No. 2008-1299

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NOS. CA 07 89441 & CA 07 89719

ALVIN C. TURNER, SR., et al,
Plaintiffs-Appellants,

v.

DR. ALLAN O. ROSENFIELD, INC.
dba SUBURBAN GERIATRICS, et al.
Defendants-Appellees.

DEFENDANTS-APPELLEES DR. ALLAN O. ROSENFIELD INC. dba SUBURBAN GERIATRICS and ALLAN O. ROSENFIELD, M.D.'S MEMORANDUM IN OPPOSITION TO JURISDICTION

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I. THIS CASE INVOLVES NO PUBLIC AND GREAT GENERAL INTEREST THAT WARRANTS THIS COURT'S DISCRETIONARY REVIEW.

This appeal involves a failure of evidence—nothing more. It is Plaintiffs—not the Court of Appeals—who have confused the elements of their malpractice claim. The Court of Appeals properly bisected the Plaintiffs' "direct" and "loss of chance" malpractice claims and correctly concluded that insufficient expert testimony was produced to support either.

Plaintiff Alvin Turner alleged that Defendant Allan Rosenfield, M.D. breached the applicable standard of care by not offering him a prostate-screening PSA test (a notoriously imprecise test with a "false negative" rate as high as 75%) in 1997 or 1998. Turner was diagnosed with prostate cancer in 2000 and has received hormone therapy—which represses, but does not cure, prostate cancer—since that time. The only claim sent to the jury was a "direct" claim that but for Dr. Rosenfield's negligence, Turner more probably than not would have been surgically cured of his cancer and, at the time of the 2006 trial, would have an "average" life span to the age of 80, instead of a predicted lifespan to the age of 72.

An argument could be made that asking jurors to quantify such an inherently speculative ultimate harm is, in itself, beyond the realm of law. But the Court of Appeals did not need to reach that thornier issue because Plaintiffs failed to present expert medical testimony that surgery more likely than not *would have cured* Turner's cancer had a PSA screening been offered in 1997 or 1998. In the absence of the requisite causation

evidence, there was no need to consider whether a jury could award damages based on the assumption that Turner would live to be 80 "but for" malpractice.

The causation testimony of Plaintiffs' expert—Joseph Schmidt, M.D.—far from being "ignored" by the Court of Appeals, is thoroughly discussed throughout the opinion. As the appellate court correctly pointed out. Plaintiffs pled and tried a second, alternative damage claim—that as a result of Dr. Rosenfield's negligence, Turner lost the "chance" of a complete cure through surgery. Phrased another way, he lost a "potential" for cure. No matter how many times Plaintiffs asked him to rephrase his opinion, Dr. Schmidt always testified to the *loss of chance* claim. That is, his testimony consistently discussed a loss of a "possible" or "potential" cure caused by alleged malpractice. The one iteration of that opinion cited on page one of Plaintiffs' supporting memorandum fares no better. Dr. Schmidt's testimony that a PSA screen would more likely than not have revealed "a PSA abnormality * * * and a diagnosis of prostate cancer would have been made when the disease was more likely localized and therefore more likely curable" speaks in terms of a potential for cure—a "curable" disease—not that Turner himself would have been cured.

The Court of Appeals did not need to address this alternative "loss of chance" claim, because Plaintiffs abandoned that claim at trial, asking that the jury be instructed only on a "direct" claim of "reduced life expectancy." But the appellate court did address the claim, to illustrate the difference between Turner's "direct" claim for loss of a cure—as to which there was insufficient evidence of causation—and his "loss of chance" claim for loss of a *potential* cure—as to which there was insufficient damage evidence.

Under *Roberts v. Ohio Permanente Med. Group, Inc.* (1996), 76 Ohio St.3d 483, Plaintiffs would have been entitled to a "relaxed causation" charge for Turner's "loss of chance" claim if they had chosen to present that claim to the jury. But as the appellate court points out, the "loss of chance" cause of action still requires evidence of damages. And because "*Roberts* requires that the jury award damages in proportion to the percentage of chance lost," Plaintiffs must present *some* statistical evidence to enable the jury to determine that proportion. See *Turner v. Rosenfield*, 8th Dist. Nos. 89441, 89719, 2008-Ohio-1932, at ¶37, Appx. 17.

In short, Plaintiffs tried their case as a "loss of chance" case but then asked the jury to be charged only on a "direct" malpractice case. The Court of Appeals correctly concluded that the evidence was insufficient as a matter of law to support a jury verdict based on a "direct" evidence claim and the trial court erred by failing to grant Dr. Rosenfield's Motion for Judgment Notwithstanding the Verdict. Further, *even if* Plaintiffs had requested a jury charge on the "loss of chance" theory, insufficient damage evidence *would have* entitled Dr. Rosenfield to any jury verdict entered on that abandoned claim. Plaintiffs' evidentiary failures provide no basis for Ohio Supreme Court jurisdiction.

Plaintiffs' first proposition of law continues their confusion by assuming that the appealed decision is premised solely on insufficient *damage* evidence. It is not. The Court of Appeals held that the "direct" malpractice claim that Plaintiffs sent to the jury—a claim that required proof of "more probable than not" causation—failed due to inadequate *causation* evidence. Turner could not claim damages based on an "average"

lifespan of 80 unless he could prove that but for the negligence he would have been cured of cancer. He failed to do so.

Plaintiffs' second proposition of law—seeking this Court's review of the Eighth District's *en banc* proceedings—springs from the same well of confusion. As pointed out in the order denying Plaintiffs' Petition for Rehearing *En Banc*, Plaintiffs' entire basis for asserting a "conflict" was their assumption that the appellate decision established a new standard for proving damages. See Appx. 26 ("in fact, the portion of the *Patton* opinion cited by appellee does not relate to proximate causation at all, but to the evidence supporting a jury instruction on future pain and suffering"). It was the substance of Plaintiffs' motion, not the local rules of procedure adopted by the Eighth Appellate District, that caused the Court to deny their Motion for Rehearing *En Banc*, as well as their virtually identical Motion to Certify Conflict.

II. COUNTER-STATEMENT OF THE CASE AND FACTS

Turner and his wife filed this medical malpractice action in May 2004 against Allen O. Rosenfield, M.D. and his medical corporation, alleging that Dr. Rosenfield failed to offer a PSA test between 1997 and 1999, resulting in a late diagnosis of cancer and a loss of chance of cure.

At the May 2006 trial, Plaintiffs advanced two theories that Dr. Rosenfield's alleged failure to offer the PSA test more than seven years earlier caused him injury. The first theory alleged a reduced life expectancy injury, analyzed under traditional proximate cause ("direct" claim). The second theory was a loss of chance of cure injury, analyzed under a "relaxed" cause standard ("loss of chance" claim). As to the direct claim,

Plaintiffs claimed that had Turner been offered the PSA test earlier, he more probably than not would have been cured of his cancer. As damages for that injury, he sought to be compensated for the eight-year difference between his current life expectancy of two years and the "average" life expectancy (80) of men who attain the age of 70. *Turner*, 2008-Ohio-1932, at ¶29, Appx. 13-14.

As to the loss of chance claim, Plaintiffs argued that Turner sustained a compensable injury in the form of a lost *chance* for a cure. Id. at ¶28, 30, Appx. 13, 14-15. That is, instead of arguing that he *would have been* cured but for the alleged malpractice, Plaintiffs argued that as a result of Dr. Rosenfield's failure to offer a PSA screening test in the 1997-1999 interval, Turner lost the *potential* for a "cure" through surgical intervention.

Dr. Schmidt—Plaintiffs' causation expert—did not provide any direct-cause evidence. He never testified that more likely than not Turner would have been cured had the prostate cancer been diagnosed earlier. Instead, he testified only about the lost *potential* for cure under the "relaxed" cause standard.

Plaintiffs abandoned their loss of chance claim at the close of the evidence and asked that the jury be instructed *only* on the direct claim. The jury returned a verdict in favor of Plaintiffs in the amount of $2 million. The trial court denied post-trial motions for judgment notwithstanding the verdict, new trial, and remittitur. Appx. 31-33.

The Eighth Appellate District reversed because Plaintiffs failed to present the expert medical testimony required to support traditional proximate causation under a reduced-life-expectancy theory. *Turner*, 2008-Ohio-1932, at ¶31, Appx. 15. Further, had

Plaintiffs not abandoned their loss of chance claim, the result would be the same, because there was also "no statistical evidence of the percentage of chance lost" to support a claim for damages as is required under *Roberts*. *Turner*, 2008-Ohio-1932, at ¶31, 37, Appx. 15, 17. Because Dr. Rosenfield was entitled to a directed verdict or judgment notwithstanding the verdict, the appellate court reversed with instructions to enter judgment in his favor. Id. at ¶38, 41, Appx. 17, 18.

Plaintiffs moved for reconsideration, to certify conflict, and for an *en banc* hearing—all of which the appellate court denied. Appx. 25, 26.

III. ARGUMENT

Counter-proposition of Law No. 1:

> **A plaintiff pursuing a "direct" medical malpractice claim must present medical expert testimony that the breach of an applicable standard of care directly caused the ultimate harm suffered.**

The above proposition of law has been set forth numerous times by this Court, most recently in *McMullen v. Ohio State Univ. Hosp.* (2000), 88 Ohio St.3d 332. *McMullen* was a wrongful-death action—the "ultimate harm" to the patient was death. This Court held that the plaintiff's estate was not limited to a "loss of chance" theory, but could prove that the medical negligence at issue was a direct (more probable than not) cause of the ultimate harm (death).

Here, Plaintiffs asked the trial court to instruct the jury on a "direct" malpractice claim based on the "ultimate harm" of a "shortened lifespan." That is, Plaintiffs claim that an "ultimate harm" that has *not* occurred—a premature death—is the result of

malpractice. Put another way, Turner claims he more probably than not would be cured of cancer and achieve the "average" lifespan of 80 had he received a screening test in 1997 or 1998.

Although the alleged ultimate harm is different (and far more speculative) than the ultimate harm in *McMullen*, the determinative causation burden is the same – expert medical evidence of a direct causal relationship between the physician's malpractice and the ultimate harm. The appellate majority did not establish a "new burden of proof" or require proof in "mathematical percentages" as alleged by Plaintiffs. Mem. in Support of Jurisdiction at 1, 9. Instead, it applied well-established direct-cause principles.

Merely because *Plaintiffs* have confused proof of causation in a direct claim with statistical proof of damages in a loss-of-chance claim does not mean that appellate courts across the state are confused as well. Like the appellate court here, other appellate courts have had no difficulty undertaking traditional proximate-cause analysis when confronted with a direct-malpractice claim. Similarly, they have been able to distinguish and apply relaxed-cause principles when faced with a loss-of-chance malpractice claim. The guidance already provided by both *Roberts* and *McMullen* sufficiently equips courts to be able to distinguish direct-malpractice/traditional proximate cause claims from loss-of-chance/relaxed causation claims and—like the appellate court did here—apply those principles consistently. See, e.g., *McDermott*, 151 Ohio App.3d 763, 2003-Ohio-885, at ¶44 (distinguishing between direct-cause *McMullen* case and a relaxed-cause *Roberts* case); *Bradley v. Univ. Hosp. of Cleveland* (Dec. 27, 2001), 8th Dist. No. 79104, 2001 WL 1654762 (evidence of direct cause of ultimate sufficient under *McMullen*). With

clear guidance already provided—and applied here—no further review by this Court is necessary.

Counter-proposition of Law No. 2:

> **An appellate panel is not required to present a motion for *en banc* hearing to the entire court when no intra-district conflict exists.**

Plaintiffs are unsatisfied that their *en banc* petition was not submitted to the entire 12-judge appellate court for resolution. They claim that review by the same appellate panel does not serve the "laudable objectives" this Court announced in *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484. See Mem. in Support of Jurisdiction at 14. But *In re J.J.* merely directed the appellate court "to resolve conflicts within their respective appellate districts through en banc proceedings." Id. at paragraph two of the syllabus. This Court saw no need then tell appellate courts how to do that. In fact, it noted with approval that the Eighth District had procedures in place that supported the *In re J.J.* directive. Id. at ¶20.

Nor did this Court see fit to impose its own procedures when it revisited the *en banc* directive in *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104. There—as in *In re J.J.*—this Court simply reiterated an appellate court's duty to "resolve internal conflicts through en banc proceedings *** ." Id. at ¶40.

The fundamental premise of this now-twice repeated directive is that there be an actual intra-district conflict. Applying thorough and well-established *en banc* procedures implemented by the Eighth District long ago, the appellate court here found no conflict

that would require submission of the petition to the entire court. The directives announced in *In re J.J.* and *In re C.F.* simply are not indicated here.

Nor is this case a "perfect companion" to *McFadden v. Cleveland State Univ.*, No. 2007-0705, which is presently pending before this Court. The Tenth Appellate District in *McFadden* recognized that its decision conflicted with an earlier decision and simply overruled the earlier decision. *McFadden v. Cleveland State Univ.*, 170 Ohio App.3d 142, 2007-Ohio-939, at ¶1 (on reconsideration); see, also, *McFadden v. Cleveland State Univ.*, 10th Dist. No. 06AP-638, 2007-Ohio-298, at ¶10. At issue on discretionary review in this Court is not only the constitutionality of *en banc* proceedings in general, but whether one panel of an appellate court can overrule a decision of another panel of the same court without convening an *en banc* hearing. See Appellant's Merit Br., No. 2007-0705.

Unlike *McFadden*, the *Turner* majority did not overrule a decision of a prior panel. More importantly, none of the cases cited by Plaintiffs in his *en banc* petition conflict with an earlier decision of the Eighth District. There is no basis to accept this case simply because a different *en banc* issue is presently pending before this Court in *McFadden*.

IV. CONCLUSION

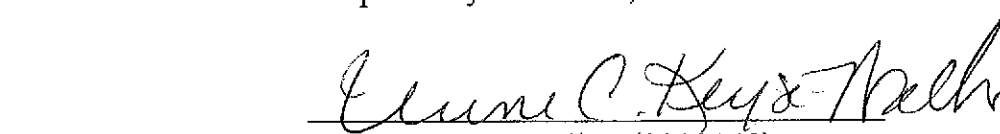
Nothing in this case warrants further review by this Court. Plaintiffs' confusion of the Court's analysis cannot create a public and great general interest where none exists. The Eighth Appellate District court established no new "mathematical percentages"

burden of proof for medical-malpractice cases premised on either a reduced-life-expectancy injury or a loss-of-chance-of-cure injury. To the contrary, it applied well-established principles of causation and damages and simply found Plaintiffs' proof lacking.

Nor is discretionary review warranted on Plaintiffs' *en banc* issue. The Eighth District has well-established procedures for *en banc* proceedings that are premised on the existence of an intra-district conflict. No such conflict exists that would run afoul of this Court's directive to resolve internal conflicts under these procedures. Without any conflict, an *en banc* hearing is unwarranted.

Dr. Rosenfield respectfully requests that this Court deny Plaintiffs' request for discretionary review.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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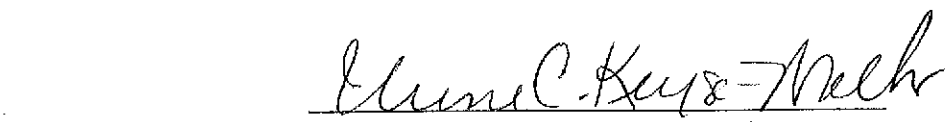

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