

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.**

**APPELLEES' BRIEF IN OPPOSITION TO
APPELLANT'S MOTION FOR RECONSIDERATION**

**DENNIS P. MULVIHILL (0063996)
GREGORY S. SCOTT (0067255)**
Lowe Eklund Wakefield &
Mulvihill Co., L.P.A.
610 Skylight Office Tower
1660 West Second Street
Cleveland, OH 44113-1454
(216) 781-2600 (Telephone)
(216) 781-2610 (Facsimile)
Email: dmulvihill@lewm.com
gscott@lewm.com

Attorneys for Plaintiffs-Appellees

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

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

LOWE
EKLUND
WAKEFIELD
& MULVIHILL
CO., LPA

ATTORNEYS
& COUNSELORS
AT LAW

610 SKYLIGHT
OFFICE TOWER

1660 WEST SECOND ST.
CLEVELAND, OH
44113-1454

216-781-2600
216-781-2610 FAX
WWW.LEWM.COM

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WAYNE E. WAITE (0008352)
Freund Freeze & Arnold
1800 One Dayton Centre
1 South Main Street
Dayton, OH 45402
(937) 222-2424 (Telephone)
(937) 425-0207 (Facsimile)
Email: wwaite@ffalaw.com

Attorney for Defendant Lima
Radiology Associates

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

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

Enough is enough. In what could only be characterized as a desperate attempt to relitigate issues that have already been litigated in the Court of Appeals and then briefed and argued in the Supreme Court, Appellant offers no new reason that this Court should do anything other than what it has done -- dismiss the appeal, thus reinstating the well-reasoned Court of Appeals decision. In fact, Appellant has reverted to deliberately distorting case law and the oral argument in an effort to convince this Court to rehear this case.

As has been extensively briefed, this case merely presented a simple question for this Court to consider: whether a jury should be instructed consistent with the evidence adduced and the admissions elicited at trial. The simple answer is yes. For personal reasons, so as to not be held liable for the cause of action to which he admitted all elements (he admitted breach of the standard of care, causation in the form of loss of chance, and he did not challenge damages), Appellant wants another bite at the apple. Thus, Appellant is insincere when he argues that this case has ramifications of great and general public interest. Instead, Appellant's interest is wholly personal -- asking this Court to change the law so he can avoid the consequences of the admissions he made at trial. Ironically, the only great and general public interest involved in this case is making sure that courts honor the time-worn rule that jury instructions are submitted consistent with the evidence in the case. And that has been done by this Court by reinstating the Court of Appeals decision.

Appellant overstates his case by arguing that this case presents a matter of first impression. It does not. Whether a trial court should instruct consistent with the evidence is not a matter of first impression in Ohio. Nor is it a matter of first impression whether a

court should submit jury instructions which require the jury to sort out between competing theories of liability. This, after all, is the function of the jury at its most basic level.

Ohio has long recognized claims for medical malpractice, and for more than a decade, has recognized claims for medical malpractice sounding in loss of chance. Because there was evidence to support both theories of recovery, the Court of Appeals merely held that the trial court should have submitted jury instructions consistent with the competing evidence and let the jury determine which party carried the day. For Appellant to construe these facts and label them as a matter of first impression illustrates the depth of Appellant's desperation to avoid submitting his admissions to the jury in this case.

Appellant also misrepresents this Court's docket by suggesting that similar cases with similar issues are currently pending. Appellant cites *Loudin v. Radiology & Imaging Services, Inc., et al.*, Sup. Ct. No. 2010-0297 for the proposition that another "loss of chance" case is pending before this Court. Even if true, that has no bearing on whether the Court should re-accept this particular case. In fact, although Appellees dispute that *Loudin* is a loss of chance case, even if it is, it has no bearing on the previously decided Third District decision in this case that properly states Ohio law. The fact that this Court is considering *Loudin* in the next several weeks is meaningless as to whether or not the Court should reconsider its decision to dismiss the instant matter as any problems that the *Loudin* case presents in terms of medical malpractice law can be cured (if necessary) in that case. Interestingly, however, the Ninth District opinion in *Loudin* did not even use the words "loss of chance" and plaintiff did not plead or argue loss of chance. So although Appellees herein dispute that *Loudin* is a loss of chance case, this Court is free to decide *Loudin* without having to rehear the instant case, which comes from a very different set of facts

and which was decided on jury instructions, as opposed to *Loudin*, which was decided on summary judgment.

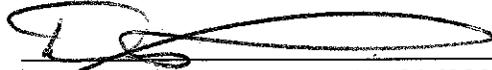
Finally, and perhaps most disconcertingly, Appellant ascribes an argument to Appellees' counsel that was never made. Appellant was explicit in his Motion that Appellees' counsel, at oral argument, made the argument that a doctor failing to do something in a timely manner was not the basis of most malpractice cases. This was demonstrably not the argument that undersigned counsel made. Appellees' argument was simple: most medical malpractice cases do not involve loss of chance claims. It was not that most medical malpractice claims do not involve allegations that a doctor moved too slowly in making a diagnosis. Instead, it was that most cases do not involve allegations of loss of chance. This distinction is easily understood. And, Appellant proves that Appellees' argument is true by referring to both *Pettiford v. Aggarwal* (2010), 126 Ohio St.3d 413 and *Erwin v. Bryan* (2010), 125 Ohio St.3d 519, neither of which support Appellant's argument nor involve the loss of chance doctrine. The issue in *Erwin* was whether or not the plaintiff therein had properly used Civil Rule 15(D) in filing and serving John Doe complaints. There was no allegation of loss of chance anywhere in *Erwin*. Similarly, in *Pettiford*, the issue was whether or not a non-party retained expert could contradict deposition testimony with a subsequent affidavit designed to defeat summary judgment based on prior inadequate deposition testimony. *Pettiford* was not a loss of chance case.

Despite Appellant misstating the arguments raised at oral argument in this case, the cases Appellant relies on for the proposition that the loss of chance doctrine is a mess for both trial courts and practitioners do not even address the issue. Additionally, Appellant

has already made the argument (incorrectly so) that loss of chance needs immediate correction so that trial courts can instruct juries properly. This was not true when Appellant first made the argument, and it is not true now.

Because Appellant offers no new arguments, but only recycles old ones, and in so doing misconstrues not only the arguments in this case but the current case law, this Court should overturn his Motion for Reconsideration.

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 Appellees' Brief in Opposition to Appellant's Motion for Reconsideration has been served by first-class U.S. Mail, this 23rd day of December, 2010, upon:

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

Wayne E. Waite, Esq.
Freund Freeze & Arnold
1800 One Dayton Centre
1 South Main Street
Dayton, OH 45402

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

Attorney for Defendant
Lima Radiology Associates

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



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