

**ORIGINAL**

IN THE SUPREME COURT OF OHIO

CASE NO. 2009-1715

JEFFREY GEESAMAN, et al.  
Plaintiffs-Appellees

09-2094

-v-

ST. RITA'S MEDICAL CENTER, et al.  
Defendants

and

JOHN COX, D.O.,  
Defendant-Appellant

On Appeal from the Third District Court of Appeals, Allen County, Case No. 01-08-065

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AMICUS CURIAE BRIEF OF THE OHIO ASSOCIATION FOR JUSTICE  
IN SUPPORT OF PLAINTIFFS-APPELLEES

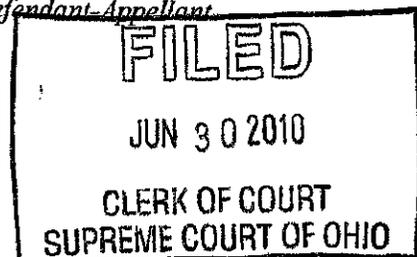
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## INTRODUCTION AND INTERESTS OF AMICUS CURIAE

This Amicus Curiae represents the interests of the Ohio Association for Justice (“OAJ”), an organization comprised of approximately 1,500 attorneys practicing personal injury and consumer law within the State of Ohio. The members of OAJ are dedicated to protecting the rights of individuals in litigation and to the improvement and promotion of public confidence in the legal system.

The OAJ and its members have a strong interest in the continued viability of the loss-of-chance doctrine, as it constitutes the only legal theory of recovery available to a number of medical malpractice victims suffering from preexisting diseases or conditions which leave them with unfavorable odds of recovery. The Third District Court of Appeals properly applied well-established precedent in this matter in ruling that the jury should have been instructed on loss-of-chance when the evidence presented at trial raised an issue as to whether Appellant’s negligence proximately caused Plaintiff to lose a less than even chance of recovery. As such, the OAJ respectfully requests that this Court uphold the decision of the Third District Court of Appeals.

## STATEMENT OF CASE AND FACTS

The OAJ adopts the statement of the case and the statement of facts set forth in the Merit Brief of Plaintiffs-Appellees.

## APPELLANT'S PROPOSITION OF LAW

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

## ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW

- I. **The Third District's accurately reflects Ohio law, which has never prohibited plaintiffs from pursuing traditional medical malpractice and "loss of chance" as alternate theories of recovery.**

The loss of chance doctrine was first adopted by this Court in *Roberts v. Ohio Permanente Med. Group, Inc.* (1996), 76 Ohio St.3d 483. The appellant in *Roberts* sought recovery for wrongful death, alleging that the defendant-appellees had failed to timely diagnose and treat the decedent's lung cancer. *Id.* at 484. The parties stipulated that if the decedent had received proper care and treatment, she would have had a twenty-eight percent chance of surviving the disease. *Id.* Based upon this calculation, the trial court granted the defendants' motion for summary judgment determining that under the all-or-nothing approach set forth in *Cooper v. Sisters of Charity, Inc.* (1971), 27 Ohio St.2d 252, the plaintiff had failed to raise a genuine issue of material fact as to whether the defendants' negligence proximately caused the death. *Id.*

On appeal, this Court noted that in many instances "traditional notions of proximate causation may unjustly deprive a plaintiff of recovery in certain cases even where a physician is blatantly at fault," and recognized the need for a relaxed causation

analysis in cases where a patient's preexisting disease or condition, present at the time of the negligent act or omission, leaves him or her with a less than even chance of recovery. *Id.* at 485. The Court therefore overruled *Cooper*, stating in part:

"[W]e recognize that our court has traditionally acted as the embodiment of justice and fundamental fairness. Rarely does the law present so clear an opportunity to correct an unfair situation as does this case before us. The time has come to discard the traditionally harsh view we previously followed and to join the majority of states that have adopted the loss-of-chance theory. \*\*\* [A] health care provider should not be insulated from liability where there is expert medical testimony showing that he or she reduced the patient's chances of survival." *Id.* at 488.

The Court therefore adopted the approach contained in Section 323 of the Restatement of the Law 2d, Torts and established the requirements for recovery of loss-of-chance damages as follows:

"In order to maintain an action for the loss of a less-than-even chance of recovery or survival, the plaintiff must present expert medical testimony showing that the health care provider's negligent act or omission increased the risk of harm to the plaintiff. It then becomes a jury question as to whether the defendant's negligence was a cause of the plaintiff's injury or death. Once this burden is met, the trier of fact may then assess the degree to which the plaintiff's chances of recovery or survival have been decreased and calculate the appropriate measure of damages. **The plaintiff is not required to establish the lost chance of recovery or survival in an exact percentage in order for the matter to be submitted to the jury. Instead, the jury is to consider evidence of percentages of the lost chance in the assessment and apportionment of damages.**" *Id.* at 488

(emphasis added).

Loss of chance, or “loss-of-less-than-even chance” was revisited by the Court in *McMullen v. Ohio State University Hosp.* (2000), 88 Ohio St.3d 332. In that case, the plaintiff filed a wrongful death action in the Court of Claims based upon claims that the defendant nurses employed by OSU Hospital negligently removed his wife’s endotracheal tube without an order from a physician. *Id.* at 334. The plaintiff’s case included allegations against an anesthesiology resident employed by OSU who had failed to re-intubate the decedent in six attempts, thereby leaving her without proper oxygenation for over twenty minutes and causing her oxygen saturation to drop to levels “inconsistent with life.” *Id.* The hypoxia caused irreparable damage to the decedent’s brain, lungs and heart, ultimately resulting in her death. *Id.*

After the liability phase of the trial, the Court of Claims found that a preponderance of the evidence established that the nurses and resident breached the standard of care. *Id.* at 335. The court also found that although the cause of Mrs. McMullen’s death was the hypoxia, her underlying leukemia and prognosis (i.e., lost chance of survival) would be taken into account at the damages phase of the trial. *Id.*

This Court reversed the Court of Claims’ decision as to this point. Distinguishing the situation from that present in *Roberts*, the majority opinion stated as follows:

“In the present case, the negligence of hospital personnel did not merely combine with a preexisting condition to create the ultimate harm, it directly caused the ultimate harm. \*\*\* This is not a situation where negligence merely hastened or aggravated the effects of a preexisting condition or allowed it to progress untreated. **Once the trial court determined that actions by hospital personnel were inconsistent with**

decedent's life, it became wholly unnecessary to inquire as to whether their negligence also increased the risk of physical harm to decedent. Having determined that negligence caused the death, the trial court should not have proceeded to consider what probably would have happened in the absence of negligence. The former finding should have subsumed the latter.” *Id.* at 341 (emphasis added).

Appellant mistakenly interprets this Court's holding in *McMullen* as confirmation of “the hornbook law that a plaintiff is the master of his or her claim,” and that the loss-of-chance doctrine “is not a ‘fallback’ claim for plaintiffs seeking full damages.”<sup>1</sup> Appellant's Brief points out that the plaintiff in *McMullen* presented expert opinion testimony that the decedent had a “high probability” to survive and leave the hospital but for the negligence of the defendants. However, the *McMullen* court's opinion was not premised on the plaintiff's *introduction* of this expert testimony, but rather upon the Court of Claims' *acceptance* of this theory in its role as trier of fact. This Court specifically noted that “[t]he plaintiff should not \*\*\* be involuntarily confined within the

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<sup>1</sup> Appellant's proposition of law also does not coincide with the fact that this Court permitted recovery for loss of chance even though the plaintiff in *Roberts v. Ohio Permanente Med. Group, Inc.* had only asserted a “traditional” wrongful death claim in his complaint. See *id.* at 491 (Cook, J., dissenting.) Based upon this fact, and supporting authority from other jurisdictions, at least one Ohio appellate court has held that a plaintiff need not plead loss-of-chance as a separate cause of action in her complaint. See *Heath v. Teich* (10<sup>th</sup> Dist.), Franklin No. 03AP-1100, 2004-Ohio-3389, at ¶7; citing *Wendland v. Sparks* (Iowa 1998), 574 N.W.2d 327, 329 (Iowa Supreme Court holding that the party need not separately plead a theory of lost chance of survival to avail himself of such claim in a wrongful death action based on medical malpractice); *Powell v. St. John Hosp.* (Mich. App., 2000), 614 N.W.2d 666 (the lost chance of survival doctrine is not a separate theory of recovery from medical malpractice claim). Although the forms of recovery may be “mutually exclusive” of each other depending on the jury's ultimate determination regarding the lost chance of recovery, the underlying cause of action is the same. As such, it is not logical to force plaintiffs to forego one kind of recovery (loss of chance) by holding them to the higher standard in situations where all of the elements identified in *Roberts* are met.

limits of an increased-risk or loss-of-chance theory where her efforts to prove a direct causal relationship between the defendant's negligence and the decedent's death are successful.” *Id.* at 339 (emphasis added). It therefore follows that any rule requiring the plaintiff to involuntarily confine himself to a single theory of recovery, i.e., traditional causation vs. loss of chance, prior to this determination by the trier of fact would run contrary to the *McMullen* court’s rationale. This is especially true in cases such as this where there are conflicting expert opinions and a genuine issue of material fact as to the patient’s chances of survival or recovery at the time of the subject negligence.

Appellant and his supporting *amici curia* also cite the appellant decisions in *Haney v. Barringer* (7<sup>th</sup> Dist.), Mahoning No. 06 MA 141, 2007-Ohio-7214; *Liotta v. Rainey* (8<sup>th</sup> Dist.), Cuyahoga No. 77396, 2000 WL 1738355; *McDermott v. Tweel* (10<sup>th</sup> Dist.), 151 Ohio App.3d 763, 2003-Ohio-885; and *Fehrenbach v. O'Malley* (1<sup>st</sup> Dist.), 164 Ohio App.3d 80, 2005-Ohio-5554 for the proposition that expert testimony as to *probability* of survival or recovery offered into evidence precludes any loss-of-chance recovery. However, a cursory review of these opinions reveals that Ohio’s lower appellate courts have not interpreted *Roberts* and *McMullen* in such a manner. For instance, although the *Haney* court accurately stated that “a medical malpractice plaintiff cannot simply rely on a loss-of-chance theory if some problem arises with respect to proving proximate cause,” its holding was premised upon the fact that “the injured patient had a greater-than-even chance of recovery at the time of the alleged medical negligence.” *Haney*, at ¶¶14, 15. As there was “no such evidence” that the decedent had a less-than-even chance at time of the alleged malpractice, *Roberts* was ultimately found to be inapplicable. *Id.* at ¶15. The decisions of the First and Tenth Districts were based

on similar conclusions. See, *McDermott*, 151 OhioApp.3d at 774 (“In the present case, the parties agree that expert testimony established that decedent had a better-than-even chance of surviving his cancer when both [defendants’] alleged incidents of malpractice occurred.”); *Fehrenbach*, 164 Ohio App.3d at 96 (“[Plaintiffs] argue that the instruction was warranted because [Plaintiff’s expert] testified that had [the patient] been properly diagnosed and treated, she would have had an 80 percent chance for a full recovery. But this evidence did not demonstrate that [the patient] had a less-than-even chance of full recovery even with proper diagnosis and treatment; in fact, it demonstrated the opposite.”).

In *Liotta*, the plaintiff sought recovery for the loss of chance of survival based upon the defendant’s failure to perform chest x-rays which would have detected the decedent’s lung cancer. *Liotta*, 2000 WL 1738355, at \*1. The trial court granted the defense a directed verdict as to the plaintiff’s claim for loss of chance. *Id.* The evidence reviewed on appeal demonstrated that the decedent’s chance of survival at the time of the initial negligence was 89%, subsequently decreasing to 70% and then 50-60% at later points when an x-ray should have been taken. *Id.* at \*2. The Eighth District affirmed, noting that the case differed from *Roberts* in that “[a]t no time did [the plaintiff’s expert] testify that [the decedent] had a less than even chance of recovery. While the chance of recovery did decrease, this decrease falls within the traditional tort theories of malpractice.” *Id.* at \*4. Unlike the case at hand, the *Liotta* opinion makes no reference to competing expert opinions regarding the patient’s chances of survival or recovery at the time of the negligence.

Despite Appellant’s assertions, the above cases stand for the proposition that if

negligence is established, the loss-of-chance doctrine set forth in *Roberts* does not apply in two scenarios: (1) the trier of fact accepts an expert's opinion regarding the "greater than even" percentage chance of recovery in its verdict, thereby permitting the plaintiff to recover "full" damages under traditional notions of causation; or (2) there is a lack of evidence which could raise a genuine issue of fact as to the patient's "less-than-even" chance of recovery.<sup>2</sup> Under *Roberts* and *McMullen*, the mere offering of evidence as to probability does not, and should not, have this same preclusive effect. Appellant's proposition of law would require a plaintiff to elect a remedy (either loss-of-chance or traditional causation malpractice) prior to trial, even though the deciding factor as to which theory is correct is inherently *a factual determination* that has always been decided by a jury or judge sitting as trier of fact.<sup>3</sup> Therefore, when evidence is presented that can support either conclusion, instructions should be submitted allowing the jury to make this determination. See, *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 590.<sup>4</sup>

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<sup>2</sup>"[T]he lost-chance 'issue must be conditioned upon a negative finding of proximate cause.'" *McMullen*, 88 Ohio St.3d at 339-40; citing *Perdue, Recovery for a Lost Chance of Survival: When the Doctor Gambles, Who Puts Up the Stakes?*, 28 So. Tex. L. Rev. 37, 60 (1987).

<sup>3</sup> "The plaintiff is not required to establish the lost chance of recovery or survival in an exact percentage in order for the matter to be submitted to the jury. Instead, the jury is to consider evidence of percentages of the lost chance in the assessment and apportionment of damages." *Roberts*, 76 Ohio St.3d at 488; citing *McKellips v. St. Francis Hosp., Inc.* (Okla. 1987), 741 P.2d 467, 475. "Stated another way, 'statistical data relating to the extent of the [plaintiff's] chance of survival is necessary in determining the amount of damages recoverable after liability is shown.'" *Travena v. Primehealth, Inc.* (11<sup>th</sup> Dist. 2006), 171 Ohio App.3d 501, 513; citing *McKellips*, 741 P.2d at 476

<sup>4</sup> "It is well established that the trial court will not instruct the jury where there is no evidence to support an issue. However, the corollary of this maxim is also true. 'Ordinarily requested instructions should be given if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction.'" *Murphy*, 61 Ohio St.3d at 590; citing *Riley v. Cincinnati* (1976), 46 Ohio St.2d 287; and Markus & Palmer, *Trial Handbook for Ohio Lawyers* (3

Appellant's proposition of law would usurp the province of the jury in preexisting condition and disease scenarios, replacing it with a strategic gamble to be made by a plaintiff and his or her counsel (i.e., elicit only testimony as to probability and risk a defense verdict predicated on proximate cause vs. elicit only testimony as to possibility and forego recovery under the traditional causation standard even though evidence may support it). The resulting conundrum would leave medical malpractice victims with preexisting conditions without reasonable options, and could potentially shield even the most "blatantly at fault" physicians from liability simply because the plaintiff "guessed" wrong as to the percentage chance of recovery to be ultimately accepted by the jury. See, *Roberts*, 76 Ohio St.3d at 485. As such, the Third District's opinion in this matter should be upheld.

**II. This Court should refrain from overruling or limiting *Roberts* and its progeny beyond the issue presented in Appellant's proposition of law.**

As noted in Appellees' Memorandum in Response to Appellant's Memorandum in Support of Jurisdiction, the proposition of law advanced by Appellant in this matter is peculiar in effect, as such a rule would essentially prevent a jury from considering evidence offered by Dr. Cox himself in this matter. It is apparent upon reviewing the merit briefs submitted to date that this appeal is a thinly-veiled attempt to bring *Roberts* and the loss-of-chance doctrine back before this Court in an effort to once again shield medical malpractice defendants from liability, regardless of negligence, so long as the patient suffered from some disease or condition leaving them with a less-than-even chance of recovery.

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Ed.1991) 860, Section 36:2.

This Court should refrain from taking such a drastic action. Only thirteen years ago, this Court, in overruling *Cooper*, noted that “rarely does the law present so clear an opportunity to correct an unfair situation” in adopting the loss of chance doctrine. *Roberts*, 76 Ohio St.3d at 488. Ever since the seminal decision of the Fourth Circuit Court of Appeals in *Hicks v. U.S.* (C.A.4, 1966), 368 F.2d 626, a number of different rationales have been advanced supporting the adoption of loss-of-chance. First and foremost, relaxing the typical causation standards in loss-of-chance situations permit patients who have been victimized by medical malpractice to have some sort of recourse, regardless of their preexisting condition. See, *Roberts*, 76 Ohio St.3d at 488 (“A patient who seeks medical assistance from a professional caregiver has the right to expect proper care and should be compensated for any injury caused by the caregiver’s negligence \*\*\*”); Mangan, M., *The Loss of Chance Doctrine: A Small Price to Pay for Human Life*, 42 S.D. L. Rev. 279, 292 (1997). Reliance on the “all-or-nothing” approach also “undermines the deterrence and loss allocation functions of tort law” by allowing a defendant to avoid liability due to the uncertainty created by his own negligence. *Mangan*, supra; citing *Kramer v. Lewisville Memorial Hospital* (Tex. 1993), 858 S.W.2d 397, 409 (Hightower, J., dissenting).

Furthermore, “[a]lthough the concerns of the medical practitioner may be justifiable, human life has value and that value is priceless. The value of human life should not be rejected in an attempt to reduce the potential burdens the loss of chance doctrine places on the medical profession.<sup>5</sup> The loss of chance doctrine recognizes that

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<sup>5</sup> Although opinions on this point are likely to vary significantly, the North Carolina Law Review article heavily relied upon in Appellant’s Merit brief casts doubt as to how much of a burden on the medical profession the loss of chance doctrine actually creates. See

human life is valuable, at all stages of health, illness, disease and ultimately, throughout the dying process.” *Mangan*, supra, at 282; see also King, J., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale L.J. 1353, 1397 (1981) (“[A] set of rules should be adopted that recognizes the destruction of a chance, including a not-better-than-even chance, of some more favorable outcome as a compensable loss worthy of redress, and that appropriately value such losses to reflect their true nature.”).

This Court has never given any indication that *Roberts* was incorrectly decided, nor has its status as controlling precedent been called into question. Given the sound reasoning upon which it was based, the doctrine of *stare decisis* requires that the loss of chance doctrine remain in tact. “Stare decisis is the bedrock of the American judicial system. Well-reasoned opinions become controlling precedent, thus creating stability and predictability in our legal system.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 17, 2003-Ohio-5849, at ¶1. It has been stated that the doctrine represents “a fundamental element of American jurisprudence—consistency and predictability. *Gallimore v. Children’s Hosp. Med. Ctr.* (1993), 67 Ohio St.3d 244, 257 (Moyer, C.J., dissenting).

In the oft-cited *Galatis* opinion, this Court set forth a three-part test for determining when *stare decisis* should be abandoned. “[I]n Ohio, a prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that

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Koch, S., *Whose Loss is it Anyway? Effects of the “Lost-Chance” Doctrine on Civil Litigation and Medical Malpractice Insurance*, 88 N.C. L. Rev. 595, 637 (“A particular state’s decision to adopt the lost-chance doctrine has no clear connection to an increase in the number of malpractice claims filed in that state. Although the data sources analyzed in this Comment were admittedly incomplete and tangentially related to the issues at hand, the lack of any definitive connection lends support to the argument that the lost-chance doctrine does not have a deleterious effect on either court docket congestion or the medical malpractice insurance market.”).

time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.” *Galatis*, 100 Ohio St.3d at 228. In the case *sub judice*, Appellant has not made any argument that *Roberts* was wrongly decided or that it defies practical workability. It would seem far-fetched to argue that the “circumstances” present in the practice of medicine or malpractice litigation have changed so much in the short time that has passed so as to no longer justify adherence to this Court’s prior holding.

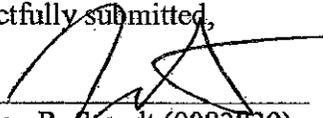
Furthermore, although the merit briefs in support of Appellant hint that such a reversal is sought, it should be noted that continued viability of *Roberts* and the loss of chance doctrine is not directly implicated in Appellant’s Proposition of Law, nor is it questioned in his Memorandum in Support of Jurisdiction. The sole issue presented by Appellant is whether or not the doctrine applies in situations where the plaintiff offers evidence that could potentially support a “traditional causation” claim of malpractice. As such, this Court should find as it has in the past and decline to address any issues not properly brought before it, including the abdication of loss of chance as a recognized theory of recovery in Ohio law. See, e.g., *In re Guardianship of Spangler* (June 9, 2010), Ohio Sup. Ct. No. 2009-0121, 2010-Ohio-2471, at ¶62 (O’Donnell, J., concurring in part and dissenting in part) (“As the board did not raise this issue in its memorandum in support of jurisdiction, it is not properly before us and we should decline to address it now.”); *Estate of Hall v. Akron Gen. Med. Ctr.*, 125 Ohio St.3d 300, 2010-Ohio-1051, at ¶60 (Cupp, J., dissenting) (“I am constrained here to adhere to this court’s established precedent in the absence of briefing and argument on the justification for abandoning that

precedent.”); *In re Timken Mercy Med. Ctr.* (1991), 61 Ohio St.3d 81, 87 (Resnick, J.) (holding that an issue not raised in the memorandum in support of jurisdiction is not properly before the court); *Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation Developmental Disabilities* (2004), 102 Ohio St.3d 230 233-34, 2004-Ohio-2629 (O’Donnell, J.) (declining to address an argument not raised by appellant in its memorandum in support of jurisdiction); *Whitaker v. M.T. Automotive, Inc.* (2006), 111 Ohio St.3d 177, 179, 2006-Ohio-5481 (Lanzinger, J.) (“Although [appellant] offers this issue in his brief before this court, because he failed to raise it in his jurisdictional memorandum, it will not be addressed”). See, also, S.Ct.Prac.R. III(1).

### CONCLUSION

Based on the foregoing, this Court should find that the trial court erred in failing to submit a loss-of-chance jury instruction in this matter, as the conflicting expert opinions regarding Mr. Geesaman’s chance of avoiding a second stroke raised genuine issues of material fact under both traditional causation and the loss of chance doctrine. This Court should further refrain from overruling or limiting its holdings in *Robert v. Ohio Permanente Med. Group* and *McMullen v. OSU Hospital* as such issues have not been properly presented for appeal, and are unwarranted under the doctrine of *stare decisis*. The OAJ and its members respectfully request that that the decision of the Third District be upheld.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Brief was served by regular U.S. Mail on this 30th day of June, 2010 upon the following:

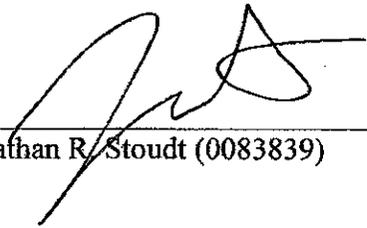
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