

Nos. 2009-1715, 2009-2094
(Consolidated)

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

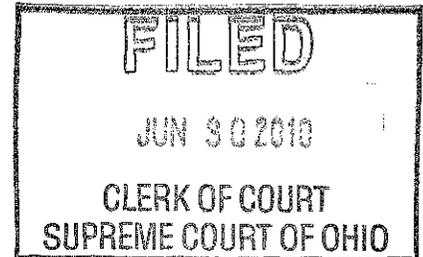
JEFFREY GEESAMAN, et al.,
Plaintiffs-Appellees,

v.

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

And

JOHN COX, D.O.
Defendant-Appellant.



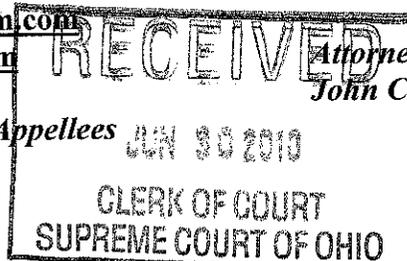
MERIT BRIEF OF APPELLEES

DENNIS P. MULVIHILL (0063996)
Counsel of Record
GREGORY S. SCOTT (0067255)
Lowe Eklund Wakefield &
Mulvihill, Co., LPA
1660 West 2nd Street, Suite 610
Cleveland, OH 44113-1454
(216) 781-2600 (Telephone)
(216) 781-2610 (Facsimile)
Email: dmulvihill@lewm.com
gscott@lewm.com

IRENE C. KEYSE-WALKER
(0013143)
Tucker Ellis & West LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, OH 44115-1414
(216) 592-5000 (Telephone)
(216) 592-5009 (Facsimile)
Email: ikeyse-walker@tuckerellis.com

Attorneys for Plaintiffs-Appellees

*Attorneys for Defendant-Appellant
John Cox, D.O.*



PATRICK K. ADKINSON (0016980)
Adkinson Law Office
4244 Indian Ripple Road, Suite 150
Dayton, Ohio 45440
(937) 431-9660 (Telephone)
(937) 228-0944 (Facsimile)
Email: pka.adklaw@bizwoh.rr.com

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

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I. STATEMENT OF THE FACTS

On March 31, 2005, Jeffrey Geesaman ("Jeffrey") presented at St. Rita's Medical Center's Emergency Room with the classic signs of a stroke -- his speech was slurred, he experienced visual problems, and he had difficulty walking. (Trial Transcript ("T. Tr.") Vol. 3 of 8, p. 636). Jeffrey's weight and hypertension were also risk factors for stroke and his symptoms were consistent with posterior artery blockage in the brain, where the two small strokes were subsequently found. (T. Tr. Vol. 3 of 8, p. 637). His emergency room physician, Dr. Beasley, thought Jeffrey was having a stroke, ordered a CT, and admitted him for neurologic evaluation and treatment. (T. Tr. Vol. 2 of 8, pp. 378, 379). Jeffrey came under the care of Dr. Almudallal, a neurologist, who ordered an MRI of Jeffrey's brain, which Dr. Cox, a neuroradiologist, interpreted. Dr. Cox missed the diagnosis and missed two small strokes in the posterior of Jeffrey's brain -- in the pons and cerebellum. Instead of identifying the small strokes, Dr. Cox read the MRI as normal, when it clearly was not. (T. Tr. Vol. 2 of 8, p. 416). As an excuse, Dr. Cox claimed that the critical series of images on an MRI that are used to identify a stroke, the diffusion weighted images, were not sent with the rest of the MRI to his work station. Hospital employees conducted an investigation of Dr. Cox's excuses and discredited his claim that the diffusion weighted images were not sent to his work station. (T. Tr. Vol. 2 of 8, p. 472, lines 14-20 and p. 492, lines 8-16). Dr. Cox testified that he knew the images were critical in evaluating stroke, and should have made sure to review them if in fact there had been a computer glitch. (T. Tr. Vol. 2 of 8, pp. 412, 413). Irrespective, he conceded that he breached the standard of care. (T. Tr. Vol. 2 of 8, p. 407).

Dr. Almudallal did not review the MRI films himself. (T. Tr. Vol. 2 of 8, p. 515). Rather, he merely read Dr. Cox's conclusion on the report -- but not even the report itself. (T.

Tr. Vol. 2 of 8, p. 529). Dr. Almudallal claimed that he did not breach the standard of care because he had a right to rely on Dr. Cox's conclusion which noted a normal MRI, despite the clinical symptoms that suggested stroke. (T. Tr. Vol. 2 of 8, p. 530).

Jeffrey remained in the hospital from March 31, 2005 through April 2, 2005, and he steadily improved. Dr. Almudallal diagnosed labyrinthitis (inner ear infection) or complicated migraine. (T. Tr. Vol. 2 of 8, p. 544). Dr. Almudallal discharged Jeffrey from the neurology service at the hospital on April 1, 2005. (T. Tr. Vol. 2 of 8, p. 543). Jeffrey was discharged from St. Rita's on April 2, 2005, with his neurological symptoms resolved. (T. Tr. Vol. 2 of 8, p. 567). At no time during his forty-eight hours in the hospital did any medical provider diagnose Jeffrey's stroke. (T. Tr. Vol. 2 of 8, pp. 568, 569). Nor did any medical provider order any secondary stroke prevention measures save administering Jeffrey aspirin during his stay. (T. Tr. Vol. 2 of 8, p. 575). Contrary to the assertions of Dr. Cox, who alleges that the only treatment Plaintiff and his experts suggested was necessary -- days-old aspirin -- to help prevent a second stroke (Appellant's brief p. 3), a series of other measures should have been implemented (T. Tr. Vol. 3 of 8, p. 841, lines 19-23 and p. 842, lines 1-22). On April 5, 2005, after three days of no preventative stroke treatment, Jeffrey sustained a massive stroke that left him permanently disabled.

Importantly, Jeffrey and Lori were **not** told that Jeffrey should take aspirin when discharged. (T. Tr. Vol. 5 of 8, p. 1036, lines 10-12). The discharge nurse testified that no physician wrote an order in the chart for aspirin, nor did any doctor give a verbal order for such medicine. (T. Tr. Vol. 2 of 8, p. 587).

Jeffrey and his wife Lori Geesaman claim that Dr. Cox and Dr. Almudallals' failure to diagnose his initial strokes on March 31, 2005 and implement secondary stroke prevention

measures proximately caused his massive April 5, 2005, stroke, in that the second stroke was avoidable with proper medical care. They offered the expert witness testimony of Dr. David Thaler, an Oxford University trained Ph.D. and M.D. neurologist, who testified that it was probable that had Jeffrey been diagnosed and treated appropriately, the disabling stroke of April 5, 2005, would have been avoided (T. Tr. Vol. 3 of 8, p. 676, lines 17-23 and p. 677, lines 1-23 and p. 678, lines 1-3). Dr. Almudallal testified in Plaintiff's case in chief, on cross examination, that he also thought that Jeffrey would have had a substantial opportunity to avoid the second stroke with appropriate care, but thought the likelihood ranged between 25 and 33 percent (T. Tr. Vol. 2 of 8, p. 577).

- 2 Q. Okay. Either way you would agree with me that
3 with proper care in your own opinion he would have had a
4 25 to 33 percent chance at least of not having that second
5 stroke; correct?
6 A. As a relative risk, yes.

(T. Tr. Vol. 2 of 8, p. 577).

Interestingly, Dr. Cox presented similar expert testimony through his expert, Dr. Kirshner, who testified that Jeffrey would have had about a twenty percent chance of avoiding the second stroke with proper care. (T. Tr. Vol. 4 of 8, pp. 936, 937, 940). The parties tried this case to a jury which returned a defense verdict in favor of Appellant, but only on the traditional proximate cause claim because loss of chance was not submitted to the jury.

Strangely, Dr. Cox spent a great deal of time in his brief discussing testimony from a witness he did not call, Dr. Preston, regarding absolute risk reduction versus relative risk reduction in secondary strokes from aspirin administration. (Appellant's Brief at 5) Given that Dr. Preston thought that under either analysis Jeffrey would have had less than a 50-percent chance of recovery with proper care, and given that the Trial Court did not permit the jury to

consider loss of chance, the issue of which percentage (absolute or relative risk reduction percentage) would be more appropriate was never addressed by either the Trial Court or the jury. And there was no decision from which an appeal could be taken. Accordingly, this Court need not address this issue on appeal, as it is irrelevant to the issues before it. Notwithstanding, relative risk reduction more accurately depicts Jeffrey's loss of chance, because the absolute analysis includes all people, including the vast majority of people who do not suffer a second stroke with or without proper care. Thus, in order to determine the efficacy of treatment, it is inappropriate statistically to include all of those whose outcomes would be **unaffected** by treatment. Thus, it is the relative risk reduction, which focuses exclusively on those who would have suffered a second stroke but for proper treatment, to determine what percentage of people would benefit from treatment and avoid a second stroke.

II. INTRODUCTION TO ARGUMENT

Dr. Cox begrudgingly admitted to a breach in the standard of care when he misread Jeffrey Geesaman's MRI on April 1, 2005, when there was a chance to save Mr. Geesaman from a lifetime of disability. Dr. Cox also introduced evidence to support a plaintiffs' verdict by offering testimony that had Jeffrey Geesaman received proper care, he had approximately a twenty-percent chance to avoid that second disabling stroke. Thus, Dr. Cox admitted to all of the elements of a medical malpractice cause of action: standard of care, proximate cause (loss of chance), and damages. In an effort to avoid these fatal admissions, Dr. Cox has: (1) attempted to suggest that loss of chance law in Ohio is hopelessly complicated (it is not) and courts are struggling to apply it (they are not); and (2) 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 in these circumstances – where the defense, through its experts

in an effort to mitigate damages, introduces evidence of less than a probability of recovery (thus admitting 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 apparently 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. Appellee would ask the following question: 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?

Because Dr. Cox admitted that his negligence caused Jeffrey Geesaman any chance he had to avoid the second, much more severe and disabling stroke, the principle issue at trial with regard to Dr. Cox was not whether Jeffrey lost a chance at recovery, but how to quantify that lost chance. Assuming adequate care, was it more likely than not Jeffrey would have recovered with no second severe stroke (keeping in mind he was discharged from the hospital after the first small stroke largely recovered and symptom free), or was it only a possibility, with the chances being less than fifty percent? Because there was expert testimony introduced at trial on both sides of that proximate cause/loss of chance divide, the Third District merely held that the Trial Court should have instructed the jury consistent with that evidence, citing *Murphy v. Carrolton Mfg. Co.* (1991), 61 Ohio St.3d 585 for the age old proposition that juries are instructed consistent with the evidence adduced at trial. Importantly, the Third District did not expand the loss of chance doctrine, and Appellant struggles to explain what it means in that regard. Instead, the Court held “if the jury did not find proximate cause, the evidence warranted instructing them to consider loss of chance, not as a fallback position for the Geesamans, as Dr. Cox asserts, but based upon evidence before it.” (*Id.* at 17, 18).

Simply put, although Appellant is unwilling to state it explicitly, what he is asking this Court to do is unprecedented: overturn two well-settled doctrines of law -- loss of chance and the notion that juries are to be instructed based on the evidence submitted at trial. Only this way can he be saved from the admissions he made. The civil justice system should not be contorted for such personal reasons. If it is allowed to be, there will be chaos in the trial courts throughout Ohio when this Court establishes brand new precedent stating that admissions carry no weight and do not have to be submitted to the jury for its consideration, if the offering party so wishes. Juries have always had and should continue to have the ability to evaluate all the evidence parties place before them -- not just hand-picked evidence when the offering party does not like the implication of the evidence he introduced.

III. ARGUMENT

Propositions of Law

The “loss of chance” doctrine applies in cases where doctors who admittedly breach their standard of care also offer evidence at trial that their breach caused their victim to lose a less-than-even chance of recovery.

Requested instructions should be given if they are correct statements of the law applicable to the facts of the case and reasonable minds might reach the conclusion sought by the instruction. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St. 3d 585, 591.

Dr. Cox admitted that he breached the standard of care with regard to Jeffrey Geesaman when he failed to review the key MRI images that showed Jeffrey’s initial stroke. He also admitted at trial, in an effort to mitigate his damages, that his malpractice caused Jeffrey Geesaman to lose a less-than-fifty-percent chance of recovery. Dr. Cox convinced the trial court not to charge the jury on his loss-of-chance theory. The Third District Court of Appeals properly held the trial court abused its discretion when it refused to charge the jury consistent with Dr. Cox’s damning admissions.

It is axiomatic that trial courts in Ohio must charge juries consistent with the evidence adduced at trial. Dr. Cox does nothing short of urging this Court to overturn 72 years of precedent, through *Simko v. Miller* (1938), 133 Ohio St. 345, 348, to keep the trial court from submitting the evidence to the jury he offered at trial. It is unprecedented that a litigant would ask this Court to fashion a rule that states that the evidence the litigant admitted into evidence should not be given to the jury for its consideration. This Court should decline Dr. Cox's invitation, exercise restraint, and show fidelity to *stare decisis* by affirming the Third District Court of Appeals' decision that the trial court abused its discretion when it kept Dr. Cox's admissions from the jury.

Despite Appellant's best effort to suggest otherwise, loss of chance is not a befuddling area of the law in Ohio. The Geesamans find it interesting that in order to manufacture this purported confusion, Appellant only cites to law review articles that are critical of how **other** states apply loss of chance, but not how Ohio does it. The Geesamans also find it interesting that Appellant fails to cite a single case from any court in Ohio that professes disorientation when a plaintiff or a defendant introduces loss of chance evidence.

Loss of chance, irrespective of its origin, is a common sense approach, established in compromise, which allows a reduced recovery when a physician breaches the standard of care, usually in missing a diagnosis and causing some measure of harm, but where the underlying disease process makes it difficult to ascertain whether that particular plaintiff would have recovered with proper care. In other words, the malpractice by the physician does not cause the disease; it merely allows the disease to advance unabated and causes the patient to lose whatever chance he or she had of recovering if proper treatment had been given.

In those cases, the plaintiff or the plaintiff's decedent is already suffering from some injury, condition, or disease when a medical provider negligently

diagnoses the condition, [or] fails to render proper aid.... As a result, the underlying condition is allowed to progress, or is hastened, to the point where its 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.

McMullen v. Ohio State University Hospital (2000), 88 Ohio St.3d 332, 338-39.

Thus, if a physician misdiagnoses a condition, and that condition is allowed to progress untreated to the point where the injury is manifest, then a claim for loss of chance is available. This is precisely the circumstance in the instant matter. Jeffrey Geesman's lesser stroke, from which he recovered with little medical intervention, despite the misdiagnosis, was left to get worse over the next several days when no secondary stroke prevention measures were implemented. This undiagnosed condition (atherosclerosis), which was not caused by any medical error, was allowed to progress without intervention, until it reached a point where the second stroke manifested itself and disabled Mr. Geesman. The only controversy at trial was whether proper intervention would have, more likely than not, prevented the second stroke or whether it was only a mere possibility. But, every expert who testified agreed that Jeffrey had some chance to avoid the second stroke with proper treatment, differing only as to how that chance was quantified.

It is important to emphasize the reasons that loss of chance evolved in the common law. Many disease processes are so insidious that even with the best care, a patient would have a less than a 50% chance of surviving/recovering. In these circumstances, this Court has determined, along with many courts throughout the United States, that it would be unfair to exonerate the physician whose negligence eliminated all possibility of recovery. *Roberts v. Ohio Permanente Medical Group, Inc.* (1996), 76 Ohio St.3d 483. Hypothetically, let us assume a disease where the patient has a 45% chance of recovery/survival with diagnosis and appropriate care. It is

usually impossible to identify into which camp any particular patient would fall, because whether by genetics or luck, people react differently to treatment. So whether an individual patient would fall into the 45% group and recover, or the 55% group and not recover, is not usually knowable. However, what is knowable is that with appropriate care, 45% would recover nicely. The problem is that medicine simply cannot tell us on an individual basis which patient would fit into which category. 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, even those 45% who would have survived with no injury. The loss of chance theory properly rejects this "all or nothing" approach, and replaces it with a relaxed causation standard, with the important trade-off of reduced damages proportional to the percent of chance lost because of the malpractice.

One day, when medicine is able to tell a patient into which category he or she would have fit -- recovery or non-recovery -- loss of chance will be eliminated as a theory of recovery. It only exists now because of the uncertainty into which group a patient fits. Absent that uncertainty, there would be no point in the loss of chance doctrine. Those who would have survived/recovered from a missed diagnosis could pursue a traditional medical malpractice claim, and those who would not have, could not pursue such a case. As it stands now, using our 45%/55% hypothetical, 100% of the patients who are victims of malpractice are permitted to recover 45% of their damages. But, as medical science continues to advance, the life expectancy of loss of chance decreases. In an interesting twist, loss of chance does not cause the liability carriers to pay any more aggregate dollars, assuming medicine could identify who would respond to treatment and who would not. As it stands now, using the same hypothetical, the carriers pay 100% of the victims of malpractice and 45% of their damages. When medicine reaches a point

when the uncertainty is removed, 45% of the victims of malpractice will receive 100% of their damages. Either way, the aggregate dollars paid remain approximately the same.

In Ohio, loss of chance is not complicated and no court has professed confusion in its application.

Dr. Cox asks this Court to force medical malpractice plaintiffs to elect between traditional proximate causation and loss of chance as mutually exclusive theories of recovery, notwithstanding the evidence admitted at trial. To demonstrate the absurdity of Dr. Cox's logic, consider the (nearly) converse of facts presented herein, where a hypothetical plaintiff pursues only a loss of chance theory of recovery. Can a defendant doctor evade liability if he or she admits to breaching the standard of care and proximately causing injury, to a reasonable degree of medical probability? If Dr. Cox gets his way with this Court, the answer would be yes. This, of course, would be absurd -- a doctor admitting at trial all the elements of a traditional medical negligence claim, but avoiding the consequences of those admissions, because the plaintiff was less certain of the proximate cause evidence and plead a loss of chance claim. Under Dr. Cox's forced election of remedies analysis, that is precisely what would happen. It does not take much imagination to foresee the mischief in trial courts throughout Ohio if this were to become the law. Courts have historically held that juries must be instructed consistent with the evidence to avoid this very gamesmanship at trial.

By way of analogy, consider a products liability plaintiff pursuing a defective design claim under R.C. § 2307.75. At trial, the plaintiff struggles with the design element of the claim. The defendant defends the case by admitting to a manufacturing defect under R.C. § 2307.74, and escapes liability because the trial court does not allow the jury to consider the admission of a manufacturing defect and instead holds the plaintiff to what he plead. Under Dr. Cox's analysis,

where courts do not permit jurors to entertain all of the evidence placed before them, the manufacturer would not be liable for an admittedly defective product. A product cannot be both defective in design and in manufacture. It is one or the other.

The same scenario could easily happen in an auto accident trial, where the case pursued is a typical negligence claim. Assume at trial a friend of the defendant testifies that the defendant was extremely intoxicated at the time of the accident. Under *Cabe v. Lunich* (1994), 70 Ohio St. 3d 598, the plaintiff could ask for a punitive damages instruction. Under Dr. Cox's proposed new rule of law that juries may not consider all of the evidence placed before them, the plaintiff could not ask for punitive damages, because he did not include the count in his complaint. Appellees use these analogous examples merely to point out the folly of Dr. Cox's request that this Court should not submit party admissions to the jury in a trial. I am sure that this Court and its staff can think of dozens of other examples of absurd results that will follow if the proposed radical change in the law Dr. Cox is proposing – that juries are no longer to be instructed with the evidence that is adduced at trial – is adopted.

In his conclusion, Dr. Cox notes this Court could decline to adopt loss of chance if this case presented the issue for the first time in Ohio. (Appellant's Brief at 33). This argument is Dr. Cox's "fallback" position in this case. He wants this Court to overturn *Roberts v. Ohio Permanente Medical Group, Inc.* (1996), 76 Ohio St.3d 483, and *McMullen*, 88 Ohio St.3d 332, despite the fact that he never submitted that Proposition of Law in this case and did not in any way analyze what is necessary before this Court takes the extraordinary step of overturning controlling precedent. *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216 (“[A]ny departure from the doctrine of stare decisis demands specific justification.” ¶ 44, citations omitted). This Court should reject Dr. Cox's argument because he failed to address the specific

justifications necessary to overturn controlling precedent. In addition, the Ohio General Assembly undertook a comprehensive study years after *Roberts* and *McMullen* to reevaluate Ohio's medical malpractice laws, and produced a comprehensive bill that fundamentally changed these laws. (SB 281, eff. 4-10-2003). The General Assembly elected not to alter the *Roberts* rule. This Court should not substitute its judgment for that of the General Assembly, which made no finding that loss-of-chance principles unduly burden or prejudice the medical profession, at which Dr. Cox subtly hints, but is unwilling to say explicitly. As such, this Court should decline Dr. Cox's "fallback" invitation to overrule *Roberts* and destroy loss of chance in Ohio.

A. This Court has Recognized Loss-of-Chance Causation in Medical Malpractice Cases since *Roberts v. Ohio Permanente Medical Group, Inc.* (1996), 76 Ohio St.3d 483.

This Court first recognized plaintiffs' rights to recover under a loss of chance of survival or recovery theory in medical malpractice cases in *Roberts v. Ohio Permanente Medical Group, Inc.* (1996), 76 Ohio St.3d 483, where it expressly overruled its previous holding in *Cooper v. Sisters of Charity of Cincinnati, Inc.* (1971), 27 Ohio St.2d 242. The *Roberts* Court recognized the import of its ruling. "Rarely does the law present so clear an opportunity to correct an unfair situation as does this case before us." *Roberts*, 76 Ohio St.3d at 488.

"[T]he loss of chance theory, which compensates an injured plaintiff for his or her diminished chance of recovery or survival, provides an exception to the traditionally strict standard of proving causation in a medical malpractice action. Instead of being required to prove with reasonable probability that defendant's tortious conduct proximately caused injury or death, the plaintiff, who was already suffering from some disease or disorder at the time the malpractice occurred, can recover for his or her "lost chance" even though the possibility of survival or recovery is less than probable. Keith, *Loss of Chance: A Modern Proportional Approach to Damages in Texas* (1992), 44 Baylor L. Rev. 759, 760.

Id. at 485. The *Roberts* Court adopted the loss-of-chance principle in Ohio to effectuate the common sense policy that plaintiffs should not be punished when their doctors negligently cause them injury which does not rise to the level of traditional proximate cause.

The rationale underlying the loss-of-chance theory is that traditional notions of proximate causation may unjustly deprive a plaintiff of recovery in certain cases where the physician is blatantly at fault; thus, the requirement of proving causation is relaxed to permit recovery.

Ibid. Without loss of chance, health care providers would be able to avoid liability for their own negligence.

Health care providers should not be given the benefit of the uncertainty created by their own negligent conduct. To hold otherwise would in effect allow [health] care providers to evade liability for their negligent actions or inactions.

Id. at 485, 486 quoting *McKellips v. St. Francis Hosp., Inc.* (Okla. 1987), 741 P. 2d 467. The *Roberts* Court specifically declined to classify loss of chance as a new or separate cause of action.

Also, in summarizing its holding, the court stressed that “our decision today is limited in its scope and does not alter traditional principles of causation in other areas of tort law.” This language again indicated that the court intended only to alter the rule of causation, not to create a new cause of action.

Southwick v. Univ. Hosp. Inc., 1st Dist. No. C-050247, 2006-Ohio-1376 at ¶ 19, quoting *Roberts*, 76 Ohio St.3d at 489.

- 1. Ohio and Other States Allow Plaintiffs to Pursue Medical Malpractice Claims Under Contemporaneous Loss-of-Chance and Traditional Proximate Cause Principles Where Conflicting Evidence Gives Rise to a Jury Question**

Ohio courts allow plaintiffs to pursue medical malpractice claims under loss-of-chance principles, without separately pleading loss of chance as a theory of recovery. This policy, consistent with the Ohio Supreme Court’s ruling in *Roberts*, discussed *supra*, ensures that plaintiffs recover for demonstrable injuries caused by defendants’ negligence, and precludes

defendants from evading liability when their negligence takes away a less-than-fifty percent chance of plaintiffs' recovery or survival.

In *Heath v. Teich*, 10th Dist. No. 03AP-1100, 2004-Ohio-3389, the Tenth District Court of Appeals held the plaintiff "was not required to plead her loss-of-chance claim separately in her complaint." *Heath*, 2004-Ohio-3389 at *2. See also *Thomas v. Univ. Hosps. of Cleveland*, 8th Dist. No. 90550, 2008-Ohio-6471. While the *Heath* court found that no Ohio court had specifically addressed the issue, it drew from *Roberts* where "the Ohio Supreme Court found that a loss of chance cause of action was viable in a case in which the plaintiff pled only wrongful death." *Ibid*. The *Heath* court also looked to cases from Iowa and Michigan where courts do not require plaintiffs to separately plead loss of chance. See *Mead v. Adrian* (Iowa 2003), 670 N.W.2d 174, 177, fn. 3; *Powell v. St. John Hosp.* (2000), 241 Mich. App. 64, 76.

Further, in *Trevena v. Primehealth, Inc.* (2006) 171 Ohio App. 3d 501, the Eleventh District Court of Appeals applied the loss-of-chance principle in an evolving stroke case to reverse the trial court's order which granted the defendants' motion for directed verdict. The *Trevena* court found that the plaintiffs-appellants failed to prove that the defendants-appellees' conduct proximately caused the patient's subsequent stroke. The court applied the loss-of-chance principle, *sua sponte*, to ensure that the jury evaluated the evidence alongside all applicable legal principles to fairly decide the plaintiffs-appellants' claim.

Our reasons for applying the loss-of-chance theory are that the [plaintiffs-appellants'] case-in-chief established a prima facie case of medical malpractice, and it also established that Trevena has a diminished chance of recovery as a result of that malpractice. In effect, he has established a prima facie case that he has lost his chance for any meaningful recovery as a result of the malpractice of Dr. Mulcahy. **The jury should be permitted to decide the extent to which that malpractice reduced Trevena's likelihood of achieving a more favorable outcome.**

Trevena, 171 Ohio App. 3d at 512 [emphasis added]. Similarly, the evidence **presented by all of the parties in this case** demonstrated that Jeffrey Geesaman suffered some loss of chance of recovery when his doctors failed to adequately treat his evolving stroke. Appellant's expert testified that this loss exceeded fifty percent, which falls into the traditional proximate causation realm, while Appellant's expert, and Dr. Almudallal, argued that Jeffrey Geesaman lost a less-than-fifty-percent chance of recovery. The Third District Court of Appeals properly found that Dr. Cox's own evidence revealed the trial court's error.

Although the Geesamans presented testimony that Mr. Geesaman's chance to avoid the second stroke and resultant injuries was more probable than not with proper diagnosis and treatment, other evidence could have lead a reasonable juror to conclude that Mr. Geesaman had a less-than-even chance to avoid the second stroke and resultant injuries. Therefore, if the jury did not find proximate cause, the evidence warranted instructing them to consider loss of chance, not as a fallback position for the Geesamans, as Dr. Cox asserts, but based on evidence before it. Thus, the trial court abused its discretion in unreasonably refusing to instruct the jury on this issue when the evidence clearly supported it.

(Third District Court of Appeals Op. at 17, 18).

Courts in other states hold that plaintiffs may argue loss of chance alongside traditional proximate causation, and that juries should decide between the conflicting evidence if they identify a causal link. In *Borkowski v. Sacheti* (1996), 43 Conn. App. 294, a Connecticut Court of Appeals ordered a new trial in a case where the trial court refused to charge the jury on the issue of loss of chance alongside traditional proximate causation. The *Borkowski* court found that litigants enjoyed a Constitutional right to have a jury decide the factual issues in their case, which extended to loss of chance. *Borkowski*, 43 Conn. App. 314, 315. Similarly, in *Renzi v. Paredes* (2008), 452 Mass. 38, the Supreme Judicial Court of Massachusetts held, in a case remarkably similar to the instant case, that where there is competing evidence on the proximate cause issue, the trial court should instruct on both proximate cause and loss of chance:

[w]here the evidence could support either a theory that the defendant's conduct caused the decedent's death (making full wrongful death damages appropriate) or a theory that the defendant's conduct caused the decedent a loss of chance of survival (making proportional damages appropriate), the judge should make it clear to the jury that only one kind of damages or the other may be awarded. A jury may find the defendant liable *either* for causing the patient's wrongful death *or* for causing the patient's loss of chance to survive, but not for both.

Renzi, 452 Mass. at 45, 46.

B. This Court Requires Trial Courts to Charge Juries with the Evidence Adduced by the Parties at Trial

The facts of this case trigger the simple legal axiom that trial courts charge juries consistent with the evidence presented during trial. As early as 1938, this Court recognized that “a jury is entitled to receive from the court such instructions in the general charge as will fully place it in possession of the issuable facts in controversy as pointed out by the pleadings and the evidence”. *Simko v. Miller* (1938), 133 Ohio St. 345, 348. In the 72 years since *Simko*, Ohio courts have charged juries consistent with the evidence adduced at trial. *See, Di Egidio v. Kealy* (1959), 162 N.E.2d 163, 170; *Feterle v. Huettner* (1971), 28 Ohio St.2d 54, 55; *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12; *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585; *Corradi v. Emmeo Corp.* (Feb. 15, 1996), 8th Dist. No. 67407 at *9; *Meyer v. Chieffo* (2008), 180 Ohio App. 3d 78, 85; *Booth v. Duffy Homes, Inc.*, 10th Dist. No. 07AP-680, 2008-Ohio-5261 at ¶ 14.

Dr. Cox urges this Court to engage in judicial activism by uprooting that time-honored principle of law. He claims that a doctor, like him, should evade liability even when he admits to breaching his standard of care and presents expert testimony at trial that his breach caused his patient to lose a less-than-even chance of recovery. Such a position runs afoul of this Court's decision in *Simko*, which holds true today. It also breaks from *Roberts* where this Court instructed:

Health care providers should not be given the benefit of the uncertainty created by their own negligent conduct. To hold otherwise would in effect allow [health] care providers to evade liability for their negligent actions or inactions.

Roberts at 485, 486, quoting *McKellips v. St. Francis Hosp., Inc.* (Okla. 1987), 741 P. 2d 467.

As this Court is aware, the Third District Court of Appeals relied on *Murphy* to hold the trial court erred when it refused to give the loss-of-chance instruction.

In general, requested instructions should be given if they are correct statements of law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St. 3d 585, 591. “In reviewing a record to ascertain the presence of sufficient evidence to support the giving of a[n] ... instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction.” *Id.*, citing *Feterle v. Huettner* (1971), 28 Ohio St. 2d 54.

Third Dist. Op. August 10, 2009 at ¶ 20.

Contrary to Appellant’s revolutionary claims, this Court should exercise judicial restraint and demonstrate fidelity to *stare decisis* by affirming the Third District Court of Appeals’ decision to charge the jury consistent with his evidence. Under Dr. Cox’s logic, medical malpractice victims would be forced to choose between loss of chance and proximate causation at the time of filing the complaint, notwithstanding the development of the evidence during discovery and at trial. This rule not only would result in significant mischief and gamesmanship at the trial level, it would also place a burden on the plaintiff of knowing what the defense is, in its entirety, before a case is even filed. No litigant could be held to such a standard. Absurdly, Dr. Cox would preclude medical malpractice victims from recovering in cases where defendant doctors admit to breaching the standard of care and proximately causing injury, provided the victim filed his case under a loss-of-chance theory. Unbelievably, Dr. Cox urges this Court to adopt a rule that exonerates defendants from civil liability despite their admissions of fault and causation. Such a revolutionary argument undermines the fundamental purpose of jury trials and

eviscerates the time-honored principle that courts instruct juries consistent with the evidence in the case, not just what was plead before any evidence was actually taken. In a very real sense, discovery and trial would be rendered meaningless by the adoption of such a rule.

In an effort to avoid the consequences of his critical admissions, Dr. Cox strangely argues that juries should not be allowed to sort out which proximate cause evidence they find most compelling (Appellant's brief at 27-29), and accuses the Third District of expanding loss of chance. The Third District did no such thing. Instead, the Third District merely held that when parties introduce competing proximate cause evidence, juries determine who carries the day. It is not at all clear why Appellant thinks this is such a radical departure in the law. For centuries, juries have been asked to sort out competing theories of 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 defendants 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 ignores the fact that one of the primary roles of juries in this state is to decide between competing facts, and different theories of liability built on those competing facts. When the Third District held that the jury should have been asked to do the same thing in this case, it was merely honoring the role of the jury in our system of justice. It was not evidence that the system is falling apart, or that the loss-of-chance doctrine has been expanded, as Appellant has suggested; rather, it demonstrates that the jury is properly fulfilling its historic duty to decide the

facts. To abandon this principle weakens our civil justice system, requires far too much from a plaintiff in the pre-suit portion of the case, and invites far too much mischief and gamesmanship.

C. The Third District Court of Appeals' Decision in This Case Does not Compromise Traditional Evidentiary Requirements or Shift the Burden of Proof

Dr. Cox would have this Court believe that the Third District Court of Appeals' decision in this case somehow shifts the burden of proof or compromises well-settled evidentiary requirements in Ohio. It does neither. Rather, it simply reflects the time-honored principle that juries should be charged consistent with the evidence. Remarkably, for this Court to accept Dr. Cox's argument, it would have to also accept the premise that litigants like Dr. Cox may offer evidence at trial and then object to its submission to the jury. Because Appellees introduced evidence that supported either theory of recovery, they unmistakably met their burden of proof.

Dr. Cox made much of a law review article by Steven Koch from the University of North Carolina, which simply does not address the issues raised in this case. First, the Koch article addresses *Dobran v. Franciscan Med. Ctr.* (2004), 102 Ohio St.3d 54, where this Court properly held the loss-of-chance doctrine did not apply, because the plaintiff had not been diagnosed with metastatic cancer, and therefore could not claim that his chance of survival was less than fifty percent. *Dobran*, 102 Ohio St.3d 54, at fn. 1. *Dobran* confronted only whether patients could recover for fear of possible cancer metastasis. *Dobran* is not a loss-of-chance case. It does not aid this Court in its analysis, because neither party in *Dobran* provided expert testimony to substantiate a loss-of-chance argument for the jury.

The Koch article and Dr. Cox also focus on *Haney v. Barringer*, 7th Dist. No. 06MA141, 2007-Ohio-7214, on which the trial court relied when it abused its discretion by deciding not to charge the jury on loss of chance. Just as in *Dobran*, no party in *Haney* offered expert testimony

to substantiate a loss-of-chance argument for the jury. And just like *Dobran*, *Haney* does not aid this Court in its analysis. The *Haney* plaintiff failed to provide evidence of proximate cause in a wrongful death case involving an alleged failure to diagnose a berry aneurysm. *Haney*, 2007-Ohio-7214 at ¶¶ 2, 5. As a result, the trial court granted the defendant's motion for summary judgment. *Id.* at ¶ 5. As a last ditch effort before the court's order granting summary judgment, the plaintiff filed supplemental authority with the court urging it to allow the jury to consider the decedent's loss of chance of survival from the aneurysm. *Id.* at ¶ 10. The plaintiff never provided evidence of loss of a less-than-even chance of recovery. The Seventh District Court of Appeals properly ruled the plaintiff could not use loss of chance as a fallback position when she could not establish proximate cause or simply failed to address the issue. *Id.* at ¶ 14. The defendant in *Haney* never offered loss-of-chance testimony.

Haney is fundamentally distinguishable from this case for two reasons. First, here the Geesamans brought a board-certified neurologist from Tufts Medical Center to testify that Dr. Cox's admitted malpractice proximately caused Jeffrey Geesaman's stroke, and introduced evidence from Dr. Almudallal that supported loss of chance. Consequently, Appellants did not look to loss of chance as a fallback position like the *Haney* plaintiff. Secondly, both defendants, including Dr. Cox himself, offered expert testimony at trial to establish that Dr. Cox's admitted malpractice caused Jeffrey Geesaman to lose a less-than-even chance of recovery.

The Third District Court of Appeals specifically addressed the groundless "fallback position" argument. It found that because Dr. Cox offered the evidence, Appellees did not use loss of chance as a fallback. "[I]f the jury did not find proximate cause, the evidence warranted instructing them to consider loss of chance, **not as a fallback position for the Geesamans, as**

Dr. Cox asserts, but based upon the evidence before it.” (Third Dist. Op. August 10, 2009 at ¶ 34) [emphasis added].

Haney simply does not respond to the inquiry posed by this case anymore than *Dobran* or any part of Koch’s general audit of state loss-of-chance law. Interestingly, Dr. Cox draws this Court’s attention to the Koch article to show the limitation of loss of chance to cases in which the plaintiff has a less-than-even chance of recovery prior to the defendant’s malpractice.

As the Koch article points out, this clarification also “illustrates the fact that the lost-chance doctrine is, by its very nature, limited in applicability to cases in which the plaintiff’s odds of recovery prior to the defendant doctor’s negligence was already less than fifty percent”, and “exemplifies the fact that the lost-chance doctrine does not compromise and [sic] traditional evidentiary requirements[.]” 88 N.C. L. Rev. at 632.

(Appellant’s Brief at 21). It is remarkable that Dr. Cox favorably recounts this excerpt because Koch defines loss of chance the same way the Third District did herein (Third Dist. Op. August 10, 2009, at ¶ 21), and because the very evidence Dr. Cox introduced at trial fits squarely within the definition of loss of chance – Jeffrey’s odds of recovery prior to Dr. Cox’s malpractice were already less than fifty percent. Given that Dr. Cox agrees with the definition of loss of chance as defined by the *Roberts* decision, and as affirmed by the Third District, and that Dr. Cox himself introduced evidence that fits neatly into the four corners of the doctrine, Appellees are perplexed as to how he could, and continues to, object to the jury being instructed consistent with the law he favorably cites.

Beyond the Koch article’s treatment of *Dobran* and *Haney*, Dr. Cox relied on *Fehrenbach v. O’Malley* (2005), 164 Ohio App. 3d 80, where the First District Court of Appeals properly held the trial court did not err when it refused to give a loss-of-chance instruction where no party offered evidence that the alleged victim had a less-than-even chance of recovery before the alleged malpractice. *Fehrenbach*, 164 Ohio App. 3d 80 at ¶ 43. Just as in *Dobran* and

Haney, the *Fehrenbach* court did not confront the situation from this case, because the defendant did not offer evidence that the alleged victim had a less-than-even chance of recovery. As such, it does not aid this Court in its analysis anymore than Dr. Cox's other cases. If anything, cases like *Fehrenbach* reinforce the axiom that courts charge juries consistent with the evidence. Put another way, it would have been error for the *Dobran*, *Haney*, or *Fehrenbach* courts to issue a loss-of-chance instruction to the jury because the evidence did not call for one. Similarly, it was error for the trial court in this case to refuse the instruction because the evidence offered by Dr. Cox did call for it.

Dr. Cox further relies on *McDermott v. Tweel* (2003), 151 Ohio App. 3d 763, where the Tenth District Court of Appeals properly refused to allow the plaintiff to include loss of chance in a medical malpractice case because "the parties agree[d] that expert testimony established the decedent had a better-than-even chance of surviving his cancer[.]" *McDermott*, 151 Ohio App. 3d at ¶ 43. Such is plainly not the case here, as Dr. Cox offered expert testimony at trial that Jeffrey Geesaman had a less-than-even chance of not suffering a second, debilitating stroke. As such, *McDermott* is distinguishable from this case for the same reason as *Dobran*, *Haney*, and *Fehrenbach*: there was no evidence of loss of chance. Here, there is.

Further, Dr. Cox relied on *Liotta v. Rainey* (Nov. 22, 2000), 8th Dist. No. 77396, where the Eighth District Court of Appeals found the trial court properly entered a directed verdict on the loss of chance for the defendant. No evidence adduced at trial demonstrated that the plaintiff had a less-than-even chance of recovery. Just as Dr. Cox's other cases, the *Liotta* court did not confront the issue from this case, because the defendant did not admit evidence of loss of chance. The *Liotta* court properly instructed the jury consistent with the evidence.

This Court should rely on *Roberts* and 72 years of precedent since *Simko* to hold the Third District Court of Appeals properly ruled that the trial court should have charged the jury consistent with the evidence Dr. Cox offered at trial. If this Court adopts Dr. Cox's revolutionary argument, it will allow civil defendants to admit to cognizable theories of recovery and then preclude the jury from considering them. Contrary to Dr. Cox's novel theory, admissions to liability are not defenses to liability in Ohio, and Appellees do not ask this Court to relieve them of their burden of proof at trial.

1. The Third District Properly Evaluated *McMullen v. Ohio State Univ. Hosps.* In Its Decision, Consistent with 72 Years of Precedent, And Did Nothing to Expand Loss of Chance in Ohio

Strangely, Appellant seems to want to set up *McMullen* as a straw man, against which it can launch its fabricated arguments. This Court in *McMullen v. Ohio State Univ. Hosps.* (2000), 88 Ohio St. 3d 332, held that loss-of-chance principles did not apply in a medical malpractice case where the defendant nurses removed a cancer patient's endotracheal (breathing) tube without a physician's order, and directly caused the patient's death by hypoxic insult. *McMullen*, 88 Ohio St.3d at 334. The Court found the nurses' actions to be "a superimposed act of malpractice, not a malpractice which hastens or aggravates the pre-existing condition." *Id.* at 341, so loss of chance did not apply. The *McMullen* dissent recognized the dire health condition of the decedent prior to the nurses' negligence, and so urged the application of loss-of-chance principles to the case. *Id.* at 345, Moyer, CJ in dissent. However, this Court was clear in *McMullen*, when a doctor directly causes a patient's death, by removing the breathing tube and failing to put another in place (*Id.* at 334), the case is manifestly not a loss-of-chance case, since the negligence did not combine with a pre-existing medical condition to cause the harm. Instead,

the negligence directly caused the ultimate harm. *Id.* at 341. Thus, there can be no dispute that *McMullen* is **not** a loss-of-chance case.

Similarly, this Court in *McMullen* explained that the loss-of-chance doctrine was intended to relax a plaintiff's burden in proving causation, not compound it. *Id.* at 339.

Appellant ignored both of these explicit instructions when he attempted to equate the facts of *McMullen* with the instant case (Appellant's brief at 26) and where he alleged that *McMullen* requires a plaintiff to stick with what was plead (Appellant's brief at 25).

Yet, despite the clear language from the Court describing what *McMullen* is and what it is not, Dr. Cox oddly attempted to convert *McMullen* into a loss-of-chance case to divert this Court's attention from the real issue in this case: whether trial courts should charge juries consistent with the evidence submitted at trials. Only by turning *McMullen* into a loss-of-chance case, which it patently is not, can Appellant even have the temerity to suggest that it also reaffirms the proposition that a plaintiff may not ask the court to instruct consistent with the evidence. (Appellant's brief at 25, "*McMullen* confirms the hornbook law that a plaintiff is the master of his or her claim.") *McMullen* does no such thing. Appellant cannot cite any language from any Ohio court, at any level, including this Court, that directly supports his propositions: (1) that admissions by a party should not be used to support jury instructions if the admissions are inconvenient to the party offering them; and (2) that loss of chance should not be given to the jury for its consideration when substantial evidence at trial supports it, even if there is also evidence to support a traditional proximate cause instruction.

Much like the other cases on which Dr. Cox relied, such as *Dobran*, *Haney*, *Fehrenbach*, *McDermott* and *Liotta*, *McMullen* does not respond to the relevant inquiry, so it does not assist

this Court in its analysis. Further, *McMullen* involved a bench trial in the Court of Claims, so it did not determine whether a jury should receive contradictory evidence from the parties at trial.

Dr. Cox selectively edits the Third District's opinion and claims the Third District reversed the trial court's decision not to charge the jury on loss of chance because it relied on two "faulty" premises, rather than Dr. Cox's own evidence supporting the charge. (Appellant's Brief at 26, 28). First, Dr. Cox claimed the Third District reached its decision in this case because it "concluded that the facts of this case were more "akin to" the loss-of-chance cases "reviewed" in *McMullen*, i.e., cases wherein a medical provider's negligence combined with [sic] "a pre-existing condition "to lead to the injury" -- than to the facts of *McMullen*. (*Id.* at 25, 26, citing Third Dist. Op. August 10, 2009 at ¶ 32). The Third District understood *McMullen* was not a loss-of-chance case and reversed the trial court because Dr. Cox offered evidence at trial that his admitted negligence caused Jeffrey Geesaman to lose a less-than-fifty percent chance of recovery. Dr. Cox's claim is not just inaccurate but also irrelevant. Whether this Court adheres to the majority rule from *McMullen* or its dissent, *McMullen* does not inform this Court's decision because it does not respond to the question voiced by this case.

Secondly, Dr. Cox claimed the Third District reached its decision because "the Third District characterized 'the entire premise' of *Roberts* as: "doctors and other medical personnel should not be allowed to benefit from the uncertainty of recovery / survival that their negligence has created." (*Id.* at 26, citing Third Dist. Op. August 10, 2009 at ¶ 33). Appellant offered an alternative premise by this Court in *Roberts*: that only those patients who cannot present a *prima facie* case of traditional proximate cause can avail themselves of loss of chance in a medical negligence claim (*Id.* at p. 27), thus subtly arguing that *Roberts* would not permit an instruction on loss of chance, no matter what the evidence was, if the plaintiff pursued a traditional

proximate cause claim. Of course, like Appellant's reconstruction of *McMullen* earlier, *Roberts* said no such thing. Instead, *Roberts* merely framed the issue as to whether Ohio should adopt loss of chance because of the inherent unfairness in allowing a physician who commits malpractice to benefit from the uncertainty of the underlying disease process.

Health care providers should not be given the benefit of the uncertainty created by their own negligent conduct. To hold otherwise would in effect allow [health] care providers to evade liability for their negligent actions or inactions.

Roberts at 485, 486 quoting *McKellips v. St. Francis Hosp., Inc.* (Okla. 1987), 741 P. 2d 467.

In no way was this Court confronted in *Roberts* with the issues confronted herein: whether the trial court should instruct consistent with the evidence, and whether loss of chance should be considered by the jury if there is evidence on both sides of the fifty percent threshold.

In reality, as noted, *supra*, the Third District Court of Appeals decided that the trial court abused its discretion because Dr. Cox presented evidence that his admitted negligence caused Jeffrey Geesaman to lose a demonstrable, but less-than-fifty-percent chance of recovery. To argue otherwise is to willfully ignore the Third District's own opinion and the central question posed by this case: whether juries may consider evidence offered by defendant doctors that their admitted negligence caused a less-than-fifty percent chance of recovery. The Third District cogently reasoned:

[a]lthough the Geesamans presented testimony that Mr. Geesaman's chance to avoid the second stroke and resultant injuries was more probable than not with proper diagnosis and treatment, other evidence could have led a reasonable juror to conclude that Mr. Geesaman had a less-than-even chance to avoid the second stroke and resultant injuries. Therefore, if the jury did not find proximate cause, the evidence warranted instructing them to consider loss of chance, not as a fallback position for the Geesamans, as Dr. Cox asserts, but based upon the evidence before it.

(Third Dist. Op. August 10, 2009 at ¶ 34).

So as to avoid the implications of *Simko*, *Roberts*, and *McMullen* (or overrule them), Dr. Cox needed to alter the facts underlying the trial court's decision not to charge consistent with the evidence, because without changing the facts, this case presents nothing extraordinary that can justify Dr. Cox's hyperbole or avoid the application of controlling precedent. For example, Dr. Cox mistakenly alleges that no court forced the Geesamans to pursue one theory or the other:

[I]like the plaintiff in *McMullen*, the plaintiff in this case chose to pursue full damages under a traditional malpractice theory. That was the claim presented and the claim defended. No court "forced" plaintiffs to pursue one theory or the other. The Third District, however, unilaterally relieved plaintiffs of their chosen burden of proof by holding that the trial court was required to instruct the jury that they could find for plaintiff *even if he did not carry his burden of proof upon which his claim is founded*.

Appellant's Brief at 27 (emphasis in the original). This is simply untrue. The trial court did precisely what Appellant claimed it did not. The Trial Court manifestly forced the Geesamans to pursue traditional proximate causation or loss of chance despite evidence supporting both these competing theories of recovery.

14 The Court considers the *Haney v. Barringer*, 2007-
15 Ohio-7214 a valuable precedent regarding this issue. Haney
16 states a medical malpractice plaintiff cannot simply rely
17 on a loss-of-chance theory if some problem arises with
18 respect to proving proximate cause. In effect the
19 plaintiffs must either prove traditional proximate cause
20 or prove that traditional notion of proximate cause does
21 not apply because the chance of survival or recovery
22 was less than fifty percent at the time of the defendant's
23 alleged negligence.

1 This court, upon review, agrees with the assertions
2 brought forth in Haney that plaintiff cannot elect to
3 adhere to two different standards of proof in a jury
4 trial.

(T. Tr. , Vol. 1 of 8, pp. 259-260, *see also*, Order Granting Defendants' Motion in Limine, Judgment Entry 9/15/08, where the Trial Court explicitly required the plaintiffs to pursue one theory or the other).

Appellant further distorts the record when he alleges that the Third District "relieved" Plaintiffs of their chosen burden of proof (*Id.* at 27). This is pure fiction. Appellees asked the trial judge to instruct the jury on both traditional proximate cause and loss of chance, based on evidence they admitted at trial and elicited on cross-examination. It was the Geesamans who adduced evidence to support both theories of recovery. Appellees met their burden with respect to loss of chance, and Dr. Cox affirmed Appellees' evidence when he introduced his own expert, Dr. Kirshner, who testified in support of a loss-of-chance instruction. Thus, the Third District did not relieve Appellees of their burden of proof. Instead, it merely understood what Appellant has willfully ignored: Appellees met their burden of proof under both theories of recovery and the jury needed to sort out which evidence carried the day.

The Geesamans submit to this Court that no Ohio law forces a plaintiff in a civil case to choose between competing theories of recovery where the evidence at trial supports a finding of either conclusion. Appellees have already demonstrated that chaos will ensue in every civil trial if parties can make binding admissions, but not have them submitted to the jury for its consideration. Chaos and mischief will proliferate if Dr. Cox has his way with this Court. Should this Court accept Dr. Cox's revolutionary argument and overturn *Simko*, it will allow Dr. Cox to evade liability for his negligent actions which he admits caused Jeffrey Geesaman to lose his chance of recovery. Such a holding would eviscerate the *Roberts* decision, which sought to hold to account those negligent doctors -- like Dr. Cox -- whose preventable errors take away their victims' chances to recover.

It is ironic that Dr. Cox argues the Third District expanded the law of loss of chance in Ohio, when it plainly did not, because Dr. Cox moves this Court to abrogate the basic tenet of Ohio jurisprudence that courts charge juries consistent with the evidence at trial. To support his groundless argument that the Third District expanded loss of chance, Dr. Cox claimed “the Third District erroneously concluded that juries must be instructed on both traditional and relaxed proximate cause, full and proportionate damages any time a defendant disputes proximate cause.” (Appellant’s Brief at 28, emphasis added). This statement reflects an intellectually dishonest reading of the Third District’s Opinion, and perhaps demonstrates the terrific irony of Dr. Cox’s position. Dr. Cox explicitly states that a jury instruction must be given any time a defendant “disputes” a proposition offered by the plaintiff. This is absurd, because a disputation is not evidence, and jury instructions are given based on evidence. So, here is the irony. Appellees are asking this Court to hold that jury instructions are to be given when the evidence supports them. Appellant, in an attempt to fight this non-controversial position, suggests the solution to the non-problem is to allow instructions to be given when there is **no** evidence, but only debate (“dispute”). So, this is where Appellant is left when he deliberately misconstrues the record and the law in this case, arguing the ironic, that jury instructions should be based on debate rather than evidence, while at the same time arguing the Court of Appeals erred merely by requiring the trial court to give jury instructions consistent with the evidence.

Had there been no evidence that Jeffrey Geesaman lost a demonstrable chance of recovery, the Third District would have affirmed the trial court’s decision not to charge the jury on loss of chance. However, Dr. Cox did offer the evidence. As such, under *Simko* and its progeny, the trial court should have charged the jury on the issue of loss of chance.

Dr. Cox also claimed “[l]oss of chance is neither an ‘add on’ to, nor a ‘fallback’ for, a traditional malpractice claim. Nothing in *Roberts* or its loss-of-chance doctrine supports such an illogical and unfair expansion of physician’s tort liability.” (Appellant’s Brief at 28). The Geesamans submit to this Court that they agree with this generic observation. But Appellees also submit that they did not proffer loss of chance as either an “add on” or a “fallback,” as insincerely asserted by Appellant. Instead there was ample evidence submitted by both parties to support either theory of recovery. Furthermore, this Court should recognize that this case in no way expands a physician’s tort liability. Rather, it reaffirms the basic principle that trial courts charge juries consistent with the evidence adduced at trial.

Dr. Cox claimed the Third District Court of Appeals fashioned a “new rule” in this case which “goes far beyond *Roberts*’ rule”. (Appellant’s Brief at 28). This Court in *Roberts* adopted loss of chance so that negligent doctors would not evade liability for their actions that cause demonstrable injury to plaintiffs with a less-than-even chance of recovery.

The rationale underlying the loss-of-chance theory is that traditional notions of proximate causation may unjustly deprive a plaintiff of recovery in certain cases where the physician is blatantly at fault; thus, the requirement of proving causation is relaxed to permit recovery.

Roberts, at 485. This is one such case, according to Dr. Cox, who admitted liability and presented evidence of loss of chance. There is no substantiation to the argument that the Third District expanded loss of chance. The facts of Jeffrey Geesaman’s underlying medical condition, combined with the missed diagnosis, make this case the prototypical loss-of-chance claim that *Roberts* embraced, the dissenters in *McMullen* embraced, and which Dr. Cox unmistakably embraced given the evidence he introduced at trial.

Despite his own admission and evidence, Dr. Cox claimed

[b]y mandating instructions on two inconsistent theories -- one based on the plaintiff's claim and the second based upon evidence offered to refute the plaintiff's claim -- the court effectively relieves the plaintiff of his burden of proof, contrary to 100 years of Ohio law.

(Appellant's Brief at 28). The "evidence offered to refute the plaintiff's claim" noted by Dr. Cox was his admission to loss-of-chance liability. Admissions to cognizable theories of recovery are not defenses to liability. Also, charging the jury consistent with the evidence adduced at trial comports with this Court's jurisprudence since 1938. The Third District did not relieve Appellants of their burden of proof. Rather, it exercised judicial restraint and looked to this Court's ruling in *Murphy* to hold the trial court should have charged the jury with Dr. Cox's evidence. No one forced Dr. Cox to admit to liability or loss of chance in this case. His own negligent conduct led him to do so.

Dr. Cox lastly relies on *Snyder v. American Cigar Co.* (1908), 33 Ohio C.D. 440, which is a case from 1908 that no court in Ohio has cited since its announcement, with the exception of its 1910 affirmation without opinion at 81 Ohio St. 568. Appellees must give Dr. Cox credit for finding a case that seemingly has not ever been used as authority by any court for any proposition of law since the day it was announced more than a century ago. The case is anachronistic and can be disregarded as a relic of the law long since abandoned in Ohio. Therein, the plaintiff was hired by the American Cigar Factory to install gates on several floors at the entrances to the elevator. (*Id.* p. 1). While the plaintiff was installing the gates, the elevator operator, who was employed by the defendant cigar company, dropped the elevator on Plaintiff's head, causing his death. (*Id.*) Among the more interesting theories of law that were available to a defendant back then was that the plaintiff had an affirmative obligation to watch out for the moving elevator and could not rely on the operator to avoid striking him. (*Id.* p. 2).

Also, because the plaintiff averred a master-servant relationship with the cigar company, he needed to prove that the elevator operator was incompetent, as carelessness was not permitted to carry the day back then; or, he needed to prove that the defendant provided an unsafe work place. (*Id.*) In the jurisprudence of 1908, apparently working on an elevator shaft, while the elevator was in motion, did not constitute an unsafe work place. (*Id.*) Finally, while acknowledging that the work was dangerous, the Court held that the plaintiff assumed “whatever” risk was associated with the work, because he accepted the job offer. (*Id.* p. 3). Simply put, *Snyder* is so archaic and has been entirely ignored for more than a century, that its applicability is non-existent.

Snyder does not assist this Court in this case. First, its pleading and procedure rules predate the Rules of Civil Procedure, and apparently any notion of fundamental fairness. Second, Ohio law orphaned the *Snyder* rule against ‘antagonistic theories’ as soon as the *Snyder* court announced it. It is not at all clear reading the decision that even if the case could be considered precedent it means what Dr. Cox believes it says. This Court should follow *Simko*, and its 72 years of progeny, and *Roberts*, to affirm the Third District’s decision that the trial court should have charged the jury consistent with the evidence adduced at trial in this case.

D. This Court Should Remand This Case to the Allen County Court of Common Pleas For a New Trial in Light of the Trial Court’s Abuse of Discretion on Both the Loss-of-Chance Issue and the Trial Court’s Error in Allowing New Expert Opinions at Trial

Dr. Cox argues this case not just on the sole Proposition of Law this Court accepted, but also on the Proposition of Law not accepted by this Court. This Court should decline to now entertain Dr. Cox’s argument regarding the trial court’s error in admitting surprise expert opinions that directly related to causation at trial. The Third District Court of Appeals held the

trial court erred when it admitted the opinions by Dr. Preston, Dr. Almodallal's expert, elicited at trial by Dr. Cox's counsel after the trial court admonished Dr. Almodallal's counsel not to ask any questions about the new, surprise opinions.

Here, the opinions rendered by Dr. Preston that evidence of new infarcts in the April 15th and April 25th MRI's would indicate that the medication was not working to defeat Mr. Geesaman's atherosclerotic disease, which was causing his strokes, was an opinion not previously disclosed during his deposition. Because Dr. Preston did not recall those images and offered no opinion regarding anything seen on those images, counsel for the Geesamans did not have the opportunity to adequately prepare for this portion of Dr. Preston's testimony. This is true regardless of who asked the questions.

Although this would not be regarded as a direct discovery violation by counsel for Dr. Cox, who did not call Dr. Preston to the stand, it nonetheless amounts to unfair surprise and defeats the spirit of the discovery rules, particularly in light of the fact that counsel for Dr. Cox was present at the deposition of Dr. Preston and during the argument and ruling on the motion in limine. For these reasons, the sixth assignment of error is well taken as to Dr. Cox.

Third Dist. Op. August 10, 2009 at ¶¶ 61, 62.

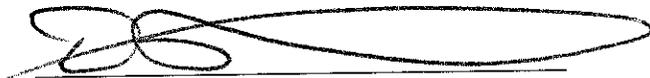
Again, though this Court did not accept Dr. Cox's second Proposition of Law from his jurisdictional memorandum, the Geesamans feel compelled to respond to his inaccurate arguments. Dr. Cox claimed "[t]he appellate court's conclusion that the assigned error was 'well taken' appears to be nothing more than guidance for the presumed retrial." (Appellant's Brief at 30). In reality, the Third District reversed the trial court judgment for Dr. Cox and remanded the case to the trial court for a new trial. *Id.* at ¶ 63. Further, the court specifically noted that the "new opinions" assignment of error, well taken as to Dr. Cox, did not affect the verdict against Dr. Almodallal because the jury did not find him to have been negligent. *Id.* at ¶ 62. As such, the Third District clearly remanded the case to the trial court on both the loss-of-chance issue and the new, surprise causation opinions Dr. Cox elicited at trial.

Dr. Cox's own appellate papers in this case undermine his argument that the Third District did not reverse on the "new arguments" error, as he appealed that decision to this Court in his jurisdictional memorandum at Proposition of Law No. 2. (Memorandum in Support of Jurisdiction at i). If Dr. Cox believed the Third District did not reverse and remand this case on that issue, then he would not have moved this Court to accept that issue for review. For the above reasons, this Court should follow the Third District's decision to remand this case on the new expert opinion issue.

IV. CONCLUSION

This Court should decline Dr. Cox's invitation to fashion a revolutionary rule whereby defendants may admit to cognizable theories of recovery to evade liability for their actions. This Court should exercise restraint and express fidelity to the core jurisprudential principle in Ohio that trial courts charge juries consistent with the evidence presented during trial. To find otherwise would open a Pandora's Box of inappropriate defenses and undermine this Court's holding in *Roberts*.

Respectfully submitted,



DENNIS P. MULVIHILL (#0063996)

GREGORY S. SCOTT (#0067255)

Lowe Eklund Wakefield &

Mulvihill, Co., L.P.A.

1660 West 2nd Street, Suite 610

Cleveland, OH 44113-1454

(216) 781-2600 (Telephone)

(216) 781-2610 (Facsimile)

dmulvihill@lewm.com

gscott@lewm.com

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

This will certify that a true copy of the foregoing Merit Brief of Appellees has been served by first-class U.S. mail, postage prepaid, this 29th day of June, 2010, upon:

Irene C. Keyse-Walker, Esq.
Tucker Ellis & West LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, OH 44115-1414

Attorney for Defendant-Appellant
John Cox, D.O.

Patrick K. Adkinson, Esq.
Adkinson Law Office
4244 Indian Ripple Road
Suite 150
Dayton, Ohio 45440

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



DENNIS P. MULVIHILL (#0063996)
GREGORY S. SCOTT (#0067255)
Attorneys for Plaintiffs-Appellees