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# IN THE SUPREME COURT OF OHIO

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

## MEMORANDUM OF AMICI CURIAE, OHIO HOSPITAL ASSOCIATION, OHIO STATE MEDICAL ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, AND OHIO OSTEOPATHIC ASSOCIATION, IN SUPPORT OF JURISDICTION


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## 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. In short, the issue before the Court is whether the "loss of chance" or "lost opportunity" doctrine should be expanded beyond plaintiffs who have a less than even chance of survival before the alleged negligence and, instead, applied to virtually all medical malpractice cases in Ohio. It should not be expanded. Such an expansion would be a drastic departure from current Ohio negligence law and would wreak havoc on Ohio's health care industry.

In *Roberts v. Ohio Permanente Medical Group* (1996), 76 Ohio St.3d 483, 668 N.E.2d 480, 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. 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. 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 Ohio adopted the loss of chance doctrine, and still today, the majority of states that have considered this doctrine have rejected it. There is no reason to expand application of the loss of chance doctrine in Ohio, especially in cases where a plaintiff could satisfy and seeks to establish traditional "more probable than not" proximate causation.

The Ohio Hospital Association (OHA), Ohio State Medical Association (OSMA), American Medical Association (AMA), and Ohio Osteopathic Association (OOA) (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[1] which is dedicated to improving patient safety in the State of Ohio, and created OHA Insurance Solutions, Inc.[2] 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.

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[1] http://www.ohiopatientsafety.org

The AMA is the largest professional association of physicians, residents, and medical students in the United States. It has approximately 240,000 members who practice in every state and in every medical specialty. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health.[3]

The OOA is a non-profit professional association, founded in 1898, that represents Ohio's 3,400 licensed physicians (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. 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 liability under a loss of chance theory – regardless of how negligible the loss may be. Amici urge this Court to make clear that the loss of chance doctrine adopted in Ohio is a limited exception that only applies to plaintiffs who have a less than fifty-percent chance of survival prior to the alleged medical negligence.

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[2] http://www.ohainsurance.com

[3] 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.

## WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

This case is one of public or great general interest because it involves an important issue to all Ohio hospitals, physicians, and other healthcare providers: Will hospitals, physicians, and other healthcare providers be subjected to an increased risk of liability in traditional medical negligence cases (i.e., where a plaintiff can present evidence that he had a fifty-percent or better chance of recovery or survival prior to the alleged negligent act or omission) because the loss of chance doctrine can now be asserted as a "fallback" or alternative theory of liability in such cases?

This issue is also important to Ohio's lower courts and litigants as hundreds of medical negligence cases are filed every year in Ohio. They need guidance and clarification from this Court to ensure the best use of scarce judicial and financial resources.

The loss of chance doctrine, historically, has been applied:

> In those cases [where] the plaintiff or plaintiff's decedent is already suffering from some injury, condition or disease when a medical provider negligently diagnoses the condition, fails to render proper aid, or provides treatment that actually aggravates the condition. As a result, the underlying condition is allowed to progress, or is hastened, to the point where it's inevitable consequences become manifest. *Unable to prove that the provider's conduct is the direct and the only cause of the harm, the plaintiff relies on the theory that the provider's negligence at least increased the risk of injury or death* by denying or delaying treatment that might have inured to the victim's benefit. The focus then shifts away from the cause of the ultimate harm itself, and is directed instead on the extent to which the defendant's negligence caused a reduction in the victim's likelihood of achieving a more favorable outcome.

*McMullen*, 88 Ohio St.3d at 339-340 (emphasis added).

In Ohio, the loss of chance doctrine generally has been applied in wrongful death cases involving a plaintiff with a less than even chance of survival before the alleged negligence occurred. From the outset, Chief Justice Moyer cautioned that the doctrine should not be extended "to injury cases in which the plaintiff argues that his or her recovery was either slower

or less complete than it might have been in the absence of negligence" because "such an expansion 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., dissenting). These concerns will become reality if Ohio's lower courts follow the decision of the Third District.

In Ohio, when the loss of chance doctrine is applied, the amount of damages recoverable is determined by multiplying the total damages for the underlying injury or death, assessed from the date of the negligent act or omission, by the percentage of lost chance. *Roberts*, 76 Ohio St.3d. 483, paragraph two of the syllabus. Thus, damages recoverable for loss of chance are always less than the amount recoverable under a proximate cause medical negligence case.

The Third District's decision turns established concepts of causation upside-down by allowing a plaintiff who fails to establish proximate cause in a traditional malpractice case to introduce a fallback theory of recovery for loss of chance. That is, under the Third District's decision, in any traditional medical malpractice case, if the jury could find for the defendant on the issue of proximate causation, the jury must also be instructed on loss of chance. Essentially, hospitals and physicians will be subject to a strict liability standard in all medical malpractice cases in which the plaintiff had a pre-existing condition, regardless of the plaintiff's chance of recovery prior to the alleged negligence.

If allowed to stand, the Third District's decision will adversely impact hospitals and physicians in Ohio by permitting recovery for loss of chance in nearly every medical malpractice case where proximate cause is at issue. As such, the Third District's decision encourages additional medical malpractice litigation, discourages settlement, and allows plaintiffs a win/win in every case. Under the Third District's approach, if a plaintiff wins on their proximate cause

theory, they receive a full recovery. But, even if the plaintiff loses by failing to establish proximate cause, he can still fall back on the loss of chance theory and recover against the defendant. This is true even if the defendant's negligence brought about only a 1% decrease in the plaintiff's chance of recovery. This makes loss of chance the rule, rather than the exception, and puts an unprecedented burden on health care defendants to defend against *any possibility* of a more favorable outcome.

The loss of chance doctrine has been rejected by the majority of states that have considered it. See *Valadez v. Newstart, LLC* (Aug. 20, 2008), Tenn.App. No. L 4831306, 2008 WL 4831306. Ohio, having adopted the minority position to allow recovery under this theory, should not now broadly expand its application to all medical negligence claims. The Court should accept this discretionary appeal to ensure that Ohio's lower courts are provided necessary guidance to thwart expansion of the loss of chance doctrine.

## STATEMENT OF FACTS

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

## ARGUMENT

**Proposition of Law No. 1:** 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 Involving a More than Even Chance of Recovery Prior to the Alleged Malpractice.

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 to a case in which the alleged medical malpractice was proved to be the actual cause of a patient's injury or death).

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 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); *McDermott v. Tweel* (10th Dist. 2003), 151 Ohio App. 3d 763, 775 (finding that because the decedent had a fifty-percent or greater chance for recovery at the time of the alleged incidents of 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."); *Haney v. Barringer*, 7th Dist. No. 06MA141, 2007-Ohio-7214, at ¶14 (finding 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" and that "a medical malpractice plaintiff cannot simply rely on a loss-of-chance theory if some problem arises with respect to proving proximate cause"); *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).

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. In other words, if a plaintiff is able to introduce evidence that he more likely than not would have recovered or survived prior to the alleged negligent act or omission, he must prove his case under a traditional negligence theory.

Here, in *Geesaman*, Plaintiff argued his case based on a traditional causation standard, presenting expert testimony that had Geesaman's first stroke been identified and properly treated, "he more likely than not would not have suffered the second stroke." *Geesaman v. St. Rita's Medical Center*, 3d Dist. No. 1-08-65, 2009-Ohio-3931, at ¶13. Because Plaintiff's case was not premised on the fact or allegation that he had a less than even chance of recovery or survival prior to the alleged negligence, the loss of chance doctrine simply is not applicable. See *Dobran*, 102 Ohio St.3d 54, 2004-Ohio-1883, at fn. 1 (stating that the court of appeals was responsible for misapplication of the loss of chance doctrine to a case in which the plaintiff did not claim that his chance of survival was less than fifty-percent). Thus, Amici urge the Court to accept the instant discretionary appeal and clarify the narrow and limited scope of the loss of chance doctrine in Ohio.

### B. Expansion of the Loss of Chance Doctrine Will Create Confusion, Inequity, and Increase Litigation

Expansion of the loss of chance doctrine will have broad implications on the health care industry. The Third District's decision *requires* that every jury in every medical negligence case where plaintiff had a preexisting condition be instructed on *both* proximate causation and loss of

chance, regardless of the evidence presented by the plaintiff. If there is any chance that the jury might find for the defendant on the issue of proximate causation, the jury must be instructed to consider loss of chance – thereby giving plaintiff the opportunity to recover against the defendant unless the defendant can establish his action or omission had *zero* impact on the plaintiff's medical outcome.

The Third District 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 proximate 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 a strict liability standard to proving only that a defendant's actions decreased the chance of recovery or survival by any negligible amount.

This new rule will significantly increase medical malpractice liability and uncertainty in Ohio. Under *Roberts*, *Dobran* and in the majority of lower courts, hospitals and physicians 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. Hospitals and physicians 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.

Permitting expansion of the loss of chance doctrine has drastic consequences for health care providers in Ohio. As Chief Justice Moyer cautioned years ago, "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." *Roberts*, 76 Ohio St.3d at 485 (Moyer, C.J. dissenting). Even where a physician's best efforts were unable to cure a patient, the patient could place an impossible burden on a 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*, Tenn.App. No. L 4831306, 2008 WL 4831306, at *5.

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, narrow in scope.

### C. Limiting the Loss of Chance Doctrine is Consistent with Well-Established Tort Principles

Jurisdictions that have considered "loss of chance" generally fall into three categories. First, some jurisdictions have completely rejected the loss of chance doctrine and follow the traditional approach, allowing recovery only where a plaintiff establishes traditional "but for"

proximate cause. At least nineteen jurisdictions have adopted the traditional approach, refusing to recognize the "loss of chance" doctrine.[4]

Second, at least five jurisdictions have adopted a "loss of a substantial chance" theory.[5] Under the "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,* Tenn.App. No. L 4831306, 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 *Kilpatrick,* 868 S.W.2d at 600-601 (quoting *Perez v. Las Vegas Med.*

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[4] *See* Mich. Comp. Laws Ann. § 600.2912a (West 2000); *Finn v. Phillips,* No. COA 01-1317, 2002 WL 31133192, at *2 (Ark.Ct.App. Sept.25, 2002); *Grody v. Tulin,* 170 Conn. 443, 365 A.2d 1076, 1079-80 (Conn.1976); *U.S. v. Cumberbatch,* 647 A.2d 1098, 1099 (Del.1994); *Gooding v. Univ. Hosp. Bldg., Inc.,* 445 So.2d 1015, 1021 (Fla.1984); *Watson v. Med. Emergency Sev.,* 532 N.E.2d 1191, 1196 n. 2 (Ind.Ct.App.1989); *Walden v. Jones,* 439 S.W.2d 571, 576 (Ky.1968); *Philips v. Eastern Maine Med. Ctr.,* 565 A.2d 306, 308 (Me.1989); *Fennell v. S. Maryland Hosp. Ctr., Inc.,* 320 Md. 776, 580 A.2d 206, 215 (Md.1990); *Fabio v. Bellomo,* 504 N.W.2d 758, 762 (Minn.1993); *Ladner v. Campbell,* 515 So.2d 882, 888-89 (Miss.1987); *Pillsbury-Flood v. Portsmouth Hosp.,* 128 N.H. 299, 512 A.2d 1126, 1130 (N.H.1986); *Alfonso v. Lund,* 783 F.2d 958, 964-65 (10th Cir .1986) (stating that "we believe that New Mexico would not apply the 'lost chance' theory ... [as] New Mexico courts have remained firm in requiring that proximate cause be shown as a probability."); *Horn v. Nat'l Hosp. Ass'n,* 131 P.2d 445 (Or.1944); *Kramer v. Lewisville Mem'l Hosp.,* 858 S.W.2d 397, 407 (Tex.1993); *Jones v. Owings,* 465 S.W.2d 371, 374 (S.C.1995); *Blondel v. Hays,* 241 Va. 467, 403 S.E.2d 340, 344-45 (Va.1991).

[5] *See Daniels v. Hadley Mem'l Hosp.,* 566 F.2d 749, 757-58 (D.C.Cir.1977); *McBride v. United States,* 462 F.2d 71 (9th Cir.1972) (applying Hawaii law) ("[T]he absence of positive certainty [that the treatment would have successfully prevented the plaintiff's injury] should not bar recovery if negligent failure to provide treatment deprives a patient of a significant improvement in his chances for recovery."); *Perez v. Las Vegas Med. Ctr.,* 107 Nev. 1, 805 P.2d 589, 592 (Nev.1991); *Kallenburg v. Beth Israel Hosp.,* 45 A.D.2d 177, 179-80, 357 N.Y.S.2d 508 (N.Y.App.Div.1974) (per curiam); *McKellips v. Saint Francis Hosp.,* 741 P.2d 467, 475 (Okla.1987).

*Ctr.* (Nev.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.* (Mich. 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.* (Mich.Ct.App. 1990), 217 Mich.App. 502, 552 N.W.2d 507. Third, some jurisdictions have adopted a pure loss of chance theory, where a patient may recover if the defendant deprives him of *any* possibility of a better result. Id. "Thus, ... a patient who faced a 95 percent chance of dying even with appropriate medical care would still have a cause of action against the physician who negligently deprived him of the 5 percent chance of survival." Id. At least fourteen jurisdictions have adopted the pure loss of chance approach.[6] (At least one court has placed Ohio in the "pure loss of chance" category, although Ohio's position is less extreme as the loss of chance theory has historically only applied in Ohio to cases where a plaintiff has a less than even chance of survival or recovery before the alleged negligence).[7]

In *Roberts*, Ohio relaxed the "all or nothing" approach to proximate cause and adopted the loss of chance doctrine in a wrongful death case where the parties stipulated that the plaintiff

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[6] The Court in *Valadez* noted that it is sometimes difficult to classify a jurisdiction's adoption of the "loss of chance" theory as pure loss of chance or loss of a substantial chance theory, several states have adopted the former. *See Thompson v. Sun City Cmty. Hosp.,* 141 Ariz. 597, 688 P.2d 605, 616 (Ariz.1984); *James v. United States,* 483 F.Supp. 581, 586 (N.D.Cal.1980) (applying California law); *Richmond County Hosp. Auth. v. Dickerson,* 182 Ga.App. 601, 356 S.E.2d 548, 550 (Ga.Ct.App.1987); *DeBurkarte v. Louvar,* 393 N.W.2d 131, 137 (Iowa 1986); *Delaney v. Cade,* 255 Kan. 199, 873 P.2d 175, 211 (Kan.1994); *Wollen v. DePaul Health Ctr.,* 828 S.W.2d 681, 685 (Mo.1992) (en banc); *Aasheim v. Humberger,* 215 Mont. 127, 695 P.2d 824, 828 (Mont.1985); *Scafidi v. Seiler,* 574 S.2d 398, 408 (N.J.1990); *Hamil v. Bashline,* 481 Pa. 256, 392 A.2d 1280, 1286 (Pa.1978); *Voegeli v. Lewis,* 568 F.2d 89, 94 (8th Cir.1997) (applying South Dakota law); *Herskovits v. Group Health Coop. of Puget Sound,* 99 Wash.2d 609, 664 P.2d 474, 479 (Wash.1983); *Thornton v. CAMC, Etc.,* 172 W.Va. 360, 305 S.E.2d 316, 324-25 (W.Va.1983); *Ehlinger v. Sipes,* 155 Wis.2d 1, 454 N.W.2d 754, 763 (Wis.1990); *Matsuyama v. Birnbaum* (2008), 452 Mass. 1, 890 N.E.2d 819.

had a twenty-eight percent chance of survival if proper and timely care been rendered. *Roberts*, 76 Ohio St.3d at 485. In adopting the loss of chance doctrine, the Court considered the "substantial possibility" rule, but ultimately followed the approach set forth in Section 323 of the Restatement of Torts 2d (1965). Section 323 provides:

> One who undertakes, gratuitously of 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).

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." See Restatement of the Law 3d, Torts: Liability for Physical Harm (2008) (Proposed Final Draft No. 1), Section 26, Comment *n*. The Reporter's Note in Restatement Section 26 recognizes the dangers of a broad application of the loss of chance doctrine:

> The lost-opportunity development has been halting, as courts have sought to find appropriate limits for this reconceptualiztion 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.

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[7] *Valadez v. Newstart, LLC* (Aug. 20, 2008), Tenn.App. No. L 4831306, 2008 WL 4831306.

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 review the application of such doctrine, and to ensure against its broad expansion.

At a minimum, the Court should not allow the loss of chance doctrine to be used by a plaintiff that has a more than even chance of recovery or survival before the alleged negligence, nor a plaintiff that presents a "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* (Mich. 1997), 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. No. 90550, 2008-Ohio-6471, at ¶33 (finding loss of chance doctrine applied in a wrongful death case); *Natoli v. Massillon Cmty. Hosp.* (5th Dist. 2008), 179 Ohio App. 3d 783, 789 (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* (11th Dist. 2006), 171 Ohio App. 3d 501 (finding that loss of chance theory applied where patient had a diminished

chance of recovery); *Davison v. Rini* (4th Dist. 1996), 115 Ohio App. 3d 688, 699 (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 on the medical community, expanding the loss of chance doctrine beyond the measured boundaries set by *Roberts* and its progeny. Amici urge this Court to accept this discretionary appeal and make clear that the loss of chance doctrine adopted in *Roberts* is a limited exception that only applies to plaintiffs who have a less than fifty-percent chance of survival prior to the alleged medical negligence.

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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum of Amicus Curiae in Support of Jurisdiction was sent via regular U.S. mail, postage prepaid this 24th day of September 2009, to the following:

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