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IN THE SUPREME COURT OF MISSOURI

No. SC 96528

THOMAS E. THARP and PAULA M. THARP,
Appellants/Cross-Respondents,

v.

ST. LUKE'S SURGICENTER - LEE'S SUMMIT, LLC,
Respondent/Cross-Appellant.

Appeal from the Circuit Court of Jackson County, Missouri
Sixteenth Judicial Circuit
Hon. Kenneth R. Garrett, III, Circuit Judge

APPELLANTS' BRIEF ON REHEARING

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The Court should modify its opinion reversing the judgment in plaintiffs' favor by ordering that the matter be remanded generally for a new trial, with all incidents and attributes thereof, for the reasons that:

(A) long-standing precedent and settled practice, founded upon the furtherance of justice, require remand instead of outright reversal unless the Court is convinced that the plaintiffs could not make a submissible case on retrial, based upon the existence or availability of additional evidence to support plaintiffs' recovery 12

(B) in reversing plaintiffs' judgment the Court made new law by clarifying for the first time the elements of the cause of action that no prior Missouri appellate decision had addressed and by pronouncing requirements that were different from decisions in other jurisdictions; without such guidance plaintiffs had reasonably proceeded upon an incorrect legal theory by mistake or inadvertence. 18

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JURISDICTIONAL STATEMENT

In this medical malpractice suit, after a jury verdict in their favor and entry of judgment thereon, plaintiffs filed this appeal in the Supreme Court challenging the constitutionality of §538.220 RSMo (2005) which mandates periodic or installment payments of future damages under certain circumstances. St. Luke's Surgicenter cross-appealed, contending that plaintiffs failed to make a submissible case for the tort of negligent credentialing. After reversing the plaintiffs' judgment, the Court granted their motion for rehearing. It retains the jurisdiction already acquired. Missouri Constitution, Art. V, §3.

STATEMENT OF FACTS

General Factual Background. Thomas and Paula Tharp commenced this action on February 13, 2013, seeking damages for personal injury and loss of consortium. They contend that St. Luke's Surgicenter - Lee's Summit (an ambulatory surgery center) was negligent in extending surgical privileges to Dr. Norman Mutchnick who, in performing a cholecystectomy on Thomas Tharp, seriously damaged his hepatic duct and common bile duct. Mr. Tharp sustained bile leakage in his abdomen, peritonitis, permanent liver damage and pancreatitis. He had to undergo additional surgeries to repair this damage. A fuller account of the facts appears in their First Brief (pp. 12-15) and Second Brief (pp. 10-30).

Additional facts and evidence, not appearing in Record on Appeal but necessary and pertinent to the narrow issue on rehearing, will be set out below. Such evidence comes from two primary sources -- either it appears in the deposition testimony developed prior to trial

or in documents obtained during discovery, or it is available to the parties generally (e.g., medical literature) and to experts in the medical and administrative fields appropriate to this lawsuit.

Recent Procedural History. In an opinion issued February 26, 2019, this Court reversed the judgment in plaintiffs' favor on the grounds that (a) "there was no evidence showing St. Luke's credentialed an unqualified surgeon" -- that Mutchnick "lacked the knowledge, skill, and experience necessary to operate on patients like Mr. Tharp 'without creating unreasonable risk of injury' " (slip op. at 11); and (b) although plaintiffs' evidence showed "but-for" causation, they failed to establish proximate causation with evidence that St. Luke's credentialed a surgeon who lacked the knowledge, skill and experience necessary to perform the operation on Tom Tharp (slip op. at 14).

On March 12, 2019, plaintiffs filed their Motion for Rehearing or Motion to Modify, requesting that the Court order this cause be remanded for a new trial instead of entering judgment for St. Luke's Surgicenter. After suggestions in opposition were filed, the Court entered an order on June 4, 2019, sustaining the motion for rehearing and set out a briefing schedule to address the narrow issue whether remand was more appropriate than reversal. Supreme Court Order of June 4, 2019.

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POINT RELIED ON

THE COURT SHOULD MODIFY ITS OPINION REVERSING THE JUDGMENT IN PLAINTIFFS' FAVOR BY ORDERING THAT THE MATTER BE REMANDED GENERALLY FOR A NEW TRIAL, WITH ALL INCIDENTS AND ATTRIBUTES THEREOF, FOR THE REASONS THAT:

(A) LONG-STANDING PRECEDENT AND SETTLED PRACTICED, FOUNDED UPON THE FURTHERANCE OF JUSTICE, REQUIRE REMAND INSTEAD OF OUTRIGHT REVERSAL UNLESS THE COURT IS CONVINCED THAT THE PLAINTIFFS COULD NOT MAKE A SUBMISSIBLE CASE ON RETRIAL, BASED UPON THE EXISTENCE OR AVAILABILITY OF ADDITIONAL EVIDENCE TO SUPPORT PLAINTIFFS' RECOVERY;

Warren v. Paragon Techs. Grp., Inc., 950 S.W.2d 844 (Mo.banc 1997)

Hagen v. Celotex Corp., 816 S.W.2d 667 (Mo.banc 1991)

Rutledge v. Railroad, 123 Mo. 121, 24 S.W. 1053 (1894), and 27 S.W. 327 (Mem.) (1894)

Swope v. Printz, 468 S.W.2d 34 (Mo. 1971)

(B) IN REVERSING PLAINTIFFS' JUDGMENT THE COURT MADE NEW LAW BY CLARIFYING FOR THE FIRST TIME THE ELEMENTS OF THE CAUSE OF ACTION THAT NO PRIOR MISSOURI APPELLATE DECISION HAD ADDRESSED AND BY PRONOUNCING REQUIREMENTS THAT WERE

DIFFERENT FROM DECISIONS IN OTHER JURISDICTIONS; WITHOUT SUCH GUIDANCE PLAINTIFFS HAD REASONABLY PROCEEDED UPON AN INCORRECT LEGAL THEORY BY MISTAKE OR INADVERTENCE;

Kenney v. Wal-Mart Stores, Inc., 100 S.W.3d 809 (Mo.banc 2003)

Bass v. Nooney, 646 S.W.2d 765 (Mo.banc 1983)

Union Sav. Bank v. Cassing, 691 S.W.2d 513 (Mo.App.W.D. 1985)

Turner v. Haar, 114 Mo. 335, 21 S.W. 737 (1893)

(C) ADDITIONAL EVIDENCE ALREADY PRODUCED IN DISCOVERY AND OTHER AVAILABLE EVIDENCE, TOGETHER WITH EXPERT TESTIMONY THEREON, PRECLUDE THIS COURT FROM FINDING THAT PLAINTIFFS CANNOT MAKE A SUBMISSIBLE CASE ON RETRIAL.

Finnegan v. Missouri Pac. Ry. Co., 244 Mo. 608, 149 S.W. 612 (banc 1912)

Bass v. Nooney, 646 S.W.2d 765 (Mo.banc 1983)

Swope v. Printz, 468 S.W.2d 34 (Mo. 1971)

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ARGUMENT

A. LONG-STANDING PRECEDENT AND SETTLED PRACTICED, FOUNDED UPON THE FURTHERANCE OF JUSTICE, REQUIRE REMAND INSTEAD OF OUTRIGHT REVERSAL UNLESS THE COURT IS CONVINCED THAT THE PLAINTIFFS COULD NOT MAKE A SUBMISSIBLE CASE ON RETRIAL, BASED UPON THE EXISTENCE OR AVAILABILITY OF ADDITIONAL EVIDENCE TO SUPPORT PLAINTIFFS' RECOVERY.

(1) Here, the judgment in favor of plaintiffs Tom and Paula Tharp has been vacated for insufficiency of evidence. In such situations, the Court is bound by more than a century of precedent to remand this case for a new trial, in the interest of justice, *unless it is convinced that the plaintiffs cannot make a submissible case on retrial*. Typical of decisions expressing this preference, policy and rationale are these:

- Warren v. Paragon Techs. Grp., Inc., 950 S.W.2d 844, 846 (Mo.banc 1997): "An appellate court should reverse a plaintiff's verdict without remand only if it is persuaded that the plaintiff could not make a submissible case on retrial. * * * The preference is for reversal and remand."

- Moss v. National Super Markets, Inc., 781 S.W.2d 784, 786 (Mo.banc 1989): "Numerous cases hold that an appellate court should reverse a plaintiff's verdict without remand only if persuaded that the plaintiff could not make a submissible case on retrial. The preference is for reversal and remand."

- Hagen v. Celotex Corp., 816 S.W.2d 667, 672 (Mo.banc 1991): "We believe that justice requires that the plaintiffs be given the opportunity to supply the deficiencies we find in their proof. We prefer reversal and remand to outright reversal, as we are not convinced that the plaintiff could not make a case on retrial."

- Kaufmann v. Nagle, 807 S.W.2d 91, 95 (Mo.banc 1991): "The furtherance of justice requires a case shall not be reversed without remanding unless the appellate court is convinced the facts are such that a recovery cannot be had."

The list of additional Supreme Court decisions adhering to this preference, practice and rationale is long indeed: *see, e.g.*, In re Adoption of C.M.B.R., 332 S.W.3d 793, 813 (Mo.banc 2011); Kenney v. Wal-Mart Stores, Inc., 100 S.W.3d 809, 818 (Mo.banc 2003); State ex rel. Div. of Fam. Services v. Standridge, 676 S.W.2d 513, 517 (Mo.banc 1984); Swope v. Printz, 468 S.W.2d 34, 41 (Mo. 1971); Morris v. Shell Oil Company, 467 S.W.2d 39, 43 (Mo. 1971); Nelson v. Grice, 411 S.W.2d 117, 126 (Mo. 1967); Spencer v. Vill. of DeKalb, 408 S.W.2d 78, 81 (Mo. 1966); State Farm Mut. Auto. Ins. Co. v. Underwood, 377 S.W.2d 459, 464 (Mo.banc 1964); Contour Chair-Lounge Co. v. Laskowitz, 330 S.W.2d 817, 825 (Mo. 1959); Yarrington v. Lininger, 327 S.W.2d 104, 111 (Mo. 1959); Feinstein v. McGuire, 297 S.W.2d 513, 518 (Mo. 1957); East v. McMenamy, 266 S.W.2d 728, 732 (Mo. 1954); Maxie v. Gulf, M. & O. R. Co., 356 Mo. 633, 202 S.W.2d 904, 911 (1947); Tant v. Gee, 167 S.W.2d 67, 69 (Mo. 1943); Faris v. City of Caruthersville, 349 Mo. 454, 162

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S.W.2d 237, 239 (1942); Hurt v. Edwards, 347 Mo. 667, 148 S.W.2d 542, 543 (1941); Prasse v. Prasse, 342 Mo. 388, 115 S.W.2d 807, 808 (1938); Patzman v. Howey, 340 Mo. 11, 100 S.W.2d 851, 858 (1936); Byrne v. Prudential Ins. Co. of Am., 88 S.W.2d 344, 347 (Mo. 1935); Allen v. Toledo, St. Louis & W. R. R. Co., 12 S.W.2d 1116 (Mo. 1929); Ginocchio v. Illinois Cent. R. Co., 264 Mo. 516, 175 S.W. 196, 196-7 (1915); Finnegan v. Missouri Pac. Ry. Co., 244 Mo. 608, 149 S.W. 612, 628 (banc 1912); Woodson v. Metropolitan Street R. Co., 224 Mo. 685, 123 S.W. 820, 827 (1909); Rutledge v. Railroad, 123 Mo. 121, 24 S.W. 1053 (1894), and 27 S.W. 327 (Mem.) (1894); Turner v. Haar, 114 Mo. 335, 21 S.W. 737, 739 (1893); and Rutledge v. Railroad, 110 Mo. 312, 19 S.W. 38, 39 (1892).

(2) The plaintiffs' burden of identifying additional evidence is not a heavy one. This Court is not confined to an examination of the trial transcript or the legal file in an effort to identify the existence of additional evidence necessary to make a submissible case. Instead, if the Court finds that other pertinent, probative evidence is or may be ***available*** to the plaintiff, even though not in the record on appeal, remand is ordered:

- "We believe that justice requires that the plaintiffs be given the opportunity to supply the deficiencies we find in their proof [as to causation]. . . *The plaintiffs should have the opportunity to introduce evidence about the causative effects of exposure to dust from the specific products of Fibreboard that Charles Hagen used*, over the period of time they were used" -- Hagen v. Celotex Corp., supra 816 S.W.2d at 672 (emphasis added);

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● "Since *the record does not indicate that all available essential evidence has been fully presented* and that no recovery can be had in any event and that on a new trial plaintiffs may be able to make a submissible case *the cause is remanded for a new trial on all issues to give plaintiffs an opportunity to develop by expert medical testimony, if so advised and if such testimony is available, that defendant was negligent in causing an injury to the laryngeal nerves*" -- Swope v. Printz, supra 468 S.W.2d at 41 (emphasis added);

● "Having failed to prove whether or not Shell gave any warning to Independent, the plaintiff failed in an essential element of her case and the trial court was correct in sustaining Shell's after-trial motion for judgment in accordance with its motion for directed verdict. *It would appear that some evidence on this matter is available and in the interest of justice the case against Shell should also be remanded for a new trial*" -- Morris v. Shell Oil Company, supra 467 S.W.2d at 43 (emphasis added);

● "The furtherance of justice requires that a case should not be reversed without remanding unless the appellate court is convinced that the facts are such that a recovery cannot be had; and even though the plaintiff fails to substantiate the theory upon which his case was tried, *if he nevertheless shows a state of facts which might entitle him to recover if his case were brought upon a proper theory*, the judgment will not be reversed outright, but instead,

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in the exercise of a sound judicial discretion, the case will be remanded to give him the opportunity to amend his petition, if so advised, so as to state a case upon the theory which his evidence discloses" -- Nelson v. Grice, supra 411 S.W.2d at 126 (emphasis added);

- "we have reviewed the record and have concluded that the case should be remanded for such additional action in this regard as plaintiff may care to take. *It is possible that facts not disclosed in the record may be made to appear on the new trial*" -- Spencer v. Vill. of DeKalb, supra 408 S.W.2d at 81 (emphasis added);
- "it appears that the evidence has not been fully developed" -- State Farm Mut. Auto. Ins. Co. v. Underwood, supra 377 S.W.2d at 464;
- "It is a settled practice of appellate procedure that a case should not be reversed for failure of proof without remanding, *unless the record indicates that the available essential evidence has been fully presented*, and that no recovery could be had in any event" -- Feinstein v. McGuire, supra 297 S.W.2d at 518 (emphasis added);
- "While essential proof is wanting herein, nevertheless the general aspects of the situation which appears to have existed justify, we think, *the assumption that upon a retrial the plaintiff can likely adduce the proof necessary to make out a prima facie case*" -- Byrne v. Prudential Ins. Co. of Am., supra 88

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S.W.2d at 347 (emphasis added), and citing several other cases.

Furthermore, at least four cases have ordered a remand for new trial based solely upon the representations of plaintiff's counsel in a motion for rehearing that such additional evidence (not in the record on appeal) was available. *See* Rutledge v. Railroad, 123 Mo. 121 24 S.W. 1053, 27 S.W. 327 (Mem) (1894) ("On motion to modify the judgment, it has been suggested that plaintiff may have a cause of action upon further proof that the signal on which the engineer acted originated with the yard master. Plaintiff hence prays that the judgment be modified so as to remand the cause, and thus give him an opportunity to amend, and present that phase of the case to the trial court"); Finnegan v. Missouri Pac. Ry. Co., supra 149 S.W. at 628 ("It is suggested that to remand a cause for a new trial because of *suggestions made of the existence of facts not fully disclosed in the record* is an innovation. But appellant is in error in that contention," citing Rutledge v. Railroad); and Allen v. Toledo, St. Louis & W. R. R. Co., supra 12 S.W.2d 1116 ("The judgment of the circuit court is accordingly reversed, and, *as it is suggested by plaintiff's counsel that plaintiff can make further proof on the issues*, [Finnegan v. Mo. Pac. R. Co.] . . . it is ordered that the cause be remanded for further proceedings"). And more recently, in Moss v. National Super Markets, Inc., supra 781 S.W.2d at 786, a slip-and-fall case, the plaintiff successfully persuaded the Court to order a general remand by "seek[ing] to make use of *the deposition of the defendant's store manager, not offered in evidence at the trial*" on the issue of notice of the dangerous condition.

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B. IN REVERSING PLAINTIFFS' JUDGMENT THE COURT MADE NEW LAW BY CLARIFYING FOR THE FIRST TIME THE ELEMENTS OF THE CAUSE OF ACTION THAT NO PRIOR MISSOURI APPELLATE DECISION HAD ADDRESSED AND BY PRONOUNCING REQUIREMENTS THAT WERE DIFFERENT FROM DECISIONS IN OTHER JURISDICTIONS; WITHOUT SUCH GUIDANCE PLAINTIFFS HAD REASONABLY PROCEEDED UPON AN INCORRECT LEGAL THEORY BY MISTAKE OR INADVERTENCE.

Remand is appropriate where, as here, the Court clarifies the elements of a cause of action or new principles applicable to it, or where a plaintiff proceeded upon an erroneous theory, even where no submissible case was made.

(1) Because the overriding preference for and policy of remand is linked to the fundamental interests of justice being done, this Court has recognized that a case should be remanded "unless the appellate court is convinced the facts are such that a recovery *cannot* be had." Kaufmann v. Nagle, supra 807 S.W.2d at 95. That is true even where the plaintiff failed to make a submissible case. Several lines of such cases are instructive here.

First, courts have ordered a remand where a change in the law was announced in the appeal of that very case, as happened here. One example is Cudney v. Midcontinent Airlines, 363 Mo. 922, 254 S.W.2d 662 (banc 1953). The plaintiff, who was injured when the plane in which she was riding suddenly lurched, sued on a res ipsa loquitur theory. The trial court directed a verdict against the pilot and entered judgment for the airline on the jury verdict.

On appeal, the Court ruled, for the first time, that res ipsa was not an available theory against airlines for such occurrences. But it nonetheless reversed the judgment and remanded for new trial on this rationale:

> Since there are some circumstances shown by the record in this case from which inferences of specific negligence might be drawn and since this is the first time in which this court has held that the doctrine of res ipsa loquitur does not apply where a passenger in an airplane has been injured under such circumstances as those shown by the record in this case, the judgment is reversed and the cause remanded so that plaintiff may plead specific negligence, if she is so advised. Id. at 667.

Union Sav. Bank v. Cassing, 691 S.W.2d 513 (Mo.App.W.D. 1985), was a suit on a note where the plaintiff did not offer the note itself into evidence. The defendant appealed the judgment in the bank's favor. Said the court, "No Missouri case has directly considered the point, but in those cases which discuss proof required in suit on notes, the inference is that the note must be introduced in evidence." Id. at 514. It then reversed the judgment but ordered a remand for new trial with this explanation:

> The deficiency in respondent's case, the failure in this record to establish production by respondent of the note on which the suit was based, is a technical but critical oversight, and probably no more. Unfortunately, however, respondent has sought no opportunity to supplement the record on

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> appeal by producing "Plaintiff's Exhibit A", but instead has continued to insist in its brief either that there was no necessity to introduce the note in evidence or, that the note was somehow in the case by inference. Appellant's point on appeal cannot be answered by speculation as to the content of the exhibit, however likely that possibility may be.
>
> The only means to remedy the defect is to afford respondent the opportunity to present the note to the trial court and have the note received in evidence. *This alternative is available even though a plaintiff has not made a submissible case*. Hood v. M.F.A. Mutual Ins. Co., 379 S.W.2d 806, 812-813 (Mo.App. 1964). In fact, where a plaintiff has by mistake or inadvertence failed to prove up a claim in a situation where the proof seems to have been available, we have no alternative but to reverse the judgment and remand the case for the reception of additional evidence. Id. at 515-6 (emphasis added).

In Aiken v. Clary, 396 S.W.2d 668 (Mo. 1965), a medical malpractice case, the plaintiff failed to present expert testimony on the duty of the physician to inform the patient of certain risks, and thus failed to make a submissible case. However, because he had relied upon a previous Supreme Court decision that such testimony was unnecessary, the Court found "it was reasonable for counsel to assume the lack of a requirement of such testimony in this case." On that basis (as well as error in limiting voir dire), it "[felt] compelled to reverse and remand for a new trial in order to afford plaintiff an opportunity to offer expert

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testimony on the standard of disclosure required." Id. at 676.

Bass v. Nooney, 646 S.W.2d 765 (Mo.banc 1983), is consistent with this view. There, the trial court granted the defendant's motion for directed verdict. On appeal this Court altered the tort of negligent infliction of emotional distress by (a) abandoning the classic "impact rule" and the requirement of physical injury resulting from emotional distress, and (b) placing increased emphasis on the element of foreseeability of harm. Id. at 772-3. Then, in considering whether to affirm the directed verdict for defendant, the Court examined the record for substantial evidence to support the foreseeability element and noted:

> On the record as it presently stands it is problematical whether the plaintiff made a submissible case on this question of foreseeability. There is, however, no need to make a decisive evaluation of the scant evidence presently before this court, because upon retrial plaintiff will have an opportunity to introduce further evidence with respect to this matter. *Various kinds of proof can be visualized* which would tend to show some substantial foreseeable likelihood that either physical or psychic harm might be caused to a person trapped in the elevator. *Where a possibility of proof exists which the plaintiff has not fully developed, a remand rather than reversal is permissible.* Id. at 773-4 (emphasis added).

Similarly, courts have ordered remand because of a change in the law between the trial and the appeal. In Warren v. Paragon Techs. Grp., Inc., supra 950 S.W.2d at 846, a slip-and-

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fall case, the trial court had denied the landlords' motion for JNOV that was based on a release of future liability from negligence. The prevailing law at the time held such releases void as against public policy. However, between the time of trial and the appeal, this Court issued Alack v. Vic Tanny Int'l of Missouri, Inc., 923 S.W.2d 330 (Mo.banc 1996), holding that releases of future negligence are not void, but are effective only if the exculpatory language is clear, unambiguous, unmistakable, and conspicuous. It reversed plaintiff's judgment but remanded: "Because the trial here occurred before the *Alack* decision, Warren should have the opportunity to plead, or introduce evidence on, an avoidance of the defendants' affirmative defense." That the change in law occurred *after* the trial is the common denominator in Warren, Cudney, Aiken, Bass, Union Sav. Bank, and this case.

Second, courts have ordered a general remand where the plaintiff chose an incorrect theory of recovery by mistake. Kenney v. Wal-mart Stores, Inc., 100 S.W.3d 809 (Mo.banc 2003), was a defamation case. The trial court submitted an erroneous verdict director that failed to instruct the jury to find in plaintiff's favor if she proved damage to her reputation, necessitating a reversal of judgment in her favor. Id. at 813-4. The Court then reviewed the sparse evidence of damages she had presented. It noted that "Ms. Kenney's proof of actual reputational injury [for defamation] was tenuous at best." Id. at 817. And while it recognized that she had other theories of recovery (such as negligent or intentional infliction of emotional distress), the evidence of her "actual physical or emotional injury" required under the other theories was "equally tenuous." Id. She had not sought medical treatment,

psychiatric or psychological counseling, nor was she treated with any medication, and she presented no testimony or other evidence of stress, sleeplessness, or other symptoms associated with mental distress. Id. at 817-8. The Court also noted that, consequently, plaintiff had failed to establish causation between the incident and any damages. Id. at 818. It then confronted the issue of general remand or outright reversal:

> [I]t appears from the record that Ms. Kenney's proof was, at best, tenuous. However, ***whether the plaintiff made a submissible case at trial is not the test for remand***.
>
> An appellate court should reverse a plaintiff's verdict without remand only if it is persuaded that the plaintiff could not make a submissible case on retrial. The preference is for reversal and remand. * * * Normally, this type of instructional error results in remand of the case for new trial. * * * *Though Ms. Kenney may face substantial obstacles in meeting her burden of proof on retrial, this Court cannot say that it is impossible for her to present a submissible case*. Id. (emphasis added; citations omitted).

Third, in at least one case, a general remand was ordered on the ground that the plaintiff had relied upon the trial court's erroneous ruling about the sufficiency of her evidence. Thus in Turner v. Haar, supra 21 S.W. at 739, the Court held:

> We are asked to reverse the judgment without remanding the cause, for the reason, as contended by defendants, that there was a total failure of proof that

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the building was insecure or dangerous. We are not willing to adopt, in this case, the rule commonly applied where plaintiff fails to make out his case by the evidence. The [trial] court held that she made a prima facie case of unfitness when she proved the falling of the building, and she was not required to go further. *What proof she could have made does not appear. The error was one of law, as to what was necessary to be proved by plaintiff, and the evidence offered may not have shown the strength of her case. We think plaintiff is entitled to a trial of her case under the law as herein declared.* [Emphasis added.]

(2) Those decisions guide the outcome here because of the multiple factual commonalities. Primarily, the opinion in this case announced for the first time the requisite elements of negligent credentialing. Plaintiffs are not clairvoyant. They failed to present additional evidence on the issue of Mutchnick's incompetence because they were proceeding under an incorrect theory of law by mistake or inadvertence. *Cf.* Cudney v. Midcontinent Airlines, supra 254 S.W.2d 662; Union Sav. Bank v. Cassing, supra 691 S.W.2d 513; Aiken v. Clary, supra 396 S.W.2d 668; Bass v. Nooney, supra 646 S.W.2d 765; Warren v. Paragon Techs. Grp., Inc., supra 950 S.W.2d at 846; and Kenney v. Wal-mart Stores, Inc., supra 100 S.W.3d 809.

At the time of trial, Missouri had recognized the tort of negligent credentialing but had not definitively identified the elements or set forth a proper verdict directing instruction.

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The Western District did not set out either the elements of a cause of action for negligent credentialing or the nature and extent of evidence sufficient to support a verdict, nor hint at an appropriate verdict director in LeBlanc v. Belton Research Hospital, 278 S.W.3d 201 (Mo.App.W.D. 2008), nor had any prior Missouri appellate decision. Rather, LeBlanc *expressly* recognized that cause of action -- a step that previous cases had not forthrightly taken -- correctly observing that "Missouri courts have not rejected negligent credentialing as a cause of action against a hospital." Id. at 204-5.[1] Moreover, LeBlanc explained that its recognition of the theory was "*consistent with*" two settled principles in Missouri -- that a hospital owes its patients a specific duty of reasonable care proportionate to their needs, and that an employer of an independent contractor is liable for the latter's negligence " 'when the employer fails to exercise reasonable care' in hiring a competent contractor." Id. at 206. It did not hold the essential elements were the same, however. It concluded, "Missouri precedent does not bar a negligence claim against a hospital for injuries caused by independent doctors authorized to practice in that hospital." Id.

LeBlanc's only discussion of the elements of a cause of action for this form of medical malpractice was set out in the context of the sufficiency of the petition to state a cause of action for negligent credentialing (a species of corporate negligence):

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[1]LeBlanc singled out Manar v. Park Lane Med. Ctr., 753 S.W.2d 310 (Mo.App.W.D. 1988), noting in that case, "We did not decide whether Ms. Manar could bring her action under the theory of Gridley and Darling but gave her that option on remand." Id. at 205.

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> Corporate negligence is merely the application of "principles of common law negligence to hospitals in a manner that comports with the true scope of their operations." * * * Under this theory, the hospital's liability is based on its actions and not those of the doctors practicing within its facility. * * * Therefore, *a claim for corporate negligence must allege the hospital's duty owed to the patient, the breach of the duty, and the resulting injury from the breach*. * * * After reviewing Ms. LeBlanc's claim against Research Belton in her first amended petition, we conclude that she sufficiently pleaded a claim of corporate negligence . . . *specifically negligent credentialing.*

Id. at 207 (emphasis added; citations omitted). LeBlanc nowhere held that a plaintiff must prove that the negligent physician was "incompetent" or "lacked qualifications."

The slip opinion confirms that conclusion in two passages. First, it quoted that very passage from LeBlanc: "Accordingly, before a hospital can be held liable for an independent physician's negligence, the plaintiff must show 'the hospital's duty owed to the patient, the breach of the duty, and the resulting injury from the breach.' " Slip op. at 5. Second, it declared: "This Court has never before considered the scope of the duty hospitals owe to their patients when deciding whether to grant staff privileges to a physician." Slip op. at 8.[2] The opinion then held that "St. Luke's owes a duty to its patients to credential only

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[2]This Court had that opportunity in 2009 but denied the hospital's Application for Transfer after the Western District's opinion.

competent and careful physicians" (slip op. at 9), defining "incompetence" as the lack of "knowledge, skill, and experience necessary to operate on patients like Mr. Tharp 'without creating unreasonable risk of injury.' " Slip op. at 11 and n.3. Furthermore, it provided a verdict directing instruction for cases of this kind (slip op. at 15, n.6), though not a separate definition of "incompetence" or "lack of qualification."

Prior to February 26, 2019, litigants in Missouri had no such guidance. Plaintiffs relied instead upon the only decisions in the nation that addressed the elements of the theory and the sufficiency of evidence presented by others:

- Johnson v. Misericordia Comm. Hosp., 99 Wis.2d 708, 301 N.E.2d 156, 171-2 (1981), where the hospital contended that the plaintiff was required to prove the surgeon was incompetent and that the hospital knew or should have known of his incompetency; *held*, "Johnson was only required to show that the defendant did not exercise reasonable care . . . to determine whether Salinsky was competent," not that he "was actually incompetent and that the hospital knew or should have known of his incompetence before granting him surgical privileges"; "Johnson was only obliged to prove that Misericordia did not make a reasonable effort to determine whether Salinsky was qualified to perform orthopedic surgery."
- Rule v. Lutheran Hospitals & Homes Soc., 835 F.2d 1250, 1253 (8th Cir. 1987), where the court approved this jury instruction: (1) "[a] hospital must

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use reasonable care in determining the competence of those granted medical staff privileges"; (2) the plaintiff had the burden to prove the doctor negligently treated her; and (3) the plaintiff had the burden to prove the child developed cerebral palsy "as a direct and proximate result of" the hospital's "negligent granting of privileges and medical malpractice."

- Frigo v. Silver Cross Hosp., 876 N.E.2d 697, 722-5 (Ill.App.1st Dist. 2007), where the court adopted the same three elements after citing Rule and Johnson and imposed no "incompetence" element."

- Beswick v. Bell, 940 N.E.2d 338, 345 (Ind.App. 2011), where the court quoted Frigo and adopted its approach to the elements a plaintiff must prove.

Plaintiffs reasonably and justifiably relied on those cases in light of Missouri's lack of guidance. *Cf.* Aiken v. Clary, supra 396 S.W.2d at 676. Plaintiffs found no case from any jurisdiction, and the Court cited none, squarely ruling that a plaintiff must prove the physician's incompetence or general carelessness, or that attempted to define those concepts.

Moreover, other events justified plaintiffs' belief that they were not required to prove Mutchnick's incompetence or lack of qualification beyond the evidence adduced at trial. First, the trial court ruled plaintiffs had made a prima facie case by denying the Surgicenter's motion for directed verdict at the close of plaintiffs' evidence after argument (Tr. 469-80), and again at the close of all evidence after argument (Tr. 601-04). They were not required to go further with their evidence. *Cf.* Turner v. Haar, supra 21 S.W. at 739.

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Second, defense counsel worked jointly with plaintiffs' counsel and the judge to draft the verdict directing instruction (No. 6) that was read to the jury (Tr. 615). Defense counsel agreed with the judge's statement that "in a collaboration we came to an agreement in regards to the form [and] the contents in regards to Instruction No. 6" (id.). The verdict director (*see* 2nd Supp.LF 1) did not submit the proposition that the Surgicenter had credentialed an "incompetent or generally careless physician" that this Court has now pronounced as essential and proper (slip op. at 15, n.6).

Third, defense counsel not only failed to object to that omission from the instruction, but readily endorsed it: "It looks all good to me, Your Honor. So the defendant has no objection to form" (Tr. 615-16). This was a form of prohibited sandbagging. Lopez v. Three Rivers Elec. Coop., 26S.W.3d 151, 158 n.4 (Mo.banc 2000).

(3) The decisions cited by the Surgicenter in its memorandum in opposition to rehearing are readily distinguishable. Smith v. St. Louis Pub. Serv. Co., 364 Mo. 104, 259 S.W.2d 692 (banc 1953), was a motor vehicle collision where the plaintiff had "pleaded several assignments of primary negligence and also a violation of the humanitarian rule."[3]

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[3]The humanitarian rule allowed a plaintiff to recover despite his own remote contributory negligence. As succinctly described by this Court, "although the plaintiff's misconduct may have contributed remotely to [his] injury, if the defendant's misconduct was the immediate cause of it, and with the exercise of prudence he might have prevented it, he is not excused." Huelsenkamp v. Citizens' R. Co., 37 Mo. 537, 549 (1866). "[T]he

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Id. at 692. The humanitarian doctrine had been recognized in Missouri since at least 1866 (*see* Huelsenkamp v. Citizens' R. Co., supra), and was certainly familiar to the bench and bar in 1953 when Smith was decided, particularly to plaintiff's counsel. While acknowledging that remand is the preferred disposition when the plaintiff submits his case on an incorrect theory, the Smith Court explained the rationales for refusing to remand (id. at 696):

> We think this record clearly shows that plaintiff, in abandoning his primary negligence assignments, did so to secure the strategic advantage of avoiding the hazard of meeting the defense of contributory negligence. Where plaintiff chooses to submit upon but one issue and that submission is so greatly to plaintiff's advantage, such submission is not mere misadventure. On the contrary it must be concluded that the hazards and consequences were weighed and that counsel committed his client's cause to the humanitarian submission for a definite strategic reason. . . .
>
> There has been no suggestion here that the facts of this case were not fully developed. And a careful reading of the transcript of the record now before us in this cause makes it clear that the facts were fully developed.
>
> . . . [W]here it appears (as here) that a counsel has committed his client's cause by choosing to restrict the submission to one issue because such

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humanitarian doctrine blots out all antecedent or primary negligence." Glenn v. Offutt, 309 S.W.2d 366, 369 (Spr.App. 1958).

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appears to his strategic advantage in the trial of the case, the cause should not be remanded for new trial.

To the same effect are Borrson v. Missouri-Kansas-Texas R. Co., 172 S.W.2d 835, 849-50 (1943) (on rehearing) (denying remand because "there is no contention in the present motion that the facts were not fully developed below" and the plaintiff had "committed himself to a particular theory"; but noting that remand is the rule where "the moving party had met with misadventure, perhaps through oversight, misunderstanding or error in legal judgment, but nevertheless misadventure"), and other cases in that line.

Many decisions that acknowledge Smith have nevertheless ordered remand based on the same distinction -- that no strategic advantage was sought: Katz v. Slade, 460 S.W.2d 608, 614 (Mo. 1970) ("Katz' counsel and the court evidently misconceived the law and submitted the case to the jury in the mistaken belief that the rule of strict liability in tort was applicable. This appears to have been misadventure based upon a mistaken legal theory . . . rather than an abandonment of his primary negligence assignments to secure a strategic advantage"); Zimmerman v. Associates Discount Corp., 444 S.W.2d 396, 398 (Mo.banc 1969) ("It is apparent that plaintiff proceeded upon an erroneous theory of liability on the part of defendant" and not 'done for strategic advantage' "); Smith v. Inter-County Telephone Co., 559 S.W.2d 518, 525 (Mo.banc 1977); Pigg v. Bridges, 352 S.W.2d 28, 34 (Mo.banc 1961); Lamont v. Thompson, 303 S.W.2d 589, 595 (Mo. 1957); Shafer v. Southwestern Bell Tel. Co., 295 S.W.2d 109, 116 (Mo. 1956); Houfburg v. Kansas City

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Stock Yards Co. of Maine, 283 S.W.2d 539, 547-8 (Mo. 1955); Snyder v. Jensen, 281 S.W.2d 819, 825 (Mo. 1955). There are many more.

The Surgicenter's citation to Bauby v. Lake, 995 S.W.2d 10 (Mo.App.E.D. 1999), is inapt. It did not involve similar issues. In a judge-tried case for damages to his stolen car, the plaintiff was awarded damages against a 14-year old passenger and his mother. The court reversed because no evidence connected the child to the theft, no other evidence existed, and no theory of liability existed to impose liability against his mother. It then entered judgment in defendants' favor under Rule 84.14.

As the numerous cases cited hereinabove squarely hold, "[t]he furtherance of *justice requires* a case shall not be reversed without remanding unless the appellate court is convinced the facts are such that a recovery cannot be had." Kaufmann v. Nagle, supra 807 S.W.2d at 95. Thus, that part of Rule 84.14 allowing the Court to make a final disposition of this case is defeated by the limiting clause, "[u]nless justice otherwise requires."

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C. ADDITIONAL EVIDENCE ALREADY PRODUCED IN DISCOVERY AND OTHER AVAILABLE EVIDENCE, TOGETHER WITH EXPERT TESTIMONY THEREON, PRECLUDE THIS COURT FROM FINDING THAT PLAINTIFFS CANNOT MAKE A SUBMISSIBLE CASE ON RETRIAL.

As noted above, plaintiffs need only show the *existence*[4] or *availability*[5] of *some evidence*[6] that *might*[7] be adduced to establish a prima facie case of the Surgicenter's knowledge or notice of Mutchnick's lack or skill, education or experience and its breach of duty to deny him privileges. It is not necessary that such evidence appears in the record

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[4]Finnegan v. Missouri Pac. Ry. Co., supra 149 S.W. at 628 ("the existence of facts not fully disclosed in the record").

[5]Swope v. Printz, supra 468 S.W.2d at 41 ("available essential evidence"); Morris v. Shell Oil Company, supra 467 S.W.2d at 43 ("available"); Feinstein v. McGuire, supra 297 S.W.2d at 518 ("available essential evidence").

[6]Morris v. Shell Oil Company, supra at 43 ("some evidence").

[7]Bass v. Nooney, supra 664 S.W.2d at 774 ("a possibility of proof"); State ex rel. Div. of Family Servs. v. Standridge, supra 676 S.W.2d at 517 (remand where "the possibility for a recovery by the plaintiff will remain if sufficient evidence is produced"); Nelson v. Grice, supra 411 S.W.2d at 126 ("facts which might entitle him to recover"); Spencer v. Vill. of DeKalb, supra 408 S.W.2d at 81 (remand where "[i]t is possible that facts . . . may be made to appear on the new trial").

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before the Court.[8] Such evidence could include expert testimony not yet developed.[9] Plaintiffs need not set out all of the evidence they anticipate might be developed or used at trial.[10]

An appropriate definition of "incompetency" for all medical malpractice cases (or, for that matter, for an electrician or roofer) is elusive. The slip opinion looked to Tendai v. Missouri State Bd. of Registration for Healing Arts, 161 S.W.3d 358, 369 (Mo.banc 2005), which turned to a dictionary for this, "lacking qualification or ability; incapable," before finding the Administrative Hearing Commission's definition "appropriate": "a general lack of present ability or lack of disposition to use a present ability to perform a given duty." The slip opinion (at 11, n.3) defines incompetence as a lack of "knowledge, skill, experience, and available equipment which a reasonable man would realize that a contractor must have in

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[8] Moss v. National Super Markets, Inc., supra 781 S.W.2d at 786 (deposition testimony "not offered in evidence at the trial"); Spencer v. Vill. of DeKalb, supra at 81 ("facts not disclosed in the record"); Finnegan v. Missouri Pac. Ry. Co., supra at 628 ("facts not fully disclosed in the record").

[9] Swope v. Printz, supra at 41; Aiken v. Clary, supra 396 S.W.2d at 676.

[10] Bass v. Nooney, supra at 774 ("Various kinds of proof can be visualized"); Allen v. Toledo, St. Louis & W.R.R. Co., supra 12 S.W.2d at 1116 ("it is suggested by plaintiff's counsel that plaintiff can make further proof on the issues"); Turner v. Haar, supra 21 S.W. at 739 ("What proof she could have made does not appear").

order to do the work which he is employed to do without creating unreasonable risk of injury to others." Despite this literal language, however, a physician surely can be found incompetent even if the equipment necessary to treat a patient properly is available because it has been supplied by the hospital. Similarly, a physician who has considerable knowledge and experience can surely be found incompetent if he lacks the motor skills necessary to operate safely because he has hand tremors from Parkinson's disease, or impaired eyesight, or other physical or mental impairment that make him unskillful and dangerous.

The difficulty of selecting an inflexible one-size-fits-all or an all-inclusive definition has been noted in the medical literature:

> Competence is a concept that defies easy definition. The etymology and a modern definition of competence both include a legal implication. Ability, skills, and performance have been used as synonyms but are not the same as competence, and lack the legal implication. Practice, expertise, or coaching are all inadequate synonyms. In medicine we use volume performance and outcome as measures of competence, but neither have the same meaning nor have they withstood scientific scrutiny. Similarly, reaction time and decision time have been used in surgeons as a measure of competence but are incomplete. Error can be an indicator of incompetence, but all humans commit error, and by itself an error does not necessarily mean that a physician is incompetent. . . . Impaired competence could exist early in a physician's

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career and might include dysfunctional or antisocial behavior, failure to keep learning, and substance abuse. Certain medical conditions, for example psychiatric disease or physical disorders affecting cognitive or psychomotor skills, may also impair competence. Late in the professional career, impaired competence might result from cognitive decline or the decrease in psychomotor skills associated with aging, or from specific neurologic or medical conditions. [App A3]

Trunkey, DD and Botney, R, *Assessing Competency: A Tale of Two Professions*, J Am Coll Surg 2001; 192:385-395, at 387 [App A1-A11].

Nevertheless, at this stage of the litigation, plaintiffs will set out available evidence that tends to prove both Mutchnick's incompetence by reference to several of the factors listed in the slip opinion and medical literature, and the Surgicenter's notice thereof.

The principal opinion's reference to an article setting out the corresponding relationship between a physician's speciality and the number of lawsuits filed each year[11] is somewhat useful in reflecting the increased frequency of malpractice claims as the physician ages: "Among physicians in low-risk specialties, 36% were projected to face their first claim by the age of 45 years, as compared with 88% of physicians in high-risk specialties [including general surgery]. By the age of 65 years, 75% of physicians in low-risk specialties

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[11] Slip op. pp. 10-1 and n.2, citing Anupam B. Jena, et al., *Malpractice Risk According to Physician Specialty*, 356 New England J. Med. 629 (2011).

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and 99% of those in high-risk specialties were projected to face a claim." Id. 633-4. That correlation is also noted in other medical literature (*infra*), and exposes the fundamental flaw in attempting to assess Mutchnick's competence by the number of lawsuits brought against him over his *entire* career. That approach does not account for the increasing frequency of suits as he aged. The issue here is his lack of competence or qualification at the time of Tom Tharp's surgery when he was 66 years old, not when he was 30 or 35. For present purposes, analysis of known suits and claims since the first one is key.

Medical literature discusses the role that age, lack of education and limitations on experience play in the decline of surgical skills. For example, one 2008 article (included at App A12-A21) entitled *The Problem of the Aging Surgeon: When Surgeon Age Becomes a Surgical Risk Factor*,[12] reviewed available studies and observed this (omitting footnotes):

- "[Anecdotal evidence] suggests there is a problem posed by the loss of skills by aging surgeons." [A13]
- "Knowledge and experience remain for a long time. First to go is strength, then eyesight, then dexterity, and finally cognition. Knowledge, experience, and reputation can compensate for a long time. The declines are gradual. The surgeon and his or her colleagues may not notice the changes until the deficits

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[12]Ralph B. Blasier, MD, JD; Clin Orthop Relat Res, 2009 Feb; 467(2): 402-411, published online 2008 Oct 31, doi: 10.1007/s11999-008-0587-7 (available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628499/).

become serious." [A13]

- "When contemplating the effect of age on surgeons, quantity of education, remoteness of education, and obsolescence of the content of the education are all at least theoretical concerns." [A13]

- " To generalize, the older a surgeon is, the more likely he or she is to have had a shorter initial education in his or her specialty. To generalize again, the older a surgeon is, the more likely it is that he or she is remote from his or her initial education in his or her specialty." [A13]

- "Only a few research projects have studied the relationship between surgeon age or remoteness of surgeon education and the results of surgery . . . ." [In a meta-data study by Choudhry et al., searching the medical literature for evidence of a relationship between physician age and quality of medical care,] 52% of the articles "reported all measures of quality of care declining with increasing physician years in practice. For the other half of the articles, the results were less clear, but only 7% reported increasing quality of medical care with increasing years in practice." [A14]

- "Closely related to the problem of remoteness of education is the need to maintain old skills, develop new skills, and grow through experience. Experience alone can substitute for a lot of mechanical skills. It is generally agreed that the deterioration of purely physical skills begins near the end of the

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third decade of life (around age 28). Cognitive skills diminish later. Yet it is widely agreed that most surgeons reach their peak of overall performance around the second half of the fifth decade (45-50 years of age). What appears to be happening is that, for more than two decades, growing experience can and does more than compensate for diminishing physical skills." [A14]

- "Greenfield and Proctor identified vision, hearing, motion, and dexterity as physical attributes of a surgeon that inevitably decline with age. Reaction time, the time needed to move in response to a stimulus, has been found to decline only slowly. Rovit lists other physical attributes that decline with age. 'Maximum strength is generally achieved during the third decade of life, with a 25% loss of strength by age 65 years. . . . As we age, visual acuity and accommodation decrease in association with hardening and yellowing of the lens [of the eye] . . . and pupillary shrinkage. Optimal performance requires . . . 100% more [illumination] in workers older than 55 years.' " [A14-A15]
- "Trunkey and Botney have developed a series of tests, together named the 'MicroCog,' designed to detect 'impaired competence occurring late in the physician's career.' The tests measure 'reactivity, attention, numeric recall, verbal memory, visiospatial facility, reasoning, and mental calculation.' According to the overall MicroCog scores, at all ages, physicians (not necessarily surgeons) perform better than nonphysicians, but even physicians

by age 75 lost 25% of their starting score. ***The decline is very rapid by age 60***." [A15]

- "Greenfield and Proctor identify (a) the ability to focus attention; (2) the ability to process and correlate information; and (3) native intelligence as cognitive attributes of a surgeon that must decline with age." [A15]
- "Neumayer et al. found ***surgeon age older than 45 years heralded an increased rate of recurrence (failure of the repair) in laparoscopic hernia repairs***." [A15]
- "[S]ome [physicians] have little insight into when their skills decline." [A16]
- "There is no uniform or widespread method to assure competence of surgeons." [A16]
- "[T]here is no evidence that [state government] mechanisms [for the discipline or suspension of so-called incompetent physicians] work to identify or intervene in cases of the gradual failing of surgeons' competence resulting from aging." [A16]
- "In some cases, when a hospital knows it has a problem with a bad surgeon, it will not take action for financial reasons." [A16]
- "As good as the initial [American Board of Medical Specialties] certification process is at assuring competency, the recertification process is

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very much weaker. To recertify, the surgeon must show evidence of a certain minimum number of hours of continuing medical education and take a test. . . . It is telling that no orthopaedic surgeon who has ever attempted to recertify has ultimately failed to do so (some have taken a test more than once but ultimately passed)." [A17]

- "It is distinctly rare to have more than one attending surgeon in an operation. There may be surgeon-trainees, nurses, and technicians in the operating room, but almost never two attending surgeons. So the opportunity for one attending surgeon to critique the performance of another is almost nonexistent. Furthermore, trainees, nurses, and technicians are not empowered or encouraged to officially criticize the technical skills of the attending surgeon. Gross negligence may be observed and reported, but anything less will be missed, and small lapses in judgment are far more likely than gross deviations, especially early in the surgeon's decline." [A18-A19]

In the CCRASS Study published in July 2008[13] (App A22-A32), the authors studied surgeons specifically, testing visual sustained attention, which also addresses stress tolerance, reaction time, which addresses psychomotor abilities, and visual learning and memory, which

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[13]Bieliauskas LA, Langenecker SA, Graver C, et al., *Cognitive changes and retirement among senior surgeons (CCRASS): results from the CCRASS Study*, J Am Coll Surg, 2008; 207:69-78; discussion at 78-79.

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also addresses visual-spatial organization (A23). Although surgeons performed better than the general population in psychomotor areas, there was nevertheless "considerable decline with age" in virtually every test (A-22, A23-A25, A29).

In a 2011 editorial in Orthopedics Today (App A33-A35), one commentator observed:

> The aging physician has the potential to have significant losses in cognitive and/or motor skills. *Recertification every 7 to 10 years and hospital credentialing every 2 years allows for significant windows that may not detect diminishing skills*. . . . More than one-third of physicians in this country are older than 60 years. . . . Poor performance and competence can be attributed to a multitude of factors other than aging. Currently physicians have to meet requirements to continue to practice. To renew a medical license in most states, doctors must complete a certain number of hours of continuing medical education (CME). Action is only considered when a doctor's behavior or their medical complications starts to become noticeable by other physicians and nurses. Mild impairments often start subtly and may become more apparent and aggravated in stressful situations.[14]

Interpretation of these study results and correlation with Mutchnick's skills, education, experience, CME testing, litigation history and other factual data call for expert testimony.

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[14]Douglas W. Jackson, MD, *The aging orthopedic surgeon: An area we need to address before others do it for us*, Orthopedics Today, April 2011.

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But those research findings and observations should be placed alongside other facts in this case because they tend to illuminate or explain them in ways favorable to plaintiffs. They tend to show that his surgery on Tom Tharp was not a single act of negligence but rather the result of the decline of his skills and judgment, and remote education as a result of age.

Mutchnick was born in April 1945. He was 66 when he operated on Tom Tharp on December 30, 2011. By that time he had been out of medical school over 41 years, and had completed his residency 35 years earlier.[15]

A laparoscopic cholecystectomy requires the surgeon's ability to focus attention, visual acuity, motion, dexterity, reaction time, and ability to process and correlate information and exercise appropriate judgment because he or she is watching a television screen while manipulating the surgical instruments inside the patient's abdomen (Tr. 56); the decline in those skills is very rapid by age 60 according to the medical literature. A jury

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[15]According to his C.V. produced in April 2013 (App A36), he attended medical school from 1966 through 1970, had an internship from 1970 to 1971, joined the Air Force in 1971, did a general surgical residency from 1973 to 1977, began practicing general surgery solo for his own business in 1978, was a coordinator of surgical education from July through December 1977 and again from 1985 to 1987, and was a clinical assistant professor for UMKC Medical School working at Menorah Medical Center from 1987 to December 1995. Mutchnick's testimony, however, differs from his C.V. He began practicing with three other surgeons in 1978, and became a solo practitioner after they all died (depo pp. 7-8).

could find that, because of his diminished skills in those respects, he used a dangerous instrument (a Harmonic scalpel) not appropriate for that surgery,[16] he failed to obtain a critical view for safety in that he failed to identify other structures that could be injured by use of that tool,[17] he got too close to the common bile duct and caused thermal injuries to it.

And yet, Mutchnick testified in deposition that he has "no idea," and was not able to

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[16] Mutchnick always used a Harmonic scalpel in performing various procedures since being trained on it in the early 1980's, and began using it exclusively for laparoscopic cholecystectomies some time after that (depo pp. 14-17). He had no further training with it after the initial period and no subsequent training on laparoscopic techniques for gallbladders or other procedures (depo pp. 16-17). He appears not to have learned new skills. By contrast, plaintiff's expert Dr. Imagawa "never" used a Harmonic scalpel in laparoscopic cholecystectomies because he "worried about injury to the bile duct" (Tr. 57; depo. p. 11).

[17] According to Dr. Imagawa, "when you do a cholecystectomy, when you try to remove the gall bladder, you want to clip this cystic duct there, you want to clip this cystic artery here, then remove the gall bladder and put it in a bag and then pull it out through the abdomen. But you need to make sure you don't injure any of the structures around here. So you have to obtain what's called a critical view of safety. . . . Failure to do that would then potentially lead to an injury by misidentifying structure. So the standard of care is to obtain this critical view. . . . We do not see in the operative report any discussion that the critical view was obtained." (Tr. 58-60).

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explain, why Tom Tharp's common bile duct got a burn injury during his surgery (depo pp. 47-8). Mutchnick saw no leak and no injury, felt he used the Harmonic scalpel properly, and contended he was nowhere near the common bile duct "that [he] could see" (p. 48).

Moreover, Mutchnick was the only attending physician during the Tharp surgery. According to the medical records, also present were an anesthesiologist, a CRNA, a circulating nurse and a surgery tech acting as scrub nurse. None were trained to observe the surgery with a critical eye, or generally empowered to report negligence had they seen it. Their failure to report a mishap by an unskillful surgeon is hardly surprising.

Mutchnick's formal medical education had ended decades earlier. As Blasier explained, "The lesser quantity of education and greater remoteness of education are not the most profound age-related effects. Because the chronologic era when the education was obtained differs, the content of the education differs. To consider orthopaedic surgery as an example, essentially every treatment technique taught 25 years ago has been abandoned and replaced. . . . All surgical specialties have had similar turnover of treatment methods. In the field of general surgery, laparoscopy is progressing to replace open abdominal surgery. 'In surgery, . . . [c]hanging skills are required. The cut-feel-stitch needed for an open surgery is quite different than those needed for operating on images on a television screen as is the case with laparoscopic surgery.' " *The Problem of the Aging Surgeon*, supra at 3/13 (App A14).

But beyond his annual CME online course, Mutchnick had few refresher courses

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(depo pp. 77-8), and none in laparoscopic cholecystectomy (p. 16) over many years except in 2009 when he had an intensive review of all areas of surgery for one week to prepare for the ACS board certification exam (pp. 78-9).

As for the online CME testing, documents obtained from Mutchnick's credentialing file with the Surgicenter for the years 2008, 2009, 2010 and 2011 can be evaluated in light of the studies discussed above, particularly the recall and memory aspects of cognition. In 2008, Mutchnick took one test in each of 24 weeks, 21 in 2009, 10 in 2010 and 12 in 2011. The subjects of the testing varied within the field of General Surgery.[18] Mutchnick would take each test first and receive a "pre-test" grade, then read or listen to the materials provided by Audio-Digest Foundation, and then re-take the same test and receive a "post-test" grade. Mutchnick never achieved a 100% pre-test score on any of those 67 subjects. He often scored as low as 30% on several, with numerous 40%, 50%, 60% and 70% scores in each calendar year. He scored 90% once and 80% only six times. After reading/listening to the materials, his post-test scores were mostly 100%.

However, in those areas of General Surgery most closely associated with the December 2011 laparoscopic cholecystectomy on Mr. Tharp, Mutchnick's pre-test scores were: *laparoscopic surgery* 70% (3/31/2008), *laparoscopy update* 50% (5/31/2009),

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[18]A fuller account of the testing, the subjects, Mutchnick's recollection of them and explanation of the process, and the accrediting organization appears in the Affidavit of Counsel attached to the Motion for Rehearing or Motion to Modify, filed March 12, 2019.

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laparoscopy 80% (9/11/2009), and *laparoscopic technique and diverticular disease* 50% (9/8/2010). He took no tests in those areas in 2011, but scored a pre-test 30% on *liver* (9/16/2011), and 50% on *surgery of the thyroid, bowel, liver, and pancreas* (11/16/2011). For his part, Mutchnick could not remember in October 2014 whether any of those tests involved laparoscopic cholecystectomies (depo p. 71).

The pattern of these test scores fairly suggests his inability to retain essential knowledge beyond the short term -- the kind of age-related cognitive deficits in the ability to memorize and recall crucial information discussed in the medical literature.

Evidence already in the record includes the 22 lawsuits that had been filed against Mutchnick prior to the cholecystectomy in December 2011 that were all available to the Surgicenter on case.net. While there is "no magical number" of lawsuits that, *ipso facto*, establishes lack of skill, knowledge or experience, they are probative evidence of incompetence or lack of qualification and of the Surgicenter's notice, actual or constructive, that permitting Mutchnick to continue to operate created an unreasonable risk of injury to others. Many courts have so held: Purcell v. Zimbelman, 18 Ariz.App. 75, 500 P.2d 335, 343-4 (1972) (evidence of four previous suits admissible to show notice as to general competency of physician to continue as member of hospital staff); Johnson v. Misericordia Comm. Hosp., supra 301 N.W.2d at 743 (seven malpractice suits available in local circuit court files relevant to establish constructive notice of incompetence); Raschel v. Rish, 488 N.Y.S.2d 923, 110 A.D.2d 1067 (1985) (three prior suits admissible to show hospital's

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breach of duty); Strubhart v. Perry Mem. Hosp. Trust Auth., 903 P.2d 263, 273 (Okla. 1995) ("the fact the doctor has previously been sued for malpractice or experienced untoward results in prior cases" relevant to show hospital's notice); Ward v. Lutheran Hospitals & Homes Soc., 963 P.2d 1031, 1033 n.2 (Alaska 1998) (that "the physician either lacked standard credentials or previously had been the subject of a malpractice suit or disciplinary proceedings" is relevant to prove hospital's notice of danger); Fletcher v. South Peninsula Hosp., 71 P.3d 833, 843 (Alaska 2003) (seven prior cases relevant to prove notice of danger). There might well be evidence of other malpractice claims made against Mutchnick that did not result in litigation.

The known claims and lawsuits against Mutchnick began with one in 1982 followed by another in 1983. In 1985, at age 40, he was sued for the wrongful death of Brenda McDaniel for failing to diagnose appendicitis. Then followed a flurry of suits -- one each in 1989, 1990, 1991 and 1992, then four in 1993, when he was 48. Two more were filed in 1996. There was a hiatus (unless claims were made not resulting in suits), but nine more were filed over the next seven years -- in 2003 when he was 58 years old, again in 2004, two in 2006, two in 2008, two more in 2009 and another in 2010 (Pltf.Exh. 79). Mutchnick's own description of these in his credentialing applications may not have been objective, so further investigation might uncover more evidence consistent with age-related changes in his skills, or cognitive decline, or other facts supporting incompetence.

Without revealing plaintiffs' trial strategy, theories and mental impressions, suffice

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to say that a considerable amount of other information and evidence is available that could shed light on the issue of Mutchnick's lack of skill, education or experience, including credentialing files from other institutions, CME test results for other years, and information about malpractice claims not heretofore disclosed.

CONCLUSION

In light of the existing and available evidence, only some of which has been set out above, coupled with testimony from medical experts developed after remand, this court cannot confidently conclude that plaintiffs are unable to make a submissible case on retrial that the defendant knew or could have known that extending surgical credentials to Mutchnick created an unreasonable risk of injury to his patients.

Wherefore, Tom and Paula Tharp pray that this court's entry of judgment in favor of St. Luke's Surgicenter - Lee's Summit be vacated and that this case be remanded generally for a new trial at which all issues are open to consideration, pleadings may be amended, and new evidence may be gathered in discovery and produced at trial.[19]

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[19] Smith v. Brown & Williamson Tobacco Corp., 410 S.W.3d 623, 634 (Mo.banc 2013); In re Adoption of C.M.B.R., 332 S.W.3d 793, 813 (Mo.banc 2011); Butcher v. Main, 426 S.W.2d 356, 358 (Mo. 1968).

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CERTIFICATE OF COMPLIANCE AND OF SERVICE

I hereby certify that the foregoing Brief fully complies with the provisions of Rule 55.03; that it contains 11,416 words and complies with the word limitations contained in Rule 84.06(b); and that on July 3, 2019, a copy of the foregoing motion was served via the Court's e-filing system to T. Michael Ward/Teresa M. Young, Brown & James, P.C., 800 Market St., Ste. 1100, St. Louis, MO 63101.

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