

ORIGINAL

IN THE SUPREME COURT OF OHIO

JEFFREY GEESAMAN, et al.,	:	Case No. 2009-1715
	:	
Plaintiffs-Appellees,	:	On Appeal from the Allen
	:	County Court of Appeals,
v.	:	Third Appellate District
	:	
ST. RITA'S MEDICAL CENTER, et. al.,	:	Court of Appeals Case No: 01-08-065
	:	
Defendants	:	
	:	
and	:	
	:	
John Cox, D.O.,	:	
	:	
Defendant-Appellant.	:	

---

**MERIT BRIEF OF AMICI CURIAE,  
OHIO HOSPITAL ASSOCIATION, OHIO STATE MEDICAL ASSOCIATION,  
AMERICAN MEDICAL ASSOCIATION, OHIO OSTEOPATHIC ASSOCIATION, AND  
AMERICAN OSTEOPATHIC ASSOCIATION,  
IN SUPPORT OF APPELLANT**

---

Anne Marie Sferra (0030855)  
 Bridget Purdue Riddell (0082502)  
 BRICKER & ECKLER LLP  
 100 South Third Street  
 Columbus, Ohio 43215  
 Tel: (614) 227-2300  
 Fax: (614) 227-2390 (facsimile)  
 E-mail: [asferra@bricker.com](mailto:asferra@bricker.com)  
       [bpurdue@bricker.com](mailto:bpurdue@bricker.com)  
*Attorneys for Amicus Curiae,  
 Ohio Hospital Association, Ohio State Medical  
 Association, American Medical Association,  
 Ohio Osteopathic Association, and  
 American Osteopathic Association*

Dennis P. Mulvihill (0063996)  
 Gregory S. Scott (0067255)  
 LOWE EKLUND WAKEFIELD &  
 MULVIHILL CO., L.P.A.  
 610 Skylight Office Tower  
 1660 West 2nd Street  
 Cleveland, Ohio 44113-1454  
 Tel: (216) 781-2600  
 Fax: (216) 781-2610  
 E-mail: [dmulvihill@lewm.com](mailto:dmulvihill@lewm.com)  
       [gscott@lewm.com](mailto:gscott@lewm.com)  
*Attorneys for Plaintiffs-Appellees*

FILED  
 MAY 11 2010  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

Irene C. Keyse-Walker (0013143)  
TUCKER ELLIS & WEST LLP  
1150 Huntington Building  
925 Euclid Avenue  
Cleveland, Ohio 44115-1414  
Tel: (216) 592-5000  
Fax: (216) 592-5009  
E-mail: [ikeyse-walker@tuckerellis.com](mailto:ikeyse-walker@tuckerellis.com)  
*Attorney for Defendant-Appellant  
John Cox, D.O.*

Patrick K. Adkinson (0016980)  
ADKINSON LAW OFFICE  
4244 Indian Ripple Road, Suite 150  
Dayton, OH 45440  
Tel: (937) 431-9660  
Fax: (937) 228-0944  
E-mail: [pka.adklaw@bizwoh.rr.com](mailto:pka.adklaw@bizwoh.rr.com)

*Additional Counsel for Defendant-Appellant  
John Cox, D.O.*

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
INTRODUCTION AND STATEMENT OF INTEREST OF AMICI CURIAE .....	1
STATEMENT OF THE CASE.....	4
STATEMENT OF FACTS .....	4
LAW AND ARGUMENT .....	5
Appellant’s Proposition of Law: The 'loss of chance' doctrine is inapplicable when a plaintiff maintains a medical malpractice claim that seeks damages for harm directly and proximately caused by medical negligence. ....	5
A.    The Loss of Chance Doctrine Should Not be Expanded to Cases Where a Plaintiff Has a More than Even Chance of Recovery Prior to the Alleged Malpractice or Where the Plaintiff Presents a Traditional Proximate Cause Case to the Jury.....	5
B.    Permitting All Medical Malpractice Plaintiffs to Pursue Damages for “Loss of Chance,” Regardless of their Chance of Recovery, Is Inequitable. ....	8
C.    Prohibiting Expansion of the Loss of Chance Doctrine is Consistent with Current Tort Jurisprudence .....	10
D.    Alternatively, Ohio Should Further Limit the Doctrine to Cases Involving a Lost Opportunity to Avoid Death .....	12
CONCLUSION.....	13
CERTIFICATE OF SERVICE .....	15

## TABLE OF AUTHORITIES

	<u>Page</u>
<b><u>Cases</u></b>	
<i>Blair v. Hutzel Hosp.</i> (Mich.Ct.App. 1990), 217 Mich.App. 502, 552 N.W.2d 507 .....	11
<i>Davison v. Rini</i> (4th Dist. 1996), 115 Ohio App. 3d, 688, 686 N.E.2d 278 .....	13
<i>Dobran v. Franciscan Med. Ctr.</i> , 102 Ohio St.3d 54, 2004-Ohio-1883 .....	1, 5, 9
<i>Falcon v. Mem'l Hosp.</i> (Mich. 1990), 436 Mich. 443, 462 N.W.2d 44 .....	11
<i>Fehrenbach v. O'Malley</i> , 164 Ohio App.3d 80, 2005-Ohio-5554 .....	6
<i>Gleason v. Zimmerman</i> (Dec. 16, 1996), 7th Dist. No. 95-B-4, 1996 Ohio App. LEXIS 5706 .....	13
<i>Haney v. Barringer</i> , 7th Dist. No. 06 MA 141, 2007-Ohio-7214 .....	6, 7
<i>Heath v. Teich</i> , 10th Dist. No. 03AP-1100, 2004-Ohio-3389 .....	13
<i>Kilpatrick v. Bryant</i> (Tenn. 1993), 868 S.W.2d, 594, 1993 Tenn. LEXIS 452 .....	11
<i>Liotta v. Rainey</i> (Nov. 22, 2000), 8th Dist. No. 77396, 2000 Ohio App. LEXIS 5475 .....	6
<i>McDermott v. Tweel</i> , 151 Ohio App. 3d 763, 2003-Ohio-885 .....	6
<i>McMullen v. Ohio State Univ. Hosps.</i> , 88 Ohio St.3d 332, 2000-Ohio-342 .....	1, 5
<i>Natoli v. Massillon Cmty. Hosp.</i> , 179 Ohio App. 3d 78, 2008-Ohio-6258 .....	13
<i>Perez v. Las Vegas Med. Ctr.</i> (Nev.1991), 107 Nev. 1, 805 P.2d 589 .....	11
<i>Roberts v. Ohio Permanente Medical Group</i> (1996), 76 Ohio St.3d 483, 668 N.E.2d 480 .. passim	
<i>Southwick v. Univ. Hosp., Inc.</i> , 1st Dist. No. C-050247, 2006-Ohio-1376 .....	6
<i>Thomas v. Univ. Hosps. of Cleveland</i> , 8th Dist. No. 90550, 2008-Ohio-6471 .....	13
<i>Trevena v. Primehealth</i> , 171 Ohio App. 3d 501, 2006-Ohio-6535 .....	13
<i>Valadez v. Newstart, LLC</i> , Tenn. Ct. App. No. W2007-01550-COA-R3-CV, 2008 WL 4831306 .....	1, 10
<i>Weymers v. Khera</i> (Mich. 1997), 454 Mich. 639, 563 N.W.2d 647 .....	12
<i>Yost v. Bermudez</i> , 11th Dist. No. 2002-T-0007, 2003-Ohio-6736 .....	13

**Restatements**

2 Restatement of the Law 2d, Torts (1965) ..... 11

Restatement of the Law 3d, Torts: Liability for Physical Harm (2008) ..... 11

**Other Authorities**

Stephen R. Koch, *Whose Loss Is it Anyway? The Effects of the “Lost-Chance” Doctrine on Civil Litigation and Medical Malpractice Insurance*, 88 N.C. L. Rev. 595, 604 (2010) ..... 2, 5, 7

## INTRODUCTION AND STATEMENT OF INTEREST OF AMICI CURIAE

This case presents an issue of great importance to hospitals, physicians, and other health care providers throughout the State of Ohio. If not reversed, the Third District Court of Appeals' decision significantly increases the risk of liability to medical malpractice defendants by greatly expanding application of the "loss of chance" doctrine. In short, this case provides the Court with the opportunity to clarify Ohio's "loss of chance" doctrine and limit its application.

This Court adopted the "loss of chance" (or more appropriately described "loss of a less-than-even chance") doctrine as a very narrow exception to traditional "more probable than not" causation in *Roberts v. Ohio Permanente Medical Group* (1996), 76 Ohio St.3d 483, 668 N.E.2d 480. The issue before the Court in *Roberts* was "whether Ohio should recognize a claim for loss of chance [of survival] in a wrongful death action where the decedent had a less than fifty percent chance of survival" prior to the alleged act of medical negligence. At the same time that the Court adopted this limited exception to traditional causation, the dangers of expanding it were recognized. *Id.* at 485 ("expansion [of the loss of chance doctrine] threatens to nullify the advantages of the new doctrine by opening the door to confusion, inequity and excessive litigation") (Moyer, C.J., concurring in part and dissenting in part).

Since *Roberts*, this Court has reaffirmed the limited nature of the loss of chance exception. *Dobran v. Franciscan Med. Ctr.*, 102 Ohio St.3d 54, 56, 2004-Ohio-1883 (making clear that the loss of chance doctrine only applies where a plaintiff has a "less-than-even chance of recovery or survival"); *McMullen v. Ohio State Univ. Hosps.*, 88 Ohio St.3d 332, 2000-Ohio-342. At the time *Roberts* was decided and still today, Ohio law on the loss of chance doctrine is the minority view. Nearly twenty states have rejected the loss of chance doctrine. See *Valadez v. Newstart, LLC*, Tenn. Ct. App. No. W2007-01550-COA-R3-CV, 2008 WL 4831306 at \* 4; see also Stephen R. Koch, *Whose Loss Is it Anyway? The Effects of the "Lost-Chance" Doctrine*

*on Civil Litigation and Medical Malpractice Insurance*, 88 N.C. L. Rev. 595, 604 (2010) (concluding that sixteen states have disavowed the loss of chance doctrine, and six have deferred on deciding it). Expansion of the loss of chance doctrine to cases where a plaintiff seeks to establish traditional “more probable than not” proximate causation would not only be a drastic departure from Ohio’s firmly established negligence law, it would single out health care defendants and impose an unjust burden on them.

The Ohio Hospital Association (OHA), Ohio State Medical Association (OSMA), American Medical Association (AMA), Ohio Osteopathic Association (OOA), and American Osteopathic Association (AOA) (collectively, “Amici”) have a strong interest in limiting the applicability of the loss of chance doctrine.

The OHA is a private nonprofit trade association established in 1915 as the first state-level hospital association in the United States. For decades, the OHA has provided a mechanism for Ohio’s hospitals to come together and develop health care legislation and policy in the best interest of hospitals and their communities. The OHA is comprised of more than one hundred seventy (170) private, state and federal government hospitals and more than forty (40) health systems, all located within the state of Ohio; collectively they employ more than 230,000 employees. The OHA’s mission is to be a membership-driven organization that provides proactive leadership to create an environment in which Ohio hospitals are successful in serving their communities. In this regard, the OHA actively supports patient safety initiatives, insurance industry reform, and tort reform measures. The OHA was involved in the formation of the Ohio Patient Safety Institute<sup>1</sup> which is dedicated to improving patient safety in the State of Ohio, and

---

<sup>1</sup> <http://www.ohiopatientssafety.org>

created OHA Insurance Solutions, Inc.<sup>2</sup> to restore stability and predictability to Ohio's medical liability insurance market.

The OSMA is a non-profit professional association of approximately 20,000 physicians, medical residents, and medical students in the state of Ohio. OSMA's membership includes most Ohio physicians engaged in the private practice of medicine, in all specialties. OSMA's purposes are to improve public health through education, encourage interchange of ideas among members, and maintain and advance the standards of practice by requiring members to adhere to the concepts of professional ethics.

The AMA is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies, and other physician groups, seated in the AMA's House of Delegates, substantially all US physicians, residents and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health.<sup>3</sup>

The AOA, an Illinois not-for-profit corporation, is a member association representing more than 67,000 osteopathic physicians (DOs). The AOA, founded in 1897, serves as the primary certifying body for DOs, and is the accrediting agency for all osteopathic medical colleges, osteopathic residency training programs, osteopathic continuing medical education, and health care facilities. The AOA's mission is to advance the philosophy and practice of

---

<sup>2</sup> <http://www.ohainsurance.com>.

<sup>3</sup> The AMA and the OSMA are participating in this brief in their own capacity and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies ("Litigation Center"). The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, non-profit state medical societies to represent the views of organized medicine in the courts.

osteopathic medicine by promoting excellence in education, research, and the delivery of quality, cost-effective healthcare within a distinct, unified profession.

The OOA is a non-profit professional association, founded in 1898, that represents Ohio's 3,400 licensed DOs, 18 health-care facilities accredited by the American Osteopathic Association, and the Ohio University College of Osteopathic Medicine in Athens, Ohio. Osteopathic physicians make up eleven percent of all licensed physicians in Ohio and twenty-six percent of the family physicians in the state. OOA's objectives include the promotion of Ohio's public health and maintenance of high standards at all osteopathic institutions within the state.

If not reversed, the Third District's decision transforms a narrow exception to proximate cause into a general rule governing liability in virtually all medical negligence cases where causation is at issue. More specifically, under the Third District's decision, if a plaintiff presents his proximate cause case to the jury and is unsuccessful, he can still establish alternative liability under a loss of chance theory – regardless of how negligible the loss may be.

Amici urge the Court to reaffirm and clarify *Roberts*, and hold that in Ohio, the “loss of chance” doctrine is limited and is not applicable to cases where a plaintiff has a more than fifty percent chance of recovery prior to the alleged malpractice or where a plaintiff has presented a traditional proximate cause case to the jury. In accordance with established Ohio Supreme Court precedent, such plaintiffs should be required to prove their case under traditional negligence and causation standards, and should not be permitted to contemporaneously request damages in the alternative for “loss of chance.”

#### **STATEMENT OF THE CASE**

Amici defer to the Statement of the Case presented by Appellant John Cox, D.O.

#### **STATEMENT OF FACTS**

Amici defer to the Statement of Facts presented by Appellant John Cox, D.O.

## LAW AND ARGUMENT

### Appellant's Proposition of Law:

**The “loss of chance” doctrine is inapplicable when a plaintiff maintains a medical malpractice claim that seeks damages for harm directly and proximately caused by medical negligence.**

**A. The Loss of Chance Doctrine Should Not be Expanded to Cases Where a Plaintiff Has a More than Even Chance of Recovery Prior to the Alleged Malpractice or Where the Plaintiff Presents a Traditional Proximate Cause Case to the Jury.**

This Court has determined that the loss of chance doctrine applies *only* in cases where a plaintiff had a less than fifty percent chance of recovery or survival prior to the alleged negligence. See *Roberts*, 76 Ohio St.3d 483 (creating cause of action for a “less-than-even chance of recovery or survival”); see also *Dobran v. Franciscan Med. Ctr.* 102 Ohio St. 3d 54, 56, 2004-Ohio-1883 (finding *Roberts* inapplicable where plaintiff had not yet been diagnosed with cancer, and “consequently [could not] claim that his chance of survival [was] less than 50 percent” prior to the alleged negligence); *McMullen v. Ohio State University Hospitals*, 88 Ohio St.3d 332, 2000-Ohio-342 (noting that the loss of chance doctrine does not apply where the alleged medical malpractice was proved to be the actual cause of a patient's injury or death). This exception to traditional proximate causation was adopted to ameliorate the harsh effect of not allowing any recovery to a plaintiff who already had a less than fifty percent chance of survival prior to the medical negligence. *Roberts*, 76 Ohio St.3d at 485-486. For example, if a patient suffered from cancer and had only a forty percent chance of recovery at the time of an alleged misdiagnosis, it would be mathematically impossible to prove that the defendant's negligence was the proximate cause of the patient's injury: even if the cancer had been diagnosed in a timely, non-negligent manner, the patient's odds of recovery would still be less than fifty percent – making it impossible to prove that the defendant's negligence was “more probably than not” the proximate cause of the patient's injury. See Koch, p. 604. But, under the

loss of chance doctrine, this patient can pursue a claim for proportional damages. *Roberts*, 76 Ohio St.3d at 488.

Until now, nearly all appellate courts in Ohio have adhered to this rule, barring plaintiffs from proceeding on a loss of chance theory in cases where a plaintiff had a greater than fifty percent chance of recovery or survival prior to the alleged negligence. See, e.g., *Liotta v. Rainey* (Nov. 22, 2000), 8th Dist. No. 77396, 2000 Ohio App. LEXIS 5475 (refusing to apply loss of chance doctrine where patient had an 89% chance of survival when she originally presented herself to the physician); *Fehrenbach v. O'Malley*, 164 Ohio App.3d 80, 2005-Ohio-5554 (affirming that a “loss-of chance” instruction “is not applicable when the plaintiff demonstrates a more than even chance of a full recovery with proper diagnosis and treatment”); *McDermott v. Tweel*, 151 Ohio App. 3d 763, 2003-Ohio-885, 775 (finding that because the decedent had a fifty percent or greater chance for recovery at the time of the alleged malpractice, she “may not pursue her claims based on the loss of chance doctrine, but is required to present some evidence that the alleged incidents of malpractice were ‘probably’ the actual cause of decedent's death.”); *Southwick v. Univ. Hosp., Inc.*, 1st Dist. No. C-050247, 2006-Ohio-1376, at ¶21 (finding that plaintiff may not recover for the loss-of-chance where the probability of survival or recovery was greater than fifty percent before the alleged negligence).

The recent Seventh District Court of Appeals decision in *Haney v. Barringer*, summarized the rule, noting that:

[I]t is clear that the loss-of-chance doctrine is not simply a fallback position when a plaintiff cannot establish proximate cause or has simply failed to address the issue \* \* \* \* [A] medical malpractice plaintiff cannot simply rely on a loss-of-chance theory if some problem arises with respect to proving proximate cause. In effect, the plaintiff must *either* prove traditional proximate cause, *or* prove that traditional notions of proximate cause do not apply because the chance of survival or recovery was less than [fifty percent] at the time of defendant's negligence.

*Haney v. Barringer*, 7th Dist. No. 06 MA 141, 2007-Ohio-7214, at ¶¶14 -15 (emphasis added); see Koch, pp. 633-634 (citing to *Haney* as an example of how the loss of chance doctrine does not allow a plaintiff with a lack of evidence regarding causation to recover under a “fallback” cause of action).

Thus, where a plaintiff has based his proof of liability on a traditional medical malpractice theory requiring “but for” causation, he cannot recover under a loss of chance theory. See *Haney*, 2007-Ohio-7214, at ¶15. Instead, the plaintiff must *either* prove traditional proximate cause, *or* prove that traditional notions of proximate cause do not apply because the chance of survival or recovery was less than fifty percent at the time of defendant's alleged negligence. *Id.* To hold otherwise would turn nearly every claim for medical malpractice where causation is at issue into a “win-if-I-win; win-if-I-lose” scenario for plaintiffs. That is, if the jury finds that the plaintiff has not established traditional “but for” proximate causation, the plaintiff doesn’t lose and a defense verdict is not entered. Instead, the plaintiff gets another bite at the proverbial apple and is allowed to recover proportionate damages under a loss of chance theory. In other words, the Third District’s decision permits the jury to find for the plaintiff not only when the plaintiff proves traditional “more probable than not” proximate causation, but also—in the same case—permits the jury to find for the plaintiff when the plaintiff fails to prove such causation.

This result should not be allowed. See Koch, p. 632 (citing Ohio’s loss of chance doctrine as an example of how courts have been able “to control the doctrine’s spread and to prevent plaintiffs from using the doctrine to skirt the rules of evidence”).

**B. Permitting All Medical Malpractice Plaintiffs to Pursue Damages for “Loss of Chance,” Regardless of their Chance of Recovery, Is Inequitable.**

Chief Justice Moyer cautioned years ago against expansion of the loss of chance doctrine: “[E]xpansion [of the loss of chance doctrine] threatens to nullify the advantages of the new doctrine by opening the door to confusion, inequity and excessive litigation.” *Roberts*, 76 Ohio St.3d at 485 (Moyer, C.J., concurring in part and dissenting in part). The Third District’s decision has made these threats a reality.

The Third District’s decision *requires* juries in every medical negligence case where causation is at issue and plaintiff has a preexisting condition to be instructed on *both* proximate causation and loss of chance, regardless of whether the plaintiff has a more than fifty percent chance of recovery or survival prior to the alleged negligence and regardless of the evidence presented by the plaintiff to establish causation. Apart from the confusion this will cause in jury trials, this unprecedented expansion of the loss of chance doctrine will have broad implications for the health care industry. If there is any chance that the jury might find for the health care defendant on the issue of proximate causation (and there always is), the jury *must* be instructed to consider loss of chance. This creates a scenario in which plaintiffs will likely be awarded damages in some form unless the health care defendant can achieve the nearly impossible task of establishing that his action or omission had *zero* impact on the plaintiff’s medical outcome. Only then could a defense verdict be attained.

The Third District’s decision does more than merely lower the threshold of proof of causation; it fundamentally alters the meaning of causation. In Ohio, in nearly every medical malpractice case where causation is at issue, the parties will present dueling experts opining as to whether the defendant medical provider more likely than not caused the plaintiff’s injuries. Under the Third District rule, however, by presenting evidence *disputing* a medical malpractice

plaintiff's "but for" causation theory, plaintiffs automatically become entitled to an additional, alternative method of recovery: loss of chance. The only way a defendant could avoid liability is if he could persuade the jury that his negligence had *zero* impact on the plaintiff's medical outcome. In *all* medical malpractice cases where causation is at issue, the plaintiff's burden is thereby reduced from proving that the defendant "more likely than not" caused plaintiff's injury to proving only that a defendant's actions decreased the chance of recovery or survival by some negligible amount.

This new rule will significantly increase medical malpractice liability and uncertainty in Ohio in all cases where causation is at issue because it will be nearly impossible to attain a defense verdict. Under *Roberts*, *Dobran* and the majority of lower court decisions that have addressed the issue, health care defendants face proportional liability under a loss of chance theory *only if* their negligence accelerated a pre-existing condition, and the plaintiff had a less than fifty percent chance of recovery prior to the alleged malpractice. Under the Third District's decision, potential liability is greatly expanded (where causation is at issue) as health care defendants will face proportional liability under a loss of chance theory regardless of whether the plaintiff had a fifty, sixty, or ninety-percent chance of recovery or survival prior to the alleged negligence.

Even where a physician's best efforts would be unable to cure a patient, the patient could place the impossible burden upon the physician for failing to stop nature (i.e. the natural progression of a disease). One Tennessee court recently recognized this and similar problems inherent in the loss of chance doctrine:

Health care providers could find themselves defending cases simply because a patient fails to improve or where serious disease processes are not arrested because another course of action could possibly bring a better result. No other professional malpractice defendant carries this burden of liability without the

requirement that plaintiffs prove the alleged negligence *probably* rather than *possibly* caused the injury.

*Valadez*, 2008 WL 4831306, at \*5. (Emphasis added.)

Placing this impossible burden on medical providers in Ohio is fundamentally unfair and unjust. As such, the loss of chance doctrine should remain, if at all, very narrow in scope, and should exclude plaintiffs with a more than fifty percent chance of recovery, as well as those who have plead and argued traditional negligence and causation theories.

**C. Prohibiting Expansion of the Loss of Chance Doctrine is Consistent with Current Tort Jurisprudence**

At least nineteen jurisdictions that have considered the “loss of chance” doctrine have completely rejected it and, instead, follow the traditional approach allowing recovery only where a plaintiff establishes traditional “but for” proximate cause.<sup>4</sup>

In those jurisdictions that have recognized the loss of chance doctrine, several require the loss of chance to be “substantial” before recovery is permitted.<sup>5</sup> Under the “loss of a substantial chance” approach, “the [defendant’s] negligence [must] be shown to have reduced a ‘substantial chance’ or ‘substantial possibility’ or ‘appreciable chance’ of a favorable end result given appropriate medical treatment.” *Valadez*, 2008 WL 4831306, at \*3-4. “This approach is apparently designed to prohibit claims where the plaintiff does not have a realistic basis for a favorable outcome even absent the defendant’s negligence[,]” while, at the same time, preventing a health care provider from avoiding liability for negligence “simply by saying that the patient would have died anyway, when that patient had a reasonable chance to live.” *Id.* (citing

---

<sup>4</sup> See *Valadez v. Newstart, LLC*, Tenn. Ct. App. No. W2007-01550-COA-R3-CV, 2008 WL 4831306, at \*4, n.5 (citing to cases in nineteen states that have adopted the traditional approach); see also Koch, at p. 607, n.57-58 (citing to cases in sixteen cases that have disavowed the loss of chance theory and to cases in six states that have deferred on deciding the issue).

<sup>5</sup> See *Valadez*, 2008 WL 4831306, at \*4, n.4 (citing cases in several states which require the loss to be “substantial” in order to apply a loss of chance theory).

*Kilpatrick v. Bryant* (1993), 868 S.W.2d, 594, 1993 Tenn. LEXIS 452 at 600-601 (quoting *Perez v. Las Vegas Med. Ctr.* (1991), 107 Nev. 1, 805 P.2d 589, 593)). Under this approach, the “impaired or destroyed opportunity” itself is considered the injury. *Id.* (citing *Falcon v. Mem’l Hosp.* (1990), 436 Mich. 443, 462 N.W.2d 44, 53-54, superseded by statute, Mich. Comp. Laws Ann. § 600.2912a (West 2000), as recognized in *Blair v. Hutzel Hosp.* (1990), 217 Mich.App. 502, 552 N.W.2d 507).

In *Roberts*, this Court relaxed the “all or nothing” approach to proximate cause and adopted the loss of chance doctrine in a wrongful death case in which the parties stipulated that the plaintiff had a twenty-eight percent chance of survival if proper and timely care had been rendered. *Roberts*, 76 Ohio St.3d at 485. The *Roberts* Court considered the “substantial loss of chance” rule, but ultimately followed the approach set forth in Section 323 of the Restatement of Torts 2d (1965), which provides:

One who undertakes, gratuitously or for consideration, to render services to another, which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if:

(a) his failure to exercise such care increases the risk of such harm \* \* \* .

2 Restatement of the Law 2d, Torts (1965).

But, Section 323 of the Restatement of Torts 2d no longer serves as a valid support for the loss of chance doctrine. Comments to the more recent Restatement (Third) of Torts specifically reject the application of Section 323 to the loss of chance doctrine: “For courts adopting lost opportunity, however, Restatement Second, Torts §323 does not supply support for

such a reform, for the reasons explained in the Reporter's Note."<sup>6</sup> The Reporter's Note cautions against expansion of the loss of chance doctrine:

The lost-opportunity development has been halting, as courts have sought to find appropriate limits for this reconceptualization of legally cognizable harm. Without limits, this reform is of potentially enormous scope, implicating a large swath of tortious conduct in which there is uncertainty about factual cause, including failures to warn, provide rescue or safety equipment, and otherwise take precautions to protect a person from a risk of harm that exists.

Id.

Because the legal underpinning of *Roberts* is no longer recognized in the mainstream as supporting the lost chance theory, this Court has yet another reason to narrow the application of such doctrine, and to ensure against its expansion.

At a minimum, the Court should not allow the loss of chance doctrine to be used by a plaintiff who (1) has a more than even chance of recovery or survival before the alleged negligence, or (2) presents a traditional "but for" proximate cause case to a jury.

**D. Alternatively, Ohio Should Further Limit the Doctrine to Cases Involving a Lost Opportunity to Avoid Death**

This Court should alternatively consider adopting the approach taken by the Michigan Supreme Court, limiting the loss of chance doctrine only to cases involving wrongful death. See *Weymers v. Khera* (1997), 454 Mich. 639, 563 N.W.2d 647 (holding no cause of action exists in Michigan under lost opportunity doctrine for loss of an opportunity to avoid physical harm less than death).

Nearly all Ohio cases applying the loss of chance doctrine address the loss of chance of survival, i.e. a lost opportunity to avoid death. See, e.g., *Roberts*, 688 N.E. 2d at 484 (adopting loss of chance doctrine in wrongful death case); *Thomas v. Univ. Hosps. of Cleveland*, 8th Dist.

---

<sup>6</sup> See Restatement of the Law 3d, Torts: Liability for Physical Harm (2008) (Proposed Final Draft No. 1), Section 26, Comment *n*.

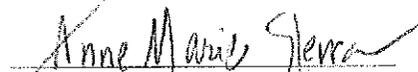
No. 90550, 2008-Ohio-6471, at ¶33 (finding loss of chance doctrine applied in a wrongful death case); *Natoli v. Massillon Cmty. Hosp.*, 179 Ohio App. 3d 78, 2008-Ohio-6258 (permitting wrongful death case based on loss of chance theory to go forward); *Gleason v. Zimmerman* (Dec. 16, 1996), 7th Dist. No. 95-B-4, 1996 Ohio App. LEXIS 5706 (applying loss of chance in wrongful death case); *Heath v. Teich*, 10th Dist. No. 03AP-1100, 2004-Ohio-3389, at ¶8 (finding that loss of chance doctrine could apply in wrongful death case); *Yost v. Bermudez*, 11th Dist. No. 2002-T-0007, 2003-Ohio-6736 (finding that instruction on the loss of chance of survival claim was proper in wrongful death case); contra *Trevena v. Primehealth*, 171 Ohio App. 3d 501, 2006-Ohio-6535 (finding that loss of chance theory applied where patient had a diminished chance of recovery); *Davison v. Rini* (1996), 115 Ohio App. 3d 688, 686 N.E.2d 278 (finding loss of chance doctrine applicable despite the fact that it was not a wrongful death case).

Thus, limiting the loss of chance doctrine in this manner is consistent with current Ohio practice and precedent.

### **CONCLUSION**

The Third District has imposed a new burden of liability upon the medical community, expanding the loss of chance doctrine beyond the measured boundaries set by *Roberts* and its progeny. Amici urge this Court to apply the loss of chance doctrine, if at all, narrowly, and to make clear that the loss of chance doctrine adopted in *Roberts* is a limited exception that does not apply to a plaintiff who (1) has a more than fifty percent chance of recovery or survival prior to the alleged medical negligence, or (2) presents a traditional “but for” proximate causation case to the jury.

Respectfully submitted,



Anne Marie Sferra (0030855)  
Bridget Purdue Riddell (0082502)  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, Ohio 43215  
(614) 227-2300  
(614) 227-2390 (facsimile)  
Email: [asferra@bricker.com](mailto:asferra@bricker.com)  
*Attorneys for Amici Curiae,  
Ohio Hospital Association,  
Ohio State Medical Association,  
American Medical Association,  
Ohio Osteopathic Association,  
and American Osteopathic Association*

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Merit Brief of Amicus Curiae in Support was sent via regular U.S. mail, postage prepaid this 11th day of May 2010, to the following:

Dennis P. Mulvihill (0063996)  
Gregory S. Scott (0067255)  
LOWE EKLUND WAKEFIELD &  
MULVIHILL CO., L.P.A.  
610 Skylight Office Tower  
1660 West 2nd Street  
Cleveland, OH 44113-1454  
*Attorneys for Plaintiffs-Appellants*

Irene C. Keyse-Walker (0013143)  
TUCKER ELLIS & WEST LLP  
1150 Huntington Building  
925 Euclid Avenue  
Cleveland, Ohio 44115-1414  
*Attorney for Defendant-Appellant  
John Cox, D.O.*

James F. Nooney (0009715)  
EASTMAN & SMITH, LTD.  
One SeaGate, 24th Floor  
P.O. Box 10032  
Toledo, OH 43699-0032  
*Attorney for Defendant-Appellee Ali S. Al-  
Mudallal, M.D.*

Patrick K. Adkinson (0016980)  
ADKINSON LAW OFFICE  
4244 Indian Ripple Road, Suite 150  
Dayton, OH 45440  
*Additional Counsel for Defendant-Appellant  
John Cox, D.O.*

  
Anne Marie Sferra