SC88887

IN THE MISSOURI SUPREME COURT

ROGER AND CARLA HICKMAN, Respondents

v.

BRANSON EAR, NOSE & THROAT, Appellant

Appeal from the Circuit Court of Christian County, Missouri
38TH Judicial Circuit
The Honorable James Eiffert, Division 1

SUBSTITUTE BRIEF OF APPELLANT BRANSON EAR, NOSE & THROAT

SUSAN FORD ROBERTSON #35932

FORD, PARSHALL & BAKER,
3210 Bluff Creek Drive
Columbia, MO 65201
573-449-2613 (phone)
573-875-8154 (fax)
srobertson@fpb-law.com
www.fpb-law.com

ATTORNEYS FOR APPELLANT
BRANSON EAR, NOSE & THROAT

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

JURISDICTIONAL STATEMENT

This appeal is from a final judgment entered on January 1, 2006 by Christian County Circuit Court following a jury verdict rendered in favor of Roger and Carla Hickman on their claim for medical malpractice against Branson Ear, Nose & Throat. Judgment was entered in favor of the Hickmans in the amount of $299,644.97 for Roger Hickman and $10,000 for his wife, Carla Hickman.

During the jury trial, at the end of the Hickmans' evidence, Branson Ear, Nose & Throat made a motion for directed verdict in its favor because the Hickmans failed to make a submissible case when they failed to adduce expert testimony defining and describing for the jury the term "standard of care" so the jury was informed of the meaning of the term and the expert testimony offered on the issue of breach of the standard of care was based upon the proper objective legal standard. The trial court denied the motion.

Branson Ear, Nose & Throat rested without presenting any evidence and renewed its motion for directed verdict at the close of all evidence for the reasons previously argued. The trial court denied the motion and the case went to the jury. The trial court entered judgment on the verdict in favor of the Hickmans. Branson Ear, Nose & Throat filed a motion for judgment notwithstanding the verdict for the same reasons expressed in its motions for directed verdict. The trial court denied the post-trial motion.

Branson Ear, Nose & Throat pursued an appeal in the Missouri Court of Appeals for the Southern District, which reversed the trial court's judgment but granted the Hickmans a new trial.

The Hickmans filed a motion for rehearing, or the alternative, for transfer to this court. The appellate court denied the motions with a per curiam addendum to its prior opinion.

The Hickmans filed an application for transfer, which this court accepted. This court has jurisdiction to address the trial court's judgment on the merits. Mo.Const.Art.V, Section 10.

STATEMENT OF FACTS

Roger Hickman filed an action against Dr. Michael Bays and Branson Ear Nose & Throat, Inc. and Skaggs Health Systems, Inc. for damages arising out of thyroid surgery performed by Dr. Bays on December 7, 2001. (L.F. 16-18.) Carla Hickman (wife of Roger Hickman) brought an action for loss of consortium. (L.F. 16-18.) Prior to trial against defendant Branson Ear Nose & Throat, the Hickmans dismissed Dr. Michael Bays and Skaggs Health Systems, Inc. (L.F. 34-37.)

In 2001 Roger Hickman was referred to Dr. Bays for examination of nodules on his thyroid. (Tr. 234, 235.) A CT scan and ultrasound performed on May 1, 2001 showed a large calcified mass (about the size of a full thyroid lobe) arising from or adjacent to the lower right pole of the right thyroid. (Tr. 132-138; 238-240.) An ultrasound was performed on November 30, 2001 revealing similar findings and Dr. Bays recommended that Roger Hickman undergo surgery on his thyroid. (Tr. 140, 141.)

Roger and Carla Hickman recall that Dr. Bays explained that he would perform a thyroidectomy on the right lobe (where the mass was located) and if a surgical dissection indicated it was cancerous he would remove the left thyroid also. (Tr. 297, 298, 481.)

Dr. Bays testified that he performed a total thyroidectomy and he told the Hickmans that was what he had done. (Tr. 243-248.) He defined a total thyroidectomy as removing as much of the macroscopic tissue from both thyroid lobes as can safely be removed. (Tr. 246, 247.) The radiologist's report of a CT scan performed the day of the operation indicates a removal of the thyroid gland. (Tr. 189-194.) Following surgery Dr.

Bays referred Roger Hickman to be treated by Dr. Gregory Ledger, an endocrinologist (Tr. 308.) In the months following surgery, Roger Hickman's thyroid hormone levels did not decrease and his THS levels did not increase as they should following a total thyroidectomy. (Tr. 149, 213, 214, 272, 273.) A scan performed May 20, 2002 showed substantial functioning thyroid tissue in the neck. (Tr. 197, 198.) Dr. Ledger recommended further surgery and surgery was performed by Dr. Moley on April 4, 2002 to remove the remaining thyroid tissue. (Tr. 194, 195, 255-256, 485, 518, 519.) Dr. Moley's subsequent surgery performed April 4, 2002 (five months after Dr. Bays' surgery) consisted of removing 8.2 grams of thyroid tissue measuring four centimeters by two and a half centimeters by two centimeters. (Tr. 194, 195.) None of the tissue contained cancer. (Tr. 195.) Subsequent testing of the thyroid tissue removed showed it cancer free and Roger Hickman testified that he was still cancer free at the time of trial. (Tr. 159, 168, 169, 493.) Roger Hickman testified that after the second surgery he lost some of the strength and range of his voice and he cannot sing as he used to, which is important to him as a church choir director. (TR. 494, 495.)

Dr. Bays testified:

Q. And when a patient comes to you, you know that they're relying upon your skill, your education, your training?

A. I'm aware of that.

Q. And you recognize, don't you, Doctor, that you owe that individual certain duties of care?

A. I definitely recognize that.

Q. And if they are going under your knife, you recognize that you owe them duties to do the operation properly, correct?

A. I do.

Q. And if you don't do the operation properly, then it is your responsibility, correct?

A. That is correct. (Tr. 233.)

…

Q. All right. And so your decision based upon what you knew and what you had before you was that you were planning to do, and told the Hickmans what they needed to do, was to have the right lobe completely and totally removed, correct?

A. Right.

Q. And depending upon what was found in surgery, then you would, if it was cancerous, remove the left lobe as well, correct?

A. Exactly. (Tr. 242.)

…

Q. As you told me you do that, and that's the standard of care when you have thyroid cancer is to remove the entire thyroid, to do a total thyroidectomy, correct?

A. You are correct. I removed the right lobe—

Q. All right.

A. —determined that there was cancer, then I removed the left lobe. (Tr. 245.)

…

Q. And a total thyroidectomy is removal of the macroscopic tissue, correct?

A. That's what I learned from literature search that that's what they define it as, removal of macroscopic tissue. (Tr. 246.)

…

Q. All right. Now, you indicated that when you do a total thyroidectomy—well, first of all, when you do a total thyroidectomy you don't leave the entire thyroid lobe, correct?

A. You definitely don't do that.

Q. You don't do that. And if you do that then you haven't done the right operation, and that would be a mess up, correct?

A. If you did that and said you did that, then you would be a liar and a fraud.

Q. And so if you leave an entire thyroid lobe and you feel you have done a total thyroidectomy, that is a surgical mistake, true? We could agree on that?

A. Um, it may not be a surgical mistake, but it would be an out-and-out lie.

Q. Well, all right. We'll get into the distinction a little bit. If you think you remove the thyroid but you left it, uh, that's a mistake; isn't it?

A. If you think you did, but you left it, yeah, that would be a mistake.

Q. All right. That would be a mistake. That would be a surgical error. That would be something that would be in violation of your duties as a surgeon, true?

A. Definitely.

(Tr. 248, 249.)

Dr. Bays is aware that Dr. Moley removed 8.2 grams of thyroid tissue in the subsequent surgery and that the measurements were that of a normal thyroid lobe. (Tr. 251, 255.) Dr. Bays was asked:

Q. All right. And so that would be—one thing would be—that would be consistent if the right thyroid lobe is not removed, true?

A. It would appear that way.

Q. All right. And if that is the case, then there would not have been a total thyroidectomy done under those circumstances, correct?

A. Under those circumstances; that's correct. (Tr. 251, 252.)

At trial the Hickmans adduced testimony from Dr. Paul Nelson, head of the kidney transplant program and chairman of the department of surgery at St. Lukes Hospital in

Kansas City and professor at the University of Missouri, Kansas City. (Tr. 122, 123.) He teaches medical students and residents in the field of surgery. (Tr. 125, 126.) From a review of the medical records, he agreed with Dr. Bays' recommendation for thyroid surgery. (Tr. 128.) He was asked from a review of the medical records and depositions taken in the case:

> Q. All right. Let me ask you, sir, do you have an opinion about whether Roger Hickman given his clinical history and findings needed to have a total thyroidectomy?
>
> A. Yes. Total thyroidectomy is the proper procedure for what Mr. Hickman's diagnosis was.
>
> Q. Do you have an opinion about whether or not Dr. Bays performed a total thyroidectomy December 7, 2001?
>
> A. He did not. (Tr. 119.)

He based his opinion on several scans that were done and the time between the two operations that show remaining thyroid tissue as well as the reports from the subsequent surgery indicating the presence of the upper parathyroid and blood flow into the thyroid gland during surgery. (Tr. 145, 146, 153-155.)

He was asked:

> Q. If you are required to do a total thyroidectomy, based upon the findings of cancer like you have described, and you leave one lobe of the thyroid, does that meet the standard of care for a surgeon?

A. No.

Q. Why does it not?

A. Well, if you—if you go to take out a whole thing and you leave half the thing in, that's not what you are supposed to do. (Tr. 146, 147.)

Dr. Nelson did not agree that there was any possibility that Roger Hickman's thyroid grew back following the first surgery. (Tr. 147, 151, 163, 186.) He admitted that thyroid tissue can slowly regrow over a period of years but he has never seen a patient come in two months after surgery with that happening. (Tr. 185.) He was asked what he felt occurred during Dr. Bays' surgery and he explained that he believes Dr. Bays took out the left lobe and took out the tumor but left intact the right lobe. (Tr. 161.) He testified that Dr. Bays surgically removed right thyroid lobe tissue, which weighed 10.1 grams and measured five centimeters by two and a half centimeters by two centimeters, which he identified as the calcified tumor and not the right lobe. (Tr. 187, 188.)

He acknowledged that the radiologist report of the CT scan performed December 17, 2001 indicated a removal of the thyroid gland meaning the entire gland was removed. (Tr. 189-194.) Dr. Nelson testified it would be appropriate for Dr. Bays to conclude after reading this report that the thyroid had in fact been removed. (Tr. 194.) He disagreed with the radiologist's reading of the CT scan on December 17, 2001. (Tr. 211.) He indicated that the radiologist missed the right lobe and instead she thought there was probably blood left over from the surgery but in fact it was actual tissue. (Tr. 211.)

He testified the standard treatment is a total thyroidectomy. (Tr. 171.) He agreed that you do not want to take out all of the thyroid tissue as you do not want to remove the parathyroid glands and surgeons often time leave some thyroid tissue adjacent to these glands and this is why radioactive ablation is utilized. (Tr. 173.) Surgeons have to be careful of the nerves that go through the thyroid and sometimes thyroid tissue is left behind. (Tr. 174.) Dr. Bays did not damage any of the parathyroid glands during the surgery. (Tr. 175, 176.) Because Dr. Bays was able to remove all of Mr. Hickman's thyroid cancer, Dr. Bays had increased Mr. Hickman's life expectancy. (Tr. 182.) He classified the second surgery as a redo and he testified that he does approximately fifty thyroid operations a year and of that number probably four or five are redo procedures for one reason or another. (Tr. 177.) His criticism of Dr. Bays is that the correct operation for a thyroid cancer of this type is to take out the whole thyroid gland and that this wasn't done as Dr. Bays left most of the right side still in. (Tr. 183.) In his judgment, Dr. Bays left substantial thyroid tissue. (Tr. 184.)

Dr. David Rabin, a radiologist, also testified for the Hickmans. He testified that Dr. Bays removed the tumor and the left thyroid lobe but left the right lobe of the thyroid that was posterior to the calcified mass. (Tr. 367-409, 418.) He testified based on a review of the scans and reports corresponding to them and based on a reasonable degree of medical certainty that Dr. Bays failed to remove a portion of the right thyroid tissue during his original December 7 surgery. (Tr. 426.) He also disagreed with the

radiologists report that the thyroid gland had been removed during the December 17, 2001 surgery. (Tr. 409-415.)

At the conclusion of the evidence by the Hickmans, Branson Ear, Nose & Throat moved for a directed verdict arguing that the Hickmans failed to make a submissible case when they failed to adduce evidence defining the term "standard of care" for the jury. (Tr. 522-530; L.F. 38-42.) The Hickmans opposed the motion, which was denied by the court. (Tr. 527-530)

Following the trial court's denial of its motion for directed verdict at the close of plaintiffs' case, Branson Ear, Nose & Throat rested without presentation of evidence and filed and argued its motion for directed verdict at the close of all of the evidence basing its argument on the same reasons—the omission of any evidence defining for the jury the term "standard of care" thus depriving the jury of the objective context necessary to allow submission to the jury of their claim that Dr. Bays was negligent in failing to perform a total thyroidectomy. (Tr. 530, 531; L.F. 43-47.) The Hickmans opposed this motion, which was denied by the trial court. (Tr. 531.)

Branson Ear, Nose & Throat objected to the verdict director proposed by the Hickmans (modeled after MAI 21.01) because the instruction was not supported by competent and substantial evidence without evidence in the case defining the term and concept of "standard of care" as well as the reason that there is no foundation laid for standard of care. (Tr. 533; L.F. 7.) Instruction number 6 tendered by the plaintiffs and read by the Court to the jury stated: "The term 'negligent' or 'negligence' is used in

these instructions means the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of defendant's profession." (L.F. 57, 71; M.A.I. 11.06; Appendix at A-3.)

The verdict director submitted to the jury stated:

> Your verdict must be for plaintiff Roger Hickman and against defendant Branson Ear Nose & Throat, Inc. if you believe:
>
> First, Michael Bays, D.O., failed to perform a total thyroidectomy on Roger Hickman, and
>
> Second, Michael Bays, D.O., was thereby negligent, and
>
> Third, such negligence directly caused or directly contributed to cause damage to Roger Hickman. (L.F. 58, 72; M.A.I. 21.01; App. A-4.)

The jury rendered a verdict finding in favor of Roger Hickman awarding total damages in the amount of $299,644.97 and in favor of Carla Hickman in the amount of $10,000.00. (L.F. 76-81.) The trial court entered judgment in accordance with the jury verdict on January 26, 2006. (L.F. 82, 83; App. at A-1.)

Branson Ear Nose & Throat filed a motion for judgment notwithstanding the verdict asserting that the Hickmans failed to make a submissible case when they failed to provide testimony defining the legal definition of negligence as required by Missouri law. (L.F. 87-105.) The Hickmans filed suggestions in opposition to the motion (L.F. 106-125). Branson Ear Nose and Throat filed additional suggestions in support (L.F. 127-

143) The trial court denied the motion. (L.F. 144.) This appeal followed. (L.F. 145-149.)

The Southern District Court of Appeals reversed the trial court's judgment but granted the Hickmans a new trial. The Hickmans sought transfer, which this court accepted.

POINT RELIED ON

THE TRIAL COURT ERRED IN DENYING BRANSON EAR NOSE & THROAT'S MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE HICKMANS FAILED TO MAKE A SUBMISSIBLE CASE IN THAT THEY FAILED TO ELICIT EXPERT TESTIMONY DEFINING THE TERM "STANDARD OF CARE" SO THAT THE JURY COULD PROPERLY DETERMINE WHETHER DR. BAYS BREACHED THE STANDARD OF CARE AND WAS NEGLIGENT.

Ladish v. Gordon,

879 S.W.2d 623 (Mo.App. W.D. 1994).

Swope v. Printz,

468 S.W.2d 34 (Mo. 1971).

Boehm v. Pernoud,

24 S.W.3d 759 (Mo.App. E.D. 2000).

ARGUMENT

THE TRIAL COURT ERRED IN DENYING BRANSON EAR NOSE & THROAT'S MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE HICKMANS FAILED TO MAKE A SUBMISSIBLE CASE IN THAT THEY FAILED TO ELICIT EXPERT TESTIMONY DEFINING THE TERM "STANDARD OF CARE" SO THAT THE JURY COULD PROPERLY DETERMINE WHETHER DR. BAYS BREACHED THE STANDARD OF CARE AND WAS NEGLIGENT.

The Hickmans failed to make a submissible case. As plaintiffs in a medical negligence case, they were required to adduce expert testimony defining and educating the jury on the concept and meaning of the term "standard of care" in order for the jury to understand the relevant legal standard by which it determines whether the defendant breached the standard of care and was negligent. Without this required expert testimony, a jury could not properly determine whether the defendant in this case was negligent, plaintiffs failed to make a submissible case, and a directed verdict in favor of the defendant is warranted. Swope v. Printz, 468 S.W.2d 34, 40 (Mo. 1971); Boehm v. Pernoud, 24 S.W.3d 759 (Mo.App. E.D. 2000); Blevens v. Holcomb, 2006 WL 3455087 (8th Cir. 2006).

STANDARD OF REVIEW

The standard of review for this court to review the trial court's denial of Branson Ear, Nose & Throat's motion for judgment notwithstanding the verdict is the same as that for the review of a denial of a motion for directed verdict. This court has determined that a case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence. In determining whether the evidence is sufficient to support the jury's verdict, the evidence is viewed in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and contrary inferences. Dhyne v. State Farm Fire & Cas. Co., 188 S.W.3d 454, 456-57 (Mo. banc 2006); Banther v. Drew, 171 S.W.3d 119, 122 (Mo.App. S.D. 2005); Ladish v. Gordon, 879 S.W.2d 623, 627-628 (Mo.App. W.D. 1994). This court reverses the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion. Dhyne, 188 S.W.3d at 456-57.

In order to make a prima facie case for medical malpractice, the plaintiff must prove that the defendant failed to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of the defendant's profession and that the negligent act or acts caused plaintiff's injury. Banther, 171 S.W.3d at 122, citing Washington by Washington v. Barnes Hospital, 897 S.W.2d 611, 615 (Mo. banc 1995). Stated another way is that in order prove a medical malpractice case a plaintiff must establish; 1) an act or omission of the defendant failed to meet the required standard of care; 2) the defendant was negligent in the performance of the act or omission; and 3) the

act or omission caused the plaintiff's injury. Montgomery v. South County Radiologists, Inc., 168 S.W.3d 685, 691 (Mo.App. E.D. 2005).

Courts have determined in professional negligence cases, including those for medical malpractice, that the specific duty at issue (and the alleged breach) is defined by the profession itself. Ostrander v. O'Banion, 152 S.W.3d 333, 338 (Mo.App. W.D. 2004). As explained, "an expert witness is generally necessary to tell the jury what the defendant should or should not have done under the particular circumstances of the case and whether the doing of that act or the failure to do that act violated the standards of care of the profession (and, thus, constituted negligence)." Ostrander, 152 S.W.3d at 338, 339. See M.A.I. 11.06.

Missouri courts have determined it is not enough that the jury is provided MAI 11.06 that informs the jury of the meaning of negligence or that some other witness testifies as to that witness's understanding of negligence in that context. Instead, it is necessary that in each case, the fact finder be informed as to whether the witness in offering opinions is using the standard prescribed by law and not some other standard. Ladish, 879 S.W.2d at 634. Without this required testimony the jury cannot make the determination of whether the defendant was negligent, plaintiffs fail to make a submissible case, and a directed verdict in favor of the defendant is warranted. Swope, 468 S.W.2d at 40.

The Hickmans failed to make a submissible case

In this case, the Hickmans failed to adduce testimony defining and explaining to the jury what the term standard of care means so that the jury not only understood the meaning of the phrase but also that the opinions offered were based on the correct objective legal standard. Without this required testimony, the jury could not properly determine whether the defendant breached the standard of care and was negligent. This omission is fatal and reversal is warranted in this case with directions to enter judgment in favor of defendant Branson Ear Nose & Throat.

The term negligence as used in reference to the healthcare providers means the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of the defendant's profession. Gridley v. Johnson , 476 S.W.2d 475, 481 (Mo. 1972). Missouri courts have determined that the use of the terms "accepted medical standards" and "standards of care" do not in themselves satisfactorily articulate the appropriate legal standard and accordingly it is required that testimony be adduced to define for the fact finder what the term standard of care means so that the jury is informed as to whether each expert witness, in offering opinions, is using the standard prescribed by law and not some other standard. Ladish, 879 S.W.2d at 634; Dine v. Williams, 830 S.W.2d 453, 456 (Mo.App. W.D. 1992).

In Swope v. Printz, 468 S.W.2d 34 (Mo. 1971) an expert witness was asked "Do you have an opinion of whether or not the operation as performed by Dr. Printz was up to acceptable medical standards as you know them?" The expert answered that the

operation "was not up to acceptable medical standards." This court reversed plaintiff's verdict because it was not clear that the expert was comparing defendant's performance with the objective legal standard of negligence. Swope, 468 S.W.2d at 40. As the appellate court determined in Ladish, Swope requires that the fact finder be informed of the standard being employed by plaintiff's experts in order for the plaintiff to make a submissible case unless the defendant's evidence amounts to a concession that the legal standard is the standard suggested by plaintiff. Ladish, 879 S.W.2d at 623. The courts have determined it is not necessary that the legal standard be recited in some type of ritualistic fashion, however, it must appear somewhere in the context that the expert's testimony that the proper objective legal standard is the standard being employed by this expert in his or her testimony. Ladish, 879 S.W.2d at 634.

As the court determined in Ladish, "if attorneys and expert witnesses are allowed to become sloppy in the use of terms such as "accepted standards" and "standards of care" without specifying at some point in the witness's testimony the meaning of those terms, experts will inevitably tend to rely upon their own views of acceptable practice rather than applying the objective legal standard." Ladish, 879 S.W.2d at 634.

Boehm v. Pernoud, 24 S.W.3d 759 (Mo.App. E.D. 2000) is instructive. In Boehm, the doctor appealed the judgment entered on a jury verdict in favor of plaintiff for medical malpractice. The doctor argued the trial court erred in entering judgment because the plaintiff failed to make a submissible case of negligence. The appellate court agreed and reversed and remanded the case because plaintiff did not prove that the doctor

failed to follow the applicable standard of care. Boehm, 24 S.W.3d at 760. Though the plaintiff's expert testified that he always refers his patients to specialists in cases where he is unsure whether he has viewed the entire retina, an expert doctor's opinion must be based upon an established standard of care and not upon a personal standard. Boehm, 24 S.W.3d at 762, citing Dine v. Williams, 830 S.W.2d 453, 457 (Mo.App. W.D. 1992). The court concluded that mere evidence that a doctor's conduct does not measure up to the standards of an individual member of the profession, as opposed to the standards of the profession at large, does not constitute substantial evidence of probative force that is sufficient to supporting a submissible case of negligence because individual standards may be higher or lower than the standards of the profession as a whole. Boehm, 24 S.W.3d at 762.

Dr. Nelson did not provide the required testimony

The Hickmans' expert, Dr. Nelson, testified that the standard treatment in this case was for Dr. Bays to perform a total thyroidectomy. (Tr. 171.) However, he never articulated or defined for the jury what "standard treatment" means and he did not make clear that his opinions were based on the required objective legal standard that Dr. Bays was negligent by failing to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of the defendant's profession.

From a review of the medical records, Dr. Nelson agreed with Dr. Bays' recommendation for thyroid surgery. (Tr. 128.) He was asked from a review of the medical records and depositions taken in the case:

Q. All right. Let me ask you, sir, do you have an opinion about whether Roger Hickman given his clinical history and findings needed to have a total thyroidectomy?

A. Yes. Total thyroidectomy is the proper procedure for what Mr. Hickman's diagnosis was.

Q. Do you have an opinion about whether or not Dr. Bays performed a total thyroidectomy December 7, 2001?

A. He did not. (Tr. 119.)

He based his opinion on several scans that were done and the time between the two operations that show remaining thyroid tissue as well as the reports from the subsequent surgery indicating the presence of the upper parathyroid and blood flow into the thyroid gland during surgery. (Tr. 145, 146, 153-155.)

He was asked:

Q. If you are required to do a total thyroidectomy, based upon the findings of cancer like you have described, and you leave one lobe of the thyroid, does that meet the standard of care for a surgeon?

A. No.

Q. Why does it not?

A. Well, if you—if you go to take out a whole thing and you leave half the thing in, that's not what you are supposed to do. (Tr. 146, 147.) He testified the standard treatment is a total thyroidectomy. (Tr. 171.) His criticism of Dr. Bays is that

the correct operation for a thyroid cancer of this type is to take out the whole thyroid gland and that this wasn't done as Dr. Bays left most of the right side still in. (Tr. 183.)

Nowhere in Dr. Nelson's testimony is any mention made of the proper objective legal standard by which his opinions should be based. The jury was not properly educated or informed of what "standard of care" means or assured that the opinions offered by Dr. Nelson were based on the required objective legal standard and not a personal or some other standard that may be higher or lower than the required standard. Dr. Nelson did not articulate the correct legal standard by which the jury could determine whether Dr. Bays breached the standard of care and was negligent.

Dr. Bays did not provide the required testimony

The Hickmans cannot use the testimony they elicited from Dr. Bays to cure this fatal omission. They failed to ask Dr. Bays to define the term "standard of care" for the jury just as they failed with Dr. Nelson. Dr. Bays testified:

Q. And when a patient comes to you, you know that they're relying upon your skill, your education, your training?

A. I'm aware of that.

Q. And you recognize, don't you, Doctor, that you owe that individual certain duties of care?

A. I definitely recognize that.

Q. And if they are going under your knife, you recognize that you owe them duties to do the operation properly, correct?

A. I do.

Q. And if you don't do the operation properly, then it is your responsibility, correct?

A. That is correct. (Tr. 233.)

…

Q. All right. And so your decision based upon what you knew and what you had before you was that you were planning to do, and told the Hickmans what they needed to do, was to have the right lobe completely and totally removed, correct?

A. Right.

Q. And depending upon what was found in surgery, then you would, if it was cancerous, remove the left lobe as well, correct?

A. Exactly. (Tr. 242.)

…

Q. As you told me you do that, and that's the standard of care when you have thyroid cancer is to remove the entire thyroid, to do a total thyroidectomy, correct?

A. You are correct. I removed the right lobe—

Q. All right.

A. —determined that there was cancer, then I removed the left lobe. (Tr. 245.)

…

Q. And a total thyroidectomy is removal of the macroscopic tissue, correct?

A. That's what I learned from literature search that that's what they define it as, removal of macroscopic tissue. (Tr. 246.)

…

Q. All right. Now, you indicated that when you do a total thyroidectomy—well, first of all, when you do a total thyroidectomy you don't leave the entire thyroid lobe, correct?

A. You definitely don't do that.

Q. You don't do that. And if you do that then you haven't done the right operation, and that would be a mess up, correct?

A. If you did that and said you did that, then you would be a liar and a fraud.

Q. And so if you leave an entire thyroid lobe and you feel you have done a total thyroidectomy, that is a surgical mistake, true? We could agree on that?

A. Um, it may not be a surgical mistake, but it would be an out-and-out lie.

Q. Well, All right. We'll get into the distinction a little bit. If you think you remove the thyroid but you left it, uh, that's a mistake; isn't it?

A. If you think you did, but you left it, yeah, that would be a mistake.

Q. All right. That would be a mistake. That would be a surgical error. That would be something that would be in violation of your duties as a surgeon, true?

A. Definitely.

(Tr. 248, 249.)

Dr. Bays is aware that Dr. Moley removed 8.2 grams of thyroid tissue in the subsequent surgery and that the measurements were that of a normal thyroid lobe. (Tr. 251, 255.) Dr. Bays was asked:

Q. All right. And so that would be—one thing would be—that would be consistent if the right thyroid lobe is not removed, true?

A. It would appear that way.

Q. All right. And if that is the case, then there would not have been a total thyroidectomy done under those circumstances, correct?

A. Under those circumstances; that's correct. (Tr. 251, 252.)

This testimony fares no better than that of Dr. Nelson. The Hickmans never inquired of Dr. Bays what the term "standard of care" means so that the jury could understand the term as well as whether the his testimony was based on the appropriate objective legal standard.

The appellate court opinion

Before the appellate court, Branson Ear, Nose & Throat argued that the Hickmans failed to make a submissible case when they failed to ask either Dr. Nelson or Dr. Bays to define the term "standard of care" to the jury. In defense of this argument, the Hickmans contended that Dr. Bays' testimony constituted an admission on what the standard of care was in this particular case. They argued that they did not need for an expert to define the term when Dr. Bays "admitted" that the standard of care in this particular case was to perform a total thyroidectomy.

The appellate court concluded that the Hickmans were incorrect for two reasons: first, that the Hickmans had failed to provide proof in their brief that Dr. Bays' testimony was binding upon Branson Ear, Nose & Throat; and second, that nothing Dr. Bays said cured the fatal omission in their case. The appellate court determined that the Hickmans had not set forth in their brief any evidence adduced at trial to support their argument that Dr. Bays' testimony could be held as binding the defendant Branson Ear, Nose & Throat. The appellate court also determined that in any event, nothing said by Dr. Bays constituted the required evidence to make a submissible case.

The Hickmans sought transfer so that this court could address the law regarding corporate representatives making binding admissions[1] and on the issues relating to

[1] The appellate court first raised this issue. Branson Ear, Nose & Throat did not raise the issue and the analysis is not relevant to the issues now before the court on transfer reviewing the propriety of the trial court's actions in denying the motions for directed verdict and notwithstanding the verdict.

medical malpractice cases that require plaintiffs to provide expert testimony to the jury on the meaning of "standard of care."

Dr. Bays' testimony does not constitute an admission

The Hickmans argued to the trial and appellate courts that they did not have to provide expert testimony defining the term "standard of care" to the jury because Dr. Bays' testimony constituted an admission on this issue. Their assertion is incorrect. Dr. Bays never admitted the legal standard by which liability in medical malpractice cases are determined. A close review of his testimony reveals that what he told the jury is similar to what Dr. Nelson said—that the standard of care when a patient has thyroid cancer is to perform a total thyroidectomy. This testimony does not constitute an admission sufficient to obviate the Hickmans' requirement to educate the jury by expert testimony on what the term "standard of care" means. Dr. Nelson and Dr. Bays may have agreed that in this case the standard of care was to perform a total thyroidectomy. However, without either of them telling the jury what is meant by "standard of care," the JURY was never provided the necessary basis upon which to understand the legal standard by which they were to determine if Dr. Bays breached the standard of care and was negligent.

As the appellate court determined in Ladish, Swope requires that the fact finder be informed of the standard being employed by plaintiff's experts in order for the plaintiff to make a submissible case unless the defendant's evidence amounts to a concession that the legal standard is the standard suggested by plaintiff. Ladish, 879

S.W.2d at 623. Dr. Bays' testimony does not amount to such a concession. Furthermore, Dr. Bays did not admit that he breached the standard of care. Cf. Richeson v. Roebber, 159 S.W.2d 658 (Mo. 1941) and Bateman v. Rosenberg, 525 S.W.2d 753 (Mo.App. E.D. 1975).

Why medical malpractice cases should continue to have this requirement

Medical malpractice cases are different from other negligence actions in that the plaintiffs in medical negligence cases must provide expert testimony defining and educating the jury on the concept and meaning of the term "standard of care" in order for the jury to understand the relevant legal standard by which it is to determine whether the defendant was negligent. This is not exalting form over substance. The law requires that a medical expert educate the jury on the relevant legal standard to determine negligence and in medical negligence actions this legal standard is expressed by the concept of standard of care. The jury must be provided expert testimony that the term "standard of care" in a medical negligence case means to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of the defendant's profession.

Members of the jury do not independently possess the knowledge of what other members in the medical defendant's profession do in the same or similar circumstances. That knowledge is something that needs to be provided to the jury by way of expert testimony. The courts require that more than just the use of the terms "standard of care"

be used by experts because again, the jury has no way of knowing what that term means in the legal sense. Thus the courts require expert testimony on the definition of the term so that the jury knows that an expert who uses those terms is testifying based on an objective legal standard and not just by way of personal opinion.

It is not enough that a qualified expert gives an opinion that the "standard of care" in this case was to do a total thyroidectomy and the failure to do this was a breach of the standard of care. If the jury is not told by an expert at some point in the case that the term "standard of care" is an objective standard that means--that degree of skill and learning ordinarily used under the same or similar circumstances by members of the defendant's profession—the jury cannot properly determine whether the defendant's failure to do whatever action complained of means the defendant was "thereby negligent" as set forth in the verdict director. In this case the jury was provided testimony of the "proper procedure" or the "standard of care" was to perform a total thyroidectomy. What the jury was not provided is testimony defining what the term "standard of care" means.

In Mills v. Redington, 736 S.W.2d 522 (Mo.App. E.D. 1987), the appellate court affirmed the trial court's grant of directed verdict for the doctor finding that the plaintiff failed to produce expert testimony that the defendant's actions breached the requisite standard of care prevailing in the medical profession generally. Mills, 736 S.W.2d at 524. The court recognized that the current standard of care applicable to physicians and surgeons and medical malpractice cases is a degree of skill and learning ordinarily used under the same or similar circumstances by members of their profession. Mills, 736

S.W.2d at 524, see MAI 11.06 and Hurlock v. Park Lane Medical Center, Inc., 709 S.W.2d 872-873 (Mo.App. W.D. 1985).

In Mills, the court noted that the general rules where the exercise of the proper degree of care of skill of a physician is at issue, expert medical testimony is essential and it is plaintiff's burden to prove that actions taken by the defendant did not meet the standard of care commonly exercised by the ordinarily skillful, careful and prudent physician in the same or similar circumstances. Mills, 736 S.W.2d at 524. Evidence of the conduct of the physician or surgeon did not measure up to the standards of an individual member of the profession, as opposed to the standards of the profession at large, does not constitute substantial evidence of probative force to support a submission of negligence in a medical malpractice case because individual standards may be higher or lower than the profession as a whole. Mills, 736 S.W.2d at 524.

There are some cases that are distinguishable. See Pettet v. Bieterman, 718 S.W.2d 188 (Mo.App. S.D. 1986), Wicklund v. Handoyo, 181 S.W.3d 143 (Mo.App. E.D. 2005), Redel v. Capital Region Medical Center, 165 S.W.3d 168, 174 (Mo.App. E.D. 2005), LaRose v. Washington University, 154 S.W.3d 365 (Mo.App. E.D. 2004) and Sheffler v. Arana, 950 S.W.2d 259 (Mo.App. W.D. 1997).

In Wicklund, the appellate court affirmed the trial court's denial of the defendant doctors' motions for a directed verdict and for a judgment notwithstanding the verdict after a jury found them liable in negligence for the death of plaintiff's son. Different than what faces this court in the case now before it, in Wicklund during the course of the

direct examination at trial, plaintiff's counsel asked their expert to define the proper standard of care for a patient such as the deceased to which the expert answered "The strict definition of standard of care is what a reasonable and prudent physician would do in similar circumstances." Wicklund, 181 S.W.3d at 146. The expert went on to say "[w]hat I think the standard of care really means if what's sensible care, what's good for the patient." Wicklund, 181 S.W.3d at 143.

The appellate court determined that though the expert could have stated the standard of care as required by MAI 11.06 with greater precision, the court did not agree that the plaintiff wholly failed to establish this element of his case, distinguishing Ladish. Wicklund, 181 S.W.3d at 147. The court recognized that Ladish does not require that the legal standard be recited in some ritualistic fashion but instead requires that it must appear similar in the context of the expert's testimony that the proper objective legal standard is being employed. Wicklund, 181 S.W.3d at 148. In Pettet (decided before Ladish) defendant contended plaintiffs failed to establish the first required element of a prima facie case of medical malpractice because plaintiffs never specifically inquired of their expert the following, "Whether or not defendant did or did not use that degree of skill and learning ordinarily used under the same or similar circumstances?" (original emphasis) Pettet, 718 S.W.2d at 190. This court found that the defendant's expert put the objective standard of care before the jury and this court rejected that the intonation of the phrase in question is a required element of plaintiff's prima facie case. Pettet, 718 S.W.2d at 190.

Redel v. Capital Region Medical Center, 165 S.W.3d 168, 174 (Mo.App. E.D. 2005) is disappointing in its apparent refusal or failure to follow Ladish. The appellate court's discussion of whether there was testimony to define the standard of care is not necessary for the court's ruling because the court found that expert testimony is not required where the basis of a plaintiff's claim of negligence is a nurse's failure to follow a doctor's orders. Redel, 165 S.W.3d at 172, 173.

The court found that plaintiff's claims of negligence were based on a nurse's failure to follow a doctor's orders to administer CPM therapy to only one of the patient's legs at a time and to monitor the patient closely to the extent the patient was disoriented. The court concluded that it was "unnecessary for Plaintiffs to offer expert testimony and that it was a violation of the standard of care to use two CPM machines at once or to apply CPM therapy when Patient was disoriented. Accordingly, plaintiffs presented a submissible case on this basis alone." Redel, 165 S.W.3d at 173. The court goes on to address an additional point on appeal as to whether the plaintiff's expert testimony is sufficient to establish the standard of care. The court's analysis appears contrary to the teachings of Swope, Ladish, Mills and Banther.

In LaRose, the appellate court rejected defendant's argument that the plaintiffs failed to make a submissible case by presenting sufficient evidence concerning defendant's breach of the standard of care when the plaintiff's expert testified based on his clinical experience as an internal medicine physician as to what other physicians, exercising the same degree of skill and learning would ordinarily use under the same or

similar circumstances. LaRose, 154 S.W.3d at 370. Similarly, in Sheffler, the appellate court rejected the defendant's argument that the plaintiffs failed to make a submissible case as the plaintiff's expert framed his answers to indicate to the jury the degree of skill and learning ordinarily used by members of the healthcare profession with respect to the surgical procedure and conduct postoperatively. Sheffler, 950 S.W.2d at 268. See Banther, where plaintiff's expert testified that references to "improper healthcare" meant failing to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of the defendant's profession. Banther, 171 S.W.3d at 122, 123. See, Wright v. Barr, 62 S.W.3d 509, 519 (Mo.App. W.D. 2001), where the expert for plaintiff testified that his opinions were based on a degree of reasonable medical certainty and the expert was asked that in using the term negligence of standard of care will he use the term negligent or negligence to mean the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of the [appellants] profession and he answered he would.

Why this court should reverse the trial court's judgment

The Hickmans can quote every time the words "proper procedure" or "standard of care" might have been used by Dr. Nelson or Dr. Bays in this case, but absent expert testimony advising the jury what those terms mean, specifically, that those terms are based on an objective standard—based on that degree of skill and learning ordinarily used under the same or similar circumstances by other members in the defendant's profession—the jury cannot know if the basis of the expert's opinion is his personal

opinion or if it is based on the appropriate objective standard. Without this fundamental knowledge, the jury cannot make the determination of whether the defendant's conduct was negligent and the trial court should have granted the motions for directed verdict or for judgment notwithstanding the verdict.

CONCLUSION

The trial court erred in denying Branson Ear, Nose & Throat's motions for directed verdict and for judgment notwithstanding the verdict. The Hickmans failed to present testimony defining the term "standard of care" and the jury was not properly informed as to the meaning of the term that articulates the relevant legal standard by which the jury is supposed to be advised so that a proper context can be established for the experts' testimony regarding the issue of whether Dr. Bays was negligent. Without the required testimony defining the term "standard of care" the jury was not properly advised as to whether the plaintiff's experts were testifying as to their own personal standards, which may be different that the requisite standard of whether the defendant used that degree of skill and learning ordinarily used under the same or similar circumstances. Branson Ear, Nose & Throat requests that this court reverse the trial court's judgment and remand with instructions to enter judgment in favor of Branson Ear, Nose & Throat and for whatever further relief this court deems fair and just in the premises.

_____

SUSAN FORD ROBERTSON #35932

FORD, PARSHALL & BAKER
3210 Bluff Creek Drive
Columbia, MO 65201
573-449-2613 (phone)
573-875-8154 (fax)
srobertson@fpb-law.com

ATTORNEYS FOR APPELLANT
BRANSON EAR, NOSE & THROAT

CERTIFICATE OF COMPLIANCE AND SERVICE

STATE OF MISSOURI)
) SS.
COUNTY OF BOONE)

SUSAN FORD ROBERTSON, of lawful age, first being duly sworn, states upon her oath that on December 10, 2007, she served two (2) copies of the foregoing BRIEF OF APPELLANT on Respondent's attorney by depositing the same in the United States mail, first class postage prepaid, at Columbia, Missouri in an envelope addressed to: Mr. Steve Garner and Ms. Rachael Dockery, The Strong Law Firm, 901 East battlefield Road, Springfield, MO 65807 and delivered a copy of the brief by email at sgarner@stronglaw.com and two copies to Mr. Bruce Hunt and Mr. Joel Block, Burkhart and Hunt, 242 South National Ave., Springfield, Mo 65802 as additional counsel for appellant. I also certify that the attached brief complies with the Supreme Rule 84.06(b) and contains 8,114 words, excluding the cover, the certification and the appendix as determined by Microsoft Word software and that the floppy disk filed with the brief containing a copy of this brief has been scanned for viruses and is virus free.

_____

SUSAN FORD ROBERTSON, Attorney

Subscribed and sworn to before me this _____ day of _____ here in my office in Columbia, Missouri.

_____
NOTARY PUBLIC

(seal)
My commission expires:_____

INDEX OF APPENDIX