**SC 88887**

**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 REPLY BRIEF OF APPELLANT BRANSON EAR, NOSE & THROAT

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## TABLE OF CONTENTS

## TABLE OF CASES AND AUTHORITIES

## Argument

The issue is whether an expert who tells the jury that in a particular case the standard of care is to do a particular surgical procedure obviates the requirement that the jury be educated on the meaning of the term and concept of standard of care itself. Courts have long held that juries do not come equipped to understand the concept and meaning of the term standard of care. Plaintiffs have been required as part of their burden to make a submissible case to provide expert testimony that defines the concept so that the jury can then determine if a defendant fails to follow that standard of care that defendant is thereby negligent. Previously it has not been enough to elicit the use of the words "standard of care" or "proper procedure" to define the term and concept itself.

This requirement is not exalting form over substance. 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 to understand the relevant legal standard by which the jury is to determine whether the defendant was negligent. The law requires that a medical expert educate the jury on the relevant legal standard to determine negligence—in medical negligence actions the legal standard of negligence 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. 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. Blevens v. Holcomb, 2006 WL 3455087 (8th Cir. 2006); Swope v. Printz, 468 S.W.2d 34, 40 (Mo. 1971).

What the Hickmans fail to acknowledge is the fundamental difference between general negligence and medical negligence cases. For example, M.A.I. 11.02 informs the jury that the term negligence in a general negligence case means "the failure to use that degree of care than an ordinarily careful person would use under the same or similar circumstances." (Appendix at A-1.) The law does not require that an expert define for the jury what the concept of ordinary care means because that is knowledge already held by members of the jury. Contrast M.A.I. 11.06 that tells the jury that negligence in a medical negligence action is that "failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of defendant's profession." (Appendix A-2.)

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. Id. Having failed to properly educate the jury on this issue should have resulted in a directed verdict for Branson Ear, Nose & Throat.

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. 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.

Nowhere in this record does an expert define for the jury what the term or concept of standard of care means. The Hickmans advance several arguments but none save the fatal evidentiary omission in the case. They argue throughout their brief that the standard of care in this case was undisputed and the only issue in dispute was the "factual" issue of whether Dr. Bays performed a total thyroidectomy. To be frank, that was the anticipated disputed issue until the Hickmans failed to elicit any expert testimony defining for the jury the term "standard of care." When they concluded their evidence and failed to elicit the required testimony, the issue became whether they made a submissible case.

No argument made in opening or closing statements had the effect of dispensing with the necessity of proof upon each of the required elements of the Hickmans' case. Blevens v. Holcomb, 2006 WL 3455087 (8th Cir. 2006); Evans v. Sears, Roebuck & Co., 129 S.W.2d 53, 57 (Mo.App. W.D. 1939); McCarthy v. Wulff, 452 S.W.2d 164, 167 (Mo. 1970). Counsel for defendant did not anticipate the Hickmans' failure to elicit the required testimony. The Hickmans' characterization of what was said in opening (or later in closing argument after the motions for directed verdict were denied) has no relevance to the issue now before this court.

The Hickmans mischaracterize the issue on appeal by repeatedly arguing that this appeal is on the issue of whether there was evidence of what the standard of care was in

this particular case. That is not the issue. The issue is whether there was testimony defining for the jury what the term "standard of care" means so that the jury could understand and put in proper context the opinions of Dr. Nelson or Dr. Bays. Merely arguing that because Dr. Nelson used the words "standard of care" in his testimony makes a submissible case misses the point. Id.

Arguing that counsel for the defendant should have cross-examined Dr. Nelson on what the term meant is an improper attempt to try to shift the burden to the defendant to prove the plaintiff's case. This is not a case where the defendant is advancing an asserted error in admitting testimony when no objection was voiced at trial. It is the Hickmans' burden of proof to elicit the testimony. It is not the job of the defendant to cure evidentiary omissions on elements of proof required by the Hickmans or to alert them to foundational testimony they failed to elicit.

The Hickmans' discussion of whether Dr. Bay's testimony constituted a binding admission against the defendant Branson Ear, Nose & Throat is irrelevant. The issue is not whether Dr. Bays can make a binding admission against the defendant or whether the Hickmans properly proved up the admission. Nothing Dr. Bays said cures the evidentiary void in the Hickmans' case. Dr. Bays never admitted the legal standard by which liability in medical malpractice cases are determined. All he told the jury is the same as what Dr. Nelson told the jury—that the particular 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.

The Hickmans' argument that there was only one issue in dispute—the "factual" issues of whether Dr. Bays performed a complete thyroidectomy—misses the point on appeal. The Hickmans were required to provide evidence on the issue of what the particular standard of care dictated and how Dr. Bays failed to meet this required conduct. The Hickmans were also required to adduce this testimony that his failure was negligent and the Hickmans were damaged as a result. One cannot argue that because evidence of damage was adduced it cures an omission to adduce evidence of negligence. Similarly, the Hickmans cannot use the evidence of what Dr. Nelson said was the standard of care in this case without providing the jury testimony through Dr. Nelson or Dr. Bays of what that term means so that the JURY understood that when Dr. Nelson said what the standard of care was in the particular case—the jury knew this was based on more than just what Dr. Nelson said he thought should have been done. The Hickmans cannot bootstrap the use of the term "standard of care" to define the term "standard of care."

Dr. Nelson may or may not have been testifying on what others in the same or similar circumstances would have done. No one can determine that from the testimony. Dr. Nelson could have been asked to define the term, however, he was not. The law requires that the Hickmans provide expert testimony to the jury that allows the jury to know that the opinions offered that form the basis of their findings of breach of that

standard and of negligence are based on more than the expert's personal opinion. Arguing that because the expert has taught students for years does not supply the needed definition. Dr. Nelson could have been teaching his own personal opinions and standards for years. The same applies to how he performed thyroidectomies. Just because he performed over 750 thyroidectomies and instructed at a university does not provide the jury with testimony that the standard of care term means that degree of care used by others in the same or similar circumstances. Arguing that Dr. Bays agreed with Dr. Nelson does not cure the fatal omission either. Nowhere in the record on in the Hickmans' brief is any reference to any testimony by any expert defining that the term "standard of care" means an objective standard meaning that degree of care used by others in the same or similar circumstances.

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.


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## 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 January 4, 2008 she served two (2) copies of the foregoing SUBSTITUTE REPLY 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, 901 East battlefield Road, Springfield, MO 65807 and delivered a copy of the brief by email at sgarner@stronglaw.com

.I also certify that the attached brief complies with the Supreme Rule 84.06(b) and contains 2.103 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