

ORIGINAL

Nos. 2009-1715 2009-2094
(Consolidated)

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.

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APPELLANT'S MOTION FOR RECONSIDERATION

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Appellant John Cox, D.O., by and through counsel, and pursuant to S.Ct.Prac.R. 11.2, respectfully moves for reconsideration of this Court's December 9, 2010 order dismissing this appeal "as having been improvidently accepted." See 2010-Ohio-5946. The Third District Court of Appeals decision at issue in this matter reversed a unanimous jury verdict in favor of Dr. Cox on the grounds that a plaintiff who alleged that deficits from an evolving stroke were more probably than not caused by malpractice, and who presented expert testimony at trial supporting that allegation, was entitled to a "relaxed" causation jury instruction *in addition to* a traditional causation instruction. Reconsideration of this Court's dismissal of Dr. Cox's appeal from that decision is appropriate for three reasons.

First, this case presents an important question of first impression in Ohio – i.e., whether a trial court is required to instruct a jury that they must award plaintiff full damages if they determine that a physician's negligence *was* more probably than not the cause of the claimed injury, and proportional damages if they find that the physician's negligence was *not* more probably than not the cause of the alleged injury. Left standing, the Third Appellate District's misconstruction of the purpose and scope of the proportional damages "loss of chance" claim recognized by this Court will continue to cause confusion and conflicts among Ohio's trial and appellate courts. Compare, for example, *Segedy v. Cardiothoracic and Vascular Surgery of Akron, Inc.* (2009), 182 Ohio App.3d 768, 779, ¶19, where the Ninth District correctly construes *McMullen v. Ohio State Univ. Hosp.* (2000), 88 Ohio St.3d 332, as holding that "[a] lost-chance claim

is applicable * * * only if the plaintiff is unable to meet the traditional burden of proving proximate cause.” See, also, the Seventh District decision in *Haney v. Barringer*, 2007-Ohio-7214 (loss of chance may not be asserted as a “fallback” claim for a plaintiff unable to prove more probable than not causation).

Second, reconsideration is appropriate when a case with similar issues is currently pending in this Court. See *State v. Pierce* (2008), 118 Ohio St.3d 1212. That doctrine applies here. *Lonna Loudin v. Radiology & Imaging Services, Inc., et al.*, Sup.Ct. No. 2010-0297, which will be orally argued January 18, 2011, is also a medical malpractice action premised on a delayed diagnosis (breast cancer). And although not included in the proposition of law,¹ “loss of chance” is an integral part of the *Loudin* appeal. Thus, the arguments made by the appellant physician in *Loudin* include: 1) that the plaintiff’s expert’s testimony failed to establish “a compensable injury under this Court’s ‘loss of chance’ decision in *Roberts v. Ohio Permanente Medical Group, Inc.*” (Appellant’s Br., p. 5); 2) that “the Ninth District has effectively redefined this Court’s precedents” by allowing the plaintiff to assert “a ‘fall back’” claim (*id.*, p. 10, citing *Haney v. Barringer*,

¹ Appellant’s proposed proposition of law in *Loudin* is:

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.3d 33, 775 N.E.2d 865, 2002-Ohio-3161.

See Appellant’s Br., Case No. 2010-0297.

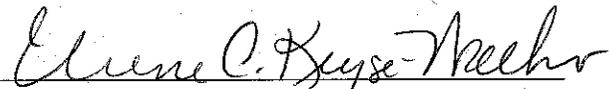
supra); and 3) that “the underlying basis for the Ninth District denying Dr. Patterson’s Motion to Certify a Conflict was an erroneous application of Ohio law with respect to ‘loss of chance’” (id., p. 5). Similarly, the Merit Brief of Amici Curiae Ohio Hospital Association, et al., argues that the rule of law established by the Ninth District will allow plaintiffs to “circumvent” this Court’s limitations on the loss-of-chance doctrine recognized in *Roberts* (Amicus Br., p. 1, 12-13), and Appellee’s Opposing Brief seeks affirmance based on the principles set forth in *Roberts* (Opp. Br., pp. 7-8, 22). Judicial efficiency would be served by clarifying the loss-of-chance issues presented in both of these delayed diagnosis cases at the same time.

Third, reconsideration is justified because this case presents an issue of great and general public interest. Contrary to the suggestion of Mr. Geesaman’s counsel at oral argument, medical malpractice claims based upon an assertion that a physician could have done “more sooner” to avert or slow the progress of a disease are the rule, not the exception. Notably, in addition to this case (delayed diagnosis of stroke) and *Loudin* (delayed diagnosis of breast cancer), two other medical malpractice cases decided by this Court this year alone were premised on a delayed diagnosis. See *Pettiford v. Aggarwal* (2010), 126 Ohio St.3d 413 (three-year delay in treatment of lung tumor due to misinterpretation of chest x-ray); *Erwin v. Bryan* (2010), 125 Ohio St.3d 519 (alleged failure to diagnosis and treat evolving stroke). The likelihood of continuing and unnecessary confusion caused by a rule of law that essentially deprives defendant physicians of the ability to present “less than probable” causation testimony to oppose

“more than probable” causation testimony in a delayed diagnosis medical malpractice case is therefore highly probable. And a rule of law that allows plaintiffs to be virtually guaranteed some recovery (i.e., a jury instruction that plaintiff receives full damages if the jury believes plaintiff’s causation experts and proportional damages if the jury believes defense experts) will lead to the further expansion of such lawsuits.

For all of these reasons, Appellant Dr. Cox respectfully urges reconsideration of this Court’s order dismissing the appeal as improvidently accepted, and requests that the appeal be held for decision after the January 18, 2011 argument of *Loudin v. Radiology & Imaging Services, Inc.*, Case No. 2010-0297.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 17th day of December, 2010, by U.S.

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