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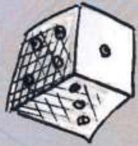
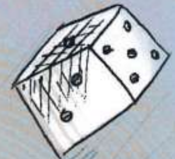


Time for Florida Courts to Revisit *Gooding*?



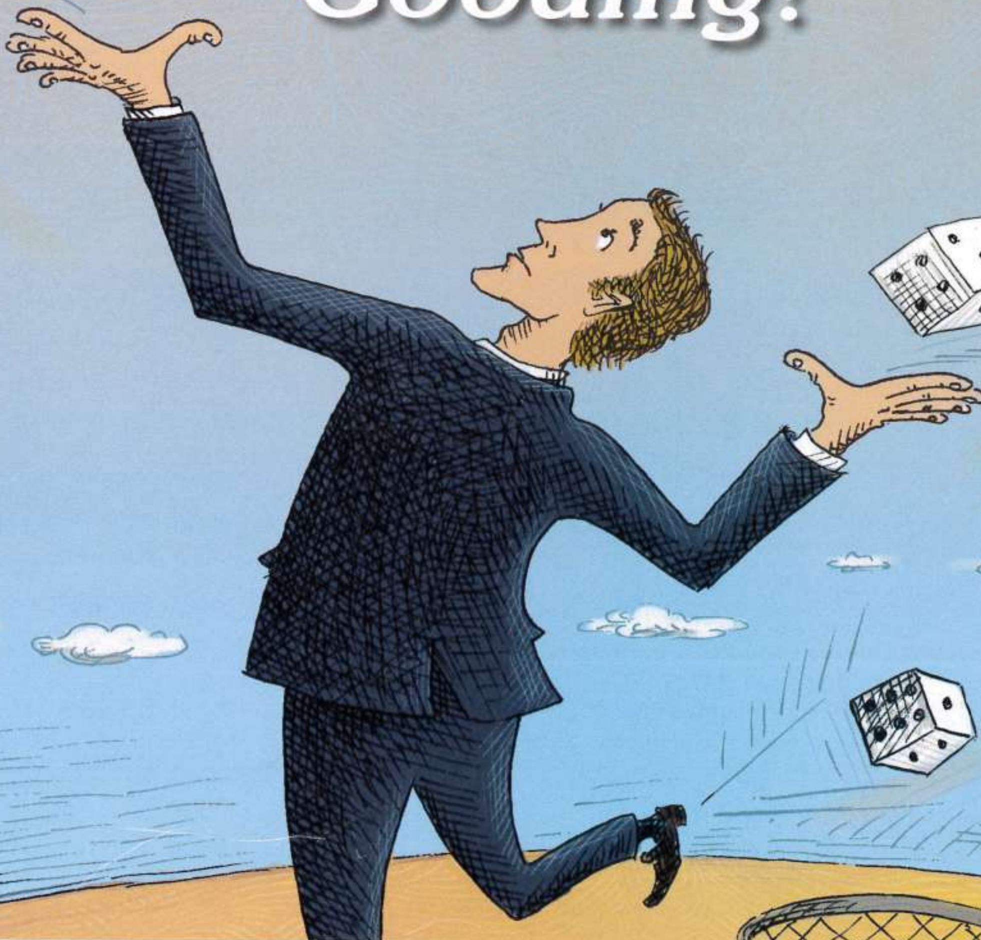


Illustration by Barbara Kelley

It Is Time for Florida Courts to Revisit *Gooding*

by Jed Kurzban, Lauren Gallagher, and Samira Arabnia

"Loss of a chance should be compensable even if the chance is not better than even, and it should be recognized and valued as such rather than as an all-or-nothing proposition. Any other rule fails to satisfy the goals of tort law."

— Professor Joseph H. King, Jr.[1]

When I first met Monica, she was 16 years old and suffering from synovial sarcoma, a rare type of cancer. Doctors told Monica's parents she was eligible for treatment that statistically had a 30 to 40 percent chance of remission. However, Monica was not diagnosed promptly and the cancer had invaded her blood stream, which reduced her chance of remission to 1 percent. The family was distraught and sought help after Monica's treating pediatrician simply failed to follow up on her radiologist's request for a biopsy. Monica and her family want to hold the doctor legally responsible for robbing Monica of her chance to fight the disease and to survive, but can they?

In Florida, Monica has no course of redress. This case had to be rejected because even though Monica lost a 40 percent chance of remission, Florida's standard for causation makes that chance meaningless. Monica could not hold the doctor legally responsible because of the probability standard for causation set forth in *Gooding v. University Hospital Building, Inc.*, 445 So. 2d 1015 (Fla. 1984).

In *Gooding*, the Florida Supreme Court held that "in negligence actions Florida courts follow the more likely than not standard of causation and require proof that the negligence probably caused the plaintiff's injury."[2] To have a viable cause of action against a health-care provider for medical negligence, a plaintiff must show that there is a greater-than-50-percent likelihood that the defendant's negligence caused the plaintiff's injuries.[3] This article addresses Florida's causation standard as set forth in *Gooding*, analyzes alternative causation approaches followed in other jurisdictions, and proposes that it is time for Florida to depart from *Gooding*'s standard of causation and adopt an approach that would best serve human rights, public policy, and the judicial notion of justice.

Elements of Medical Malpractice in Florida

To prevail in a medical malpractice action in Florida, "a plaintiff must establish the following: the standard of care owed by a defendant, the defendant's breach of the standard of care, and that said breach proximately caused the damages claimed."[4] Unlike the majority of jurisdictions, Florida courts follow the "more likely than not" standard of causation.[5] In other words, the plaintiff carries the burden of proof "that the negligence *probably* caused the plaintiff's injury."[6] Thus, the plaintiff "must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result."[7] The Florida Supreme Court's rigid approach to determining proximate causation in medical malpractice actions distinguishes Florida's standard of proof from the majority of other jurisdictions in this country.[8]

Gooding and the 51 Percent Chance Rule

Limited to medical malpractice actions and wrongful death actions that stem from medical malpractice, the Florida Supreme Court in *Gooding* held:

> [A] plaintiff in a medical malpractice action must show more than a decreased chance of survival because of a defendant's conduct. The plaintiff must show that the injury *more likely than not* resulted from the defendant's negligence in order to establish a jury question on proximate cause. In other words, the plaintiff must show that what was done or failed to be done probably would have affected the outcome.[9]

The "more likely than not" standard is satisfied when

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a plaintiff can prove there was a 51 percent or greater chance the injury or death would not have occurred but for the actions, or lack thereof, of the health-care provider.[10] Thus, if a plaintiff has less than a 51 percent chance of survival or treatability prior to a health-care provider's negligent act, the plaintiff does not have a cause of action against that provider in Florida.[11]

While other jurisdictions have moved away from this causation standard, there are still a minority of states that, like Florida, require proof that an injury was probably caused by a health-care provider's negligence.[12] "Probably" is defined as at least a 51 percent chance the injury was caused by such negligence, thus, showing the plaintiff would have been successfully treated for or survived the injury but for the negligent acts of the defendant.[13]

The court in *Gooding* justified the continued use of the more-likely-than-not standard by drawing attention to the fact that no other professional malpractice defendants may be held liable in cases in which the plaintiff is unable to prove the physician's negligence probably, rather than possibly, caused the injury.[14] In addition, the court held that relaxing the causation requirement could create an injustice in that "health care providers could find themselves defending cases simply because a patient fails to improve or where serious disease processes are not arrested because another course of action could possibly bring a better result."[15]

In *Gooding*, the Florida Supreme Court cited and agreed with the more-likely-than-not standard of causation as stated by the Ohio Supreme Court in *Cooper v. Sisters of Charity of Cincinnati, Inc.*, 272 N.E.2d 97 (Oh. 1971). Yet in 2006, the Ohio Supreme Court overruled *Cooper* and recognized the loss-of-chance theory in *Roberts v. Ohio Permanente Medical Group, Inc.*, 668 N.E.2d 480 (Oh. 2006). In doing so, the Ohio Supreme Court acknowledged that since its inception, the more-likely-than-not standard "has been criticized as an 'all-or-nothing' approach by commentators and courts alike."[16] As a result, the court stated that it could "no longer condone this view."[17] The court concluded that in overruling *Cooper*, they "join the majority of states that have adopted the loss-of-chance theory and recognize the importance of compensating plaintiffs in an amount consistent with the defendant's negligent acts or omissions."[18]

The Problem with *Gooding*: For Every Wrong Resulting in a Loss, There Should Be a Remedy

Gooding's more-likely-than-not standard of causation deprives plaintiffs of their fundamental right to free access to the courts and the chance of a legal remedy for their losses and injuries.[19] Moreover, any ambiguities in the judicial construction of a statute must be resolved in favor of free access to the courts.[20]

The goals of tort law and public policy are more adequately satisfied when plaintiffs are compensated in an amount consistent with the defendants' negligent acts or omissions. However, under the more-likely-than-not standard, more weight is placed on the plaintiff's chance of recovery, rather than on the defendant's negligence. Yet, there is value in an individual's chance of recovery, no matter how small this chance may be. Regardless, the *Gooding* rule denies recovery even in cases in which an individual's chance of recovery is significantly reduced.

Additionally, the 51 percent probability standard is arbitrary. It is a mathematical measure used to determine what cannot always be logically or readily addressed mathematically. Although there are general nationwide and worldwide statistics regarding most diseases and injuries delineating the chances of full recovery and/or survival, standards of causation should not be based on such general statistics.[21] Legal standards of causation that are based on these general statistics do not yield the ultimate truth of medicine and/or treatment for such diseases or injuries, especially as it specifically relates to each individual plaintiff. Individuals, such as 16-year-old Monica, have their own chance of remission despite general statistics.

For instance, imagine there is a particular type of treatment or medicine for a disease that can treat four out of 10 individuals who suffer from that disease. Imagine further that a health-care provider withheld that treatment from all 10 individuals, causing all 10 to die. On the other hand, if the health-care provider was not negligent in failing to provide the treatment to the 10 individuals, four of those individuals would have survived the disease. Should there not be a cognizable cause of action in Florida?

Statistically, if the particular medicine or treatment can help four out of 10 individuals at random, *i.e.*, giving all 10 individuals a 40 percent chance to survive, then the general statistics for those 10 individuals fall short of the 51 percent requirement for them to have a cause of action in Florida. Without that medicine, four out of 10 of those individuals, who otherwise could and would have survived if the medicine was given to them, now have a 0 percent chance of surviving and a 100 percent chance of dying. Those individuals lost their chance to fight their disease.[22] At the very least, this rationale should meet the more-likely-than-not standard of causation in light of the fact that the above-described 10 individuals would not have had a 100 percent chance of dying *but for* the health-care provider's negligence in failing to give them medicine. Instead, Florida courts continue to rely on an outdated position based on general statistics to require proof that there would have been at least a 51 percent chance that an individual plaintiff can be treated for a cause of action to exist.

A plaintiff should not be deprived of their right to bring a cause of action against a negligent health-care provider simply because the general statistics about their particular disease suggest they had a less than 51 percent chance of surviving, irrespective of the negligence of the health-care provider.[23] Anyone should be allowed the opportunity to seek to recover damages as a result of someone else's negligence, even if that chance was less than 51 percent initially. A relaxation of this traditional causation requirement in Florida is necessary.

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The Loss-of-Chance/Lost-Opportunity Doctrine

The majority of jurisdictions apply a different standard of causation under the loss-of-chance doctrine, which recognizes a cause of action for the loss of a chance to survive, "even where the patient's chances of survival were evenly balanced or less than likely."[24] In essence, these jurisdictions have modified their causation standard to make an exception to allow recovery when a loss of chance exists. The loss-of-chance doctrine, also referred to as the lost-opportunity doctrine, "allows a plaintiff to recover when the defendant's negligence possibly, *i.e.,* a probability of 50 [percent] or less, caused the plaintiff's injury."[25] A total of 26 jurisdictions now accept and apply the loss-of-chance/lost-opportunity doctrine in medical malpractice litigation.[26] These jurisdictions now favor some application of the doctrine when a cause of action exists if a plaintiff's opportunity to receive treatment for a disease or injury was destroyed or reduced due to the negligence of a health-care provider.[27] Essentially, to maintain a cause of action, the loss-of-chance doctrine requires plaintiffs to present medical testimony from an expert to show that the risk of injury to a plaintiff was increased due to the health-care provider's negligence.[28]

Many states have elected to make the transition from the more-likely-than-not standard to the loss-of-chance doctrine. For example, the Ohio Supreme Court, in changing its standard, explained:

> [W]e recognize that our court has traditionally acted as the embodiment of justice and fundamental fairness. Rarely does the law present so clear an opportunity to correct an unfair situation as does this case before us. The time has come to discard the traditionally harsh view we previously followed and to join the majority of states that have adopted the loss-of-chance theory. A patient who seeks medical assistance from a professional caregiver has the right to expect proper care and should be compensated for an injury caused by the caregiver's negligence which has reduced his or her chance of survival.[29]

As described by the Wyoming Supreme Court, "the loss of an improved chance of survival or improvement in condition, even if the original odds were less than 50 [percent], is an opportunity lost due to negligence."[30] The court pointed out that "much treatment of diseases is aimed at extending life for brief periods and improving its quality rather than curing the underlying disease."[31] In addition, money spent is "aimed at improving the odds."[32]

The many jurisdictions that recognize the loss-of-chance doctrine do so by acknowledging that even the loss of a small chance of cure or better result due to negligence is worth compensating. This lost chance should be compensated for reasons of fairness. In addition, proponents of the doctrine argue that if the initial act of the physician was itself negligent, they should be responsible for the plaintiff's lost chance. Support for the loss-of-chance doctrine is also based on the argument that it is arbitrary to permit or deny recovery based on an arbitrary statistical percentage.[33] No two patients are the same and, thus, statistics cannot accurately predict what the outcome will be for a particular patient.

The Problem With Loss of Chance: Unfairness and Uncertainty

Opposition to the loss-of-chance doctrine is based on several policy arguments, which in turn support the use of *Gooding*'s more-likely-than-not standard of causation. The root of these arguments in opposition of the loss-of-chance doctrine stem from the idea that any standard less than more-likely-than-not violates traditional tort principles.[34] Since tort liability is rooted in fault, should a defendant be held at fault if they are not more than 50 percent responsible for causing the injury? Doing so can be viewed as inconsistent with the purposes of tort law, which attempt to compensate one person for injuries they sustained due to the conduct of another.[35]

In addition, the more-likely-than-not standard creates a more clear-cut and predictable approach. By setting a specific standard of 50 percent, jurors are more easily able to apply the law when deciding causation issues.[36] This clear-cut standard is more manageable for juries. It is a difficult proposition to request a juror to determine that a defendant more-likely-than-not caused a death when there was already a less than 50 percent chance of avoiding the death to begin with.

Further, those in opposition point out that by applying a lesser standard with the loss of chance doctrine, liability is unjustly imposed on physicians. As discussed previously, no other professional malpractice defendants may be held liable when the plaintiff only proves that the physician's negligence possibly caused the injury, rather than probably.[37] In the end, the number of claims could increase and in turn, the price of malpractice insurance and health costs.[38]

Approaches to Loss-of-Chance/ Lost-Opportunity Doctrine

Although the majority of jurisdictions have now adopted the loss of chance doctrine, these courts have been unable to apply a uniform approach. Courts typically adopt one of four approaches: 1) pure loss of chance, 2) substantial loss of chance, 3) increased risk of harm, or 4) combination of the increased risk of harm/ substantial approach.

In *Weymers v. Khera*, 563 N.W. 2d 647 (Mich. 1997), the Michigan Supreme Court discusses the first two approaches to the loss-of-chance doctrine allowing a plaintiff to recover. The *Weymers* court describes the pure lost-chance approach as follows:

> The pure lost chance approach allows a plaintiff to recover for his injury even though it was more likely than not that he would have suffered the injury if the defendant had not been negligent. The plaintiff only has to show that the defendant's negligence decreased the plaintiff's chance, no matter how slight, of avoiding the injury. If the plaintiff makes such a showing, he receives full damages.[39]

Jurisdictions that follow the pure lost-chance approach focus on the alleged injury. Plaintiffs are required to apply the more-probable-than-not method of causation, "but the loss of chance becomes the compensable interest, not the ultimate injury or death."[40] Jurisdictions that adopt the pure lost-chance approach calculate damages by a percentage probability test. This approach would allow a plaintiff to recover damages equal to the percentage of chance lost.[41] For example, if a plaintiff lost a 30 percent chance of survival due to the defendant's negligence, the plaintiff could recover 30 percent of the damages allowed based on the value of the plaintiff's life. New Hampshire and Georgia are among the jurisdictions that have discussed adopting the pure lost-chance approach.[42]

Second, the *Weymers* court describes the substantial possibility approach as follows:

> Under this approach, the plaintiff must show that there is a substantial possibility that the defendant's negligence caused his injury. It is unclear what constitutes a "substantial possibility." It is clear however, that it does not have to be more than fifty percent. Thus, the substantial possibility approach is identical to the other approaches to the extent that each approach allows a plaintiff to recover for his injury even though it was more likely than not that he would have suffered the injury if the defendant had not been negligent.[43]

The substantial possibility approach differs from the pure lost-chance approach in that the substantial possibility approach views the ultimate harm as the patient's death.[44] Under the substantial possibility approach, plaintiffs are required to provide evidence, which shows that the defendant's negligence resulted in a substantial loss of chance for recovery or survival.[45] Once this evidence is presented, it is up to the jury to determine causation — whether the defendant's actions proximately caused the plaintiff's injury or death.[46] Jurisdictions such as New York, Nevada, and Wyoming follow the substantial possibility approach.[47]

The third approach is the increased-risk-of-harm doctrine, which requires that the defendant's act expose the plaintiff to an increased risk of harm.[48] This approach follows the *Restatement Second of Torts*, §323, which provides:

> Negligent Performance of Undertaking to Render Services. One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) *his failure to exercise such care increases the risk of such harm,* or (b) the harm is suffered because of the other's reliance upon the undertaking.[49]

Under the increased risk-of-harm approach, expert testimony is required to show that the defendant's negligent act or omission increased the plaintiff's risk of harm.[50] The jury then determines whether the negligence was a substantial factor in bringing about the patient's death.[51] This approach is followed by jurisdictions including Pennsylvania and Montana.[52] Other states, including Illinois, follow a combination of the increased risk of harm and the substantial possibility approaches or use slightly different terminology.[53]

Conclusion

Gooding has been a landmark case for the more-likely-than-not standard of causation for decades in Florida. This standard ensures a harsh result and deprives many plaintiffs of their right to free access to courts and to recover for an injury simply because they had less than a 51 percent chance to recover, regardless of how flagrant the medical provider's negligence was. Plaintiffs who have up to a 50 percent

chance to fully recover from an injury or up to a 50 percent chance to survive from a disease, prior to the negligence of a health-care provider, should also have the ability to recover for their loss.

A cause of action for medical malpractice should not be stricken simply due to statistics about a disease or an injury that are general in nature and not specific to the facts and circumstances of a particular plaintiff. Just as in other types of action in Florida, the particular, variable, and unique factual circumstances of each and every plaintiff in a case is, and should be, considered by jurors. This premise should also hold true in medical malpractice actions.

Any lost opportunity or loss of a chance to fully recover or survive from an injury or disease due to the negligence of a health-care provider should be a cognizable injury in Florida, regardless of how small the chance to recover or survive is. These plaintiffs lost 100 percent of their chance to fight their disease or injury as a result of a health-care provider's negligence, and they should be able to recover for same. It is time for Florida to follow in the footsteps of the majority of jurisdictions and revisit the standard of causation issue in medical malpractice actions. Medicine has evolved, but the law in Florida has not.❑

[1] Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale L. J. 1353 (1981).

[2] *Gooding*, 445 So. 2d at 1018.

[3] *Wroy v. N. Miami Med. Ctr., Ltd.*, 937 So. 2d 1116, 1117 (Fla. 3d DCA 2006); *Chaskes v. Gutierrez*, 116 So. 3d 479, 489 (Fla. 3d DCA 2013); *Rivet v. Perez,* 655 So. 2d 1169, 1171 (Fla. 3d DCA 1995).

[4] *Gooding*, 445 So. 2d at 1018.

[5] *Id.*

[6] *Id.* (emphasis added).

[7] *Id.* (quoting Prosser, Law of Torts §41 (4th ed. 1971)).

[8] A survey of the 50 states reveals that 26 have adopted a form of the loss of chance doctrine in medical malpractice actions. These states are Arizona (*Thompson v. Sun City Community Hosp., Inc.*, 688 P.2d 605 (Ariz. 1984)); Delaware (*U.S. v. Anderson*, 669 A.2d 73 (Del. 1995)); Hawaii (*McBride v. U.S.*, 462 F.2d 72 (9th Cir. 1972)); Illinois (*Scardina v. Nam*, 775 N.E.2d 16 (Ill. 2002)); Indiana (*Alexander v. Scheid*, 726 N.E.2d 272 (Ind. 2000)); Iowa (*Wendland v. Sparks*, 574 N.W.2d 327 (Iowa 1998)); Kansas (*Pipe v. Hamilton*, 56 P.3d 823 (Kan. 2002)); Louisiana (*Smith v. State, Dept. of Health and Hosps.*, 676 So. 2d 543 (La. 1996)); Massachusetts (*Matsuyama v. Birnbaum*, 890 N.E.2d 819 (Mass. 2008)); Minnesota (*Dickhoff ex rel. Dickhoff v. Green*, 836 N.W.2d 321 (Minn. 2013)); Missouri (*Holloway v. Cameron Community Hosp., Inc.*, 18 S.W.3d 417 (Mo. App. W. Dist. 2000)); Montana (*Aasheim v. Humberger*, 695 P.2d 824 (Mont. 1985)); Nevada (*Perez v. Las Vegas Med. Ctr.*, 805 P.2d 589 (Nev. 1991)); New Jersey (*Scafidi v. Seiler*, 574 A.2d 398 (N.J. 1990)); New Mexico (*Alberts v. Schultz*, 975 P.2d 1279 (N.M. 1999)); New York (*Kallenberg v. Beth Israel Hosp.*, 357 N.Y.S.2d 508 (N.Y. App. Div. 1st Dept. 1974), *aff'd*, 337 N.E.2d 128 (N.Y. 1975)); North Dakota (*VanVleet v. Pfeifle*, 289 N.W.2d 781 (N.D. 1980)); Ohio (*Roberts v. Ohio Permanente Medical Group, Inc.*, 668 N.E. 2d 480 (Oh. 2006)); Oklahoma (*McKellips v. St. Francis Hosp., Inc.*, 741 P.2d 467 (Okla. 1987)); Oregon (*Smith v. Providence Health & Services-Oregon*, 393 P.3d 1106 (Or. 2017)); Pennsylvania (*Hamil v. Bashline*, 392 A.2d 1280 (Pa. 1978)); Utah (*Medved v. Glenn*, 125 P.3d 913 (Utah 2005)); Washington (*Herskovits v. Group Health Co-op. of Puget Sound*, 664 P.2d 474 (Wash. 1983)); West Virginia (*Thornton v. CAMC, Etc.*, 305 S.E.2d 316 (W. Va. 1983)); Wisconsin (*Fischer by Fischer v. Ganju*, 485 N.W.2d 10 (Wis. 1992)); and Wyoming (*McMackin v. Johnson Cty. Healthcare Ctr.*, 73 P.3d 1094 (Wyo. 2003), *on reh'g*, 88 P.3d 491 (Wyo. 2004)). Seventeen states have rejected the loss of chance doctrine. These states are Alabama (*Hrynkiw v. Trammell*, 96 So. 3d 794 (Ala. 2012)); Alaska (*Crosby v. United States*, 48 F. Supp. 2d 924 (D. Alaska 1999)); Connecticut (*Boone v. William W. Backus Hosp.*, 864 A.2d 1 (Conn. 2005)); Florida (*Gooding*, 445 So. 2d 1015); Idaho (*Manning v. Twin Falls Clinic & Hosp., Inc.*, 830 P.2d 1185 (Idaho 1992)); Kentucky (*Gill v. Burress*, 382 S.W.3d 57 (Ky. App. 2012)); Maryland (*Fennell v. S. Maryland Hosp. Ctr., Inc.*, 580 A. 2d 206 (Md. 1990)); Michigan (Mich. Comp. Laws Ann. §600.2912a (West)); Mississippi (*Est. of Sanders v. U.S.*, 736 F.3d 430 (5th Cir. 2013)); Nebraska (*Rankin v. Stetson*, 749 N.W.2d 460 (Neb. 2008)); New Hampshire (N.H. Rev. Stat. Ann. §507E:2 (2009)); South Carolina (*Jones v. Owings*, 456 S.E.2d 371 (S.C. 1995)); South Dakota (S.D. Codified Laws §20-9-1 (2004)); Tennessee (*Kilpatrick v. Bryant*, 868 S.W.2d 594 (Tenn. 1993)); Texas (*Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397 (Tex. 1993)); Vermont (*Smith v. Parrott*, 833 A.2d 843 (Vt. 2003)); and Virginia (*Murray v. U.S.*, 215 F.3d 460 (4th Cir. 2000)). Seven States are either conflicted or have yet to address the issue specifically. These include Arkansas (*Holt ex rel. Est. of Holt v. Wagner*, 43 S.W.3d 128 (Ark. 2001)); California (*Bird v. Saenz*, 103 Cal. Rptr. 2d 131, 138 n.3 (Cal. Ct. App. 2001), *rev'd on other grounds*, 51 P.3d 324 (Cal. 2002)); Colorado (*Reigel v. SavaSeniorCare LLC*, 292 P.3d 977 (Colo. App. 2011)); Georgia (*Richmond Cty. Hosp. Auth. Operating Univ. Hosp. v. Dickerson*, 356 S.E.2d 548 (Ga. 1987)); Maine (*Phillips v. E. Maine Med. Ctr.*, 565 A.2d 306 (Me. 1989)); North Carolina (*Katy v. Capriola*, 742 S.E.2d 247 (N.C. App. 2013)); and Rhode Island (*Contois v. Town of W. Warwick*, 865 A.2d 1019 (R.I. 2004)).

[9] *Gooding*, 445 So. 2d at 1020 (emphasis added).

[10] *Chaskes*, 116 So. 3d at 488 (quoting *Jackson Cty. Hosp. Corp. v. Aldrich*, 835 So. 2d 318, 328 (Fla. 1st DCA 2002)); *Rivet*, 655 So. 2d at 1171; *Wroy*, 937 So. 2d at 1117.

[11] *Chaskes*, 116 So. 3d at 488. It should be noted that although some courts use the 51 percent standard, "probably" only requires a greater than 50 percent chance, which could still be less than 51 percent. Since numerous Florida courts have affirmed cases with 51 percent terminology, the authors use this standard for readability.

[12] *See* note 8.

[13] *See Hanselmann v. McCardle*, 267 S.E.2d 531 (S.C. 1980) (a plaintiff must show that but for the defendant's error, death would have been averted); *Rewis v. United States*, 503 F.2d 1202 (5th Cir. 1974) (a plaintiff must prove that if the doctor had done what proper medical practice required, it is more likely than not that the child would have been saved); *Alfonso v. Lund,* 783 F.2d 958 (10th Cir. 1986) (the proof that the injury was caused by the negligence of the defendant must show probabilities); *Morgenroth v. Pacific Medical Center, Inc.,* 54 Cal. App. 3d 521 (Cal. 1d 1976) (probability is the standard of proximate cause); *Anthony v. Hospital Service Dist. No. 1,* 477 So. 2d 1180 (La. App. 1985) (expert testimony is required on whether the person more probably than not would have survived had proper diagnosis or treatment been given).

[14] *Gooding,* 445 So. 2d at 1020.

[15] *Id.*

[16] *Roberts,* 668 N.E.2d at 483.

[17] *Id.* at 484.

[18] *Id.* at 485.

[19] *See* Fla. Const. art 1, §21 ("The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay.").

[20] *Id.* at 812; *see also G.B.B. Investments, Inc. v. Hinterkopf*, 343 So. 2d 899 (Fla. 3d DCA 1977) ("Constitutional right to free access to courts guarantees every person right to free access on claims of redress of injuries free of unreasonable burdens and restrictions and any restrictions must be liberally construed in favor of constitutional right."); *see also Swain v. Curry*, 595 So. 2d 168, 174 (Fla. 1st DCA 1992) (open courts provision of Florida Constitution guarantees to every person the right to have free access to courts or claims or redress of injury free of unreasonable burdens and restrictions).

[21] *See, e.g.,* Brain Aneurysm Foundation, Brain Aneurysm Statistics and Facts, http://www.bafound.org/about-brain-aneurysms/brain-aneurysm-basics/brain-

aneurysm-statistics-and-facts/; National Cancer Institute, Cancer Stat Facts: Cancer of Any Site, https://seer.cancer.gov/; University of Utah Health, Non-Hodgkin Lymphoma: Your Chances for Recovery, https://healthcare.utah.edu/healthlibrary/related/doc.php?type=34&id=BLymD5.

[22] It is an injustice for courts to take away a cause of action from individuals who wish to fight their disease/injury but could not do so as a result of a health-care provider's negligence, while at the same time allowing a criminal and civil cause of action against health-care providers who help people that do not wish to fight their disease to die. *See* FLA. STAT. §§782.08, 768.19. There is no rational basis for recognizing one cause of action and not the other.

[23] This is especially true today in a world in which medical breakthroughs occur daily for diseases that are frequently misdiagnosed. Many diseases that are treatable today through new scientific research and medicine were not treatable in recent history.

[24] *See Gooding*, 445 So. 2d at 1018.

[25] *See Weymers v. Khera*, 563 N.W.2d 647, 652 (Mich. 1997).

[26] *See* note 8.

[27] *See Roberts,* 668 N.E.2d 480.

[28] *See id.*

[29] *Id.* at 484.

[30] *McMackin*, 73 P.3d at 1099.

[31] *Id.*

[32] *Id.*

[33] *See* discussion above.

[34] *Fennell*, 580 A. 2d at 215; *Crosby*, 48 F. Supp. 2d at 931.

[35] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §127 at 6 (5th ed. 1984).

[36] *Id.* at 214; *Kramer,* 858 S.W.2d at 405.

[37] *Gooding*, 445 So. 2d at 1019-20; *Kilpatrick*, 868 S.W.2d at 603.

[38] *Crosby*, 48 F. Supp. 2d at 931; *Fennell*, 580 A.2d at 215; *Gooding*, 445 So. 2d at 1019.

[39] *Weymers*, 563 N.W.2d at 653 (internal citations omitted).

[40] Tory A. Weigand, *Loss of Chance in Medical Malpractice: The Need for Caution*, 87 MASS. L. REV. 3, 9 (2002), *available at* http://www.massbar.org/publications/massachusetts-law-review/2002/v87-n1/loss-of-chance-in-medical. *See also Lord v. Lovett*, 770 A.2d 1103, 1106-08 (N.H. 2001); Michelle L. Truckor, Comment, *The Loss Of Chance Doctrine: Legal Recovery For Patients On The Edge Of Survival*, 24 U. DAYTON L. REV. 349, 358 (1999).

[41] *See* King, *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L. J. at 1382-84.

[42] *Lord,* 770 A.2d at 1103; *Richmond Cty. Hosp. Auth. Operating Univ. Hosp.*, 356 S.E.2d at 548.

[43] *Weymers*, 563 N.W.2d at 653-654 (internal citations omitted).

[44] *McMackin*, 88 P.3d at 492.

[45] *See* King, *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L. J. at 1368; *Herskovits*, 664 P.2d at 484.

[46] *Kallenberg,* 337 N.E.2d at 128; *McMackin*, 73 P.3d at 1094; *Perez*, 805 P.2d at 589.

[47] *Id.*

[48] *Hamil*, 392 A.2d at 1288-89; *Aasheim*, 695 P.2d at 828.

[49] *See Hamil*, 392 A.2d at 1286 (emphasis added).

[50] *Id.*; *Beswick v. City of Philadelphia*, 185 F. Supp. 2d 418, 433 (E.D. Pa. 2001); *Aasheim*, 695 P.2d at 824.

[51] *Id.*

[52] *Id.*

[53] *Scardina*, 775 N.E.2d at 16.

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