IN THE SUPREME COURT OF MISSOURI

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| THOMAS E. THARP, et al.,<br><br>Appellants/Cross-Respondent,<br><br>vs.<br><br>ST. LUKE'S SURGICENTER-LEE'S SUMMIT, LLC,<br><br>Respondent/Cross-Appellant. | ) | No. SC96528 |

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
STATE OF MISSOURI

THE HONORABLE KENNETH R. GARRETT, III
PRESIDING CIRCUIT JUDGE

# RESPONDENT/CROSS-APPELLANT ST. LUKE'S SURGICENTER – LEE'S SUMMIT, LLC'S BRIEF ON REHEARING

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## STATEMENT OF FACTS

Respondent/Cross-Appellant Saint Luke's Surgicenter – Lee's Summit, LLC ("St. Luke's") has prepared a separate Statement of Facts to set forth those facts material to the question presented by this appeal under the appropriate standard of review.

### A. Plaintiff Thomas Tharp suffered a known risk during a laparoscopic cholescystomy performed by Dr. Mutchnick.

Norman Mutchnick, M.D., performed a laparoscopic cholecystectomy on Plaintiff Thomas Tharp ("Tharp"). The procedure involves the removal of the gall gladder through a laparoscope. (Tr. 56:1-10.)

Plaintiffs' expert witness, David Imagawa, M.D., testified the injury rates for this procedure are one to one-and-one-half percent of all such procedures performed. (Tr. 87:1-4.) Dr. Mutchnick performed more than 4,000 such procedures during his career before operating on Tharp with only forty negative results, which is within the average injury rate. (Tr. 93:24-94:2, 95:3-12, 206:6-16.) Moreover, Dr. Mutchnick has only received two complaints related to this procedure. (Tr. 206:17-22.)

### B. St. Luke's undertook an extensive review of Dr. Mutchnick's qualifications before extending him credentials to perform the type of procedure he performed on Tharp.

The purpose of the credentialing process is to ensure that doctors practicing at St. Luke's are qualified to perform the surgeries or procedures they conduct at the surgery center. (Tr. 296:12-15.) An applicant physician lists on the application the procedures that the physician intends to perform at the center. (Tr. 386:13-15.)

Lawsuits filed against a physician, particularly if there is no known outcome, represent only one consideration in St. Luke's decision to credential a physician or not. (Tr. 347:5-10.) It is acknowledged that the type of medicine a physician practices can have a significant impact on how many lawsuits are filed against the physician. (Tr. 519:6-17.)

St. Luke's hired contractors to ensure that it obtained complete information concerning physician applicants. After receipt of the contractors' investigation, St. Luke's sends the physician's application to the credentialing division and the medical director to ensure it is complete, and, thereafter, the application is sent to the credentialing committee, consisting of physicians only, for consideration. (Tr. 250:6-251:20.) At times, the credentialing committee would identify missing information or request follow-up information, and the process would be paused to allow the credentialing division to secure additional documentation. (Tr. 252:16-253:2.) This follow-up could include additional information about lawsuits. (Tr. 256:18-24.)

St. Luke's would also verify the physician's education, board certification, medical staff memberships, information about complaints and lawsuits addressed by the National Practitioner Data Bank ("NPDB"), and privileges that the physician maintains at other facilities. (LF. 385:20-386:17.) St. Luke's would further contact other physicians with whom the applicant previously worked to obtain their opinions concerning the applicant's competency. (Tr. 386:18-23, 486:21-24.) Often, the opinions of these physicians are considered the most important information in determining whether a physician is credentialed. (Tr. 508:9-14, 514:1-4.) St. Luke's would also often share credentialing information with the other St. Luke's facilities. (Tr. 340:23-341:23.)

The NPDB report that St. Luke's regularly obtains as part of the credentialing process provides St. Luke's with details concerning up to five lawsuits, such that St. Luke's had this lawsuit information at the time it considered Dr. Mutchnick's application, regardless of whether Dr. Mutchnick failed to provide certain of this information. (Tr. 156:6-14, 249:5-15, 287:20-25, 549:20-21.)

The NPDB tracks adverse actions against physicians on a national basis. (Tr. 502:3-13) The NPDB is also a clearing house that reports what monies have actually been paid as a result of lawsuits and complaints, such that an important claim will generally be reported by the NPDB. (Tr. 215:2-6, 222:7-12.) St. Luke's considers the NPDB to be a primary source of information and did not look at courthouse records to see whether unresolved allegations were filed in lawsuits. (Tr. 320:4-24, 366:6-8.)

Dr. Mutchnick never had his license challenged, limited, suspended or revoked by any institution at any time. (Tr. 183:14-18, 522:L5-15.) He also had staff privileges, such that he would have necessarily undergone a credentialing process at St. Luke's Surgicenter, St. Luke's East, Lee's Summit Medical Center, St. Joseph Hospital, and Menorah Medical Center. (Tr. 187:4-11.)

Ultimately, based on the information available to it, St. Luke's credentialed Dr. Mutchnick. (Tr. 295:24-25.)

### C. At trial, Plaintiff's expert opined that St. Luke's should not have credentialed Dr. Mutchnick "right away" based on his failure to provide a complete list of every lawsuit filed against him.

St. Luke's Medical Staff Bylaws include a guideline that provides that a physician should be automatically removed from consideration in the event the physician fails to provide complete and accurate information on an application. (Tr. 156:15-20, 228:19-229:3.) Plaintiffs' expert, John Hyde, II, Ph.D., testified that those participating in St. Luke's credentialing process are expected to follow the facility's bylaws. (Tr. 289:21-299:4.) He explained that this provision means you "don't credential him right away. If there's some explanation for that, you give people the benefit of the doubt." (Tr. 157:16-158, 227:1-5)

In addition to the lawsuits contained in the NPDB report, Dr. Hyde noted the Missouri court filing system recorded twenty-two lawsuits against Dr. Mutchnick over approximately the last thirty years. (Tr. 165:5, 221:23-25) However, Dr. Hyde conceded that such lawsuits only constitute mere allegations, and were not necessarily evidence that Dr. Mutchnick was negligent in those cases. (Tr. 214:13-24.)

Nonetheless, Dr. Hyde opined that St. Luke's should have rejected Dr. Mutchnick's application based on his failure to include a complete list of lawsuits filed against him, including all money settlements or judgments regardless.

## RESPONDENT/CROSS-APPELLANT'S ARGUMENT

**I. The Court should deny Plaintiff's Motion to Modify its Opinion because there is no basis to remand this case for further proceedings in that remand requires evidence that Plaintiffs could present to make a submissible case on retrial, and Plaintiffs have presented no evidence showing that Dr. Mutchnick was incompetent or to rebut the undisputed record indicating that Dr. Mutchnick was a qualified, experienced, and well-respected physician who performed the same procedure conducted on Tharp thousands of times in the past and well below the national average failure rate.**

### A. Introduction

Plaintiffs, in their Motion to Modify, ask the Court to remand the case to permit them to amend their pleadings to assert new claims, to conduct additional discovery, and for a new trial. Their Motion should be denied and the Court's decision reversing the trial court's judgment outright should be affirmed. The Court should not grant Plaintiffs a second bite at the apple in this case because the record makes clear Norman Mutchnick, M.D. was a competent physician and, therefore, Plaintiffs did not, and can never make, a submissible case that St. Luke's was negligent in extending him privileges at its facility – even if this matter is remanded for further proceedings.

Plaintiffs' claim against St. Luke's was a weak one. Plaintiffs lacked substantial evidence that Dr. Mutchnick was incompetent to perform the procedure at issue. Therefore, they elected to try their negligent credentialing claim on the novel theory based on a technical violation committed by St. Luke's during its credentialing process, a violation

irrelevant to the question of whether Dr. Mutchnick was a competent physician or whether the violation caused Plaintiffs any harm. Under these circumstances, and in the absence of any evidence that Dr. Mutchnick was incompetent, including the additional evidence referenced in Plaintiffs' Motion and Brief on Rehearing, Plaintiffs' request for remand and a new trial should be denied.

While Missouri's appellate courts have shown a preference to remand a case for a new trial after concluding that a plaintiff has failed to make a submissible case, they have only done so when the record demonstrates the plaintiff would have additional evidence to present such that the plaintiff could make a submissible case on remand. Here, no such evidence is available to Plaintiffs. To the contrary, the undisputed evidence establishes Dr. Mutchnick was a competent physician well qualified to perform the procedure at issue. Dr. Mutchnick is a board-certified physician who has never had his license challenged and who has maintained privileges at four other established and well-respected facilities before he was credentialed by St. Luke's. Moreover, he had received only two complaints after completing approximately 4,000 procedures like the one he performed on Plaintiff Thomas Tharp, a procedure that he performed well below the national failure rate for the procedure.

Contrary to the argument Plaintiffs now present, it was well established Missouri law that the purpose of the credentialing process is to ensure that credentials are only extended to competent independent contractors. Moreover, the trial court indicated to Plaintiffs during trial that the submissibility of their claim based solely on St. Luke's technical violation of its own guidelines was a "sticky issue." Yet, Plaintiffs proceeded with the only evidence they had, namely, St. Luke's extended privileges although Dr.

Mutchnick had failed to provide complete information regarding every lawsuit filed against him.

Plaintiffs' claim on remand that they will be able to present additional evidence to show Dr. Mutchnick is an incompetent physician is without merit. Plaintiffs continue to cite information on Case.net showing that Dr. Mutchnick had twenty-two lawsuits filed against him during his career. However, Plaintiffs' argument fails to advance their position or show that they are entitled to a new trial. Plaintiffs' own expert at trial testified that this evidence is not an indication of incompetence. This Court, on appeal, agreed.

Plaintiffs also argue they could present evidence that Dr. Mutchnick was suffering from age-related deterioration of his abilities. Yet, they provide no evidence that such deterioration has occurred, other than journal articles that generally indicate that a physician's skills can deteriorate with age. They have no evidence whatever that Dr. Mutchnick's skills have deteriorated in any way. Indeed, contrary to Plaintiffs' suggestion that average physicians become significantly more likely to have a lawsuit filed against them in later years, the number of lawsuits filed against Dr. Mutchnick decreased as he got older.

Plaintiffs next point to evidence that Dr. Mutchnick had received certain low scores on "pre-tests" administered during his Continuing Medical Education ("CME") courses as further signs of his deteriorating skills. However, these pre-tests were given before Dr. Mutchnick studied the CME materials and, in any case, he received many pre-test scores of seventy-nine percent or better, which qualify as a passing score during the "post-test." Moreover, Plaintiffs admit Dr. Mutchnick generally received one hundred percent on the

"post-tests," and do not argue that he failed to secure the necessary CME credit to maintain his license. Indeed, the evidence demonstrates, without any contradiction, that he maintained his license without incident and without interruption.

Ultimately, Plaintiffs brought this claim under the only argument they had available to them, namely, that St. Luke's committed a technical violation of its own guidelines during Dr. Mutchnick's credentialing process. The Court should not remand this case to allow Plaintiffs to amend their pleading, engage in further discovery, or conduct a second trial. Absent is any indication they could make a submissible case on remand. Plaintiffs chose to make this technical violation the sole foundation of their claim, and not Dr. Mutchnick's competence. As this Court noted long ago, "'it is obvious a party should not always be granted a remand of a cause for successive trials in order that he may experiment with different theories of his adversary's liability. The latter has some rights.'" *Smith v. St. Louis Public Service Co.*, 259 S.W.2d 692, 693 (Mo. 1953) (quoting *Borrson v. Missouri-Kansas-Texas R. Co.*, 172 S.W.2d 835, 850 (Mo. 1943)). Plaintiffs' Motion should be denied.

**B. The Court need only remand a case for a new trial if the record demonstrates Plaintiffs could make a submissible case on retrial.**

When plaintiffs fail to make a submissible case, they are not entitled to remand for a new trial. *Bauby v. Lake*, 995 S.W.2d 10, 13 (Mo. App. E.D. 1999). Rule 84.14 authorizes Missouri's appellate courts to enter the judgment that should have been entered by the trial court. When a judgment on appeal is vacated because the plaintiff failed to make a submissible case, the appropriate judicial action is the entry of a judgment for the

defendant. *Id*. Under such circumstances, the plaintiff is not entitled to remand for a new trial. *Id*. As long held by this Court, a plaintiff losing on one theory is not permitted a remand for successive trials to experiment with different theories of his adversary's liability. *Smith v. St. Louis Public Service Co*., 259 S.W.2d 692, 693 (Mo. 1953).

Instead, Missouri courts have only expressed a preference for reversal and remand in cases in which the record demonstrates the plaintiff could make a submissible case on retrial. *Kaufmann by Kaufmann v. Nagle*, 807 S.W.2d 91, 95 (Mo. banc 1991); *Moss v. Nat'l Super Markets, Inc*., 781 S.W.2d 784, 786 (Mo. banc 1989); *but see Kaufmann by Kaufmann*, 807 S.W.2d at 95–96 (Billings, J., dissenting) ("A plaintiff who adopts a theory of recovery that is rejected by an appellate court should have a second chance only when that reversal was not to be reasonably anticipated and the record demonstrates there is evidence available to support a theory upon which recovery is a probability."). Thus, "[i]f a plaintiff, by mistake or inadvertence, fails to produce sufficient evidence at trial to prove his claim, in a situation where the proof seems to be available, the case should be remanded to permit the introduction of additional evidence." *Hickman v. Branson Ear, Nose & Throat, Inc*., 2007 WL 2429928, at *9 (Mo. App. S.D. Aug. 29, 2007).

Plaintiffs attempt to distinguish *Smith* and *Bauby*. They argue the Court only rejected remand after determining the plaintiffs proceeded on their chosen theory to gain a strategic advantage. (Appellants' Brief on Rehearing, 30-31.) Plaintiffs ignore they made a similar strategic choice at the original trial in the face of expert testimony showing Dr. Mutchnick was a competent physician. Moreover, Missouri cases uniformly hold that remand is appropriate only where the plaintiff show that additional evidence would be

available to present a submissible case. *Kaufmann by Kaufmann*, 807 S.W.2d at 95.

**C. The undisputed record demonstrates Dr. Mutchnick was a well-qualified physician to whom St. Luke's properly granted staff privileges.**

Undisputed evidence, much of which came into evidence through Plaintiffs' expert witnesses, demonstrates Dr. Mutchnick was a competent physician well qualified to perform the gallbladder procedure on Plaintiff Thomas Tharp. St. Luke's undertook a thorough investigation to confirm Dr. Mutchnick's competence before granting him staff privileges. The investigation disclosed that Dr. Mutchnick had never had his license challenged, limited, suspended, or revoked by any institution. (STR 183:14-18, 522:L5-15.) Before applying for staff privileges at St. Luke's, Dr. Mutchnick had sought and received staff privileges at other institutions, such that he would have necessarily undergone and passed credentialing investigations at St. Luke's Surgicenter, St. Luke's East, Lee's Summit Medical Center, St. Joseph Hospital, and Menorah Medical Center. (STR 187:4-11.)

As part of its credentialing process, St. Luke's also verifies a physician's education, board certification, medical staff memberships, information about complaints and lawsuits reported by the NPDB, and privileges that the physician maintains at other facilities. (LF 385:20-386:17.) St. Luke's also contacts other physicians with whom the applicant has worked to determine their opinions regarding the applicant's competence. (STR 386:18-23, 486:21-24.) Typically, the physician contacts constitute the most important information in determining whether a physician should be credentialed or not. (STR 508:9-14, 514:1-4.) St. Luke's would also often share credentialing information with the other St. Luke's

facilities. (STR 340:23-341:23.) Based on all of the information gathered, St. Luke's credentialed Dr. Mutchnick. (STR 295:24-25.)

Moreover, Dr. Mutchnick was well qualified to perform the type of procedure he performed on Plaintiff Thomas Tharp. The evidence at trial permitted no other conclusion. Plaintiffs' own expert witness, David Imagawa, M.D., testified that the injury rate for the type of procedure Dr. Mutchnick performed in this case is one to one-and-one-half percent of all such procedures performed. (STR 87:1-4.) Dr. Mutchnick performed more than 4,000 such procedures during his career before operating on Plaintiff Thomas Tharp. (STR 93:24-94:2, 206:6-16.) If Dr. Mutchnick had forty cases with resulting injuries, the number of resulting injuries would be within the average injury rate. (STR 95:3-12.) However, Dr. Mutchnick had received complaints related to only two such procedures. (STR 206:17-22.)

**D. Plaintiffs based their negligent credentialing claim on the only evidence they had, namely, that St. Luke's did not strictly adhere to its bylaws in the credentialing process.**

Absent evidence that Dr. Mutchnick was incompetent in general, or in performing the procedure at issue in this case, Plaintiffs ultimately predicated their negligent credentialing claim solely on their argument that St. Luke's violated its own guidelines during the credentialing process. In St. Luke's Medical Staff Bylaws, there is a guideline for applications for staff privileges that states that if a physician fails to provide complete and accurate information on an application, the physician must be automatically removed from consideration. (STR 156:15-20, 228:19-229:3.)

Yet, Plaintiffs' expert, Dr. Hyde, explained that this provision means 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.) Lawsuits filed against a physician, particularly if there is no known outcome, represent only one consideration in the decision to credential a physician or not (STR 347:5-10) because the type of medicine a physician practices can have a significant impact on how many lawsuits are filed against the physician. (STR 519:6-17.)

**1. Plaintiffs understood that a determination of competency is the heart of a negligent credentialing claim.**

Plaintiffs argue this Court's prior decisions led them to believe they did not need to present evidence addressing Dr. Mutchnick's competence in bringing their negligent credentialing claim. (Appellants' Brief on Rehearing, 25-28.) Not so. Prior decisions by Missouri courts made clear that 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. *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.).

Moreover, Plaintiffs acknowledged at trial in their case in chief that they understood that competency was at the heart of a negligent credentialing claim. Plaintiffs established through their direct examination of Janet Gordan, a St. Luke's administrator, that the purpose of the credentialing process is to ensure that doctors practicing at St. Luke's are qualified to perform the surgeries or procedures they conduct at the surgery center:

> Q: Would you agree that the credentialing process is a process designed to promote patient safety?
>
> . . .
>
> Q: Why do you do the credentialing process?
>
> A: I -- I don't know the answer. I assume that it's to make sure that doctors are qualified to perform the surgeries, the procedures that they do at the surgery center.
>
> Q: That doctors are competent to do that?
>
> A: (The witness shook her head.) Again, I'm not a clinically trained individual, so I don't – I don't know the relationship between the questions that are asked and determination and competency.

(STR 296:1-20.)

Ultimately, Plaintiffs presented the best case they had available to them to advance a negligent credentialing claim against St. Luke's. (*See* Appellant's Second Brief at 68.)

Their argument was based on St. Luke's failure to strictly adhere to its own guidelines in the credentialing process, and not on Dr. Mutchnick's incompetence. (*Id.* at 68-70.)

**2. The trial court rulings did not cause Plaintiff to withhold any available evidence of Dr. Mutchnick's incompetence.**

Plaintiffs next argue that "other events" during trial justified their belief that they need not prove Dr. Mutchnick's incompetence, including the trial court's finding that they made a submissible claim and the submission of verdict directors in line with that ruling. (Appellants' Brief on Rehearing, 28-29.) Yet, the trial court clearly alerted the parties at trial that it intended to give St. Luke's Motion for Directed Verdict serious consideration.

> I've heard arguments on this multiple times, and I understand that this is a very sticky issue because I definitely see the defendant's point. But as the defendants know, after hearing Mr. McIntosh's oral motion for the Court to reconsider that particular motion in limine, I see his position. . . . I think they've met their burden, so at this point I'm going to overrule the defendant's motion for directed verdict at the close of the plaintiffs' evidence. (STR 477-78.)

That the trial court allowed the case to proceed absent evidence of incompetence is precisely the error that Dr. Mutchnick challenged in this appeal. Moreover, while Plaintiffs complain yet again that Dr. Mutchnick did not object to the verdict director, this Court considered their waiver argument on that issue and rejected it.

Ultimately, contrary to Plaintiffs' present argument, the trial court did not dissuade or foreclose them from submitting evidence of Dr. Mutchnick's competence. In the end,

Plaintiffs tried the case they wished to try under the theory and evidence of their choosing. The fact that they could not prove at trial that Dr. Mutchnick was incompetent to perform the procedure at issue is no reason to remand this matter for a new trial when all the evidence at trial established that Dr. Mutchnick was, in fact, competent to perform this procedure.

Plaintiffs' claim rested on a technical violation. It is the claim they advanced throughout trial. It is clear the trial court would not have submitted their claim to the jury but for this violation. They should not now be permitted the remand of this case to advance another theory based on Dr. Mutchnick's purported incompetence, especially when there is no such evidence in the first instance. *Smith,* 259 S.W.2d at 693.

**E. Plaintiffs simply have no evidence that Dr. Mutchnick was incompetent such that this Court should remand the case for retrial.**

Plaintiffs argue that if the Court were to remand this case for further proceedings there is additional evidence they could present supporting their negligent credentialing claim. (Appellants' Brief on Rehearing, 33.) Plaintiffs rest their argument on Dr. Mutchnick's age at the time of the procedure, only 66; "pre-test" scores that Dr. Mutchnick received while satisfying his required Continuing Medical Education ("CME") requirements; and that Dr. Mutchnick has been sued twenty-two times, which their own expert rejects as evidence of incompetence.

This Court should reject Plaintiffs' argument. Even if all of the evidence cited by Plaintiffs in their post-opinion Motion and Brief is taken as true, and Plaintiffs are given every favorable intendment, the evidence would not support a submissible claim that Dr.

Mutchnick was incompetent such that St. Luke's was negligent in extending credentials to him.

**1. Dr. Mutchnick's age, only 66 at the time of the procedure, is not evidence of incompetence.**

Plaintiffs point to medical journals that discuss "the role that age, lack of education and limitations on experience play in the decline of surgical skills." (*Id.* at 37.) While they suggest that an increased frequency in lawsuits filed against a physician represents evidence of a deterioration of skills, they show no such increase in frequency for Dr. Mutchnick. Under Plaintiffs' own analysis of the years in which Dr. Mutchnick was sued, this is not the case with Dr. Mutchnick. (*Id.* at 48.)

Plaintiffs admit that fifteen out of the twenty-two lawsuits filed against him occurred before he was sixty years old, and he was sued nine times during his forties. (*Id.*) Dr. Mutchnick was sued nine times between 2001 and 2010, the time period they claim evidences his deteriorating skills. (*Id.*) Yet, he was sued eight times between 1991 and 2000, the decade immediately before. (*Id.*) Plaintiffs' theory simply does not hold.

Moreover, the record shows, and Plaintiffs do not dispute, that Dr. Mutchnick secured the necessary CME credit to maintain his license and maintained his license without incident and without interruption. Nor can Plaintiffs present any evidence that Dr. Mutchnick lacked experience. The undisputed record demonstrates he performed the same procedure that he performed on Tharp more than 4,000 times, with only two complaints lodged against him. Plaintiffs' general citation to journals discussing the possible impact of age on a physician's skill are of no import absent evidence that Dr. Mutchnick himself

was incompetent. Plaintiffs' "age" argument rests in the realm of speculation and conjecture.

Finally, in a last ditch effort to argue that Dr. Mutchnick was simply too old at 66 to competently perform Tharp's procedure, Plaintiffs argue his use of the Harmonic scalpel was driven by his age. (Appellants' Brief on Rehearing, 44-45.) Yet, Dr. Mutchnick testified he had always used the Harmonic scalpel during this type of procedure, a procedure that he performed thousands of times with a failure rate well below the national average. (*Id.* at 44.) That Plaintiffs' expert, or his group, does not use the Harmonic scalpel for this particular procedure is of no import. He did not testify, as Plaintiffs suggest, that the instrument is "dangerous" or that Dr. Mutchnick was using it due to his age. To the contrary, Plaintiffs admitted his group uses the Harmonic scalpel for other procedures. (Tr. 57.)

Ultimately, the record developed by Plaintiffs indicates that Dr. Mutchnick is a skilled, experienced, and careful physician who performed the same type of procedure conducted on Tharp at or below the average national failure rate. Plaintiffs provided no evidence at trial, and identify no evidence they could present during a retrial, that Dr. Mutchnick was simply too old or out of medical school for too long to be credentialed by St. Luke's. The generalized evidence they point to in their Brief on Rehearing would require a jury to enter a verdict based on rank speculation such that no submissible claim could be made.

**2. Dr. Mutchnick's CME "pre-test" scores do not indicate incompetence.**

As explained by Plaintiffs, when physicians have the option of completing at least some of their required CME requirements online, a "pre-test" for these on-line courses is first administered that identifies some of the areas that will be covered by the CME material. The physician then reviews the material during the time allotted and takes a "post-test." (Appellants' Brief on Rehearing, 46.) The CME provider need not disclose the "pre-test" score to the physician. Ultimately, the physician must score seventy percent or better on the "post-test" to obtain CME credit. For certain online courses, the physician can attempt the post-test three separate times and still obtain credit.

Plaintiffs make no argument that Dr. Mutchnick failed to undergo any required CME test, or that his license was negatively impacted by any CME test, much less any pre-test that he took. Instead, Plaintiffs argue that insomuch as many of Dr. Mutchnick's "pre-test" scores fell below one hundred percent he must not be able to retain information long term. In the first instance, Plaintiffs' argument misapprehends the purpose of the CME courses. By its very nature, the CME process is intended to ensure that physicians participate in educational activities, and not to determine what a physician recalls from prior education. (*See* AMA PRA Frequently Asked Questions for Physicians[1].)

[1]www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/public/physicians/cme/physician-faq.pdf.

Moreover, Plaintiffs' counsel admits Dr. Mutchnick scored high enough on each of the "post-tests" to obtain the CME credit that he sought. (*Id. at* 2-3.) Indeed, counsel admits Dr. Mutchnick regularly scored one-hundred percent on his post-tests. (*Id.*) And, in point of fact, many of Dr. Mutchnick's "pre-test" scores would, in fact, qualify him for CME credit before even studying the educational materials presented. Simply put, Plaintiffs' purported evidence for consideration on remand does not establish that Dr. Mutchnick lacked the "knowledge, skill, experience, and available equipment which a reasonable man would realize that a contractor must have in order to do the work which he is employed to do without creating unreasonable risk of injury to others," which is the evidence necessary to support a negligent credentialing claim. (*See* Opinion at 11 n. 3 (quoting RESTATEMENT (SECOND) OF TORTS § 411 cmt. a).)

**3. Plaintiffs' expert testified, and this Court ruled, that the fact Dr. Mutchnick had been sued does not establish he was incompetent.**

The only other evidence Plaintiffs identify for purposes of showing Dr. Mutchnick was incompetent for purposes of retrial is the fact that twenty-two lawsuits had been filed against him over the past thirty years. (STR 165:5, 221:23-25.) However, the impact of these lawsuits was already addressed at trial and on appeal.

Plaintiffs' expert, John Hyde, II, Ph.D., testified that a hospital should look at the lawsuits filed against a physician for the purpose of tracking, but acknowledged 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.) David Imagawa, M.D., another expert called by Plaintiffs, agreed that simply because you have been sued does not mean that you did

anything wrong. (STR 83:6-10.) Dr. Imagawa acknowledged that anyone can hire an attorney and file a lawsuit. (STR 83:11-14.)

Moreover, Plaintiffs argued on appeal that even if they had to show Dr. Mutchnick was incompetent to maintain their negligent credentialing claim, they did so by presenting evidence regarding the twenty-two lawsuits that were filed against him. (Appellants' Second Brief at 70-71.) The Court was unpersuaded. Disagreeing with Plaintiffs' argument, the Court explained that the number of times a physician has been sued does not indicate competence or incompetence. (Opinion at 10-11.) Further, the Court emphasized that a physician's area of practice can have a significant impact on the number of times a physician is sued. (Opinion at 11 n. 2.)

**F. Conclusion**

Plaintiffs advanced at trial their best and only argument that St. Luke's was negligent in credentialing Dr. Mutchnick, namely, that St. Luke's had committed a technical violation of its bylaws in failing to suspend the credentialing process when it determined that Dr. Mutchnick had failed to include complete information regarding every lawsuit filed against him. Plaintiffs' evidence was insufficient to sustain Plaintiffs' negligent credentialing claim. The undisputed evidence at trial demonstrates Dr. Mutchnick was a competent physician well qualified to perform the procedure on Plaintiff Thomas Tharp in this case. Dr. Mutchnick had performed the procedure thousands of times without incident or complaint. On remand, Plaintiffs suggest they would show that Dr. Mutchnick was sixty-six at the time of the procedure, had low scores on some "pre-tests" he took while studying CME materials, and had twenty-two lawsuits filed against him. Yet,

Plaintiffs provide no evidence that Dr. Mutchnick's age had any impact on his skills as a physician, Plaintiffs' counsel admits Dr. Mutchnick passed all of his "post-test" scores to meet his CME requirements, and Plaintiffs' expert and this Court have already rejected Plaintiffs' argument that prior lawsuits are evidence of incompetence.

Here, no remand is required for a new trial because no evidence to support a submissible claim is available. Plaintiffs tried their case under the theory of their choice and they lost. They should not be permitted a second chance when the evidence they contend supports a new trial is insufficient to make a submissible case on the question of Dr. Mutchnick's competence to perform the procedure at issue.

As this Court observed long ago, parties defendant have rights too. *Smith v. St. Louis Public Service Co.*, 259 S.W.2d 692, 693 (Mo. 1953); *Borrson v. Missouri-Kansas-Texas R. Co.*, 172 S.W.2d 835, 850 (Mo. 1943). There is a time for closure and finality. St. Luke's should not be subjected to the expense of another trial in the absence of any showing that the evidence that Plaintiffs have identified for purposes of retrial would establish by the preponderance of the evidence that St. Luke's credentialed an incompetent physician. Here, there is absolutely no evidence of incompetence, whether offered at trial or identified by Plaintiffs' in their post-opinion briefing. Therefore, the Court's decision should be reaffirmed and Plaintiffs' request that the Court's opinion should be modified for purposes of ordering a new trial should be denied.

## CONCLUSION

Defendant St. Luke's Surgicenter – Lee's Summit, LLC respectfully requests the Court to deny Plaintiffs' Motion for Rehearing, 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.

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 August 6, 2019, 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 Brief on Rehearing includes the information required by Rule 55.03.

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

3. Respondent's/Cross-Appellant's Brief on Rehearing, excluding cover page, signature blocks, certificate of compliance, and affidavit of service, contains 5,965 words, as determined by the word-count tool contained in the Microsoft Word 2010 software with which this Respondent's/Cross-Appellant's Brief was prepared; and

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

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

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