

ORIGINAL

IN THE SUPREME COURT OF OHIO

LONNA LOUDIN,	:	Case No. 2010-0297
	:	
Plaintiff-Appellee,	:	On Appeal from the Summit
	:	County Court of Appeals,
v.	:	Ninth Appellate District
	:	
RADIOLOGY & IMAGING	:	
SERVICES, INC., et. al.,	:	Court of Appeals Case No: 24783
	:	
Defendants-Appellants.	:	

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**MERIT BRIEF OF AMICI CURIAE,  
OHIO HOSPITAL ASSOCIATION, OHIO STATE MEDICAL ASSOCIATION,  
AMERICAN MEDICAL ASSOCIATION, OHIO OSTEOPATHIC ASSOCIATION,  
AMERICAN OSTEOPATHIC ASSOCIATION, AND OHIO ALLIANCE FOR CIVIL  
JUSTICE, IN SUPPORT OF APPELLANTS**

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**FILED**  
 AUG 24 2010  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

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## **INTRODUCTION AND STATEMENT OF INTEREST OF AMICI CURIAE**

This case presents an issue of great importance to hospitals, physicians, and other health care providers throughout the State of Ohio. Allowing a negligent infliction of emotional distress claim as a new independent cause of action in the context of a medical negligence case will greatly affect Ohio medical providers by permitting plaintiffs to circumvent: (1) established rules applicable to medical negligence claims (such as the need for expert testimony); (2) this Court's rule in *Roberts v. Ohio Permanente Medical Group* (1996), 76 Ohio St.3d 483, 668 N.E.2d 480, permitting recovery for loss of chance only where the plaintiff suffered a "loss of a less-than-even chance" of recovery or survival; and (3) the medical litigation reform limitations placed upon medical negligence actions by the Ohio General Assembly. On the other hand, if this new independent tort for negligent infliction of emotional distress is merely duplicative and derivative of a traditional medical negligence claim, it is unnecessary and confusing.

The Ohio Hospital Association (OHA), Ohio State Medical Association (OSMA), American Medical Association (AMA), Ohio Osteopathic Association (OOA), American Osteopathic Association (AOA), and Ohio Alliance for Civil Justice (collectively, "Amici") have a strong interest in ensuring that the already nebulous tort of negligent infliction of emotional distress is not expanded so as to create new liability in the context of alleged medical negligence.

The OHA is a private nonprofit trade association established in 1915 as the first state-level hospital association in the United States. For decades, the OHA has provided a mechanism for Ohio's hospitals to come together and develop health care legislation and policy in the best interest of hospitals and their communities. The OHA is comprised of 169 private, state, and federal government hospitals and more than 18 health systems, all located within the state of Ohio. The OHA's mission is to be a membership-driven organization that provides proactive leadership to create an environment in which Ohio hospitals are successful in serving their

communities. In this regard, the OHA actively supports patient safety initiatives, insurance industry reform, and tort reform measures. The OHA was involved in the formation of the Ohio Patient Safety Institute<sup>1</sup> which is dedicated to improving patient safety in the State of Ohio, and created OHA Insurance Solutions, Inc.<sup>2</sup> to restore stability and predictability to Ohio's medical liability insurance market.

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

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

The OOA, founded in 1898, is a non-profit professional association with more than 4600 members (including osteopathic physicians and residents), 18 health-care facilities accredited by the American Osteopathic Association, and the Ohio University College of Osteopathic

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

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

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

Medicine in Athens, Ohio. Osteopathic physicians make up 11% of all licensed physicians in Ohio and 26% of the family physicians in Ohio. OOA's objectives include the promotion of Ohio's public health and maintenance of high standards at all osteopathic institutions within the state.

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

The Ohio Alliance for Civil Justice is a broad-based, non-profit, coalition which has worked to support tort reform legislation since 1987. The Ohio Alliance for Civil Justice includes Ohio trade and professional associations, small and large businesses, medical groups, farmers and others committed to reforming Ohio's civil justice system.

Amici urge the Court to reverse the Ninth District's decision which creates a new independent tort for medical negligent infliction of emotional distress. Where a plaintiff's traditional medical negligence or loss of chance claim fails, she should not be able to plead "negligent infliction of emotional distress" as an alternative basis for recovery. This is not the intended use of the negligent infliction of emotional distress tort, and it should not be so extended.

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

Amici defer to the Statement of the Case presented by Appellants.

## STATEMENT OF FACTS

Amici defer to the Statement of Facts presented by Appellants.

## LAW AND ARGUMENT

### Appellant's Proposition of Law:

**The Ninth District's Decision Has Impermissibly Created a New Infliction of Emotional Distress Cause of Action That Is Not Recognized or Sanctioned By This Court's Precedents And That Is In Direct Conflict With The Second District Court of Appeals' Decision in *McGarry v. Horlacher*, 149 Ohio App. 33, 2002-Ohio-3161.**

### Amici's Proposed Proposition of Law:

**In the Context of a Medical Negligence Claim, the Independent Tort of Negligent Infliction of Emotional Distress is Not a Stand-Alone Tort; Rather, Damages for Emotional Distress Stemming From Medical Negligence Must Be Sought Through a Claim for Medical Negligence.**

- A. **The Tort of Negligent Infliction of Emotional Distress Should Not be Expanded to Create an Alternative Cause of Action for a Plaintiff Who Is Unable to Establish a Claim for Medical Negligence.**

In *Heiner v. Moretuzzo*, 73 Ohio St.3d 80, 87-88, 1995-Ohio-65, this Court rejected a request to “create a ‘subspecies’ of the tort of negligent infliction of emotional distress that applies *only* in the context of the patient-physician relationship.” *Heiner*, 73 Ohio St.3d at 87-88 (emphasis added). Yet, that is precisely what the Ninth District’s decision does in this case. The Court should again reject the request to create a subspecies of the independent tort of negligent infliction of emotional distress applicable to all cases in which a physician’s alleged negligence resulted in either a misdiagnosis or a delayed diagnosis. Any cognizable claim for misdiagnosis or delayed diagnosis of a medical condition is a “medical claim” alleging medical negligence. This Court should not permit an end-run around the established elements and statutory requirements necessary to establish such a claim.

**1. If Permitted, a Negligent Infliction of Emotional Distress Claim Arising Out of an Incident of Alleged Medical Negligence Would Improperly Circumvent the Legislative and Common Law Limitations Imposed upon Medical Claims.**

Recognizing the independent tort of negligent infliction of emotional distress in the context of medical negligence has the potential to undo important legislation that was enacted by the Ohio General Assembly to rein in unwarranted lawsuits against medical providers and hospitals. If the Ninth District decision is upheld, and unless this new tort is specifically considered a “medical claim” for purposes of R.C. 2305.113 and Civil Rule 10(D)(2), this important legislation by the General Assembly will be uprooted.

- a. To the extent an independent tort for negligent infliction of emotional distress exists in the context of medical negligence, it is a “medical claim” for purposes of R.C. 2305.113 and Civil Rule 10(D)(2).**

Loudin’s purported independent claim for negligent infliction of emotional distress is a “medical claim.” As defined in R.C. 2305.113(E)(3), a “medical claim” is “any claim that is asserted in any civil action against a *physician* \* \* \* [or] *hospital* \* \* \* *that arises out of the medical diagnosis, care, or treatment of any person.*” R.C. 2305.113(E)(3) (emphasis added). A “medical claim” includes a claim resulting “from acts or omissions in providing medical care.” R.C. 2305.113(E)(3)(b). See *Estate of Stevic v. Bio-Medical Application of Ohio, Inc.*, 121 Ohio St.3d 488, 2009-Ohio-1525, ¶19 (holding that a claim against any medical provider enumerated in R.C. 2305.113(A) for personal injury is a “medical claim” under R.C. 2305.113 because it arises out of medical diagnosis or care and was asserted against a medical provider).

Because Loudin’s claim for negligent infliction of emotional distress is asserted in a civil action against a physician arising out of the alleged failure to timely diagnose her cancer, her claim is by definition a “medical claim.” As such, it is subject to the same rules and restrictions applicable to all medical claims in Ohio. Of course, if that is the case, there is no reason to

recognize an independent claim for negligent infliction of emotional distress. And, as discussed more fully in Section A.2. below, doing so simply creates confusion.

- b. If the proposed stand-alone tort of negligent infliction of emotional distress in the context of medical negligence is not considered a “medical claim,” it will circumvent established legislative and common law restrictions which now govern medical negligence claims.**

The Ohio General Assembly has enacted laws designed to limit the burden on the medical community arising from baseless medical negligence lawsuits. In enacting reform measures applicable to the medical community a few years ago, the General Assembly expressed several concerns that lead to the changes in Ohio law including, but not limited to:

- “[m]edical malpractice litigation represents an increasing danger to the availability and quality of health care in Ohio” (R.C. 2323.43, Section Notes, Section 3);
- the “overall cost of health care to the consumer has been driven up by the fact that malpractice litigation causes health care providers to over prescribe, over treat, and over test their patients” (Id.); and
- medical malpractice insurers were leaving the state, and “some health care practitioners, including a large number of specialists, have been forced out of the practice of medicine altogether as a consequence.” (Id.)

The General Assembly took specific steps to address these and other concerns. If the Court permits a stand-alone, independent subspecies of negligent infliction of emotional distress applicable to medical negligence claims, but does not consider these to be “medical claims,” all of these enactments could be effectively undone.

For example, the General Assembly created a one-year statute of limitations applicable to medical claims. See R.C. 2305.113(A); see also former R.C. 2305.11 (establishing a one-year statute of limitations for medical claims). But, a two-year statute of limitations applies to claims for negligent infliction of emotional distress. See R.C. 2305.10; *Lawyers Cooperative Publishing Co. v. Muething* (1992), 65 Ohio St.3d 273, 280, 603 N.E.2d 969; see also *Callaway*

*v. Nu-Cor Auto. Corp.*, 166 Ohio App.3d 56, 2006-Ohio-1343, ¶19 (citing *Muething*, 65 Ohio St.3d at 273) (“Negligent infliction of emotional distress is governed by a two-year statute of limitations.”).

Thus, if a stand-alone claim for negligent infliction of emotional distress can be asserted for failure to properly diagnose a medical condition, a plaintiff could circumvent the well established one-year statute of limitations for medical claims by characterizing the claim as one for negligent infliction of emotional distress. This end-run around established limitations applicable to medical negligence claims should not be permitted.

Similarly, if a stand-alone claim for negligent infliction of emotional distress is permitted in the context of medical negligence, prospective plaintiffs could circumvent the affidavit of merit required by Ohio Civil Rule 10(D)(2). Civil Rule 10(D)(2) requires that every complaint containing a “medical claim,” as defined by R.C. 2305.113, be accompanied by an affidavit of merit from a qualified expert. See R.C. 2743.43, Section Notes, Section 3 (requesting that the Ohio Supreme Court amend the Ohio Civil Rules to require “a plaintiff filing a medical liability claim to include a certificate of expert review as to each defendant.”). The affidavit of merit must include statements that the affiant has reviewed all medical records reasonably available; (2) is familiar with the applicable standard of care; and (3) is of the opinion that the defendant breached the standard of care and caused the plaintiff’s injury.

This Court recently opined on the important purpose underlying the affidavit of merit requirement:

Clearly, the purpose behind the [affidavit of merit] rule is to deter the filing of frivolous medical-malpractice claims. The rule is designed to ease the burden on the dockets of Ohio’s courts and to ensure that only those plaintiffs truly aggrieved at the hands of the medical profession have their day in court. To further this end, Civ.R. 10(D)(2)(c) expressly made it clear that the affidavit is necessary in order to establish the adequacy of the complaint.

*Fletcher v. Univ. Hospitals of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, ¶10.

If the Ninth District's newly created independent claim for negligent infliction of emotional distress is not considered a "medical claim," it will not be subject to the affidavit of merit requirement. If such a claim is not considered a "medical claim" by the Court, a future plaintiff alleging harm from a delayed diagnosis would be able to assert *only* a claim for negligent infliction of emotional distress. By doing so, she could avoid the affidavit of merit requirement and the very purpose underlying it as articulated by this Court: "to ease the burden on the dockets of Ohio's courts and to ensure that only those plaintiffs truly aggrieved at the hands of the medical profession have their day in court." *Id.* This end-run of Ohio's affidavit of merit requirement should not be permitted, as it would undoubtedly open the floodgate to innumerable claims that otherwise could not be brought.

Likewise, in an effort to rein in unlimited awards for pain and suffering and to ensure some consistency and predictability, the General Assembly has enacted limitations on non-economic damages in medical malpractice actions. See R.C. 2323.43(a)(2), Section Notes, Section 3 (noting Ohio's "rational and legitimate state interest in stabilizing the cost of health care delivery by limiting the amount of compensatory damages representing non-economic loss awards in medical malpractice actions."). This statute too could be circumvented by plaintiffs who fashion their medical malpractice claim as a negligent infliction of emotional distress claim to avoid these limitations.

Moreover, it is well established that testimony from a lay witness is insufficient to support a claim for medical negligence. See *Schraffenberger v. Persinger, Malik & Haaf, M.D.S, Inc.* (1996), 114 Ohio App.3d 263, 266, 683 N.E.2d 60 (citing *Bruni v. Tatsumi* (1976), 46 Ohio St. 2d 127, 346 N.E.2d 673)) (finding that a plaintiff must produce expert testimony

demonstrating the applicable standard of care and breach of this standard in order to establish a medical malpractice claim); see also R.C. 2743.43(A) (setting forth the competency requirements for an expert witness providing testimony as to a medical claim). Again, this limitation could be circumvented if a plaintiff is permitted to plead a stand-alone claim for negligent infliction of emotional distress in the context of a medical negligence claim. For instance, in the instant case, Loudin used her own affidavit as evidentiary support for the argument that she would not have suffered her alleged damages from the lymph node dissection but for the delay in diagnosis. *Loudin v. Radiology & Imaging Servs.* (May 8, 2009), Summit C.P. No. 2008-03-2197, at 12. This type of self-serving affidavit is insufficient to support a medical negligence claim and should not be permitted to support a stand-alone negligent infliction of emotional distress claim.

Allowing plaintiffs to plead a claim for negligent infliction of emotional distress separate from and independent of a medical negligence claim will create a gaping hole in the established and necessary legislative and common law limitations on medical claims. Accordingly, this Court should reject attempts to circumvent these statutory and common law limitations on medical negligence claims. If a plaintiff is unable to prove a medical negligence claim, she should not be permitted to alternatively bring a negligent infliction of emotional distress claim, which contains the same elements and same remedies as medical negligence (as discussed more fully below), but circumvents established restrictions.

**2. A Cause of Action for Negligent Infliction of Emotional Distress Against a Medical Provider is Duplicative of and Subsumed Within a Medical Negligence Claim.**

In the context of a medical negligence claim, permitting the creation of a separate cause of action for “negligent infliction of emotional distress” would be duplicative of the comprehensive cause of action that already exists in Ohio for medical negligence. Thus,

Loudin's "claim" for negligent infliction of emotional distress is subsumed within her claim for medical negligence. Any other approach would simply create confusion.

This principle is highlighted by the fact that, here, Loudin did not even plead negligent infliction of emotional distress as an independent tort. See *Loudin v. Radiology & Imaging Servs.*, 185 Ohio App.3d 438, 2009-Ohio-6947, ¶16. Rather, the Amended Complaint appears to allege only that "as a direct and proximate result of the negligence of the Defendants, Plaintiff \* \* \* has experienced pain, suffering, mental anguish, and serious emotional distress." Amended Complaint, ¶9.<sup>4</sup> In other words, the Amended Complaint appears to request damages for mental anguish and emotional distress only within the context of Loudin's medical malpractice claim. Accordingly, if she succeeds on her malpractice claim, she can recover appropriate damages for her mental anguish.

Any claim for negligent infliction of emotional distress in the context of alleged medical negligence is not a stand-alone claim. Rather, such a claim is duplicative of and subsumed within a claim for medical negligence. A separate negligent infliction claim would be duplicative of a medical negligence claim because it would require proof of the same prima facie elements as a medical negligence claim, including proximate cause and actual harm, and would permit the same recovery as a medical negligence claim.

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<sup>4</sup> It should be noted that at no point did Loudin amend her Complaint to properly plead an independent claim for negligent infliction of emotional distress. Both the trial and appellate courts noted this flaw in their respective opinions. See *Loudin*, 2009-Ohio-6947, ¶16; see also *Loudin v. Radiology & Imaging Servs.* (May 8, 2009), Summit C.P. No. 2008-03-2197, at 3. Although the lower courts noted that the parties "agreed that Ms. Loudin had asserted a separate cause of action for negligent infliction of emotional distress," the proper procedural steps to amend the Complaint were not taken. See *Loudin*, 2009-Ohio-6947, ¶16. On this procedural flaw alone, the Ninth District's decision should be reversed and the case remanded to the trial court.

- a. **The prima facie elements of an independent tort for negligent infliction of emotional distress would be virtually indistinguishable from the elements of medical negligence.**

In the context of medical negligence the prima facie elements of a negligent infliction of emotional distress claim and a medical negligence claim are virtually indistinguishable. A traditional medical negligence claim requires that a plaintiff establish liability based on the alleged negligence of a medical provider by proving: “(1) a duty running from the defendant to the plaintiff (i.e. a professional duty of care), (2) a breach of that duty by the defendant (i.e. the failure to adhere to the applicable standard of care), (3) damages suffered by the plaintiff, and (4) a proximate causal relationship between the breach of duty and the damages.” *Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assocs.*, 108 Ohio St.3d 494, 2006-Ohio-942, ¶17.

If a claim for negligent infliction of emotional distress is permitted in the context of medical negligence, a plaintiff should be required to establish each of these same four elements. This is similar to what is required for negligent credentialing claims. As this Court recently held, in order to establish a claim for negligent credentialing, a plaintiff must first prove that the “physician's failure to abide by ordinary standards of care proximately caused the patient's harm.” *Schelling v. Humphrey*, 123 Ohio St.3d 387, 2009-Ohio-4175, ¶19 (holding that in the usual case, prior to bringing a claim against a hospital for negligent credentialing, a plaintiff “must obtain a prior determination that a doctor committed medical malpractice and that the malpractice proximately caused the plaintiff's injury”).

In the case of negligent credentialing, once the underlying medical negligence is established, a plaintiff must prove several additional elements to establish the independent tort. *Id.* Here, unlike negligent credentialing, once the underlying medical negligence is established, there is *nothing* additional left to prove to establish a negligent infliction of emotional distress claim other than the type of harm suffered. And, damages for mental anguish or emotional

distress are already recoverable in the context of a traditional medical negligence claim. See R.C. 2323.43(A)(3), (H)(3) (non-economic damages, including pain and suffering, mental anguish, and other intangible losses, are all permissible damages in a medical malpractice action).

In other contexts, where one cause of action is duplicative or derivative of a more comprehensive cause of action, this Court has found that the lesser claim is subsumed within the more comprehensive claim. See, e.g., *Kerans v. Porter Paint Co.* (1991), 61 Ohio St.3d 486, 495-496, 575 N.E.2d 428 (holding that appellants failed to state a separate claim where the claim for intentionally or negligently maintaining a policy condoning sexual harassment was duplicative of their claims of assault and battery and for intentional or negligent failure to provide a safe work environment); see also *Biddle v. Warren Gen. Hosp.*, 86 Ohio St. 3d 395, 408-409, 1999-Ohio-115 (affirming lower court finding that appellee's additional theories of liability were each "subsumed by the tort of breach of confidence.")

Ohio's appellate courts have applied this same principle, finding that duplicative claims are subsumed within the larger, more comprehensive cause of action. See *Pierson v. Rion*, 2d Dist. No. CA23498, 2010-Ohio-1793, at ¶14 (finding that plaintiffs' fraud, breach of contract, and negligent misrepresentation claims were duplicative claims concerning the same alleged omissions, and should be dismissed as subsumed by his legal malpractice claim); *Firelands Reg'l Med. Ctr. v. Jeavons*, 6th Dist. No. E-07-068, 2008-Ohio-5031, at ¶28 (noting that "a claim for breach of contract subsumes the accompanying claim for breach of the duty of good faith and fair dealing"); *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.* (1996), 115 Ohio App.3d 137, 149, 684 N.E.2d 1261 ("Where fraud and negligent misrepresentation are claimed as to the same set of underlying facts, if fraud is proved, then the claim of negligent misrepresentation is

necessarily subsumed thereby.”); *Schraffenberger*, 114 Ohio App.3d at 267 (finding that plaintiff’s malpractice claims “subsumed their claim of promissory estoppel” because promissory estoppel is not cognizable in the context of medical malpractice); *Muir v. Hadler Real Estate Mgmt. Co.* (1982), 4 Ohio App.3d 89, 90, 446 N.E.2d 820 (“Malpractice by any other name still constitutes malpractice.”).

Similarly here, to the extent Loudin has properly pled an independent cause of action for negligent infliction of emotional distress, such a claim is duplicative and derivative of her more comprehensive medical negligence claim. As such, her claim for negligent infliction of emotional distress should be dismissed as subsumed within her medical negligence claim.

**b. The requirement of proximate causation must be identical in claims for medical negligence and for negligent infliction of emotional distress.**

In order to establish medical negligence, a plaintiff must demonstrate through expert testimony both the applicable standard of care and whether the defendant satisfied that standard. *Vaught v. Cleveland Clinic Found.*, 98 Ohio St.3d 485, 2003-Ohio-2181, ¶31; R.C. 2743.43(A) (setting forth the competency requirements for an expert witness in a medical claim).

In Ohio, this requisite proximate causation element can be demonstrated in only two ways: (1) in a traditional medical negligence case, by showing that the patient’s injury was “more probably than not” caused by the physician’s negligence, or, (2) in a case where the plaintiff has less than 50% chance of recovery or survival prior to the alleged negligence, by showing that the physician’s negligence caused plaintiff to lose some percentage of her chance of recovery or survival. See *Roberts v. Ohio Permanente Medical Group*, 76 Ohio St.3d 483, 485,

1996-Ohio-375 (loss of chance doctrine applies where there is a “less-than-even chance of recovery or survival”).<sup>5</sup>

Here, Plaintiff’s expert testified that Loudin’s chance of survival was 85% before the alleged negligence and 82% after the alleged negligence. *Loudin*, 2009-Ohio-6947, at ¶13. Because she had a more than 50% chance of recovery, the loss of chance doctrine is inapplicable. See *Dobran v. Franciscan Med. Ctr.*, 102 Ohio St.3d 54, 2004-Ohio-1883, ¶8 n.1 (refusing to permit recovery for a “lost opportunity for early diagnosis” where the plaintiff had a greater than 50% chance of survival prior to the alleged negligence).

**B. There is No Justification for Expansion of the Nebulous Tort of Negligent Infliction of Emotional Distress.**

Historically, Ohio has permitted damages for negligent infliction of emotional distress in only two situations: (1) where the plaintiff suffered a “contemporaneous physical injury,” or (2) where the emotional injury caused by a defendant was found to be “severe and debilitating to a reasonable person.” See *Binns v. Fredendall*, 32 Ohio St.3d 244, 245-246. Recognition of this tort in the latter instance is usually limited to “bystander” recovery. See *Paugh v. Hanks* (1983), 6 Ohio St.3d 72, 451 N.E.2d 759 (setting a higher bar for recovery for negligent infliction of emotional distress where the plaintiff-bystander alleged no physical injuries to herself).

**1. The Tort of Negligent Infliction of Emotional Distress Should Not be Extended to the Context of Medical Negligence.**

This Court has traditionally limited claims for negligent infliction of emotional distress to cases involving dangerous, and often life-threatening, accidents. The Court should maintain this

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<sup>5</sup> The issue of application of the loss-of-chance doctrine is currently pending before this Court in *Geesaman v. St. Rita’s Medical Center*, Sup. Ct. Case No. 2009-1715. Specifically at issue in *Geesaman* is whether the “loss of chance” doctrine is available as an alternative claim when a plaintiff pursues a traditional medical malpractice claim based on “but for” causation. See *Geesaman*, 124 Ohio St.3d 1472, 2010-Ohio-354 (accepting appeal on proposed proposition of law).

limited approach and decline the Ninth District's invitation to create a new independent tort for negligent infliction of emotional distress in the context of alleged medical negligence.

More specifically, historically this Court has permitted recovery for negligent infliction of emotional distress only where the plaintiff was injured in an accident or was a bystander at the scene of an accident affirmatively caused by defendant. See *Heiner*, 73 Ohio St.3d at 86 (noting that the Court's precedent suggests that recovery for negligent infliction of emotional distress be limited "to instances where the plaintiff has either witnessed or experienced a dangerous accident or appreciated the actual physical peril" of a dangerous accident); *Binns v. Fredendall* (1987), 32 Ohio St.3d 244, 246-247, 513 N.E.2d 278 (permitting recovery for negligent infliction of emotional distress by plaintiff-passenger where defendant caused automobile accident that killed passenger's boyfriend); *Schultz v. Barberton Glass Co.* (1983), 4 Ohio St.3d 131, 136, 447 N.E.2d 109 (permitting recovery for negligent infliction of emotional distress against defendant who caused automobile accident); *Paugh v. Hanks* (1983), 6 Ohio St.3d 72, 80-81, 451 N.E.2d 759 (permitting recovery for negligent infliction of emotional distress against defendant whose vehicle crashed into plaintiff's residence); and *Wolfe v. Great Atlantic & Pacific Tea Co.* (1944), 143 Ohio St. 643, 644-646, 56 N.E.2d 230 (permitting recovery of damages for emotional distress where plaintiff became physically ill after eating a can of peaches with worms). Compare *Dobran*, 2004-Ohio-1883, at ¶¶18-19 (refusing to recognize negligent infliction claim where medical provider negligently destroyed lymph node samples, depriving plaintiff of the opportunity to have them tested for the probability of metastasis); *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 162, 1997-Ohio-219 (finding "no basis" for a claim of negligent infliction of emotional distress based upon termination of employment); *Heiner*, 73 Ohio St.3d at 80 (refusing to permit recovery for negligent infliction of emotional distress against a physician

where plaintiff was misdiagnosed as HIV positive); *Burriss v. Grange Mut. Cos.* (1989), 46 Ohio St.3d 84, 93, 545 N.E.2d 83, overruled in part on other grounds in *Savoie v. Grange Mut. Ins. Co.* (1993), 67 Ohio St.3d 500, 504, 620 N.E.2d 809 (refusing to recognize negligent infliction claim where a mother allegedly developed physical injuries as a proximate result of being informed of the death of her son where the mother never “sensorially perceived the accident”).

The Court should maintain this precedent and refuse to extend the tort of negligent infliction of emotional distress outside this realm and into the realm of medical negligence. Such an expansion is particularly problematic in the context of the physician-patient relationship as physicians often have an obligation to provide emotionally distressing information to their patients, such as apprising patients of a chronic ailment or life-threatening disease. Plainly, the “harm” one suffers from being informed that she has a chronic ailment or life-threatening disease is not compensable. Yet, if negligent infliction of emotional distress claims are permitted in the context of medical negligence, doctors and hospitals will be subjected to potential liability based on such harm.

**2. The “Physical Injury” Element of A Negligent Infliction of Emotional Distress Claim Should be Limited to Cases in Which the Plaintiff Actually Sensorially Perceived Pain or Discomfort as a Result of the Injury.**

The Ninth District determined that Loudin could pursue a “contemporaneous physical injury” claim for negligent infliction of emotional distress, finding that “the growth and metastasis of cancer are contemporaneous physical injuries that may support a claim for negligent infliction of emotional distress that is not severe and debilitating.” *Loudin*, 2009-Ohio-6957, at ¶31.

Where a plaintiff seeks to recover damages for emotional distress stemming from a “contemporaneous physical injury,” this Court historically has limited recovery to cases in which the plaintiff actually sensorially perceived some kind of pain or discomfort caused by the injury.

See *Burris*, 46 Ohio St.3d at 93, overruled in part on other grounds in *Savoie*, 67 Ohio St.3d at 504 (denying recovery where a mother allegedly developed physical injuries as a proximate result of being informed of the death of her son where the mother never “sensorially perceived the accident”); see also *Dobran*, 102 Ohio St.3d at 55-56 (refusing to recognize negligent infliction claim where defendant negligently destroyed lymph node samples, depriving plaintiff of the opportunity to have them tested for the probability of metastasis); *Heiner*, 73 Ohio St.3d at 86-87 (holding that the Court was not “prepared to create a ‘subspecies’ of the tort of negligent infliction of emotional distress that applies only in the context of the patient-physician relationship”).

This approach has also been adopted by courts outside of Ohio. For example, in *Chouinard v. Health Ventures* (2002), 179 Ore. App. 507, 515, 39 P.3d 951, plaintiff argued that the “presence of a growing tumor” was sufficient to establish the “physical injury or impact” required for recovery of damages for negligent infliction of emotional distress. The Oregon court disagreed, holding that “the mere presence of a growing tumor that had no perceptible effect on plaintiff [i.e. caused no physical symptoms], is not a sufficient physical impact to recover damages for negligently inflicted emotional distress.” *Id.* at 955.

Amici take no position as to whether the metastasis of cancer itself (that occurs after a failure to diagnose) could ever constitute a physical injury for purpose of a claim for negligent infliction of emotional distress. But, in cases like this where there is no evidence of any physical pain or discomfort and no medical evidence of emotional harm, Amici urge the court not to extend the reach of the “contemporaneous physical injury” tort of negligent infliction of emotional distress. (Notably, the potential decrease in the rate of survival after 10 years from 85% to 82% is not a physical injury sustained by Loudin.)

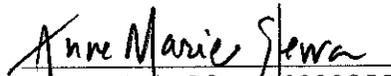
Amici suggest that the Court should take a limited approach. Rather than characterizing a “physical” injury as a mere “physical change,” the Court should define “physical injury” for purposes of negligent infliction of emotional distress claims only where the plaintiff contemporaneously appreciates the perceived harm injury, i.e., experiences some kind of pain, discomfort or other palpable harm. See *Ackison v. Anchor Packing Co.*, 120 Ohio St. 3d 228, 2008-Ohio-5243, ¶¶22-24 (finding that an “injury” in the context of asbestos exposure litigation must consist of more than simply an “alteration to the structure of the body” where no other harm is caused).

This is both consistent with this Court’s prior case law and would prevent the illogical result of awarding damages for emotional distress based upon a physical injury where the plaintiff did not even know of or appreciate danger or harm (or present any medical evidence of emotional harm). Here, Loudin was not even aware that the tumor had grown until *after* it had been removed and a pathology report was performed. *Loudin*, 2009-Ohio-6947, ¶4. Obviously, one cannot experience emotional distress based on a physical injury of which she is unaware.

### CONCLUSION

Amici urge the Court to reverse the Ninth District Court of Appeals decision and hold that no independent tort for negligent infliction of emotional distress is cognizable in the context of alleged medical negligence.

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**CERTIFICATE OF SERVICE**

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