
IN THE SUPREME COURT OF OHIO

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

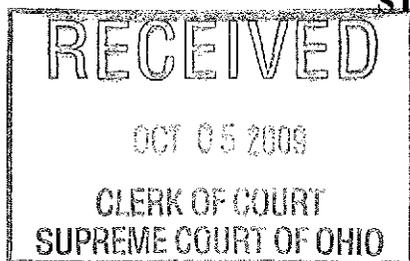
JEFFREY GEESAMAN, et al.,
Plaintiffs-Appellees,

v.

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

And

JOHN COX, D.O.
Defendant-Appellant.



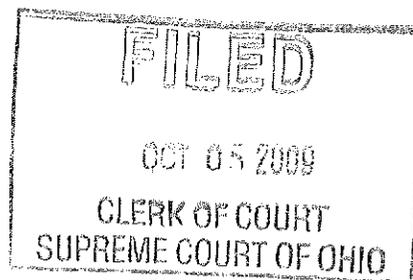
APPELLEES' MEMORANDUM IN RESPONSE TO
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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**APPELLEES' MEMORANDUM IN RESPONSE TO APPELLANT'S
MEMORANDUM IN SUPPORT OF JURISDICTION**

I. INTRODUCTION

In a strangely argued Memorandum, with bizarre implications if taken at face value, Appellant is apparently unwilling to say explicitly what he desires this Court to do: ignore *stare decisis*, overrule precedent, and eliminate the loss of chance doctrine for injured patients who pursue medical malpractice claims. Appellant's lack of honesty with this Court is striking, given that he told both the trial court and the court of appeals that it was his desire to see *Roberts v. Ohio Permanent Med. Group, Inc.* (1996), 76 Ohio St.3d 483, 1996-Ohio-375; *McMullen v. Ohio State University Hospitals* (2000), 88 Ohio St.3d 332, 2000-Ohio-342 overruled. It is unclear why Appellant suddenly wants to obfuscate his primary goal. Whether Appellant is willing to be honest with this Court, this Court should decline jurisdiction in the instant matter since the issue is not one of public or great general interest. Instead, the Third District merely followed controlling precedent and honored the time-worn rule that jury instructions must be submitted consistent with the evidence adduced at trial.

Appellant himself put on evidence that supported all of the elements of a medical negligence claim under a loss of chance theory of recovery. If Appellant is taken to mean what he says, he is asking this Court to do nothing short of fashioning a new rule that precludes a jury from accepting the evidence that Appellant himself introduced at trial. Since Appellant admitted to all of the elements of a loss of chance claim, the jury should have been allowed to render a verdict consistent with Appellant's evidence. Thus, the only way Appellant could escape the consequences of his admissions would be for this Court to overrule *Roberts* and *McMullen*. Otherwise, Appellant either loses the case or bizarrely argues that the jury should not have been

allowed to consider the evidence he himself introduced. So, Appellant is left in the untenable position of either arguing a position that is in conflict with controlling precedent (which he is now unwilling to do); or, asking this Court to fashion a rule that precludes the jury from evaluating the evidence that Appellant himself introduced at trial, and rendering a verdict on that evidence. If taken at face value, Appellant would be the first litigant in the history of jurisprudence to argue that a jury should be precluded from considering evidence he himself introduced at trial.

The Third District Court of Appeals properly understood the issues and applied the universally accepted axiom that a jury should be instructed consistent with the evidence. Such rulings are routinely entered every day in the courts of Ohio. No public or great general interest is implicated in such a circumstance.

Not surprisingly, Appellant soft-peddled his admissions. Under both *Roberts* and *McMullen* these admissions should have entitled Appellees to a verdict for loss of chance, assuming the jury found that Mr. Geesaman's recovery would have been less than probable. Dr. Cox is motivated not by any concerns for public interest or other litigants. His expressed motivation cannot be believed because he is advocating for the absurd: a ruling by this Court that his own evidence should not be submitted to the jury for its consideration. Instead, his is the basest of all motivations – self-interest - a desire to avoid being held accountable for the catastrophic damage he admittedly caused.

A. This Case Does Not Present Issues of Public or Great General Interest.

This Court can accept jurisdiction in this case if it determines that the case presents issues of public or great general interest. This burden cannot be met. Instead, Dr. Cox

simply wants to have this Court undo more than a decade of well-settled medical malpractice law to offset the admissions he made that he is liable to Appellees under a loss of chance theory.

For centuries, juries have been asked to sort out competing theories for civil liability and contradictory charges in criminal cases. Frequently a plaintiff will ask a jury to make a finding of malice sufficient to support a punitive claim; a finding of recklessness sufficient to eliminate comparative negligence as a defense; or a finding of negligence to support liability; all in the same case. Criminal juries frequently find defendants guilty of lesser included offenses, with different *mens rea* elements than the crimes under which a defendant had been charged. Having a jury determine whether a plaintiff was more probably than not going to recover or simply lost a chance of recovery because of a physician's breach of the standard of care is no different. Appellant seems to ignore the fact that one of the primary roles of juries is to decide between competing facts, and different theories of liability built on those competing facts. When a jury is asked to make such a determination, it is not evidence that the system is falling apart, as Appellant has suggested; rather, it demonstrates that the jury is properly fulfilling its historic duty to decide the facts, which we ask juries to do every day.

If this Court were inclined to accept Dr. Cox's invitation to undo the consequences of his admitting to a recognizable cause of action under Ohio law and overturn *Roberts* and *McMullen*, then Appellees would agree that this case does present issues of public or great general interest. Absent the Court's willingness to cavalierly disregard *stare decisis*, this case presents nothing more than a jury being given the opportunity to evaluate the evidence placed before it by Dr. Cox himself---certainly not the stuff of great general interest.

Although the facts giving rise to Mr. Geesaman's current medical condition are not in too much dispute, Dr. Cox shaded the facts in a manner that does require some correction. On

March 30, 2005, Jeff Geesaman presented to the Emergency Department at St. Rita's Medical Center in Lima, Ohio with symptoms consistent with a minor stroke, including slurred speech and some balance difficulties. After Dr. Cox admittedly misread the MRI that the neurologist ordered, the diagnosis became labyrinthitis or migraine and the care shifted away from secondary stroke prevention measures. After forty-eight hours, Mr. Geesaman was discharged home with virtually no neurologic symptoms and continued to recuperate for the next couple of days. It is important to note that no physician told Mr. Geesaman to take aspirin at home and no physician prescribed secondary stroke prevention medicine. Instead, a number of different medications were prescribed and filled by Mr. Geesaman. The discharge nurse testified that: 1) no physician told her to make sure that Mr. Geesaman was instructed to take aspirin or some other blood thinner upon discharge; and 2) no physician wrote any such order in the medical chart. Thus, the medical records, as well as the testimony of the discharge nurse, contradict Appellant's assertion that Mr. Geesaman was told to take aspirin.

Three days after discharge, Mr. Geesaman had a second, much more severe stroke, which left him permanently disabled. He is unable to work, unable to care for himself, and is wholly dependent upon his wife, who herself cannot work because she now functions as a full-time nurse and maid for her disabled husband. Their financial situation is dire.

In an effort to minimize Mr. Geesaman's claims, Appellant seemed to suggest that all Appellees' expert neurologist had to say was that aspirin would have prevented the subsequent stroke. Dr. Cox knows this not to be true. In fact, both at deposition and at trial, Appellees' expert identified a number of interventions that should have been started in order to help prevent a second stroke, including anti-platelet and anti-coagulant therapy, blood pressure management, and proper IV therapy.

In determining whether this Court should accept Dr. Cox's furtive invitation to overturn *Roberts* and *McMullen*, it is important to emphasize the reason that those decisions evolved in the common law. Many disease processes are so insidious that even with the best care, instituted as early as possible, a patient would have a less than 50% chance of surviving/recovering. In these circumstances, this Court has determined, along with the majority of courts throughout the United States, that it would be unfair to the patients to exonerate the physician whose negligence eliminated all possibility of recovery. For example, let us assume a disease where the patient has a 45% chance of recovery/survival with appropriate care. It is usually impossible to identify which patient would fall into which camp -- either the 45% chance of recovery, or the 55% that will not recover. This uncertainty, under traditional notions of proximate cause, would permit all negligent physicians to escape all acts of malpractice, as no plaintiff could meet the probability threshold. In *Roberts* and *McMullen*, the Court properly rejected this "all or nothing" approach.

Appellees hired an Oxford University-trained M.D./Ph.D. neurologist (Dr. David Thaler), who is a stroke specialist at Tufts University in Boston, Massachusetts. He opined that had Jeffrey Geesaman been diagnosed properly on March 30, 2005, and treated appropriately, then the disabling stroke of April 5, 2005, probably would have been avoided. Defendant neurologist Dr. Ali Almudallal (who is not a party to this Appeal) testified that had he known of Mr. Geesaman's underlying condition (the small strokes missed by Dr. Cox), then Mr. Geesaman would have had a 25 to 33% chance of recovery. Dr. Cox's own expert neurologist (Dr. Kirshner) testified that Mr. Geesaman had somewhat less than a 25% chance of recovery, and Dr. Almudallal's expert (Dr. Preston) testified it was even less than that. **Importantly, every physician that testified for the defense opined that Mr. Geesaman lost his chance of recovering from the stroke as a result of Dr. Cox's malpractice, but simply disagreed as to**

the percentage of chance. As a result, Defendant Cox admitted to all of the elements of recognizable cause of action under Ohio law, pursuant to *Roberts* and *McMullen*.

In an effort to avoid this fatal admission, Dr. Cox has contorted loss of chance to somehow require a Plaintiff to make a fictional election of remedies that simply does not exist under Ohio law. Precluding a loss of chance claim - even where the defense experts are the ones who, as an affirmative defense in mitigation of damages, claim less than a probability of recovery, but admit to a lost chance of recovery - is unjust and would be akin to asking the jury to nullify the critical admissions. Appellant confused the significance of his admissions: he incorrectly believed that offering evidence of less than an even chance of recovery is a defense to liability. It is not. Rather, it is both an admission to liability and an effort to mitigate damages. Appellees would ask the following rhetorical questions: 1) In what other area of law does affirmative defense-introduced evidence in mitigation of damages not constitute an admission; and, 2) In what other area of law do admissions by a defendant that support a theory of recovery against him not get submitted to the jury?

Dr. Cox has gotten extremely agitated over the fact that his admissions to both standard of care and proximate cause (loss of chance) should be given to the jury to support a verdict against him. Appellant cited three reasons why the Court of Appeals erred by holding that his clear admissions were sufficient evidence to support jury instructions on loss of chance. (Appellant's Brief, pp. 2 through 5) Appellee will respond in kind.

First, Defendant playfully, but disingenuously, calls the Third District's decision the "win-if-I-win/win-if-I-lose" rule. This maxim proves too much and is nothing more than a criticism of the loss of chance doctrine itself, which allows limited recovery where a lost chance of recovery is accepted by the jury. It must be remembered that Appellees' expert testified as to

probability of recovery and Appellees also elicited, upon cross-examination in their case in chief, testimony from the treating neurologist (Dr. Almudallal) that Mr. Geesaman's chance of recovery would have been between 25% and 33%, had there been no malpractice by Dr. Cox. Thus, in Appellees' case in chief, there was evidence to support both traditional proximate cause and loss of chance. In addition, Dr. Cox put on evidence in his defense case that Mr. Geesaman had a less than even chance of recovery, supporting the cognizable loss of chance theory of recovery under *Roberts* and *McMullen*. Thus, if the jury believed that Appellees carried the day with respect to proximate cause, Mr. Geesaman would have been awarded his full measure of damages; and if the jury believed the defense experts, Mr. Geesaman would have been awarded only a percentage of his damages. Thus, loss of chance is not a "win if I lose" proposition for a plaintiff. Instead, it is a "win if there is credible evidence to support the cause of action" proposition. In a twist of irony apparently lost of Appellant, his playful maxim is more accurately ascribed to his own argument: "Win if I lose" applies to a defendant who admits to a cause of action (ordinarily a "loss"), but who convinces the trial judge not to instruct on that evidence (a "win). Thus, Dr. Cox won (no instruction) by losing (admitting to all elements of a cause of action).

Second, Appellant suggests that the Third District decision is in conflict with other loss of chance decisions from the First, Seventh, Eighth and Tenth District Courts of Appeals. This is simply untrue. **In not one case cited by Appellant has a court determined that where evidence is adduced at trial to support both traditional proximate cause and loss of chance theories of recovery for medical malpractice is the court precluded from charging the jury on both.** Since the Third District held that both instructions should have been given, and no case says otherwise, patently there is no conflict with any other court of appeals. Instead, the cases

say one of two things: 1) that loss of chance does not apply where the plaintiff pursues traditional proximate cause, and there happens to be no evidence of loss of chance, a proposition with which Appellees agree; or, 2) that a Plaintiff cannot use loss of chance as a fallback position, a proposition with which Appellees also agree.

Just as importantly, conflicts with other courts of appeals are to be certified by the court of appeals and reviewed by this Court (Rule IV, Supreme Court Rules of Practice) and do not form an independent basis under which the Supreme Court can accept discretionary jurisdiction pursuant to Rule III (*id.*). Thus, not only is Appellant inaccurate with respect to the conflict issue, but it is simply of no consequence to this Court, as a manufactured conflict is not a permissible reason for this Court to accept discretionary jurisdiction, pursuant to Rule III.

Third, Appellant asserts that the Third District has both dramatically expanded the loss of chance doctrine and created a “gap” in this Court’s loss of chance jurisprudence such that inconsistencies are sure to follow (Appellant’s Brief, p. 4). In so doing, Appellant would have this Court hold: 1) that loss of chance can only be submitted to the jury if the plaintiff puts on the evidence; and 2) that the trial court and jury should ignore key admissions made by a defendant sufficient to support a loss of chance claim. This Court can reject these arguments for two reasons: first, admissions by parties to causes of action require courts to submit those causes of action to the jury, *Murphy v Carrollton Mfg. Co.* (1991), 61 Ohio St. 3d 585, 590 (citing the time-honored rule that instructions should be submitted to the jury if there is evidence to support them); and, second, Appellees called the defendant neurologist in their case and elicited loss of chance testimony from him. Thus, although Appellant’s contention is without merit, even if this Court were to accept the argument – only evidence that a Plaintiff puts on can be considered to

support a jury instruction – Appellees met this proposed evidentiary burden by calling the defendant neurologist in their case in chief.

Appellant’s cry of injustice is no different than that of a criminal defendant who was charged with capital murder, complaining about being convicted of manslaughter when he admitted to the elements of a manslaughter charge, while testifying in his own behalf, hoping to avoid the capital conviction. Here, Dr. Cox was hoping to avoid the full measure of damages by offering expert testimony designed to mitigate those damages. In so doing, Dr. Cox admitted to a loss of chance theory of recovery and cannot be heard to complain if a judge instructs on the evidence Dr. Cox brought into the courtroom.

II. STATEMENT OF THE CASE

After Dr. Cox misread the MRI of Mr. Geesaman’s brain, reporting it normal when it was not, Dr. Almodallal, the treating neurologist, testified that his care for Mr. Geesaman changed and he no longer considered stroke as a diagnosis.

Rather than directly admitting that he misread the MRI, Dr. Cox fabricated an excuse, saying that the images that captured the two small strokes were never sent to his work station by the hospital computer system. These were the diffusion-weighted images, which are a part of any routine MRI of the head. Dr. Cox knew that diffusion images are critical when determining whether a patient had a stroke. Thus, Dr. Cox admitted a breach of the standard of care (sort of) by stating that he should have endeavored to locate the missing diffusion-weighted images because of their importance in making a stroke diagnosis. Importantly, Dr. Cox never admitted that he simply misread the film. Appellees elicited testimony from hospital employees who directly contradicted Dr. Cox’s testimony about the computer foul-up being responsible for the

misread film. These employees conducted an investigation and could find no error with respect to the MRI images that were sent to Dr. Cox's work station. Thus, Dr. Cox begrudgingly admitted he breached the standard of care, but only did so in a manner that he thought exonerated him. In short, it was easier for Dr. Cox to admit that he made a mistake by not locating the purported missing film, rather than admitting he misread film that was in front of him.

Dr. Preston (Dr. Almudallal's expert) was asked in deposition about all the opinions he expected to express at trial. When asked, he had no opinion about the MRIs taken on April 15 and April 25, 2005, since he did not recall reviewing them. Only at trial did the missing MRIs become important to Dr. Preston when he wanted to use them in his testimony. Appellees asked the Trial Court for a ruling that Dr. Preston should not be allowed to discuss those MRIs, as any opinion he offered would have constituted trial by ambush, since he had no opinion about them when he was deposed. The Trial Court agreed, and would not let Dr. Preston talk about those new opinions in direct examination. The Trial Court erred when it let co-defendant, Dr. Cox, elicit the previously excluded testimony, because it was brought out during "cross-examination." The Third District properly recognized the error. It is not who was asking the questions that was important, as both defendants were offering identical evidence on proximate cause. Rather, it was whether the testimony itself was a surprise.

Appellant attempted to minimize this prejudice by arguing that Appellees may have had an hour or two to digest the new opinions (untrue) and thus, the surprise testimony was not prejudicial. Although Appellees dispute that they had two hours to assimilate the surprise testimony, such a contention is irrelevant. The damage was done as Appellees' expert neurologist was back in Boston practicing medicine and was not able to observe the testimony or offer suggestions on how to examine Dr. Preston about his new opinions. This type of

evidentiary ruling is entered routinely in trial courts across the State of Ohio. As the Third District noted, the Civil Rules, particularly with respect to disclosure of expert opinions, have long since disfavored surprise testimony, particularly where the witness had been given an opportunity to discuss opinions at deposition and passed because he was unfamiliar with the evidence.

III. ARGUMENT AGAINST APPELLANT'S PROPOSITION OF LAW NO. 1

A. Counter Proposition of Law No. 1: The Loss of Chance Doctrine is Applicable When There is Evidence Adduced at Trial to Support the Doctrine.

Because Appellant is unwilling to state explicitly what he desires the Supreme Court to do with this case, his argument in support of Proposition of Law No. 1 is somewhat confusing. The explicit argument is that when a plaintiff puts on evidence of traditional cause, despite admissions from the defendants as to loss of chance, a jury should not be instructed consistent with those defense admissions. Appellant incorrectly attempts to frame *Roberts* to say that only when a plaintiff introduces evidence of loss of chance is that theory of recovery submitted to the jury. This argument does not withstand scrutiny. In any seminal case from this Court establishing a new theory of recovery, the elements of that claim will always be framed in terms of what a plaintiff must prove to support the cause of action. If a plaintiff cannot meet those elements, the case must fail. But that rule has never been extended to say that if the defendant presents evidence to support every element of a cognizable claim, the jury should not be instructed thereon. The age-old axiom that juries are instructed consistent with the evidence is as applicable to medical malpractice cases as it is to any other cause of action.

Consider the following example of the injustice and inconsistency that would follow if this Court adopted Appellant's argument. Assume, hypothetically, that a middle aged man goes to the hospital with a minor stroke. An MRI is ordered, but read as normal. It is not normal and two small strokes are missed. Every doctor knows that after a first stroke, however minor, the risk of a second stroke increases dramatically. That is why every doctor that suspects stroke implements secondary stroke prevention measures immediately. Assume that no secondary stroke prevention measures were implemented and the patient, a few days after being discharged with a clean bill of neurologic health, has a massive, disabling stroke. Further assume that a claim for malpractice is brought. Assume the economic cost of the care and treatment of the disabled person is in the millions of dollars. Assume the radiologist admits he breached the standard of care. Experts are hired. Assume that every doctor that testifies in the case believes that the patient, with proper care, had a chance to avoid the second stroke, but that chance was taken away because of the malpractice. The experts only disagree as to the percentage of that chance. In an effort to mitigate damages, assume the experts hired by the defense testify that there was a chance (although less than even) that proper care would have averted the second stroke. Assume the jury accepts the evidence introduced by the defense, which one can assume the defendant wants, otherwise he would not put on the evidence. Assume the jury is not permitted to enter a verdict consistent with the defense evidence.

This is, of course, not a hypothetical situation. These largely are the facts of the instant case. What is lost on Appellees, however, is how Appellant can claim injustice by having a jury accept the evidence introduced by Appellant's own witnesses. **Only in the upside down world of a defendant who wants desperately to avoid responsibility for a cause of action to which he admitted, would the defendant have the temerity to argue that a jury should not be**

allowed to enter a verdict consistent with the evidence the defendant himself introduced at trial. This is precisely why Appellant's unwillingness to be honest about what he wants this Court to do (overrule *Roberts* and *McMullen*) is the only rational way to interpret his strange arguments about the Third District expanding *Roberts*. The Third District faithfully followed *Roberts*; by no means did it expand loss of chance. But *Roberts* will be eviscerated and confusion will follow if a jury is not permitted to accept the evidence put before it by a defendant who is attempting to mitigate damages by admitting to loss of chance.

It must be remembered that by admitting to loss of chance, Appellant was putting on evidence to substantially reduce his exposure in the damages portion of the case. If the jury believed his evidence, it would have returned a verdict that would have been anywhere between 1% and 33% of the real damages suffered by Appellees, depending on which loss of chance defense witness the jury cared to embrace.

Appellees submit that it is Appellant who is attempting to create rules that would wreak havoc on trial courts throughout the State, by having this Court hold that admissions are not admissions and causes of action that a defendant supports with evidence cannot be submitted to the jury for consideration.

B. Counter Proposition of Law No. 2: No Party Was Sanctioned for Failing to Supplement Discovery.

The Trial Court did not sanction Dr. Almudallal for attempting to introduce evidence about which Dr. Almudallal's expert had no opinion at his deposition. Instead, the Court simply precluded the expert (Dr. Preston) from offering those surprise opinions at trial on direct examination, as it should have. Thus, the Trial Court was in agreement with the Court of Appeals that the opinions from Dr. Preston that constituted trial by ambush were prejudicial and

inadmissible. The mistake by the Trial Court was simply allowing those exact same opinions to be elicited under the guise of “cross-examination” by Dr. Cox. It must be understood that Dr. Cox and Dr. Almudallal were offering the identical proximate cause defense – that Mr. Geesaman’s condition was so uncertain that even proper intervention probably would not have changed the outcome. It is a meaningless distinction to suggest that Dr. Cox, who had identical interests to Dr. Almudallal from a proximate cause perspective, could elicit the surprise testimony on cross-examination. The examination of Dr. Preston by Dr. Cox’s counsel was anything but adverse or cross. Instead, it was one softball question after another designed to bolster their common proximate cause defense. The distinction, as to which defendant gets to elicit the surprise testimony, made no sense and the Court of Appeals properly held that it was the testimony that mattered, not the person asking the questions.

It is inconceivable that Appellant believed that since other doctors had been thorough and actually evaluated the two subsequent MRIs (and revealed their opinions about those MRIs) that Dr. Preston should have been allowed to offer his surprise opinions. Essentially, Appellant is asking this Court to adopt a rule that says surprise testimony by one witness is perfectly permissible if another witness previously addressed the subject matter of the concealed testimony. This rule would only harm plaintiffs, since plaintiffs put on their evidence first, and all of the issues in the case would have been discussed by the time the defense experts arrive in court. Simply because an issue had been previously discussed, it does not minimize the harm caused by surprise testimony. Each expert witness is likely to have his/her own interpretation of the evidence at issue, and the fact that the evidence had been previously discussed is not helpful in trying to determine what another witness might say about it. If this new defense rule were adopted, defendants would be free to conceal testimony with impunity and then argue that since

the plaintiff's experts had addressed the subject matter previously, that there would be no harm in springing the surprise testimony at trial. That has never been the rule, nor can it be a rule if Appellant is true to his word that he does not want unjust results in trials.

IV. CONCLUSION

Appellees respectfully request that this Court deny jurisdiction as there are no public or great general interests at stake.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This will certify that a true copy of the foregoing Appellees' Memorandum in Response to Appellant's Memorandum in Support of Jurisdiction has been served by ordinary U.S. mail, postage prepaid, this 2-day of October, 2009, upon:

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