Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

IN THE SUPREME COURT OF MISSOURI

---

**NO. SC96901**

---

HEATHER SHALLOW, MICHAEL BISHOP AND TODD BISHOP,

*Plaintiffs/Appellants,*

vs.

RICHARD FOLLWELL, D.O. AND RICHARD O. FOLLWELL, P.C.,

*Defendants/Respondents.*

---

Appeal from the Circuit Court of Lincoln County, Missouri
45th Judicial Circuit
Honorable Chris Kunza Mennemeyer, Circuit Judge
Case No. 13L6-CC00122

---

# APPELLANTS' SUBSTITUTE BRIEF

---

Amy Collignon Gunn, #45016MO
Anne Brockland, #59693MO
Elizabeth Washam, #68469MO
800 Market Street, Ste. 1700
St. Louis, MO 63101
agunn@simonlawpc.com
abrockland@simonlawpc.com
ewasham@simonlawpc.com
Phone: 314-241-2929
Fax: 314-241-2029

***Attorneys for Appellants***

## Table of Contents

Table of Contents ........................................................................................................ i

Table of Authorities ..................................................................................................... ii

Jurisdictional Statement ............................................................................................... 1

Statement of Facts. ....................................................................................................... 2

Points Relied On ......................................................................................................... 20

Argument ................................................................................................................... 22

I. The trial court erred in permitting all four of Respondents' retained experts, in addition to Respondent Dr. Follwell, to give the same expert opinions on multiple issues; such testimony was grossly cumulative, highly prejudicial and an abuse of the trial court's discretion.........................................................................22

II. The trial court erred in permitting Respondent Dr. Follwell to testify regarding a new opinion for the first time at trial ............................................................. 28

Conclusion. ................................................................................................................ 31

Certificate of Compliance .......................................................................................... 32



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

## Table of Authorities

**Cases**

*Adkins v. Hontz*, 337 S.W.3d 711 (Mo. App. W.D. 2011)....23

*Bailey v. Norfolk and Western Ry. Co.*, 942 S.W.2d 404 (Mo. App. E.D. 1997)......21, 28, 29, 30

*Destin v. Sears, Roebuck and Company*, 803 S.W.2d 113 (Mo. App. W.D. 1990).... 20, 22

*Grab ex rel. Grab v. Dillon*, 103 S.W.3d 228 (Mo. App. E.D. 2003) .... 20, 22

*Haskell v. Kaman Corp.*, 743 F.2d 113 (2d Cir. 1984) .... 20, 23

*Mathes v. Sher Express, LLC*, 200 S.W.3d 97 (Mo. App. W.D. 2006) .... 22

*Nolte v. Ford Motor Co.*, 458 S.W.3d 368 (Mo. App. W.D. 2014)....25, 26

*Pasalich v. Swanson*, 89 S.W.3d 555 (Mo. App. W.D. 2005).... 21, 29

*State v. McCabe*, 512 S.W.2d 442 (Mo. App. 1974) .... 20, 22

*Whitted v. Healthline Mgmt., Inc.*, 90 S.W.3d 470 (Mo. App. E.D. 2002) .... 21, 28, 30

**Statutes**

MO. REV. STAT. §477.050 .... 1

MO. SUP. CT. R. 41.03 .... 26

MO. SUP. CT. R. 56.01 .... 29

MO. SUP. CT. R. 83.04 .... 1

**Other Authorities**

Article V, Section 3 of the Missouri Constitution.... 1

Article V, Section 9 of the Missouri Constitution.... 1

22 Mo. Prac., Missouri Evidence § 101:1 (4th ed.) .... 26

Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

## Jurisdictional Statement

This action is a wrongful death case that was tried by a jury from September 28, 2015 through October 2, 2015 in front of Judge Chris Kunza Mennemeyer in the Forty-Fifth Judicial Circuit of Lincoln County, Missouri.

This appeal comes from the trial court's denial of Appellants' motion and objections to Respondents' presentation of cumulative evidence and the trial court's decision to allow Respondent Dr. Follwell to testify to his new opinion regarding causation. The trial court entered judgment in favor of Respondents on October 2, 2015 and denied Appellants' Motion for a New Trial on December 9, 2015.

Appellants filed a timely notice of appeal on December 21, 2015. On October 17, 2017, the Court of Appeals, Eastern District, issued an opinion reversing and remanding the trial court. Mo. Const. Art. V, § 3; Section 477.050.

This Court ordered transfer on March 6, 2018 after Respondent's application. Mo. Const. Art. V, § 9; Rule 83.04.

Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

## Statement of Facts

On the morning of November 30, 2012, Saundra Beaver ("Decedent") underwent a laparoscopic reduction and repair of her incarcerated ventral hernias ("the subject hernia surgery") at Lincoln County Medical Center ("Lincoln Medical") performed by Richard Follwell, D.O. ("Respondent Dr. Follwell"). Legal File ("L.F.") 80; Trial Tr. vol. 4, 591:19–20. At that time, Respondent Dr. Follwell was a general and bariatric surgeon. Trial Tr. vol. 5, 660:21. Decedent was discharged the same day as the subject hernia surgery around 12:30 P.M., but began complaining of abdominal pain six hours later. Trial Tr. vol. 4, 592:11–14, 593:6–8. Decedent's daughter, Heather Shallow, called Respondent Dr. Follwell to report Decedent's worsening condition and Respondent Dr. Follwell instructed Decedent to increase her pain medication and ice her abdomen. Trial Tr. vol. 4, 593:15–594:5. Despite following said order, Decedent's severe pain persisted and she returned to Lincoln Medical that evening around 9:00 P.M. Trial Tr. vol. 4, 593:15–594:5. Decedent was finally admitted to the hospital around 2:30 A.M. and given Demerol to reduce her pain. Trial Tr. vol. 3, 409:21–410:7; vol. 4, 594:6–16. Despite receiving more pain medication at 4:30 A.M. and 8:10 A.M., Decedent's severe pain continued. Trial Tr. vol. 3, 416:2–417:7.

On the morning of December 1, 2012, the day after the subject hernia surgery, Respondent Dr. Follwell visited Decedent at Lincoln Medical and determined that the plan was to continue pain control and hopefully discharge her later that day. Trial Tr. vol. 3, 417:12–14, 422:19–423:3. By 11:40 A.M., Decedent's pain was still severe and she was given yet another dose of Demerol. Trial Tr. vol. 3, 426:24–427:10. Despite her

Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

pain persisting more than 24 hours after the subject hernia surgery and decreased appetite, Decedent was simply given more pain medications and discharged home by Respondent Dr. Follwell. Trial Tr. vol. 3, 427:11–430:4.

On December 2, 2012, while at home, Decedent became unresponsive and Ms. Shallow called an ambulance to take her mother back to Lincoln Medical. Trial Tr. vol. 4, 598:3–599:23. Decedent's condition was so grave that she was transferred to St. Joseph Hospital West. L.F. 80; Trial Tr. vol. 4, 599:24–600:11. At St. Joseph Hospital West, Decedent was diagnosed with septic shock and a wound infection. L.F. 80. A CT scan performed on Decedent showed a small bowel perforation, and on December 3, 2012, she underwent a diagnostic laparoscopy, an exploratory laparotomy with partial small bowel resection, removal of infected mesh and wound VAC closure. L.F. 80. It was determined that her septic shock was caused by the bowel perforation. L.F. 80.

Between December 3, 2012 and Decedent's death on July 5, 2013, she had multiple abdominal treatments and surgeries including, but not limited to, several exploratory and re-exploratory laparotomies, a recurrent ventral hernia repair, oversewing of her small bowel ischemic injury, an abdominal washout and small bowel resection and an abdominal wall reconstruction closure. L.F. 81. Throughout this time, Decedent remained on an IV TPN and stayed at Rancho Nursing Home and Select Specialty Hospital until she ultimately succumbed to her injuries on July 5, 2013. L.F. 81.

**Procedural History**

On October 7, 2013, Decedent's three adult children, Heather Shallow, Todd Beaver and Michael Beaver ("Appellants"), brought suit against Respondent Dr. Follwell

Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

and his practice Richard O. Follwell, P.C. ("Respondents") as well as Lincoln Medical for the wrongful death of their mother. L.F. 77–79. Appellants later dismissed Lincoln Medical without prejudice. L.F. 49. Appellants alleged that Respondents acted negligently by perforating Decedent's bowel during the subject surgery, failing to recognize and treat the bowel perforation and ultimately delaying her diagnosis and treatment, which led to her extensive additional surgeries and eventual death. L.F. 81–85.

A five-day jury trial was held in Lincoln County from September 28, 2015 through October 2, 2015. Trial Tr. vol. 1, 1. Prior to trial, Appellants filed a Motion to Exclude Cumulative Testimony of Respondents' experts Dr. Gregory Brabbee, Dr. Morton Rinder and Dr. Thomas Naslund who all had the same opinions regarding causation. L.F. 45. In denying Appellants' Motion, the trial court stated that it would allow these experts to all testify as to causation as long as the proper foundation was laid. Trial Tr. vol. 2, 324:4–16, 325:17–326:7, 326:17–21. Judge Mennemeyer ruled:

> I didn't find anything to the contrary that said they could not do that. [...] I have to hear what they know or what they did or how they have an opinion in this case, and assuming all of that happens, **then just because there are several in number does not mean they would not be able to give their testimony.**

Trial Tr. vol. 2, 324:23–24, 325:3–6 (emphasis added).

***Appellants' Theory***

During the trial, Appellants' theory of the case was straightforward: during Decedent's hernia repair surgery on November 30, 2012, Respondent Dr. Follwell nicked her bowel causing a 0.2 centimeter hole to be formed ("subject bowel perforation"). Trial

Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

Tr. vol. 2, 293:17–25. Dr. Follwell ignored the signs and symptoms of the subject bowel perforation on December 1, 2012, which allowed 14 milliliters of liquid in the bowel to leak into Decedent's abdominal space. Trial Tr. vol. 2, 291:4–296:1. This leakage led to an infection, which caused Decedent to go into septic shock, multi-organ failure and eventual death. Trial Tr. vol. 2, 281:4–301:18.

To support this theory, Appellants brought one retained expert: Dr. Garry Ruben, a physician specializing in vascular and general surgeries. Trial Tr. vol. 3, 358:5–12. Dr. Ruben testified that in his expert medical opinion, Decedent's injuries and death were due to complications in the delay of her operation to fix the subject bowel perforation. Trial Tr. vol. 3, 434:25–435:8. Thus, Respondent Dr. Follwell fell below the standard of care by failing to take any measures, like minimally invasive procedures such as a CT scan, to treat Decedent within an appropriate time frame when Decedent returned to the hospital with signs and symptoms of a bowel perforation on November 30, 2012. Trial Tr. vol. 3, 430:11–433:14, 436:10–437:24. Had Respondent Dr. Follwell done so, Decedent's bowel perforation could have been corrected sooner and she likely would have recovered fully. Trial Tr. vol. 3, 436:24–437:7.

Dr. Mark Liebold, Decedent's subsequent surgeon at St. Joseph's Hospital West, also testified as a non-retained expert by video deposition, which took place on December 3, 2012. Trial Tr. vol. 4, 631:5–8. He testified that when he first saw her on December 3, 2012, he "was worried about a missed bowel injury." Trial Tr. vol. 4, 631:5–8; Liebold Dep. 16:3-4, Dec. 3, 2012. He also testified that the bowel perforation was located

"adjacent to the mesh" that was implanted during the subject hernia surgery. Trial Tr. vol. 4, 631:5–8; Liebold Dep. 45:1-10, Dec. 3, 2012.

In sum, Appellants' theory of negligence was that the bowel perforation occurred during the subject hernia surgery, the bowel perforation went undetected due to the negligence of Respondent Dr. Follwell and his negligence caused or contributed to cause Decedent's death.

***Respondents' Theory***

Respondents' theory is that Respondent Dr. Follwell did not fall below the standard of care, in part, because Decedent's bowel was *not* perforated during the subject hernia surgery. Trial Tr. vol. 3, 313:8–317:20. Respondents opine that Decedent's bowel did not perforate until *after* she was discharged from Lincoln Medical by Respondent Dr. Follwell on December 1, 2012. Trial Tr. vol. 3, 313:8–317:20. Instead, Respondents claim that Decedent's bowel perforation that was directly adjacent to where the mesh was placed during the subject hernia surgery actually occurred on the morning of December 2, 2012 due to a previously unknown, undiagnosed heart condition, atrial fibrillation, causing a clot to develop in her heart and travel through her aorta as an embolus to her superior mesenteric artery and its distal branches. Trial Tr. vol. 3, 318:3–18. This embolus then caused a "showering of clots" and intestinal and segmental intestinal ischemia, which led to bowel death at the exact site where Dr. Follwell had operated and where the perforation in her bowel was found by Dr. Liebold. Trial Tr. vol. 3, 318:19–321:19. Thus, according to Respondents, there was nothing Dr. Follwell could have done that would have changed Decedent's outcome. Trial Tr. vol. 3, 321:15–9.



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

Respondents brought in four retained expert witnesses to testify live, in addition to Respondent Dr. Follwell who provided expert testimony on his own behalf, regarding the cause of Decedent's injuries and the standard of care: Dr. Grant Bochicchio (a critical care surgeon), Dr. Rinder (a cardiologist), Dr. Naslund (a vascular surgeon) and Dr. Brabbee (a colorectal surgeon). Trial Tr. vol. 5, 660; vol. 6, 851; vol. 7, 967; vol. 8, 1096; vol. 9, 1223. Despite the experts' different backgrounds, they all gave the same opinions on multiple topics, such as:

(1) There was no indication of a bowel injury following Decedent's initial surgery:

(a) Dr. Follwell: "Yes, I do have an opinion and I do not believe that there was a perforation at the time I finished the surgery." Trial Tr. vol. 5, 703:5–6.

(b) Dr. Bochicchio: "Yeah. My opinion is that the patient did not have a perforation at the time of the end of surgery." Trial Tr. vol. 6, 888:12–13.

(c) Dr. Naslund:

Q; Doctor, anything to indicate that there was any injury interoperatively [sic] that occurred [during Decedent's initial surgery]?

A: None.

Trial Tr. vol. 8, 1114:18–20.

(d) Dr. Brabbee:

Q: Do you have an opinion as to whether or to a reasonable degree of medical certainty if it's possible that her bowel was perforated at any time during the surgery performed by Dr. Follwell?

A: I don't believe that it was perforated at the time by Dr. Follwell, no.

Trial Tr. vol. 9, 1271:2–7.

(2) Decedent did not show signs and symptoms of a slow bowel leak as of 3:00 P.M. on November 30, 2012 as posited by Dr. Ruben:

(a) Dr. Follwell:

Q: Doctor, in a patient such as Dr. Ruben described who might have had a bowel perforation by 3:00 in the afternoon, would you have expected these kinds of vital signs?

A: No. [...]

Q: Dr. Ruben also said that, eh, she might have had a slow leak. Do you agree with that, if that were true, that would have these vital signs if the patient had a slow leak?

A: No.

Trial Tr. vol. 5, 729:25–730:12.

(b) Dr. Bochicchio:

Q: We have had testimony in this case from Dr. Ruben, that she had a frank perforation of her bowel by 3:00 on the afternoon of Friday, November 30th [...] and that she had that bowel perforation when she presented to the hospital at 9:35 that night. Do you have an opinion as to whether that is correct?

A: I would say I would disagree with that opinion [...] Because at that time, there was no signs and symptoms that were diagnostic of a perforation.

Trial Tr. vol. 6, 896:10–23.

(c) Dr. Naslund:

Q: Doctor, do you have an opinion, [...] that she had a frank perforation of her bowel as of 3:00 earlier that afternoon. [...] Do you have an opinion as to whether or not that would be consistent, her presentation would have been consistent with a bowel perforation, a frank perforation that had existed since 3:00 that afternoon?

A: It was not consistent with that.



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

Trial Tr. vol. 8, 1119:3–11.

(d) Dr. Brabbee:

Q: Doctor, the opinion of the plaintiffs' expert in this case, Dr. Ruben, is that around 3:00 on Friday afternoon Ms. Beaver had a manifest perforation through her bowel that had been made by scissors during the operative procedure and that fecal contents were spilling into the bowel. Do you have an opinion whether that is reasonable given her presentation at the hospital that night?

A: I think that's most unlikely. [...] The vital signs were really not impressive.

Trial Tr. vol. 9, 1245:19–7.

(3) Decedent did not show signs and symptoms of a slow bowel leak when she was discharged at 2:00 P.M. on December 1, 2012:

(a) Dr. Follwell [answering over the objection of Appellants]:

Q: Do you have an opinion, Doctor, to a reasonable degree of medical certainty as to whether or not she had a bowel perforation as she was discharged? [...]

A: Yes. [...] That it was not perforated.

Trial Tr. vol. 5, 772:20–779:4.

(b) Dr. Bochicchio: "In my opinion, she did not have a frank perforation at the time of discharge [at 2:00 on that Saturday afternoon]." Trial Tr. vol. 6, 913:8–9.

(c) Dr. Naslund:

Q: Have you also got opinions as to whether or not full thickness perforation of her small bowel was identified at Dr. Leibold's operation was present at any time before discharge from Lincoln County Medical Center on December 1st of 2012?

A: I've determined it was not.



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

Trial Tr. vol. 8, 1109:19–24.

(d) Dr. Brabbee: I don't believe she had any sort of perforation at the time of discharge [at 2:00 that Saturday afternoon], no. Trial Tr. vol. 9, 1259:15–16.

(4) A CT/CAT scan was not necessary to detect whether Decedent had a bowel perforation prior to December 3, 2012, as posited by Dr. Ruben:

(a) Dr. Follwell:

Q: Doctor, Dr. Ruben has told us that he believes you should have performed a CT Scan of Ms. Beaver. Do you agree?"

A: I do not.

Trial Tr. vol. 5, 759:22–25.

(b) Dr. Bochicchio: "All it's [CT or CAT scan] going to do is, quite honestly, waste money, give the patient unnecessary radiation and drive up the cost. So in this specific instance, doing a CAT scan was not the right issue. […] I would not get a CAT scan." Trial Tr. vol. 6, 909:5–12.

(c) Dr. Naslund [answering over the objection of Appellants]:

Q: Doctor, it's been suggested that Dr. Follwell should have done a CT examination on December 1st. Do you agree?

A: Well, I disagree. I don't think it should have been done. […] The CT scan is not going to show you anything. It's too early.

Trial Tr. vol. 8, 1124:13–1127:22.

(d) Dr. Brabbee: "Number one, I don't see any indication to do a CAT Scan. […] But more importantly, I think a CAT Scan might have been misleading because when you do a CAT scan at this time frame, postoperatively, you're liable to see things which could be quite confusing." Trial Tr. vol. 9, 1256:12–19.



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

(5) Dr. Leibold, Decedent's subsequent treating surgeon, was incorrect when he stated that the likely cause of Decedent's ischemic and necrotic bowel might have been hypoperfusion:

(a) Dr. Follwell:

Q: Dr. Leibold in his testimony indicated that he thought a likely cause of her ischemic and necrotic bowel might be hypoperfusion. Do you agree with him?

A: I do not.

Trial Tr. vol. 6, 795:19–22.

(b) Dr. Bochicchio:

Q: The surgeon who performed that surgery on Monday, December 3rd. You've read his opinion about how he felt it likely that it was a hypoperfusion that may have caused what he found. Do you agree with that, and if not, why not?

A: Well, again, if you think of hypoperfusion, that would mean – I know I keep using the hose situation because that's what makes sense to me. If I were to turn the throttle down up here, the main hose or the blood supply that's flowing here, it's going to affect everything. It's not going to just affect you know, these skipped segments. So it's either a flow or no flow. So if you think of hypoperfusion, it's basically just turning them out on your hose down [sic] and it affects everything. It doesn't selectively choose what's going to do well for and choose what it's not.

Trial Tr. vol. 6, 919:18–920:9.

(c) Dr. Rinder:

Q: As you know, the plaintiffs' theory in this case is that she had a perforation that was a result of the laparoscopic ventral hernia repair on Friday, that manifested before she left the hospital on Saturday at about 2:00, and that the perforation then caused her sepsis, and that ultimately caused a hypoperfusion, resulting in the ischemic bowel identified by Dr. Leibold [...] Do you agree with that?

A: No, I don't [...] I think based on the report from the operating room, the fact that this is more of a segmental picture rather than the entire infarcted segment being gone, doesn't suggest that it is a hypoperfusion state that caused the dead gut.

Trial Tr. vol. 7, 1035:17–1036:24.

(d) Dr. Naslund:

Q: Doctor, do you understand that the plaintiffs' case is that she had a perforation, followed by sepsis, followed by hypoperfusion as a result of low blood pressure, followed by ischemic. You understand that to be the sequence that they contend occurred here?

A: I understand their contention. That is physiologically inaccurate.

Trial Tr. vol. 8, 1142:5–12.

(e) Dr. Brabbee:

Q: We've heard from Dr. Liebold in this case. His deposition was given. You've read his deposition where he indicated what his opinion of the possible cause of her bowel necrosis was. Do you agree with his opinion?

A: No, I don't agree with his opinion and, again, I don't know that he can explain the findings that he found based on how he hypothesized it occurred.

Trial Tr. vol. 9, 1271:13–19.

(6) The cause of Decedent's dead or necrotic bowel was a vascular injury, specifically due to atrial fibrillation (which she had never been diagnosed with was found nowhere in her previous medical records prior to becoming septic), instead of a bowel perforation caused by surgery as opined by Appellants:

(a) Dr. Follwell [answering over the objection of Appellants]:



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

Q: Doctor, do you have an opinion as to whether or not Ms. Beaver's ischemia was due to low blood pressure or sepsis from low blood pressure, or whether it was due to something? […]

A: Yes, I have an opinion. […] That it was a vascular injury.

Trial Tr. vol. 5, 785:7–789:14.

(b) Dr. Bochicchio [explaining Decedent's heart blockages]:

Q: Doctor, those blockages would be due from what? […]

A: It could be a variety. It could be ready to, you know, if atrial fibrillation where you throw clots from the heart, the heart throws it down the aorta, small pieces can flick off.

Trial Tr. vol. 6, 916:18–918:18.

(c) Dr. Rinder:

Q: Doctor, […] did you reach an opinion as to what the cause of this embolic event in Ms. Beaver may have been?

A: So my opinion is that she had atrial fibrillation that that was unrecognized prior to this. She subsequently had atrial fibrillation in the hospital. […] The clot was sitting in her left atrial appendage, and at the right moment it broke off and went to her gut.

Trial Tr. vol. 7, 988:3–16. *See also* Trial Tr. vol. 7. 991:22–992:1, 1023:19–1024:9, 1024:19–1025:3.

(d) Dr. Naslund:

Q: Doctor, do you have an opinion as to what the cause of that embolic even may have been?

A: Yes, I do. […] Superior mesenteric artery embolus.

Q: Do you have an opinion as to the source of that embolus?

A: I do. […] Atrial fibrillation. […]



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

Q: Do you agree or disagree with Dr. Rinder's opinion about that?

A: I agree.

Trial Tr. vol. 8, 1134:13–1135:4.

(e) Dr. Brabbee:

A: I think it's reasonable to assume that it's [the ischemic bowel] due to an embolic phenomenon. Basically what I think I've mentioned before is that it's an interruption of the blood flow to the bowel in some way or form. [...]

Q: And is there a recognized source, if you will, for embolic events within the superior mesenteric artery when you find mesentery ischemia that is a known source?

A: Well, one of the main sources is from the heart, from atrial fibrillation.

Trial Tr. vol. 9, 1266:9–1268:5.

(7) Dr. Follwell did not breach the standard of care:

(a) Dr. Follwell: "I did not breach the standard of care." Trial Tr. vol. 6, 796:20.

(b) Dr. Bochicchio: "Yes. My opinion, he [Dr. Follwell] truly met the standard of care." Trial Tr. vol. 913:18–19.

(c) Dr. Naslund:

Q: And your opinion as to whether or not Dr. Follwell has complied with the standard of care in his treatment and management of Ms. Beaver is what?

A: Yes, that he complied. [...]

Q: Do you have an opinion as to whether or not he complied, and I think you've touched on this, with the standard of care at all times in his care and treatment of her from the operation on November 30th of 2012,until the time of discharged on that Saturday at 2:00?



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

A: Yes, I believe he did comply.

Trial Tr. vol. 8, 1110:4–7, 1131:19–24.

(d) Dr. Brabbee:

Q: Do you have an opinion as to whether or not in Dr. Follwell's performance of the surgical procedure on November 30th of 2012, he complied with the standard of care?

A: I believe he did, yes.

Trial Tr. vol. 9, 1241:3–6.

Given the length of some Respondents' experts' testimony and the word limit for this brief, the following chart more accurately pinpoints the repetitive testimony:

| OPINIONS | Dr. Follwell | Dr. Bochicchio | Dr. Rinder | Dr. Naslund | Dr. Brabbee |
|---|---|---|---|---|---|
| There was no indication that there a subtle injury to Ms. Beaver's bowel. | 702:8–10 | 867:21–868:4; 920:10–16 | | 1109:19–24 | 1237:6–17; 1271:8–12 |
| There was no perforation in Ms. Beaver's bowel at the conclusion of her surgery. | 703:2–6 | 867:21–868:4; 888:8–13 | 1035:20–038:6 | 1114:18–23 | 1239:15–20; 1271:2–7 |
| Ms. Beaver's symptoms did not show a slow leak as of 3:00 PM on that Friday. | 728:16–730:4 | 896:11–897:2 | 1035:20–038:6 | 1119:3–11 | 1252:20–25 |
| There was no indication in her vital signs for 12 hours that Ms. Beaver had a bowel perforation. | 746:22–25 | 905:19–23 | | 1122:24–123:3 | 1245:19–247:11 |
| There was no bowel perforation | 769:20–770:6 | 867:21–868:4; | 1035:20–038:6 | 1131:25–132:10 | 1259:6–16 |



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

| as of 2:00 PM Saturday. | | 913:1–9 | | | |
|---|---|---|---|---|---|
| Ms. Beaver's condition had improved after first ER visit. | 770:17–24 | 909:21–910:9 | | 1129:12–130:6 | 1253:6–15; 1257:18–258:2 |
| This was a vascular injury that caused the dead bowel/necrotic bowel. | 789:15–22 | 918:12–21 | 988:3–16; 991:22–992:1; 1023:19–025:3 | 1110:8–14; 1134:13–22; 1161:23–162:22 | 1266:4–14; 1268:1–5 |
| Dr. Leibold is incorrect that the likely cause of Ms. Beaver's ischemic and necrotic bowel might be hypoperfusion. | 795:19–22 | 919:18–920:9 | 1035:20–036:24; 1037:22-038:6 | 1142:5–143:16; 1144:5–9 | 1271:13–19 |
| Dr. Follwell did not breach the standard of care. | 796:15–20 | 913:14–23 | | 1110:4–7; 1131:19–24 | 1241:3–6; 1272:6–9 |

These testimonies and more came into evidence because the trial court overruled all of Appellants' objections to their cumulative nature. Trial Tr. vol. 2, 323:21–326:21; vol. 7, 962:15–963:21; vol. 8, 1124:23–1235:22, 1200:9–1205:9; vol. 9, 1254:2–1255:20. First, in overruling Appellants' Motion to Exclude, the trial court stated:

> [J]ust because there are several [experts] in number does not mean they would not be able to give their testimony [...] Now again, I'll agree if it were something as simple as, this is made of wood. We don't need 10 people to say this is made of wood, but that's not the case in a case like this.

Trial Tr. vol. 2, 325:5–326:2.

Appellants then renewed their objection following the testimony of Dr. Follwell and Dr. Bochicchio, explaining that the previous witnesses had already testified to



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

standard of care and causation and that it was expected that Dr. Rinder would also testify to causation and Dr. Naslund to both standard of care and causation. Trial Tr. vol. 7, 962:14–963:4. Judge Mennemeyer was initially inclined to agree and cautioned Respondents to use discretion when describing topics that had already been covered, but then informed Appellants "you'll just have to make the objection at that time and the Court will be aware of that, as well." Trial Tr. vol. 7, 963:5–21.

Following the instructions of the trial court, Appellants renewed their objection again as to cumulative evidence during Dr. Naslund's direct examination where, for the third time, Respondents tried to elicit testimony regarding the necessity of the CT/CAT scan that Appellants expert had testified the standard of care required. Trial Tr. vol. 8, 1124:23–1126:3. Despite its cumulative nature, Dr. Naslund was permitted to give a long answer on why a clinician would not order a CT scan, as Appellants' expert had opined, and as Drs. Follwell and Bocchichio had already testified. Trial Tr. vol. 8, 1126:19–1128:6.

Next, immediately before Respondents' fifth witness and fourth paid expert, Dr. Brabbee's, direct examination, Appellants renewed their Motion to Exclude Cumulative Evidence again stating that at this point, the jury had heard four separate experts testify about the same issues four different times. Trial Tr. vol. 8, 1200:9–17. Respondents stated that, regarding standard of care, he "didn't need to beat that horse to death" with Dr. Brabbee and that it would be a "quick touch." Trial Tr. vol. 8, 1203:8–1204:1. In overruling Appellants for a fourth time, Judge Mennemeyer stated:

I mean, any extra testimony is always cumulative, but it's not cumulative to the point that it should be excluded. [...] So then for the record, the motion to exclude the testimony of Dr. Brabbee as cumulative will be denied for reasons stated.

Trial Tr. vol. 8, 1204:2–10, 1205:7–9. Appellants objected a fifth time to the cumulative nature of Dr. Brabbee's testimony during his direct examination regarding the significance of Decedent's white blood cell count and the standard of care, yet Appellants were overruled for a fifth time with the trial court merely warning Respondents to speed it up. Trial Tr. vol. 9, 1254:2–1255:22.

During his direct examination, Respondent Dr. Follwell also testified regarding a new expert opinion on causation over the objection of Appellants. Trial Tr. vol. 5, 785:7–789:14. During his deposition taken before trial, Respondent Dr. Follwell was specifically asked, "What caused the ischemia?" to which he answered, "I don't know." Trial Tr. vol. 6, 785:18–20.

Despite this testimony, during his direct examination at trial, Respondents asked Dr. Follwell if he had an opinion as to whether Decedent's ischemia was due to low blood pressure or sepsis from low blood pressure or "something else." Trial Tr. vol. 6, 785:7–10. The trial court asked Respondents to rephrase their question, but Respondents ultimately still asked and elicited an answer regarding the specific causation of Decedent's injuries: "Do you have an opinion whether or not dead bowel, necrotic bowel, such as Dr. Leibold found, could occur as a result of anything other than a vascular injury in this patient?" Trial Tr. vol. 5, 789:1–4. Appellants objected twice to Dr. Follwell being permitted to answer, and were overruled both times, allowing Dr. Follwell to state



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

that it was his opinion that Decedent's injuries were the result of a vascular injury and provide an explanation for this new opinion. Trial Tr. vol. 6, 789:5–22.

Following the trial, the jury returned a verdict for Respondents. Trial Tr. vol. 9, 1375. The trial court entered judgment in favor of Respondents. L.F. 41–42. On December 9, 2015, the trial court denied Appellants' Motion for a New Trial. L.F. 28. This appeal followed.



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

## Points Relied On

I. **The trial court erred in permitting all four of Respondents' retained experts, in addition to Respondent Dr. Follwell, to give the same expert opinions on multiple issues; such testimony was grossly cumulative, highly prejudicial and an abuse of the trial court's discretion.**

*Grab ex rel. Grab v. Dillon*, 103 S.W.3d 228 (Mo. App. E.D. 2003)

*Destin v. Sears, Roebuck and Company*, 803 S.W.2d 113 (Mo. App. W.D. 1990)

*Haskell v. Kaman Corp.*, 743 F.2d 113 (2d Cir. 1984)

*State v. McCabe*, 512 S.W.2d 442 (Mo. App. 1974)



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

## Points Relied On

**II. The trial court erred in permitting Respondent Dr. Follwell to testify regarding a new opinion for the first time at trial.**

*Bailey v. Norfolk and Western Ry. Co.*, 942 S.W.2d 404 (Mo. App. E.D. 1997)

*Pasalich v. Swanson*, 89 S.W.3d 555 (Mo. App. W.D. 2005)

*Whitted v. Healthline Mgmt., Inc.*, 90 S.W.3d 470 (Mo. App. E.D. 2002)



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

## Argument

**I. The trial court erred in permitting all four of Respondents' retained experts, in addition to Respondent Dr. Follwell, to give the same expert opinions on multiple issues; such testimony was grossly cumulative, highly prejudicial and an abuse of the trial court's discretion.**

***A. Respondents' Expert Testimony Should Have Been Excluded As Cumulative.***

"It is typically considered proper to exclude cumulative evidence." *Grab ex rel. Grab v. Dillon*, 103 S.W.3d 228 (Mo. App. E.D. 2003). "Cumulative evidence is additional evidence of the same kind tending to prove the same point as other evidence already given." *State v. McCabe*, 512 S.W.2d 442, 444 (Mo. App. 1974). Appellate review of a trial court's decision to admit or exclude cumulative evidence is for an abuse of discretion. *Mathes v. Sher Express, LLC*, 200 S.W.3d 97, 112 (Mo. App. W.D. 2006). "An appellate court will not interfere with that discretion unless it appears that such discretion has been abused." *Destin v. Sears, Roebuck and Company*, 803 S.w.2d 113, 116 (Mo. App. 1990).

The danger of cumulative evidence is also highlighted by its inclusion in the definition for legal relevance. Evidence must be both logically and legally relevant. *Nolte v. Ford Motor Co.*, 458 S.W.3d 368, 382 (Mo. App. W.D. 2014). "Legal relevance [...] is a determination of the balance between the probative and prejudicial effect of the evidence" which "requires the trial court to weigh the probative value, or usefulness, of the evidence against its costs, specifically the dangers of unfair prejudice, confusion of the issues, undue delay, misleading the jury, waste of time, or *needless presentation of*



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

*cumulative evidence.*" *Id.* (internal quotations omitted) (emphasis added). "If the cost outweighs the usefulness, the evidence is not legally relevant *and should be excluded.*" *Id.* (quoting *Adkins v. Hontz*, 337 S.W.3d 711, 720 (Mo. App. W.D. 2011) (emphasis added).

Appellants assert that the trial court abused its discretion in permitting four, sometimes five medical experts to testify to the same standard of care and causation opinions. These were not fact witnesses testifying to what they knew or personally observed. These were four paid experts plus the Respondent himself positing the same theory to a jury of laypeople. Such cumulative evidence was overkill, exceeded a reasonable approach to medical expert testimony and created an undue advantage for Respondents that was highly prejudicial to Appellants. *See Haskell v. Kaman Corp.*, 743 F.2d 113, 122 (2d Cir. 1984) ("the strongest jury instructions could not have dulled the impact of a parade of witnesses").

Over Appellants' motion to exclude and multiple objections, the trial court permitted Drs. Follwell, Bochicchio, Rinder, Naslund and Brabbee to provide repetitious testimony supporting their theory that a previously undiagnosed heart condition, specifically atrial fibrillation, caused Decedent's bowel perforation and subsequent death instead of the subject surgery causing her bowel perforation and subsequent death. Trial Tr. vol. 2, 323:21–326:21; vol. 6, 962:15–963:21; vol. 8, 1124:23–1235:22, 1200:9–1205:9; vol. 9, 1254:2–1255:20. Thus, by the time Respondents called their last witness, Dr. Brabbee, the jury had already heard the same testimony three to four times. Some of the most significant examples include:



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

(1) Drs. Follwell, Bochicchio, Naslund, and Brabbee all testified that there was no indication of a bowel injury following Decedent's initial surgery. Trial Tr. vol. 5, 703:5–6; vol. 6, 888:12–13; vol. 8, 1114:18–20; vol. 9, 1271:2–7;

(2) Drs. Follwell, Bochicchio, Naslund, and Brabbee all testified that Decedent did not show signs and symptoms of a slow bowel leak as of 3:00 P.M. on November 30, 2012 as posited by Appellants' expert Dr. Ruben. Trial Tr. vol. 5, 729:25–730:12; vol. 6, 896:10–23; vol. 8, 1119:3–11; vol. 9, 1245:19–7;

(3) Drs. Follwell, Bochicchio, Naslund, and Brabbee all testified that Decedent did not show signs and symptoms of a slow bowel leak when she was discharged at 2:00 P.M. on December 1, 2012. Trial Tr. vol. 5, 772:20–779:4; vol. 6, 913:8–9; vol. 8; 1109:19–24; vol. 9, 1259:15–16;

(4) Drs. Follwell, Bochicchio, Naslund, and Brabbee all testified that a CT/CAT scan was not necessary to detect whether Decedent had a bowel perforation prior to December 3, 2012, as posited by Dr. Ruben. Trial Tr. vol. 5, 759:22–25; vol. 6, 909:5–12; vol. 8, 1124:13–1127:22; vol. 9, 1256:12–19;

(5) Drs. Follwell, Bochicchio, Rinder, Naslund, and Brabbee all testified that Decedent's subsequent treating surgeon Dr. Leibold was incorrect when he stated that the likely cause of Decedent's ischemic and necrotic bowel



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

might have been hypoperfusion. Trial Tr. vol. 6, 795:19–22, 919:18–920:9; vol. 7, 1035:17–1036:24; vol. 8, 1142:5–12; vol. 9 1271:13–19;

(6) Drs. Follwell, Bochicchio, Rinder, Naslund, and Brabbee all testified that the cause of Decedent's dead or necrotic bowel was a vascular injury, specifically due to an undiagnosed underlying heart condition known as atrial fibrillation, instead of a bowel perforation caused by surgery as opined by Appellants. Trial Tr. vol. 5, 785:7–789:14; vol. 6, 916:18–918:18; vol. 7, 988:3–16; vol. 8, 1134:13–35:4; vol. 9, 1266:9–1268:5; and

(7) Drs. Follwell, Bochicchio, Naslund, and Brabbee all testified that Dr. Follwell did not breach the standard of care. Trial Tr. vol. 6, 796:20, 913:18–19; vol. 8, 1131:19–24; vol. 9, 1241:3–6.

Appellants objected to cumulative testimony in regard to causation and standard of care four more times in addition to the motion to exclude throughout the trial and Judge Mennemeyer denied all four of their objections. Trial Tr. vol. 7, 962:14–963:21; vol. 8, 1124:23–1126:3, 1200:9–1205:9; vol. 9, 1254:2–1255:22. Thus, Respondents were given five separate opportunities to present their theory that Decedent's injuries were due to atrial fibrillation throwing an embolus, not Dr. Follwell's failure to treat her bowel perforation, and subsequently the jury returned a verdict in favor of Respondents. Trial Tr. vol. 9, 1375:11–16.

Judge Mennemeyer's statement that "just because there are several in number does not mean they would not be able to give their testimony" was an abuse of discretion and sets a dangerous precedent. Trial Tr. Vol. 2, 324:23-24, 325:3-6. This bombardment of



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

cumulative evidence was improper and gave Respondents an unfair advantage. These testimonies came in because the trial court denied all of Appellants' objections to their cumulative nature. Trial Tr. vol. 2, 323:21–326:21; vol. 7, 962:15–963:21; vol. 8, 1124:23–1235:22, 1200:9–1205:9; vol. 9, 1254:2–1255:20. This cumulative expert testimony is overwhelming and disturbs the conscience.

### *B. Judicial Economy Dictates that the Cumulative Evidence Should Have Been Excluded.*

The principle of judicial economy also required the trial court to exclude this cumulative testimony:

> Rules of evidence must reflect the facts that the human life span is finite, and the resources that can be devoted to the resolution of disputes are limited. Thus, it is necessary and reasonable to exclude cumulative evidence [...]. The Missouri Rules of Court governing procedures in criminal and civil cases specifically provide that they "shall be construed to secure the just, speedy and inexpensive determination of every" case or action [footnote omitted]. Principles and rules governing the admission of evidence should be construed in a manner consistent with the promotion of these same goals.

22 Mo. Prac., Missouri Evidence § 101:1 (4th ed.). This proposition is supported by Missouri Supreme Court Rule 41.03, which states that "Rules 41 to 101, inclusive [the Rules of Civil Procedure], shall be construed to secure the just, speedy and inexpensive determination of every action." MO. SUP. CT. R. 41.03.

The trial court's permission of the admission of the abundantly cumulative expert testimony in this matter turned what should have been a search for truth and justice into a battle of resources. If this kind of cumulative expert testimony is permitted to ensue, medical negligence cases are simply competitions of who has the most money to spend;



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

and the winner will most often be the defendants. Further, judicial resources are also at stake. For those plaintiffs fortunate to have enough money to spend on a plethora of experts to testify to the exact same opinion, the response will be simply to designate the same number of expert witnesses as the defense did in rebuttal– turning one week trials into two and so on.

### *C. Conclusion.*

Trial courts have discretion in excluding cumulative evidence, and the trial court here abused that discretion when it permitted Respondents to present four, sometimes five, identical testimonies regarding when Decedent's bowel perforation occurred, Respondent Dr. Follwell's meeting of the standard of care and the cause of Decedent's injuries and death. The cumulative evidence presented at trial in this matter resulted in Appellants being unduly prejudiced and Appellants request that this Court reverse and remand this case.



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

## II. The trial court erred in permitting Respondent Dr. Follwell to testify regarding a new opinion for the first time at trial.

Appellate review of a trial court's decision to admit or exclude expert testimony is for an abuse of discretion in finding prejudice. *Whitted v. Healthline Mgmt., Inc.*, 90 S.W.3d 470, 474 (Mo. App. E.D. 2002). "When an expert who has been deposed later changes his or her opinion before trial or bases it on new or different facts from those revealed at the deposition, the party intending to use the expert's testimony has the duty to disclose the new information to the opposing party, effectively updating the responses made during the deposition." *Whitted*, 90 S.W.3d at 475.

In *Whitted*, the trial court ordered a new trial after determining that the defendant healthcare provider's expert changed his opinion between his deposition and trial regarding the cause of death for the plaintiff's decedent. *Id.* at 475–77. During his deposition, the expert stated that he did not know the cause of decedent's death but presumed he had a malignant arrhythmia, but at trial stated tissue damage caused chemicals to be released into decedent's body causing ventricular fibrillation. *Id.* In affirming the trial court's decision to grant a new trial, this Court pointed out that that in his deposition, the expert had been unable to pinpoint a cause of death and at trial contradicted himself, and had failed to inform opposing counsel of this change. *Id.* at 477. As the Court stated, the purpose of discovery, including deposing expert witnesses, is to eliminate, as far as possible, concealment and surprise in litigation. *Id.* at 475.

Similarly, in *Bailey v. Norfolk and Western Ry. Co.*, this Court affirmed the trial court's order to disregard the opinions of an expert who had changed his opinion about

the cause of the plaintiff's injuries. 942 S.W.2d 404, 412–15 (Mo. App. E.D. 1997). In *Bailey*, the trial court found that the change in the expert's opinion between his deposition and trial was an unfair surprise. *Id.* During his first deposition, the expert stated that the plaintiff's work schedule and sleep deprivation were "relatively minor contributions" to plaintiff's heart disease and reiterated in his second deposition that there was a "very loose" association between these lifestyle factors and heart disease. *Id.* at 413. At trial, however, he testified that he did not find a causal relationship between plaintiff's work schedule and conditions and his heart disease. *Id.* In affirming the lower court, this Court explained that the rules of discovery, including Rule 56.01(b)(4)(b) regarding a party's right to depose experts, were "designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits and to provide a party with access to anything that is 'relevant' to the proceedings and subject matter of the case not protected by privilege." *Id.* at 414. This principle is true even if the expert changing his opinion is the defendant and if his own experts had previously expressed similar opinions prior to trial. *Pasalich v. Swanson*, 89 S.W.3d 555, 563–64 (Mo. App. W.D. 2005).

Here, the trial court abused its discretion in permitting Respondent Dr. Follwell to testify regarding the causation of Decedent's injuries, which was a new opinion heard for the first time at trial. During his deposition, Respondent Dr. Follwell was specifically asked by Appellants, "What caused the ischemia?" Trial Tr. vol. 6, 785:18–19. Dr. Follwell's answer in his deposition was, "I don't know." Trial Tr. vol. 6, 785: 20. Yet during his direct examination at trial, Respondent Dr. Follwell was permitted, over multiple objections by Appellants, to state his new opinion that Decedent's injuries must



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

have occurred due to a vascular injury directly injuring or cutting the blood vessel or occlusion from a clot or emboli. Trial Tr. vol. 6, 789:1–22.

Like the experts in *Whitted* and *Bailey*, Respondent Dr. Follwell changed his opinion regarding causation between his original deposition and trial. Like the experts in *Whitted* and *Bailey*, if Respondent Dr. Follwell had a firm opinion on the cause of Decedent's dead bowel, he should have stated so in his deposition instead of answering "I don't know," which gave Appellants no opportunity to ask follow-up questions on his reasoning.

Respondents never provided Appellants the opportunity to re-depose Dr. Follwell after his opinion allegedly changed. As stated above, the purpose of discovery is to eliminate, as far as possible, concealment and surprise in litigation. At trial was the first time that Appellants got to hear Respondent Dr. Follwell's causation opinions that an alleged vascular injury was the actual cause of Decedent's injuries and Appellants were caught off guard. *See Whitted*, 90 S.W.3d at 475; *Bailey*, 942 S.W.2d at 415. Thus, the trial court abused its discretion in permitting Respondent Dr. Follwell to give his causation testimony, such testimony was highly prejudicial and Appellants request that this Court reverse and remand this case.



Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

## Conclusion

For each of the reasons raised in this brief, Appellants request this Court to reverse the trial court's decision to permit cumulative evidence and Dr. Follwell's new opinion, remand this case back to the Circuit Court of Lincoln County with instructions that Respondents may not offer cumulative expert testimony or previously undisclosed opinions, and that this Court grant such further relief as deemed necessary and proper.

Respectfully submitted,

/s/ *Amy Collignon Gunn*
Amy Collignon Gunn, #45016MO
Anne Brockland, #59693MO
Elizabeth Washam, #68469MO
800 Market Street, Ste. 1700
St. Louis, MO 63101
agunn@simonlawpc.com
abrockland@simonlawpc.com
ewasham@simonlawpc.com
Phone: 314-241-2929
Fax: 314-241-2029

***Attorneys for Appellants***

Electronically Filed - SUPREME COURT OF MISSOURI - March 26, 2018 - 10:52 AM

**Certificate of Service and Compliance**

1. The foregoing brief was electronically filed on behalf of Appellants Heather Shallow, Todd Beaver, and Michael Beaver with the Clerk of the Court by use of this Court's electronic filing system on this 23rd Day of March, 2018.

2. Copies of the foregoing were delivered by first class mail and by electronic mail on this 23rd Day of March, 2018 to attorneys for Respondents.

3. This brief complies with Rule 55.03 and the limitations contained in Rule 84.06(b) limiting Appellants' brief to 31,000 words. This brief contains 7,511 words, as determined by the word count feature of MS Word (not including the cover, certifications, signature blocks and appendix).

/s/ *Amy Collignon Gunn*
Amy Collignon Gunn, #45016MO
Anne Brockland, #59693MO
Elizabeth Washam, #68469MO
800 Market Street, Ste. 1700
St. Louis, MO 63101
agunn@simonlawpc.com
abrockland@simonlawpc.com
ewasham@simonlawpc.com
Phone: 314-241-2929
Fax: 314-241-2029

***Attorneys for Appellant***