

Medical Malpractice Update

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The Lost Chance Doctrine is Still Alive in Medical Malpractice Actions: *Hemminger v. LeMay*

In *Hemminger v. LeMay*, 2014 IL App (3d) 120392, *modified upon denial of reh'g*, a female patient presented to her physician, an obstetrician/gynecologist, with complaints of abdominal pain and spotting. A physical examination found an enlarged cervix, but the doctor did not perform a biopsy. *Hemminger*, 2014 IL App (3d) 120392, ¶ 8. Six months later, the patient was diagnosed with Stage IIIB cervical cancer. According to national guidelines, this condition carries a five-year survival rate of 32%. *Id.* ¶ 8. Nearly 18 months later, the patient died from the disease. *Id.* ¶ 3. Her surviving spouse filed a medical malpractice lawsuit against the defendant physician and claimed damages under the lost chance doctrine. *Id.* ¶ 4. The plaintiff argued that the defendant's failure to diagnose cancer decreased his wife's chances for survival, even though there was no evidence that a better outcome would have occurred with an earlier diagnosis. *Id.* ¶ 4. In fact, at trial, the plaintiff's only expert opined that it is impossible to know whether earlier treatment would have saved the patient. *Id.* ¶ 11. *Hemminger* is the most recent appellate case to address the lost chance doctrine, and as outlined below, follows the Illinois Supreme Court's holding in *Holton v. Mem'l Hosp.*, 176 Ill. 2d 95 (1997), which resolved a previous conflict among the lower courts on the burden of proof requirement.

The plaintiffs involved in medical malpractice actions must prove that the defendant health-care provider breached the applicable standard of care and that the breach was a proximate cause of the plaintiff's injuries. *Purtill v. Hess*, 111 Ill. 2d 229, 241-42 (1986). The lost chance doctrine is a factor in the proximate cause analysis, and not a separate cause of action, when the plaintiff alleges that the defendant health-care provider's delay in diagnosis or treatment decreased the overall effectiveness of potential recovery. *Holton*, 176 Ill. 2d at 119 (1997).

Illinois courts have been divided on the burden of proof required for claims pursuant to the lost chance doctrine. *Id.* at 105. Some courts have dismissed the theory after finding that it decreases the plaintiff's burden for proving proximate cause. *Id.* The Illinois Supreme Court, however, has stated that the doctrine is a viable theory, and that the plaintiff who claims injuries for a lost chance must prove that that the alleged malpractice proximately caused an increased risk of harm, or a lost chance of recovery, to a reasonable degree of medical certainty. *Id.* at 120. The plaintiff need not show survival or that a better outcome would have resulted, only the negligence of the defendant. *Id.* at 119.

The Illinois Supreme Court put any question of the definition, or the applicability of the lost chance doctrine, to rest in its decision in *Holton*. In that case, the patient presented to the defendant hospital with numbness and tingling below the waist. *Id.* at 100. During her admission she gradually lost the ability to move her legs, but this progression was not reported to the physicians. *Id.* at 101. The patient eventually lost all

motor control from the waist down. *Id.* The nurse called the primary-care physician and neurosurgeon, but did not report that the condition had been progressively declining. *Id.* The patient was transferred to another hospital where she was diagnosed with osteomyelitis, which resulted in paraplegia. *Id.* at 103. The treating neurosurgeon testified that had he been told that the patient's condition had been gradually declining he would have initiated a different course of treatment, and the patient would have had a very strong chance for a positive outcome. *Id.* at 102. The jury found in favor of the plaintiff, and the hospital appealed. *Id.* at 103. The appellate court affirmed. *Id.*

The defendant then argued to the Illinois Supreme Court, *inter alia*, that the appellate court's opinion improperly decreased the plaintiff's proximate cause burden of proof. *Id.* at 104. Specifically, the defendant asserted that the plaintiff failed to put into evidence any expert testimony that established that her paralysis would have been avoided had the nurses alerted the physicians earlier of the patient's declining condition. *Id.* at 107. The court disagreed. *Id.* (citing *Borowski v. Von Solbrig*, 60 Ill. 2d 418, 424 (1975)). The supreme court found that the plaintiff does not need to prove that a better outcome would have resulted absent the alleged negligent care. *Holton*, 176 Ill. 2d at 107. The *Holton* court held that evidence that shows "to a reasonable certainty that negligent delay in diagnosis or treatment . . . lessened the effectiveness of treatment is sufficient to establish proximate cause." (Emphasis added.)" *Id.* at 115 (quoting *Northern Trust Co. v. Louis A. Weiss Mem'l Hosp.*, 143 Ill. App. 3d 479 (1986)). The court reasoned that the nurse's failure to notify the physicians of the patient's change in condition diminished any possibility of receiving the proper treatment. *Holton*, 176 Ill. 2d at 108. The plaintiff presented evidence that a different course of treatment would have been rendered had the nurses properly communicated the patient's change in condition. *Id.* Any question as to the legitimacy of the lost chance doctrine was answered by the court as it stated, "[t]o the extent a plaintiff's chance of recovery or survival is lessened by the malpractice, he or she should be able to present evidence to a jury that defendant's malpractice, to a reasonable degree of medical certainty, proximately caused the increased risk of harm or lost chance of recovery." *Id.* at 119. The court expressly rejected the notion that the plaintiffs cannot recover for medical malpractice injuries if they cannot prove that they would have had a greater than 50% chance of survival or recovery absent the negligent care by the defendant. *Id.* Any evidence of a shortened lifespan goes to the issue of damages, not liability. *Id.* at 120 n.2 (citing *McKellips v. Saint Francis Hosp., Inc.*, 741 P.2d 467, 476-77 (Okla. 1987) and Martin J. McMahon, Annotation, *Medical Malpractice: Measure and Elements of Damages in Actions Based on Loss of Chance*, 81 A.L.R.4th 485 (1990)).

Holton is still the law in Illinois, and appellate courts have both followed and distinguished its holding. In *Aguilera v. Mt. Sinai Med. Ctr.*, the plaintiff's experts testified that a negligent delay in administering a CT scan lessened the effectiveness of treatment. *Aguilera v. Mount Sinai Med. Ctr.*, 293 Ill. App. 3d 967, 968-70 (1st Dist. 1997), *appeal denied*, 178 Ill. 2d 573 (1998). However, the court found that the plaintiff failed to prove causation because the evidence revealed that no medical treatment was available for the decedent's fatal illness, even if the proper treatment had been rendered timely, and that there was no evidence to support the opinions that the negligence lessened the effectiveness of treatment. *Aguilera*, 293 Ill. App. 3d at 974-76. In *Perkey v. Portes-Jarol*, the plaintiff's expert testified that the decedent's pancreatic cancer most likely was incurable, regardless of any treatment, at the time she was seen by the defendant physician. *Perkey v. Portes-Jarol*, 2013 IL App (2d) 120470, ¶ 62. The defendant argued that the plaintiff failed to prove the decedent had a chance to survive, and that this was required to show proximate cause. *Perkey*, 2013 IL App (2d) 120470, ¶ 62. The expert also testified that even though the patient would most likely have eventually succumbed to the disease, her chance for being cured would have doubled had there been no delay in diagnosis by the defendant. *Id.* ¶ 64. Based upon this testimony, the appellate court found that the plaintiff presented at least "some evidence" that the defendant's negligence decreased her chances for survival, and left the question of whether this was enough to establish proximate cause to the jury. *Id.*

In *Seef v. Ingalls Mem'l Hosp.*, the court distinguished *Holton*, finding in favor of the hospital defendant in a lost chance claim when the plaintiff produced no medical expert to establish what treatment would have been rendered had the nurse notified the physician of changes in fetal heart rate. *Seef v. Ingalls Mem'l Hosp.*, 311 Ill. App. 3d 7, 21, 24 (1st Dist. 1999), *appeal denied*, 188 Ill. 2d 584 (2000). Unlike *Holton*, where testimony established that had the physicians known about the patient's change in condition the physician would have provided different treatment, in *Seef*, the defendant physician asserted that he would not have done anything differently even if he had been properly notified of the patient's changes. *Id.* at 20. *See also Reed v. Jackson Park Hosp. Found.*, 325 Ill. App. 3d 835, 840-47 (1st Dist. 2001) (holding that when there is medical evidence that establishes the patient's outcome would have been the same regardless of the treatment rendered, the plaintiff's claim of lost chance must fail).

In *Hemminger*, the appellate court found the plaintiff presented sufficient evidence to establish that the defendant deprived the plaintiff of an opportunity to undergo treatment that could have been effective if administered earlier. *Hemminger*, 2014 IL App (3d) 120392, ¶ 24. The patient's surviving husband brought suit against the treating physician for failure to diagnose his wife's cervical cancer. *Id.* ¶ 4. The defendants moved for a directed verdict at the end of the trial, arguing that the plaintiff failed to meet his burden of proving proximate causation because there was no evidence presented that established the defendant's negligence lessened the patient's chance of survival. *Id.* ¶ 12. The defendant asserted that the plaintiff's expert, who testified that within a reasonable degree of medical certainty the delay in diagnosis caused a decrease in chance for survival, "was unable to opine that the outcome in [the patient's] specific case would have been different with earlier treatment." *Id.* ¶ 23. The trial court granted the defendant's motion for directed verdict, finding that the plaintiff's expert offered only generalized evidence based upon cancer survival rates and a general opinion that an earlier diagnosis leads to better results. *Id.* ¶¶ 12-13.

The appellate court reversed, finding that the plaintiff's expert expressly connected the survival rate statistics to the case by opining that the failure to diagnose the patient's cancer decreased her chances for survival. *Id.* ¶ 28. The court found it significant that the expert did not merely refer to generalized statistics, but instead relied upon her training and education to form an opinion on the patient's cancer staging and rate of survival. *Id.* The court stated that the type of evidence presented by the plaintiff's expert was sufficient to establish a *prima facie* case for proximate causation and to survive a motion for directed verdict, and the plaintiff presented enough evidence to create a triable issue of fact on the issue of proximate cause. *Id.* ¶ 25. The court reached this decision even though the plaintiff's expert testified that there was no way to know how the patient would have responded to treatment had the diagnosis been made earlier. *Id.* ¶ 11. Unlike *Holton*, the *Hemminger* opinion makes no mention of any testimony from the patient's treating oncologist as to what treatment would have been rendered had there been an earlier diagnosis, and appears to have based its holding on the plaintiff's presentation of enough evidence on causation to submit to a jury. *See Holton*, 176 Ill. 2d at 106.

For the plaintiff to prevail on a claim for lost chance of survival or recovery, the evidence must show that within a reasonable degree of medical certainty the alleged negligent delay in diagnosis or treatment lessened the effectiveness of treatment. *Holton*, 176 Ill. 2d at 119. When defending such a claim, it may be beneficial to elicit medical testimony that the outcome would have been identical, or that the subsequent treating physicians would have administered the same treatment, even if the alleged negligent acts did not occur. The determination of proximate cause is an issue of fact and will therefore be a question for the jury.

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