IN THE SUPREME COURT OF MISSOURI

THOMAS E. THARP, et al., Appellants/Cross-Respondent, vs. ST. LUKE'S SURGICENTER-LEE'S SUMMIT, LLC, Respondent/Cross-Appellant.	)	No. SC 96528

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
STATE OF MISSOURI

THE HONORABLE KENNETH R. GARRETT, III,
PRESIDING CIRCUIT JUDGE

CROSS-APPELLANT'S REPLY BRIEF OF ST. LUKE'S SURGICENTER – LEE'S SUMMIT, LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

CROSS-APPELLANT'S ARGUMENT

I. The trial court erred in denying Defendant St. Luke's Surgicenter's Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict, because the evidence presented by Plaintiffs was insufficient to support a negligent credentialing claim, in that there was no substantial evidence demonstrating that a reasonably prudent health care facility would have refused to credential Dr. Norman Mutchnick; Plaintiffs presented no expert testimony to prove that fact, as required to establish all of the essential elements of a negligent credentialing claim; and, in any event, there was no evidence, expert or otherwise, that Dr. Mutchnick was incompetent to perform the procedure that he performed on Plaintiff Thomas Tharp.

This Court should reverse the trial court's judgment for Plaintiffs because the record makes plain that Plaintiffs failed to make a submissible case on their negligent credentialing claim. They claim fails as a matter of law for want of any showing that Dr. Mutchnick was incompetent to operate on Thomas Tharp. The evidence demonstrates:

- Dr. Mutchnick was skilled at this procedure with a much lower rate of complication than the national average. (STR 93:24-94:2, 206:6-16, 206:17-22.)
- Dr. Mutchnick has never had his license challenged, limited, suspended, or revoked by any institution. (STR 183:14-18, 522:L5-15.)
- Dr. Mutchnick had undergone and passed credentialing investigations for staff privileges at several other institutions. (STR 187:4-11.)

These facts belie Plaintiffs' claim. While Plaintiffs complain St. Luke's Surgicenter – Lee's Summit, LLC failed to follow its own credentialing process to the letter, St. Luke's ultimately credentialed a competent physician in granting privileges to Dr. Mutchnick, regardless of the defects in Dr. Mutchnick's paperwork.

The gravamen of a negligent credentialing claim is the extension of privileges to an incompetent physician and then allowing the incompetent physician to perform procedures for which the physician is not qualified on patients. *LeBlanc v. Research Belton Hosp*., 278 S.W.3d 201, 206 (Mo. App. W.D. 2008) (Employer can be held liable for an independent contractor's negligence "when the employer fails to exercise reasonable care in hiring a competent contractor."); *see also Manar v. Park Lane Med. Ctr*., 753 S.W.2d 310, 311–12, 14 (Mo. App. W.D. 1988) (Liability flows from extending staff privileges to doctor who was not "skilled, experienced or qualified in the procedure" and "allowing him to render treatment for which he was not qualified."); and *Gridley v. Johnson*, 476 S.W.2d 475, 484–85 (Mo. 1972) (Hospital may be held liable for allowing unqualified doctors to practice at its facility.). Absent here is any evidence that Dr. Mutchnick was an incompetent physician.

Plaintiffs' arguments do not compel a contrary conclusion. Plaintiffs, in their Respondents' Brief, argue they did, in fact, present substantial evidence that Dr. Mutchnick was "unskilled and not qualified to perform surgery" at St. Luke's. (Cross-Respondent's Brief, 68-7.) In support, they claim Dr. Mutchnick was incompetent because he was improperly credentialed. (*Id.* at 68-69.)

Plaintiffs' argument is circular and untenable. Simply put, St. Luke's did not render Dr. Mutchnick unskilled or unqualified to perform surgery by failing to follow its credentialing process to the letter. Plaintiffs' attacks on the credentialing process do not address in any way whether Dr. Mutchnick had the requisite skill, learning, and competence to perform the procedures that he performed at St. Luke's facility, much less call into question his skill, learning, and competence as a surgeon.

Plaintiffs further argue the jury could have determined that Dr. Mutchnick was unskilled that because he had been subject to twenty-two lawsuits. (*Id.* at 69-71.) Yet, Plaintiffs' own expert, John Hyde, II, Ph.D., conceded that lawsuits should be considered for the purpose of tracking, but opined there is no certain "magical number of lawsuits" such that "if you have over this you're bad or good or indifferent." (STR 144:15-19.) Indeed, the undisputed evidence at trial demonstrated that the type of medicine practiced can have a significant impact on how many lawsuits are filed against a physician. (STR 519:6-17.)

Here, the evidence established that Dr. Mutchnick had conducted over 4,000 similar procedures with only two complaints, well below the accepted average for injuries in such procedures. (STR 93:24-94:2, 206:6-16, 206:17-22.) Indeed, even if all twenty-two lawsuits had involved the same procedure that Dr. Mutchnick performed on Thomas Tharp, which they did not, and even if all twenty-two lawsuits had resulted in verdicts against Dr. Mutchnick, which they did not, Dr. Mutchnick still would have been well below the accepted average for injuries in such procedures.

Ultimately, if Plaintiffs' evidence established any incompetence by Dr. Mutchnick, it was in completing the credentialing forms for St. Luke's, and not in conducting surgery. Moreover, regardless of Dr. Mutchnick's paperwork, St. Luke's conducted a thorough investigation into Dr. Mutchnick, including gathering information about complaints and lawsuits reported by the NPDB. (LF 385:20-386:17.) Therefore, St. Luke's was aware of Dr. Mutchnick's lawsuits and, in balance with his completed information, judged him to be a competent surgeon. Plaintiffs produced no evidence that St. Luke's was wrong in its ultimate assessment of Dr. Mutchnick's competence to perform surgeries at its facility.

Plaintiffs next argue Dr. Mutchnick's competence to perform surgery was irrelevant to their negligent credentialing claim because St. Luke's negligence flows instead from the technical violation St. Luke's committed in credentialing an otherwise competent physician. Plaintiffs argue state regulations required St. Luke's to follow its bylaws for its credentialing process and that, here, St. Luke's failed to adhere to the letter of its bylaws, and, therefore, nothing more is needed to prove a negligent credentialing claim beyond Plaintiffs' damages. (Cross-Respondent's Brief, 55-67.) Plaintiffs' argument should be denied.

As an initial matter, the statutes and regulations cited by Plaintiffs do not create a private cause of action supporting a *per se* negligent credentialing case. *R.L. Nichols Ins., Inc. v. Home Ins. Co.*, 865 S.W.2d 665, 666–67 (Mo. banc 1993) (Where there are other means of enforcement, courts will not recognize a private civil action unless it appears to be a clear implication.)*; Shqeir v. Equifax, Inc.*, 636 S.W.2d 944, 948 (Mo. 1982) (A private remedy will not be implied when it does not promote or accomplish the primary goals of

the statute, and, here, such appears to be the case.); *see also* 19 CSR § 30-30.020(1)(L) (providing regulatory remedy for complaints against surgicenter).

Regardless, even Plaintiffs' own expert, in discussing the standard of care in credentialing physicians under these types of bylaws, acknowledged that the omission of lawsuits should not automatically remove a physician from consideration for privileges. Instead, Plaintiffs' expert explained that if a facility discovers that a physician has failed to report a lawsuit, you "don't credential him right away. If there's some explanation for that, you give people the benefit of the doubt." (STR 157:16-158, 227:1-5.)

Plaintiffs, in further support of their claim that a physician's competence is irrelevant to a negligent credentialing claim, cite a 1981 Wisconsin case, *Johnson v. Misericordia Community Hosp*., 301 N.W.2d 156 (Wis. 1981).[1] There, the court concluded the plaintiff need not show that the physician "was actually incompetent and that the hospital knew or should have known of his incompentence before granting him privileges." *Id.* at 172. Plaintiffs claim their case is even stronger because St. Luke's "knew" before credentialing Dr. Mutchnick that he was not properly qualified.

Plaintiffs' argument should be denied as untrue. As discussed at length above, St. Luke's conducted an extensive investigation into Dr. Mutchnick's background and the

[1] Plaintiffs suggest St. Luke's incorrectly cited this case in support of its position. In fact, St. Luke's, in open disclosure to the Court of the case law addressing credentialing claims as revealed by its research, cited the *Johnson* case as contrary authority, with the introductory phrase "but see."

evidence developed during that investigation, as well as the evidence at trial, demonstrated that Dr. Mutchnick was a highly qualified physician.

Plaintiffs next take issue with St. Luke's case authority. They complain these cases do not require Plaintiffs to show a physician is incompetent as an essential element of a negligent credentialing claim. (Cross-Respondent's Brief, 64-67.) In so arguing, they fail to heed the lessons to be drawn from these cases. Uniformly, these authorities make plain that a facility's conduct in allowing an incompetent physician to practice at the facility is the gravamen of a negligent credentialing claim. *Rule v. Lutheran Hospitals & Homes Society of America*, 835 F.2d 1250, 1253 (8th Cir. 1987) (Hospital "must use reasonable care in determining the competence of those granted medical staff privileges."); *Frigo v. Silver Cross Hospital and Medical Ctr.*, 876 N.E.2d 697, 724 (Ill. App. Ct. 2007) (It is a breach "to permit a physician whom the hospital knows or should have known is unqualified, or negligent, to practice on its premises."); *Beswick v. Bell*, 940 N.E.2d 338 (Ind. Ct. App. 2010) (summary judgment granted for defendant facility when there was no evidence that but for the lack of investigation, the physician would not have been credentialed); *Larson v. Wasemiller*, 738 N.W.2d 300 (Minn. 2007) (Hospital will not be held liable on the mere negligence of a physician, but on failure to exercise due care in granting staff privileges to an incompetent physician.); *Ferguson v. Gonyaw*, 236 N.W.2d 543 (Mich. App. Ct. 1975) (directed verdict for hospital because even if hospital had conducted the investigation plaintiff urged, it would reasonably have extended privileges because the physician was competent); *Taylor v. Singing River Hosp. System*, 704 So.2d

75 (Miss. 1997) (summary judgment affirmed where information omitted in the physician's application did not require denial of privileges).

Plaintiffs, in a final attempt to argue that they need not show St. Luke's credentialed an incompetent physician to prove their claim, argue St. Luke's failed to preserve this issue for appellate review. In support, Plaintiffs argue St. Luke's failed to use the words "incompetent" or "qualified" in its motions for directed verdict at the close of Plaintiffs' case or the close of evidence. (Cross-Respondent's Brief, 53-55.) Plaintiffs misconstrue the standard St. Luke's must meet to preserve its argument for appeal.

Rule 72.01(b) declares that "a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the motion for a directed verdict." Rule 72.01(a) requires a motion for a directed verdict to "state the specific grounds therefore." *Howard v. City of Kansas City*, 332 S.W.3d 772, 790 (Mo. banc 2011). To preserve the question of submissibility for appellate review in a jury-tried case, a motion for directed verdict must be filed at the close of all the evidence and, in the event of an adverse verdict, an after-trial motion for a new trial or to set aside a verdict must assign as error the trial court's failure to have directed such a verdict. *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 163 (Mo. App. W.D. 1997) (internal citations omitted). St. Luke's has met this standard.

The purpose of motions for directed verdict and JNOV is to "'challenge the submissibility of the plaintiff's case.'" *Newell Rubbermaid v. Efficient Solutions*, 252 S.W.3d 164, 170 (Mo. App. E.D. 2007) (quoting *Coon v. Dryden*, 46 S.W.3d 81, 88 (Mo. App. W.D. 2001)). "'A case is not to be submitted to the jury unless each fact essential to

liability is predicated upon legal and substantial evidence.'" *Newell Rubbermaid*, 252 S.W.3d at 170 (quoting *Coon*, 46 S.W.3d at 88).

Here, in its Motions for Directed Verdict, St. Luke's argued Dr. Mutchnick's omission of certain lawsuits in completing his application, absent more, was insufficient to satisfy Plaintiffs' burden in this case. (SLF 59-61, 64-66.) St. Luke's argument at trial is the same as its argument on appeal, namely, Plaintiffs may not rely solely on the application process to satisfy their burden, and addresses the same issue, namely, Plaintiffs' claim that Dr. Mutchnick's competence as a physician is irrelevant to their negligent credentialing claim.

Plaintiffs cannot claim surprise because this issue was the salient issue at trial and for all intents and purposes represented the liability issues at trial. As detailed above, the record was replete with evidence showing – without contradiction – that Dr. Mutchnick was a competent physician well-skilled in the procedure he performed on Thomas Tharp, and that St. Luke's credentialing investigation showed as much, regardless of the omission of certain lawsuits in Dr. Mutchnick's paperwork. That St. Luke's did not use the specific terms subscribed by Plaintiffs in its Motions does not defeat its argument on appeal. The issue was before the trial court, and preserved for appeal.

Plaintiffs further argue, without citation to any relevant authority, that St. Luke's waived its right to appellate review by "collaborating" in the preparation of the verdict directing instruction. Plaintiffs, in so arguing, suggest a step to preservation that is simply not required under Missouri civil practice. Missouri law makes plain that to preserve the issue of submissibility for appellate review, a defendant must present the issue in its

motions for directed verdict at the close of plaintiff's case, the close of the evidence, and in its after-trial motions, and nothing more. *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 163 (Mo. App. W.D. 1997). St. Luke's met this burden and was not required to challenge the trial court's instructions to obtain appellate review.

II. The trial court erred in denying St. Luke's Motion for New Trial, because the jury's verdict awarding Plaintiffs future damages was against the weight of the evidence in that Plaintiffs failed to sustain their burden to prove that future expenses were reasonable and necessary to treat Thomas Tharp's injuries and in that their medical experts could only speculate as to what potential future complications Thomas Tharp might suffer, along with a general recommendation that he should receive certain periodic monitoring, with no evidence concerning the cost of any such future medical treatment.

The Court should reverse the trial court's judgment because Plaintiffs failed to produce substantial evidence establishing the reasonableness and medical necessity of any future medical expenses. Plaintiffs' medical experts offered nothing more than speculation as to what complications Thomas Tharp might suffer, if any, in the future, and they could not inform the jury as to what any such future medical care might cost. Therefore, insomuch as the jury's award for future medical expenses was not supported by the evidence against the weight of the evidence admitted, a new trial on damages should be awarded in the event the judgment is not set aside and held for naught on submissibility grounds.

Plaintiffs argue they presented extensive evidence on all possible increased risks that Thomas Tharp faces as a result of the complication he suffered during this procedure. (Cross-Respondent's Brief, 79-83.) Plaintiffs ignore under Missouri law that evidence of mere possibilities, absent more, is insufficient to make a submissible case. *Shackelford v. West Central Electric Coop., Inc.*, 674 S.W.2d 58, 62 (Mo. App. W.D. 1984) (If the opinion of an

expert is couched in terms of "might or could" or possibilities, the evidence has no probative value and is insufficient to make a submissible case on causation.).

A recent decision by the Eastern District of the Missouri Court of Appeals addresses this rule in depth:

> First, to aid the jury in determining the extent and value of a present injury, the plaintiff can present expert testimony to a reasonable degree of medical certainty that the defendant's conduct placed the plaintiff at an increased risk of suffering possible future consequences. *Id.* (citing *Emery v. Wal-Mart Stores, Inc.*, 976 S.W.2d 439, 447 (Mo. banc 1998)). When using evidence of future medical consequences to establish the value of a present injury, it is not necessary to establish that the future consequences are reasonably certain to occur; rather, the plaintiff must show merely that there is an increased risk of suffering possible future consequences. Second, by contrast, where a plaintiff seeks to recover the medical costs associated with a future secondary injury that has not yet occurred, the plaintiff must prove the future injury itself is reasonably certain to occur. [*Swartz v. Gale Webb Transp. Co.*, 215 S.W.3d 127, 130 (Mo. banc 2007)] ("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") (citing *Seabaugh v. Milde Farms, Inc*., 816 S.W.2d 202, 210-11 (Mo. banc 1991)).

Ball v. Allied Physicians Group, L.L.C., ED 105030, 2018 WL 1474196, at *5 (Mo. App. E.D. Mar. 27, 2018).

In *Ball*, a hypodermic needle broke during a procedure and became lodged in the plaintiff's body. *Id.* at *1. Multiple attempts to retrieve the needle were unsuccessful. *Id.* At the trial of the plaintiff's malpractice claim, the plaintiff's expert testified he had not yet recommended surgery because the needle was encased in scar tissue and unlikely to migrate unless the plaintiff suffered a trauma such as a bad fall or car accident. *Id.* at *2. However, the expert explained that he would recommend surgery in the future if the needle migrated further or if the scar tissue continued to grow such that it impinged on the plaintiff's spinal nerve roots. *Id.* Ultimately, insomuch as the plaintiff sought future medical costs, and not merely the present value of the medical injury, the Eastern District, based on this Court's prior rulings, held the expert's testimony about what "could" happen was insufficient to support a jury's verdict. *Id.* at 5.

Here, similar to the plaintiff in *Ball*, Plaintiffs sought and received a verdict for future damages of $1.5 million. There is no substantial evidence supporting this award. The only treatment Plaintiffs' experts could identify with any certainty was the need for continued medical monitoring. But even Plaintiffs do not suggest that this monitoring would cost anything near the $1.5 million award.

As to other future medical costs, Plaintiffs' experts offered only speculation. Dr. Imagawa claimed that twenty to twenty-five percent of patients will need a follow-up procedure to remove scar tissue (STR 72:7-12), but admitted this statistic is difficult to gauge due to difficulty in tracking patients long after a repair surgery (STR 72:15-22). Dr. Randall acknowledged that some patients have no additional problems following the repair procedure. (SLF A220.) He further testified it is impossible to determine within a

reasonable degree of medical certainty whether a patient will suffer any of the possible complications. (SLF A221.) At the time of trial, Thomas Tharp was five years post-procedure and had no need for any follow-up procedures. (STR 98:20-99:6.)

Absent more, the jury's verdict was unsupported by the evidence and against the weight of the evidence because any award for future medical treatment beyond the cost of medical monitoring was speculative and could not be forecasted within a reasonable degree of medical certainty. Moreover, the jury had insufficient evidence concerning the specific costs associated with any of the procedures the experts speculated may later become necessary. (STR 78:1-3, 105:8-15, 109:9-19.) Therefore, the jury's verdict was against the weight of the evidence on that ground as well.

Finally, Plaintiffs argue St. Luke's waived appellate review of this issue because it did not present the argument in either of its motions for directed verdict, and did not object to the submissibility of Plaintiffs' claim during the instruction conference. Plaintiffs misconstrue St. Luke's argument, namely, that the jury's verdict was against the weight of the evidence. The trial court has inherent power under MO. R. CIV. P. 78.02 to weigh the evidence and grant a new trial on the ground that the verdict is against the weight of the evidence. *Braddy v. Union Pacific R. Co*., 116 S.W.3d 645, 649 (Mo. App. E.D. 2003). A motion for new trial, and not for directed verdict, is the appropriate method for challenging the weight of the evidence. *See, e.g., Reyes v. St. Luke's Hosp. of Kansas City,* 716 S.W.2d 294, 295 (Mo. App. W.D. 1986). St. Luke's presentation of this issue in its Motion for New Trial was sufficient to preserve the issue for this Court's review. (SLF 84-89.)

CONCLUSION

Defendant St. Luke's Surgicenter – Lee's Summit, LLC respectfully requests the Court to affirm the trial court's determination that the future medical payments are subject to MO. REV. STAT. § 538.220 and deny Plaintiffs' argument that Section 538.220 violates the Missouri Constitution.

St. Luke's also requests the Court to reverse the trial court's judgment for Plaintiffs and to remand the case for entry of judgment in St. Luke's favor on the Plaintiffs' negligent credentialing claim based on Plaintiffs' failure to present any evidence that Dr. Mutchnick was not qualified to perform the subject procedure on Plaintiff Thomas Tharp.

Finally, and in the alternative, St. Luke's requests the Court to reverse the trial court's judgment for Plaintiffs and to remand the case for a new trial on damages because the jury's verdict was against the weight of the evidence because Plaintiffs failed to support their claim for future medical damages with substantial evidence.

Respectfully submitted,

/s/ Teresa M. Young

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CERTIFICATE OF SERVICE AND CERTIFICATION UNDER RULE 55.03(A)

I hereby certify that a copy of the foregoing pleading was served by the Court's electronic filing system on May 17, 2018, on Mr. H. William McIntosh, Attorney for Plaintiffs, The McIntosh Law Firm, P.C., 1125 Grand Boulevard, Suite 1800, Kansas City, Missouri 64106.

In addition, the undersigned counsel certifies under Rule 55.03(a) of the Missouri Rules of Civil Procedure that she has signed the original of this Certificate and the foregoing pleading.

/s/ Teresa M. Young
Teresa M. Young #53427

CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. Respondent's/Cross-Appellant's Reply Brief includes the information required by Rule 55.03.

2. Respondent's/Cross-Appellant's Reply Brief complies with the limitations contained in Rule 84.06;

3. Respondent's/Cross-Appellant's Reply Brief, excluding cover page, signature blocks, certificate of compliance, and affidavit of service, contains 4,041 words, as determined by the word-count tool contained in the Microsoft Word 2010 software with which this Reply Brief was prepared; and

4. Respondent's/Cross-Appellant's Reply Brief has been scanned for viruses and to the undersigned's best knowledge, information, and belief is virus free.

/s/ Teresa M. Young
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