Testimony in Opposition to House Bill 7
Before the Ohio House Civil Justice Committee
Loss of Chance
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Good afternoon, Chairman Butler, Vice Chairman Hughes, Ranking Member Boggs, and Members of the House Civil Justice Committee. My name is Sarah Tankersley. I am a member of the Ohio Association for Justice and for the last 19 years I have represented the victims of medical malpractice.

Among other things, House Bill 7 seeks to abolish recovery for victims of medical malpractice when the patient had a less than even chance of recovery from her underlying condition, even when the physician is clearly negligent, and even when her chances of survival or recovery would have been as much as 50% if she had gotten proper care. This proposal protects those who are negligent or careless at the expense of those who place their lives in those hands.

The loss of chance doctrine protects our most vulnerable citizens: those who already have health problems and who have been further harmed by the negligence of a physician. The most common application of loss of chance is with cancer patients, so we will use cancer to illustrate how this works and why it is so important.

Cancer patients fall into three basic categories:

1. those in the very early stages of cancer, where treatment is almost certain to result in full remission or cure: "Mrs. Jones, you have discreet and definable tumor. We want to remove it surgically,

you won't need any other treatment, and your cancer will be gone. Do you want the treatment?"

2. those in the very late stages of cancer, where treatment is almost certainly not going to make any difference: "Mrs. Jones, you have a cancerous tumor. The cancer has spread to your lymph nodes, your bones, and your brain. The only thing that might possibly make a difference is if we immediately start aggressive chemotherapy and radiation treatment. The treatments will make you violently ill, take all of your strength and cost you hours every day. You will have radiation burns and diarrhea and constant debilitating nausea. You will be in pain from the treatment as much as from the disease. Without treatment, you will surely die. Even with the treatment, it is almost certain that you will die. Do you want the treatment?"

3. those with cancer at the in between stages. "Mrs. Jones, you have a tumor and the cancer has spread to your lymph nodes. We aren't sure how much further it has gone. We want to remove the tumor and the lymph nodes, and then start chemo therapy. It might not work. Even with the treatment, there's about a 50% chance that you will die. If you don't have treatment, you will surely die. Do you want the treatment?"

The loss of chance doctrine protects those who go from the in between stage to the final stage because of a doctor's failure. It does not alleviate the need plaintiff patient to prove every element of her claim. In order to prevail, the patient still has to prove all the elements of a tort claim: duty, breach, causation, and injury. The doctor does a test and misreads the results. He had a duty to read the results correctly and he

breached that duty. In any case, loss of chance or otherwise, this basic threshold must be proven before any recovery may be had.

The patient still must also prove causation. This is where the medical and insurance communities want to confuse you. We still have to prove that the doctor's failure caused harm to the patient. We have to prove through medical testimony that the doctor took something from the patient. He took her chance of survival. Because he misread her test results, she went from having a 49% chance of surviving to having a 0% chance of surviving. That has value. It is not the same value as the value of going from a 90% chance of survival to a 0% chance of survival, but it does have value that can be determined by a jury. The jury first determines the value of the lost life (a traditional and common provenance of the jury), and then determines (with the help of expert testimony) the percentage chance she would have survived in the absence of any negligence, reducing the damages for loss of life to that percentage of the total. In other words, if the patient had a 45% chance of survival in the absence of any negligence and the jury determines her life to be worth $100, the compensation to her family for the loss would only be $45.

A case where there is no proximate cause would be where a doctor misreads a test result and tells the patient it was normal, but within a week or two, she sees a different doctor who reads the test correctly and she is diagnosed before the cancer has had a chance to spread or mutate. Doctor A has committed malpractice, but there was absolutely no harm done to the patient. Her condition has not worsened and her chance of survival is exactly the same. In loss of chance, harm is done – her cancer has spread and she has lost a valuable opportunity for treatment and survival. The negligent doctor has created the uncertainty and

should not be able to evade liability for his negligence simply because his patient was already quite sick.

If Doctor A misreads the exact same test on Mrs. Smith and Mrs. Jones, and Mrs. Smith had a 51% chance of survival, but Mrs. Jones' cancer was slightly more advanced so that she had only a 49% chance, is it truly fair that Mrs. Jones not be allowed to recover for her loss?

From a practical perspective, these cases are few and far between. That is not a reason do deny recovery to someone who was denied an opportunity for treatment and a chance at life.

Thank you for your time and attention. I'll be happy to take any questions.