school bus she operated for Appellant Gale Webb Transportation Company (“Appellant”). (*See generally* Tr. 186-190). Respondent claimed that as Mr. Hobbs approached the intersection of County Road 2225 and County Road 1090 from the south, he was driving at an excessive speed and his vehicle struck the bus operated by Ms. Morris. (*See generally* Tr. 186-190). Mr. Hobbs then lost control of his car, which traveled off both sides of County Road 2225 before striking a tree and overturning. (*See generally* Tr. 186-190). Ms. Swartz subsequently sued Mr. Hobbs, Ms. Morris, and Appellant for personal injury in the Circuit Court of Jasper County, Missouri.¹ (Legal File (“LF”) 16-18, ¶¶ 2-5, 8-10).

The focus of this appeal is the trial court’s decision to admit Respondent’s evidence and arguments regarding her claims for possible future medical consequences and damages. Specifically, during trial Respondent raised the issue of her ability to have a child or have a child naturally given her injuries from the accident. In opening statements, Respondent’s counsel stated:

¹Respondent dismissed Ms. Morris as a defendant in the case twelve days before trial. (LF 52).

We 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). During opening statements, Respondent's counsel also introduced the issues of whether Respondent would possibly develop problems with her gastrointestinal system due to consumption of anti-inflammatory medications and whether she might possibly need future sacral lumbar fusion surgery. (*See* Tr. 210-211, lines 12-25, 1-21).

During trial, Respondent presented the testimony of two of her treating physicians via videotaped deposition regarding these three future medical issues (her ability to have a child or have a child naturally, the possible complications from taking anti-inflammatory medications, and the possibility of future back surgery). (*See* Tr. 449-450). Specifically, over Appellant's objections, the trial court allowed Respondent to present the testimony of Dr. Clyde W. Parsons, III. (*See* LF 62-63; *see also* 158-164; Tr. 448, lines 10-25). The basis for Appellant's objections to Dr. Parson's testimony was that the testimony was speculative, not given within a reasonable degree of medical certainty, and therefore inadmissible. (LF 158-164). With respect to the issue regarding Respondent's ability to have a child naturally Dr. Parsons testified:

Q. Basically the issue as to whether or not she's going to be able to have children naturally is something that's **undetermined at this point**?

A. That's correct.

(See Trial Exhibit 22, Dr. Parsons' Deposition, page 24, lines 5-8) (emphasis added). Dr. Parsons further testified:

Q. And at that point in time, Doctor, is it a fair statement that you referred [Respondent] to an OB-GYN just to question whether or not she might have problems with – with the birthing process?

A. Correct.

Q. And that doctor essentially said that there's no way for us to know –

A. Correct.

Q. -- correct?

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).

Appellant also objected to Dr. Parson's testimony regarding Respondent's potential need for future back surgery because the testimony was speculative and not given within a reasonable degree of medical certainty (*See* LF 62-63; *see also* LF 158-164). Dr. Parsons testified that if Respondent needed back surgery in the future, it would cost approximately \$25,000. (Dr. Parsons' Deposition, page 39, lines 2-9). However,

Dr. Parsons admitted that Respondent had only a “50-50” chance of needing a lumbar fusion. (Dr. Parsons’ Deposition, pages 37-38, lines 25, 1-23). Dr. Parsons testified:

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

A. Correct.

(Dr. Parsons’ Deposition, page 38-39, lines 9-16, 24-25, 1) (emphasis added). Dr.

Parsons also testified:

Q. **As to whether or not she’s going to require any future further surgical intervention, would you agree at this point that you cannot say that she will with 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.**

(Dr. Parsons' Deposition, page 41, lines 17-25) (emphasis added).

Over Appellant's written objections, the trial court also allowed Respondent to present the testimony of Dr. Charles Bret Bowling. (*See* LF 64-66, 151-157). Dr. Bowling not only testified that Respondent had only a **25-50%** chance of requiring future lumbar fusion surgery, the trial court also allowed him to testify that there is a 5% chance Respondent will develop an ulcer or gastric bleeding from taking anti-inflammatory medications because of the accident. (Trial Exhibit 25, Dr. Bowling's Deposition, pages 29-30, lines 24-25, 1-9).

At the close of evidence, Appellant proffered withdrawal instructions to the Court regarding the future medical issues raised by Respondent during the trial. (*See* LF 188-190). Specifically, Appellant offered a withdrawal instruction regarding the issue of the gastric bleeding from taking anti-inflammatory medications which stated: "The issue of adverse results from medication and anti-inflammatories, including ulcers and gastric bleeding, is withdrawn from the case and you are not to consider such issue in arriving at your verdict." (LF 188).

Appellant also offered a withdrawal instruction regarding the issue of Respondent's potential problems with the birthing process which stated: "The issue of problems with the birthing process is withdrawn from the case and you are not to consider such issue in arriving at your verdict." (LF 189).

Finally, Appellant offered the following instruction on the issue of Respondent's potential need for future surgery: "The issue of future surgery, including fusion surgery in the pelvic area, is withdrawn from the case and you are not to consider such issue in

arriving at your verdict.” (LF 190). The trial court rejected all three proffered instructions. (*See* LF 188-190).

Because the trial court allowed Respondent to present the testimony of Dr. Parsons and Dr. Bowling, Respondent’s counsel made closing arguments regarding the damages Respondent should recover for these possible future medical conditions. (*See* Tr. 627-628, lines 22-25, 1-21). Respondent’s counsel argued,

[W]e don’t know if [Respondent] is going to be able to carry a baby naturally, because of the change in her pelvic inlet. If she can’t, she’ll require a c-section. She will have to be in a hospital. She cannot be stuck somewhere else for her to have a baby full-term of a certain size.

(Tr. 609, lines 3-10).

Counsel also referenced the testimony regarding the possibility Respondent will require future back surgery. He stated, “and whether she’s going to need surgery ten years down the road, twenty years down the road where she ends up, we don’t know. She’s in the 50/50 category.” (Tr. 614, lines 8-11). Respondent’s counsel also referenced the 5% chance she faces of developing gastric bleeding. He argued in closing statements that: “yeah; she’s only got a 5% chance of taking anti-inflammatories [sic] medications and developing some gastric bleeding. That’s right, she’s got to worry about [-] **throw that on - just pile that on.**” (Tr. 628, lines 10-14) (emphasis added).

The jury eventually returned a verdict in favor of Respondent and awarded her damages of \$335,000. (*See* Tr. 700-701). Appellant subsequently filed a motion for new trial, which the trial court overruled on December 8, 2004. (*See* LF 206-312; *see also* Tr.

755, lines 3-5). Thereafter, on October 5, 2004, the Jasper County Circuit Court, Honorable Judge William C. Crawford presiding, entered judgment against Appellant jointly and severely with Defendant Christopher Hobbs in the amount of \$391,417.67. (LF 197-198).

On December 22, 2004, after the trial court overruled Appellant's Motion for New Trial, Appellant filed an appeal of the trial court's judgment to the Southern District Court of Appeals. (*See* LF 206-312, 423-424, 448). On June 26, 2006, the Court of Appeals affirmed the trial court's judgment. Although the Court of Appeals appeared to recognize the speculative nature of Dr. Parsons and Dr. Bowling's testimony, it felt constrained to affirm the judgment because of a line of cases from this Court. Appellant filed a Motion for Rehearing, or in the Alternative for Transfer, with the Court of Appeals on July 11, 2006. The Court of Appeals denied the Motion for Rehearing, or in the Alternative to Transfer on July 18, 2006, and Appellant proceeded to file an Application for Transfer with this Court on August 2, 2006. On August 22, 2006, this Court sustained the Application and accepted transfer of the case.

Defendant Christopher Hobbs also appealed the trial court's judgment, and this Court accepted transfer of that case, Appeal No. SC87890.

POINTS RELIED ON

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.

<u>Authorities</u>	<u>Page(s)</u>
<u>Hahn v. McDowell</u> , 349 S.W.2d 479 (Mo. Ct. App. 1961)	19, 20 ,21
<u>Hobbs v. Harken</u> , 969 S.W.2d 318 (Mo. Ct. App. W.D. 1998)	16, 17
<u>Kramer v. May Lumber Co.</u> , 432 S.W.2d 317 (Mo. Ct. App. 1968)	17, 20, 21
<u>Stuart v. State Farm Mut. Auto. Ins. Co.</u> , 699 S.W.2d 450 (Mo. Ct. App. W.D. 1985) ...	17

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.

<u>Authorities</u>	<u>Page(s)</u>
<u>Breeding v. Dodson Trailer Repair, Inc.</u> , 679 S.W.2d 281 (Mo. 1984) (en banc).....	26
<u>Bynote v. National Supermarkets, Inc.</u> , 891 S.W.2d 117 (Mo. 1995) (en banc)	26
<u>Emery v. Wal-Mart Stores, Inc.</u> , 976 S.W.2d 439 (Mo. 1998) (en banc)	26, 27
<u>Seabaugh v. Milde Farms, Inc.</u> , 816 S.W.2d 202 (Mo. 1991).....	26, 27

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.

<u>Authorities</u>	<u>Page(s)</u>
<u>Haggard v. Mid-States Metal Lines, Inc.</u> , 591 S.W.2d 71 (Mo. Ct. App. 1979)	29
<u>Hobbs v. Harken</u> , 969 S.W.2d 318 (Mo. Ct. App. W.D. 1998)	29

STANDARD OF REVIEW

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.

This Court should reverse the trial court's entry of judgment in favor of Respondent and remand the case for a new trial because the trial court erroneously allowed Respondent to present purely speculative testimony regarding her future ability to bear children naturally.

Under well-settled and undisputed Missouri law, evidence regarding the potential future consequences of an injury is inadmissible unless the consequences are "reasonably certain" to occur. *See Hobbs v. Harken*, 969 S.W.2d 318, 324 (Mo. Ct. App. W.D. 1998). This cornerstone of Missouri personal injury law is based on the equally settled rule that evidence introduced to a jury must "lay a foundation to enable the jury to make a fair and

reasonable” decision. Hobbs, 969 S.W.2d at 323 (internal citation omitted).

Evidence of speculative, contingent, or merely probable future medical complications may not be considered by a jury in determining a plaintiff’s damages. Stuart v. State Farm Mut. Auto. Ins. Co., 699 S.W.2d 450, 455-56 (Mo. Ct. App. W.D. 1985); *see also* Thienes v. Harlan Fruit Co., 499 S.W.2d 223, 229 (Mo. Ct. App. 1973). Specifically, it is insufficient for a doctor to testify that a future medical complication is merely possible. Hobbs, 969 S.W.2d at 324 (internal citation omitted); Kramer v. May Lumber Co., 432 S.W.2d 617, 621 (Mo. Ct. App. 1968). Instead, the doctor must testify that the complication is **reasonably certain to follow** (the “reasonably certain standard”). Hobbs, 969 S.W.2d at 324.

In this case, the trial court erred in admitting Respondent’s testimony and argument regarding her possible difficulty or inability for natural childbirth in the future because the evidence presented by her treating physician regarding this issue was purely speculative, was not given within a reasonable degree of medical certainty, and did not meet the “reasonably certain” standard. Respondent raised the issue of her ability to “carry a child to term and bear that child naturally” numerous times during trial. (*See e.g.*, Tr. 199, lines 11-21). In Respondent’s opening statement, for instance, her attorney admitted the speculative nature of Respondent’s potential future medical problems when he stated:

[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).

Respondent also presented the deposition testimony of her treating orthopedic surgeon Dr. Clyde Parsons during her case-in-chief to support her claim for future damages due to her alleged inability or difficulty to have a child naturally. (*See* Tr. 449; *See generally* Dr. Parsons' Deposition). Dr. Parsons testified, over Appellant's written objections, that:

Q. Basically the issue as to whether or not she's going to be able to have children naturally is something that's **undetermined at this point**?

A. That's correct.

(*See* LF 62-63; *see also* 158-164; Tr. 448, lines 10-25; Dr. Parsons' Deposition, page 24, lines 5-8) (emphasis added). Dr. Parsons further testified:

Q. And at that point in time, Doctor, is it fair statement that you referred [Respondent] to an OB-GYN just to question whether or not she might have problems with – with the birthing process?

A. Correct.

Q. And that doctor essentially said that there's no way for us to know –

A. Correct.

Q. -- correct?

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 14-25,1) (emphasis added). Finally, Dr. Parsons testified:

Q. And what's your understanding of the results of that examination?

A. Basically, like we talked about, there's no way to know, until she's actually pregnant, whether there – whether there will be a concern with – with those – with those fractures. And the way it was explained to me, if she has a small baby, that she might not have any trouble at all with vaginal delivery. And if – if she has a very large baby, then, you know, **whether or not she even had the accident**, she still may need to have a C-section.

So, it really, truly is all up in the air until –

(Dr. Parsons' Deposition, page 63, lines 11-23) (emphasis added).

A young lady's ability to bear children is a highly inflammatory issue. Any allusion to complications with childbirth naturally tends to weigh heavily on jurors' minds. Such evidence, if presented without a proper foundation, clearly has the potential to poison a trial. As such, Missouri's courts of appeal have held that a new trial is warranted where a plaintiff relied on speculative medical testimony regarding equally prejudicial medical complications to seek future damages. *See e.g., Hahn v. McDowell*, 349 S.W.2d 479 (Mo. Ct. App. 1961).

In Hahn, the plaintiff sought damages related to a burn he sustained in an automobile accident. *See* 349 S.W.2d at 480. Specifically, as a basis for his claim for future damages, the plaintiff elicited the testimony of two physicians who testified regarding the possibility of cancer developing inside the plaintiff's burn scar. *See Id.* at 481-82. In the end, the appellate court reversed the judgment for the plaintiff and remanded for a new trial because:

Both expert witnesses were permitted, over the objection of the defendant, to testify that there was a possibility of cancer developing in the site of the scar. Neither doctor gave it as his opinion that such development was **reasonably certain** to result, nor even that it would probably result from the injury. We think the evidence was clearly incompetent and prejudicial. Id. at 482 (emphasis added).

Similarly, in Kramer, the appellate court reversed a trial court judgment and remanded for a new trial where the plaintiff sought damages for future medical expenses related to the removal of a plate and screws from her leg and the expert testimony regarding the need for such removal was speculative. *See generally Kramer*, 432 S.W.2d 617. Specifically, the appellate court found that the evidence regarding the need to remove the plate and screws was incompetent because plaintiff's expert testified that the removal would only be necessary if the plaintiff experienced future pain related to the plate and screws. Id. at 622. The mere fact that the plaintiff had a chance of needing the removal surgery in the future was not

enough to sustain an award for future damages. Id. Thus, the evidence and arguments regarding such an award was improper.

As in Hahn and Kramer, this Court should find that Respondent's evidence and arguments regarding her difficulty for natural childbirth were improper and inadmissible. Dr. Parsons himself testified that whether Respondent will have difficulty with natural childbirth in the future is "speculation." (Dr. Parsons' Deposition, pages 55-56, lines 14-25, 1). Thus, his testimony did not meet the "reasonably certain" standard and should not have been allowed into evidence. Further, without such foundational testimony, there was no basis for Respondent's arguments for recovery of future medical expenses.

Appellant properly objected to Dr. Parsons' testimony as to whether Respondent will be able to have a child naturally. (*See* LF 62-63; *see also* Tr. 448). Specifically, Appellant filed written objections to Dr. Parsons' testimony regarding this issue on September 2, 2004. (LF 62-63). The basis for the objection to Dr. Parsons' testimony regarding this issue was that Dr. Parsons' testimony was admittedly speculative and not given within a reasonable degree of medical certainty. (*See* LF 62-63). (Because the trial court overruled Appellant's objection to Dr. Parsons' initial testimony regarding the natural childbirth issue, Appellant was not required to object to further testimony of the same type, i.e., further testimony from Dr. Parsons concerning Respondent's potential difficulty with the birthing process (testimony that should or would have been excluded but for the trial court's decision to allow Dr. Parsons' original statement into evidence). *See* State of Missouri ex rel. State Hwy. Comm. v. Offutt, 488 S.W.2d 656, 661 (Mo. 1972) (*stating* "when a party has duly objected to a certain type of evidence and the

objection has been overruled, he need not repeat the objection to further evidence of the same type.”)). The trial court overruled Appellant’s objection at trial, however, and Respondent presented the testimony to the jury in the form of Dr. Parsons’ videotaped deposition. (*See* Tr. 448-449, lines 1-25, 1-7).

Because the testimony and arguments regarding Respondent’s potential for difficulty in natural childbirth were improper, and the trial court overruled Appellant’s objections to the testimony, Appellant offered a withdrawal instruction regarding the issue. (*See* LF 189). The proffered instruction stated: “The issue of problems with the birthing process is withdrawn from the case and you are not to consider such issue in arriving at your verdict.” (LF 189). However, the trial court rejected the withdrawal instruction. (*See* LF 189).

The admission of Respondent’s evidence regarding the childbirthing issue is, without question, contrary to the well-established rule that evidence regarding the potential future consequences of an injury is inadmissible unless the potential consequences are “reasonably certain” to occur. The admission of Dr. Parsons’ testimony in this regard was therefore an abuse of the trial court’s discretion and unduly prejudiced Appellant. The trial court erred in overruling Appellant’s motion for new trial, and this Court should reverse the trial court’s judgment and remand the case for a new trial. A ruling to the contrary would eviscerate the “reasonably certain” standard and result in the potential opening of the proverbial flood gates as to the admission of evidence regarding any imaginable potential future consequence of every injury suffered by every personal injury plaintiff in Missouri.

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.

Over Appellant’s objections, Respondent presented evidence at trial that she “might” need sacral-lumbar fusion surgery because of the injuries she sustained in the accident with Mr. Hobbs. (*See Dr. Parsons’ Deposition*, pages 37-38, lines 14-25, 1; *see also* LF 62-63, 158-164; Tr. 448). Respondent also introduced evidence, over Appellant’s objections, that such surgery would cost in excess of \$25,000.00. (*Dr. Parsons’ Deposition*, page 39, lines 2-9; *see also* LF 62-63, 158-164; Tr. 448-449). Then, during closing arguments, Respondent’s counsel urged the jury to compensate Respondent for this alleged “damage.” (*See* Tr. 626, lines 14-22; *see also* Tr. 627-628, lines 22-25, 1-21). Like Respondent’s evidence and arguments regarding her inability for natural childbirth, her arguments regarding the potential need for future back surgery were improper because they were supported by purely speculative testimony that was not given within a reasonable degree of medical certainty.

Respondent relied on the testimony of both Dr. C. Bret Bowling and Dr. Parsons to support her claim for future medical damages related to the potential future fusion surgery. Specifically, Respondent asked Dr. Bowling about the potential need for sacral-

lumbar surgery and Dr. Bowling responded that there is a “25 to 50% chance that she will eventually need surgery on her lower spine.” (See Dr. Bowling’s Deposition, page 29, lines 3-9).

With respect to the possibility that Respondent will require future surgery, Dr. Parsons testified:

Q. And just basically relate it to the types of – to the anatomical structures that you cared for?

A. I guess I could say from our standpoint, I think [Respondent] probably will see an orthopedic surgeon provider periodically for the rest of her life. And she may require anti-inflammatory medications intermittently. I hope she would not be permanently on – on anti-inflammatory medications. And she **might** look at some sort of -- or be looking at some sort of surgical procedure in the future.

Q. You’re talking about 10, 20 years down the road?

A. I would hope it could be put off as long as possible, for either fusion – probably a fusion of the SI joint or depending on what her lumbar spine does, you know, some sort of procedure there. **But that probably would be speculation.**

(Dr. Parsons’ Deposition, pages 37-38, lines 14-25, 1-5) (emphasis added). Dr Parsons further testified:

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

A. Correct.

(Dr. Parsons' Deposition, page 38-39, lines 9-16, 24-25, 1) (emphasis added). Finally,

Dr. Parsons admitted:

Q. As to whether or not she's going to require any future further surgical intervention, would you agree at this point that you cannot say that she will with 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.

(Dr. Parsons' Deposition, page 41, lines 17-25) (emphasis added).

As previously stated, an expert witness can only testify as to future consequences of an injury if the consequences are reasonably certain to occur. Stuart, 699 S.W.2d at

455-56. Consequences which are contingent, speculative, or merely possible may not be considered by a jury in determining damages. Id.

In this case, the trial court allowed Respondent to offer Dr. Parsons and Dr. Bowling's speculative testimony over Appellant's written objections. (*See* LF 62-66; *see also* LF 151-164; Tr. 448-450). The trial court also refused Appellant's withdrawal instruction regarding the issue of Respondent's need for future surgery. (LF 190). The proffered instruction stated: "The issue of future surgery, including fusion surgery in the pelvic area, is withdrawn from the case and you are not to consider such issue in arriving at your verdict." (LF 190).

This Court's decisions in Breeding v. Dodson Trailer Repair, Inc., 679 S.W.2d 281 (Mo. 1984) (en banc) and its progeny (Seabaugh v. Milde Farms, Inc., 816 S.W.2d 202 (Mo. 1991) (en banc); Bynote v. National Supermarkets, Inc., 891 S.W.2d 117 (Mo. 1995) (en banc); and Emery v. Wal-Mart Stores, Inc., 976 S.W.2d 439 (Mo. 1998) (en banc) (collectively referred to as the "Supreme Court Cases")), do not support the admission of the doctors' admittedly speculative testimony. In the Supreme Court Cases, this Court allowed testimony regarding potential future treatment options for the various plaintiffs' injuries despite the fact that the potential future treatment was conditioned on the success or failure of conservative treatment for an already existing condition. *See* Breeding, 679 S.W.2d at 284; Seabaugh, 816 S.W.2d at 210-211; Bynote, 891 S.W.2d at 126; Emery, 976 S.W.2d at 446-447. In each case, the Court concluded that the conditional nature of the potential future treatment options did not render the doctors' testimony speculative or inadmissible. *See e.g.*, Seabaugh, 816 S.W.2d at 210-211. The

decisions in these cases were also based on foundational issues and evidence not present in this case. *See e.g., Seabaugh*, 816 S.W.2d at 209 (where this Court found that the defendant waived the right to object to the testimony on appeal by failing to properly preserve an objection before the appeal); *see also Emery*, 976 S.W.2d at 447 (finding that Wal-Mart’s challenge on appeal lacked 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.”)

In this case, Appellant does not contend the doctors’ testimony is speculative because it was conditional. Instead, the doctors’ testimony was speculative because the doctors specifically admitted Respondent’s possible future consequences were speculative. The Supreme Court Cases are therefore inapposite, and do not serve as an adequate basis for sustaining the trial court’s decision to admit the doctors’ testimony regarding Respondent’s potential need for future surgery.

If the holdings of the Supreme Court cases truly are to be applied such that the admittedly speculative testimony of Drs. Parson and Bowling is admissible, the “reasonably certain” standard in Missouri is, for all practical purposes, abrogated. Analysis of the doctors’ speculative testimony under the “reasonably certain” standard makes the evidence of Respondent’s potential need for future surgery inadmissible. Applying the holdings of the Supreme Court Cases to this case does not change the undisputed fact that Respondent is not “reasonably certain” to need future back surgery. The trial court nevertheless allowed the jury to consider the possible need for surgery, and its attendant costs, when deliberating. In effect, the trial court allowed the jury to

award Respondent damages for a consequence which may never occur, and is, admittedly, not reasonably certain to occur. This result unduly prejudiced Appellant and was an abuse of the trial court's discretion. This Court should therefore reverse the judgment entered in favor of Respondent and remand the case for 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.

At trial, Respondent also presented testimony and arguments regarding the risks associated with taking medications related to the injuries from her accident. (*See e.g., Dr. Bowling's Deposition*, pages 29-30, lines 24-25, 1-9). Although Appellant objected to this testimony, the trial court allowed Respondent to present Dr. Bowling's testimony regarding the issue. (*See* LF 64-65; *see also* LF 151-157). The trial court's decision to admit this evidence, and allow Respondent to submit the issue to the jury, once again constituted reversible error.

At trial, Dr. Bowling testified via his videotaped deposition that there is a **5% risk** Respondent will develop an ulcer or gastric bleeding due to her consumption of anti-inflammatory medications because of the accident. (*Dr. Bowling's Deposition*, pages 29-30, lines 24-25, 1-9). As with Respondent's evidence regarding the potential need for

future surgery or her potential difficulty for natural childbirth, her evidence regarding gastric bleeding from taking anti-inflammatory medications was inadmissible because it did not meet the “reasonably certain” standard.

As previously mentioned, evidence regarding a future medical complication from an accident is admissible if a doctor testifies that the complication is **reasonably certain** to follow from the accident. *See Hobbs*, 969 S.W.2d at 324. In this case, however, a five percent possibility does not rise to the requisite standard of “reasonable certainty.” While Respondents’ alleged damages need not be established with absolute certainty, reasonable certainty is required and the evidence must not leave the matter to speculation. *See Haggard v. Mid-States Metal Lines, Inc.*, 591 S.W.2d 71, 77 (Mo. Ct. App. 1979).

To allow the jury to deliberate and consider potential ulcers or gastric bleeding as part of Respondent’s damages is to once again allow the jury to consider future consequences that were speculative in nature and not reasonably certain to occur. If this type of evidence is admissible in spite of the “reasonably certain” standard, then there is, in effect, no barrier or standard which must be met before a jury can award damages for any potential future consequence of an injury, no matter how small the risk of that injury may be.

For example, under the trial court’s ruling, a jury could award a plaintiff damages based on the risk that the plaintiff will die as a result of taking over-the-counter pain medicine which the plaintiff has to take because of an accident. Even though the actual risk of dying from taking the pain medication may be less than 1%, the plaintiff could argue that she should recover damages based on the risk she will die. Taken to the

logical extreme, the potential list of consequences from an injury, and the potential damages a jury could award, are limitless. That is unless the “reasonably certain” standard is enforced such that a consequence must be reasonably certain to occur before a jury may take the consequence into account when considering a plaintiff’s damages.

In an attempt to correct the placement of this issue before the jury, Appellant offered a withdrawal instruction which stated: “The issue of adverse results from medication and anti-inflammatories, including ulcers and gastric bleeding, is withdrawn from the case and you are not to consider such issue in arriving at your verdict.” (LF 188). As with Appellant’s other two proffered withdrawal instructions, the trial court rejected the instruction regarding this issue. (*See* LF 188).

Appellant suffered prejudice when the trial court allowed the introduction of Dr. Bowling’s testimony regarding ulcers and gastric bleeding and allowed Respondent’s counsel to argue for the recovery of damages for these potential future consequences (*See* Tr. 627-28, lines 22-25, 1-21). Not only did Appellant suffer prejudice, but the trial court’s decision to admit this testimony and argument was contrary to Missouri law and threatens the continued viability of the “reasonably certain” standard. This Court should therefore reverse the trial court judgment in favor of Respondent and remand the matter for new trial.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument of the issues herein.

Respectfully submitted,

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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 6,241 words, excluding the cover, the Request for Oral Argument, this Certification, and the Appendix, 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 25th day of September, 2006, to:

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