

APPELLATE CASE NOTES

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SWARTZ V. GALE WEBB TRANSPORTATION COMPANY, ET AL

In *Swartz v. Gale Webb Transportation Company, et al.*, the Missouri Supreme Court made clear that if defendant's conduct placed plaintiff at an increased risk of future consequences, expert testimony given within a reasonable degree of medical certainty describing those increased risks is admissible to aid the jury in assessing the extent and value of the plaintiff's present injuries, even if those future consequences are not reasonably certain to occur.

RELEVANT FACTS

Megan Swartz ("Megan") was a passenger in a vehicle driven by Christopher Hobbs that was struck by a school bus owned by Gale Webb Transportation Company ("Webb Transportation"). Megan filed suit against Webb Transportation and Hobbs for personal injury, including fractures to her pelvis and lower back. At trial, Megan presented the deposition testimony of two treating physicians – an orthopedic surgeon and a family practice physician. Neither doctor was able to state that Megan was more likely than not to require surgery or to develop complications related to taking pain medication. However, both testified that she was at an increased risk of needing surgery in the future and that the pain medications she was taking carried risks of gastric, liver and kidney complications. The orthopedic surgeon further testified that the fracture to her pelvis might cause her more difficulty in having a natural childbirth, although whether or not that was the case could not be determined in advance.

A jury awarded \$335,000 to Megan for her injuries. Both defendants appealed alleging that the trial court erred in admitting the expert testimony regarding future risks and in refusing to give a withdrawal instruction regarding this expert testimony.

A. THE EXPERT TESTIMONY REGARDING RISK OF FUTURE INJURIES

Both treating physicians, Dr. Parsons (Megan's orthopedic surgeon) and Dr. Bowling (Megan's internist), testified that Megan was reasonably certain to have an increased risk of needing back surgery in the future. Dr.

Parsons opined that she had a "50/50" chance of requiring future surgery while Dr. Bowling testified that the risk was "25 to 50 percent." Dr. Parsons conceded on cross-examination that whether Megan would require future surgery was "speculation" and could not be stated "with a reasonable degree of medical certainty." If surgery were required, the likely cost was at least \$25,000.

With respect to the anti-inflammatory medications Megan was taking for the back injury, the internist testified that daily use of these medications carried a five percent per year risk of causing an ulcer or gastric bleeding and, more rarely, the risk of allergic reaction or kidney or liver damage.

In addition to testifying about the possibility of future back surgery, the orthopedic surgeon briefly stated at three points in this deposition testimony that Megan's fractured pelvis might have some effect on her ability to deliver children naturally.¹ Defendant Webb Transportation argued that this testimony was speculative and that its objection to one of these three pieces of testimony was sufficient to preserve the issue for appeal.

B. STIPULATIONS REGARDING THE EXPERT TESTIMONY

All parties agree that the medical testimony of Doctors Parsons and Bowling did not establish to a reasonable degree of medical certainty that Megan will need back surgery or will suffer other complications. The parties also agreed that under existing Missouri law a plaintiff is only entitled to recover for an injury that has not yet occurred if the injury is reasonably certain to occur in the future. Finally, the parties agreed that, according to the experts' testimony, the plaintiff had at most a 50 percent and at least a 25 percent chance of requiring future surgery and a five percent chance of developing complications related to the use of medications.

LEGAL ANALYSIS

The Missouri Supreme Court began its analysis by citing to Missouri's basic damage instruction, MAI 4.01. It is a well-settled rule in Missouri that a plaintiff is entitled to

full compensation for past or present injuries that the plaintiff has shown, more probably than not, were caused by the defendant. This testimony is admissible to aid the jury in assessing the extent and value of the plaintiff's present injuries, even if future consequences are not reasonably certain to occur. The Court cited a long line of Missouri cases and cases from other jurisdictions that permit recovery for the possibility of future injury and allow similar expert testimony to aid the jury in evaluating the extent and nature of a plaintiff's present injury.²

"[M]any other Missouri cases also have admitted expert testimony of the probability, short of reasonable certainty, that a future surgery may be necessary and of the potential costs of such treatment."

The Court held that the expert testimony of the orthopedic surgeon and the family practice physician was admissible for purposes of establishing the extent and nature of Megan's injuries. The increased risk of injury and the future problems must be stated within a reasonable degree of medical certainty even if the future risks and future consequences are not reasonably certain to occur. The Court noted that because the plaintiff did not seek to recover the costs of these potential complications and merely offered them to have the jury consider the fact that she must cope with the possibility of future problems, the trial court did not err in admitting the evidence.³

With respect to the admission of evidence regarding childbirth problems, the Court pointed out that defendant objected to only a single portion of the testimony and that before Dr. Parsons' deposition testimony was offered, the plaintiff testified *without objection* that she had been informed she might have trouble with natural childbirth. Because the

portion of Dr. Parsons' testimony that was admitted without objection was very similar to the at issue testimony and to the unobjected-to testimony of the plaintiff, the admission of Dr. Parsons' testimony concerning her ability to deliver a child naturally was not prejudicial and the denial of a withdrawal instruction did not prejudice defendant.

The *Swartz* Court affirmed the judgment of the trial court holding that expert testimony, given within a reasonable degree of medical certainty, that the defendant's conduct placed the plaintiff at an increased risk of future consequences is admissible to aid the jury in assessing the extent and value of the plaintiff's present injuries, even if the future injuries are not more likely than not to occur.

CONCLUSION

Expert testimony concerning an increased risk of future injuries and the possibility of medical complications is admissible to help the jury assess the nature and extent of a person's present injuries even if the future risks are not reasonably certain to occur. Missouri law, and indeed the MAI instruction authorizing recovery for future damages, requires that the increased risk of injury and future problems be stated within a reasonable degree of medical certainty even if the future consequences and future risks are not reasonably certain to occur. The rationale is that an injury that carries the risk of complications is more significant than one that does not include this risk. The jury is entitled to consider that increased risk in considering the nature and extent of a plaintiff's damages. ■

ENDNOTES:

1 Only defendant Webb Transportation appealed this point.

2 *Emery v. Wal-Mart Stores, Inc.* 976 S.W.2d 439, 447 (Mo. Banc 1998) (trial court did not err in admitting a physician's testimony that to "a reasonable degree of medical certainty," a plaintiff might need an operation in the future); *Breeding v. Dodson Trailer Repair, Inc.*, 679 S.W.2d 281 (Mo. Banc 1984) (expert testimony regarding future surgery was admissible even though the expert testified that the likelihood of future surgery was contingent upon the failure of more conservative treatment); *Bynote v. National Super Markets, Inc.*, 891 S.W.2d 117 (Mo. Banc 1995) (possible need for future surgery and the estimated costs of that surgery held admissible); *Stephens v. Guffey*, 409 S.W.2d 62 (Mo. 1966) (admission of testimony about need for future surgery and its attendant costs held admissible).

3 The Court was careful to point out that under *Seabaugh v. Milde Farm, Inc.*, 816 S.W.2d 202 (Mo. banc 1991) the plaintiff would not be entitled to recover the costs of possible future back surgery or other complications since they were not reasonably certain to occur. Here, the evidence concerning the risk of future injuries was admissible to assist the jury in evaluating the extent of injury, specifically that Megan Swartz would have to cope "with not knowing whether she is going to have surgery in the future" and with the possibility of other additional complications arising out of her known injuries.