[Cite as *Rosenshine v. Med. College Hosps.*, 2012-Ohio-2864.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Dawn Rosenshine,	:	
Plaintiff-Appellant,	:	No. 11AP-374 (Ct. of Cl. No. 1998-04701)
v.	:	(REGULAR CALENDAR)
Medical College Hospitals,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 26, 2012

Boss & Vitou Co., L.P.A., and *Mark F. Vitou*, for appellant.

Michael DeWine, Attorney General, *Eric A. Walker* and *Anne Berry Strait*, for appellee.

APPEAL from the Court of Claims of Ohio

DORRIAN, J.

{¶ 1} Plaintiff-appellant, Dawn Rosenshine ("appellant"), executor of the estate of Theresa Dougherty, appeals from a decision of the Court of Claims of Ohio in favor of defendant-appellee, Medical College Hospitals, now known as University of Toledo Medical Center (hereinafter "appellee," "MCH" and "UT" will be used interchangeably), on wrongful death and survivorship claims. Because we conclude that the trial court's decision was against the manifest weight of the evidence, we reverse.

{¶ 2} Referred by her internists, Drs. Eloise Gard and Douglas Federman, on May 30, 1995, Ms. Dougherty was admitted to MCH for a cardiac catheterization. The admitting physician, Dr. Blair Grubb, was the attending physician for the cardiology services group at that time. A resident, Dr. William Walston, was then on rotation in the group, working under the direction of Dr. Michael Lorton, a cardiology fellow. Upon admission, Dr. Walston ordered that Ms. Dougherty undergo a chest x-ray to exclude the

possibility of myocardial infarction. The x-ray was taken and a report was prepared by a radiologist, Dr. Lee Woldenberg, who noted a "right upper lung mass, measuring 2.5 centimeters." On June 2, 1995, Ms. Dougherty was discharged from MCH. A successor resident to Dr. Walston, Dr. Banerjee, prepared the discharge summary, and Dr. Grubb signed it. The discharge summary did not refer to the right upper lung mass found in the x-ray, and no one informed Ms. Dougherty of the same.

{¶ 3} In November 1996, Ms. Dougherty was diagnosed with cancer in both of her lungs. The cancer had metastasized to her brain. Ms. Dougherty passed away on November 3, 1997.

{¶ 4} On April 24, 1998, appellant filed wrongful death and survivorship claims alleging that the medical care provided to Ms. Dougherty by appellee, its agents and/or employees, was provided in a negligent manner, below the accepted standard of medical care. Specifically, appellant alleged that appellee, its agents and/or employees, failed to properly diagnose and/or treat and/or inform appellant of the cancer from which she suffered. Appellant further alleged that the death of Ms. Dougherty was the direct and proximate result of said negligence and recklessness. Appellant filed separate claims against Drs. Woldenberg, Federman, Gard, and Grubb in the Lucas County County Court of Common Pleas.

{¶ 5} There were numerous delays in the case at the trial court level. Ultimately, the trial court proceeded by bifurcating the issues of liability and damages. The parties agreed to submit the case to the court for a trial on the merits based upon briefs and supporting exhibits, including medical records, depositions, and affidavits of Ms. Dougherty's next of kin.

{¶ 6} On March 15, 2011, the trial court filed a decision finding that Drs. Walston and Banerjee fell below the standard of care in not informing Ms. Dougherty of the results of the chest x-ray prior to her discharge.[1] The court found Dr. Lorton negligent in his supervision of Drs. Walston and Banerjee and therefore also in breach of the standard of

[1] The evidence was unclear as to whether Dr. Walston ever saw the x-ray report of Dr. Woldenberg because he left the cardiology services group the day after the x-ray was ordered and he was transferred to the family medicine group. The trial court found, however, that Dr. Walston "did not meet the standard of care in that he both failed to follow up on the chest x-ray that he had ordered and failed to communicate the need for a follow-up by Dr. Banerjee when he turned Dougherty's care over to him." (Mar. 15, 2011 Decision, 7.)

care. Thus, the court held that MCH could be held liable to appellant for the negligence of its employees under the theory of respondeat superior. (Mar. 15, 2011 Decision at 7-8.) The trial court went on to find, however, that "plaintiff did not present sufficient evidence to prove to the court that an earlier diagnosis and surgical intervention in May 1995 would have saved Dougherty's life." (Decision at 12.) Therefore, the trial court entered judgment in favor of appellee.

{¶ 7} Appellant appeals from the Court of Claims' decision, setting forth the following assignment of error for this court's review:

> The trial court's entry of judgment for the Defendant-Appellee and against the Plaintiff-Appellant was against the manifest weight of the evidence.

{¶ 8} In rendering judgment for appellee, the trial court held: "Inasmuch as plaintiff bears the burden of proof on the critical element of causation, the court finds that plaintiff has failed to establish, by the preponderance of the evidence, that defendant's negligence was a proximate cause of Dougherty's harm." (Decision at 12.) More specifically, the trial court concluded that appellant had "not persuaded the court that defendant's failure to diagnose the 2.5 centimeter mass in Ms. Dougherty's lung was the proximate cause of her death." (Decision at 12.) Appellant argues that this judgment was against the manifest weight of the evidence.

{¶ 9} "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 280 (1978). "Under the civil [manifest-weight-of-the-evidence] standard, examining the evidence underlying the trial judge's decision is a prerequisite to determining whether the trial court's judgment is supported by some competent, credible evidence." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 40. Accordingly, a reviewing court must consider the evidence presented in the trial court. However, we will not reverse a decision based on a difference of opinion regarding the credibility of the witnesses and evidence presented at trial. *Id.* at ¶ 24, citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 81 (1984). Rather, the court will determine whether, if believed by the trial court, the evidence constitutes some competent, credible evidence to

support the trial court's judgment. *Kleisch v. Cleveland State Univ.*, 10th Dist. No. 05AP-289, 2006-Ohio-1300, ¶ 30; *Jenkins v. Ohio State Univ. Hosps.*, 10th Dist. No. 96API01-119 (July 23, 1996); *Hughes v. Univ. of Cincinnati Hosp.*, 10th Dist. No. 99AP-1146, (Sept. 7, 2000).

{¶ 10} "The general rule of causation in medical malpractice cases requires the plaintiff to present some competent, credible evidence that the defendant's breach of the applicable standard of care 'probably' caused plaintiff's death." *McDermott v. Tweel*, 151 Ohio App.3d 763, 2003-Ohio-885, ¶ 39 (10th Dist.), citing *Hitch v. Ohio Dept. of Mental Health*, 114 Ohio App.3d 229 (10th Dist.1996). " 'Probably' is defined as 'more likely than not' or greater than fifty percent chance." *Id.*, quoting *Miller v. Paulson*, 97 Ohio App.3d 217 (10th Dist.1994). The plaintiff must prove this by a preponderance of the evidence.

{¶ 11} As to the issue of proximate cause, the parties presented dueling expert witnesses. To support the argument that the failure to inform Ms. Dougherty of the right upper lung mass was the proximate cause of her death, appellant presented Dr. Robert J. Steele. At the time of his deposition, Dr. Steele was board certified in internal medicine and medical oncology and was licensed to practice medicine in the state of Indiana. He had been practicing in the field of oncology for 23 years. He estimated that two-thirds of his time was spent in medical oncology. (Steele depo. 5-13, Exhibit No. 1.) To refute this argument, appellee presented Dr. Harvey Lerner. Dr. Lerner was on the faculty of the University of Pennsylvania School of Medicine and previously was the head of surgical oncology and cancer chemotherapy at Pennsylvania Hospital. (Lerner depo. 7-12.)

{¶ 12} To begin, we will examine the testimony of appellee's expert witness, Dr. Lerner, to determine whether, if believed by the trial court, it constitutes some competent, credible evidence to support judgment in favor of appellee. We first note that it is not entirely clear from its decision that the trial court believed Dr. Lerner's testimony. The trial court did not specifically state that it found Dr. Lerner's testimony to be more credible than the testimony of Dr. Steele, appellant's expert, or for that matter to be credible at all. In addition, with regard to Dr. Lerner's conclusion that the eventual development of lesions in the left lung and brain was evidence that the cancer had metastasized in 1995, the court commented that Dr. Lerner "was unwilling to say with a reasonable degree of medical certainty that Dougherty's cancer had metastasized by May

1995." (Decision at 12.) Nevertheless, we will assume for the purpose of analysis that the trial court believed Dr. Lerner's testimony and will address now whether it constitutes some competent, credible evidence in support of a judgment in favor of appellee.

{¶ 13} Dr. Lerner opined that the delay in treatment did not affect appellant's outcome and that "whatever was going to happen as far as survival or death was not going to change." (Lerner depo. 35.) He supported this opinion by stating: "I have had the opportunity of seeing what subsequently transpired in her natural history of her tumor." (Lerner depo. 37.) Dr. Lerner further stated: "I believe [Dr. Steele's assumptions] are not valid because we *know* what subsequently appeared." (Emphasis added; Lerner depo. 40.) Dr. Lerner summarized his opinion during the following exchange in his deposition:

> A. * * * My opinion is if [Ms. Dougherty] had her surgery done in '95 and the 2.5 centimeter [right lung] lesion removed, she would have developed the left upper lobe lesion and would have developed a known brain metastases.
>
> Q. Regardless of that surgery?
>
> A. Regardless of the surgery. Now I only *know* that because I am looking at things in retrospect. I would not have known that on the date of surgery if she were recepted. But I *know* the subsequent unfolding of the events.

(Emphasis added; Lerner depo. 48.)

{¶ 14} Although Dr. Lerner purported to know what happened with Ms. Dougherty, he admitted to a lot of unknowns. Dr. Lerner did not know important facts related to Ms. Dougherty's condition in 1996 when the cancer was diagnosed. He did not know: (1) the brain tumor size in 1996, (2) the node size in 1996, or (3) whether the cancer in the left lung in 1996 was the same type of cancer in the right lung. Regarding the brain tumor size in 1996, Dr. Lerner stated, "I don't have a measurement of a lesion in her brain, but I assume it's at least a centimeter in size but I don't know that because none of the reports list the size of the tumor." (Lerner depo. 39.) He further stated:

> Q. Do you have any opinion as to, and maybe you don't, but do you have an opinion as to when cancer was present in the brain?

> A. I can give you a better estimate of that when I get a measurement.
>
> Q. I think you mentioned before that there was no measurement of the size of that lesion?
>
> A. Not on the reports that I received.

(Lerner depo. 49-50.) Regarding the size of the nodes in November of 1996, Dr. Lerner stated he would need more information: "I would like somebody to give me the size of what they estimated that a size of the nodes were in on the CT scan or X-ray of 11/96." (Lerner depo. 45.) Regarding whether the cancer in the left lung in 1996 was the same type of cancer in the right lung, Dr. Lerner testified:

> A. [T]he only microscopic diagnosis of cancer as I recall is the left upper lobe 1.5 centimeter lesion and the others at least to the best of my knowledge, the big lesion was never formally under the microscope diagnosed as a lung cancer or an adenocarcinoma.
>
> Q. What is the significance of that for you, Doctor?
>
> A. Well, it would have been nice to know if they were the same cell type or different cell types.
>
> Q. That would be –
>
> A. They look similar or dissimilar under the microscope.
>
> Q. Does that relate to whether or not they are simultaneous cancer?
>
> A. They could be simultaneous.
>
> Q. A multiple sight [sic]?
>
> A. Right. Or metastases. But if they were different cell types, they would have to be different cancers. If they are the same, then you assume if they look under the microscope the same, that one came from the other. But it's possible to make two different cancers in a lung at the same time or in proximity to each other.

(Lerner depo. 41-42).

{¶ 15} Dr. Lerner also did not know important facts of Ms. Dougherty's condition in 1995. In addition to the right lung mass, Dr. Woldenberg's 1995 report noted the presence of scarring in Ms. Dougherty's left lung. However, Dr. Lerner admitted that he did not know whether the left lung scarring indicated in the 1995 report was cancerous or whether the cancer had spread to the nodes as of 1995. Regarding whether the left lung scarring noted in 1995 was cancerous, Dr. Lerner testified as follows:

> Q. Is it your opinion that that reference to the scarring in the left lung in 1995 is referenced to another sight [sic] of cancer?
>
> A. It may be. I have not reviewed the films and I have to go over them with the radiologist. * * *
>
> Q. You don't have any opinion as to whether or not that scarring as noted in the May 31, 1995 is cancerous; is that correct?
>
> A. I can't tell you that. * * *

(Lerner depo. 40-41.) Similarly, regarding whether the cancer had spread to the nodes in 1995, Dr. Lerner testified:

> Q. Do you have an opinion as to whether or not that cancer had spread to any of the notes [sic] in May of 1995?
>
> A. I need more information. The information I need is I would like somebody to give me the size of what they estimated that a size of the nodes were in on the CT scan or X-ray of 11/96, if I can get some estimate of that, I would be glad to answer the question.
>
> * * *
>
> Q. And maybe I am not understanding you, but am I correct to assume that at present you have no opinion as to whether or not those notes [sic] were negative or positive?
>
> A. I can't answer that question until I get that information we need.
>
> Q. Without that information you're not prepared to render any opinion as to whether or not the notes [sic] were positive or negative in May of '95; isn't that correct?

A. That's correct.

(Lerner depo. 45-47.)

{¶ 16} Without *knowing* these important facts, Dr. Lerner declined to opine regarding Ms. Dougherty's chances of survival in 1995:

> Q. Based on what you do know, which is the opinion that the cancer was present in both lungs in May of 1995[,] but the status of the nodes are unknown, given those facts, do you have an opinion as to the reasonable statistical likelihood of Mrs. Dougherty's survival?
>
> A. I can't answer that until I get the answer about the size of the notes [sic] in '96 and then I'll be glad to answer that question straightaway.
>
> Q. Let me ask it this way to see if I can get some idea. We might have to come back and revisit this.
>
> A. Given a choice, I'd like to have a radiologist give me a size of the tumor in the brain and the size of the lymphnodes [sic] in the chest at the '96 diagnostic studies.

(Lerner depo. 45-46.)

{¶ 17} Dr. Lerner did testify that, even without knowing the size of the nodes and the brain lesion, he still believed that, by May 1995, Ms. Dougherty already had metastasis in her left lung and her brain. (Lerner depo. 46.) Yet, as noted above, he commented, "it would have been nice to know if they were the same cell type or different cell types" in the right and left lung because "if they were different cell types, they would have to be different cancers. If they are the same, then you assume if they look under the microscope the same, that one came from the other." (Lerner depo. 41-42.) But, Dr. Lerner did not know whether they were the same cell type, so this could not be the basis of his opinion that there was metastasis in May 1995. In the end, as noted by the trial court, Dr. Lerner declined to say with a reasonable degree of medical certainty that Ms. Dougherty's cancer had metastasized by May 1995. (Decision at 12.)

{¶ 18} Next, we consider whether the testimony of appellant's expert witness, Dr. Steele, constitutes some competent, credible evidence to support the trial court's decision in favor of appellee. We begin by noting that Dr. Steele opined conservatively, to a

reasonable degree of medical certainty, that Ms. Dougherty's prognosis in May 1995, had she been diagnosed and treated, was 70 percent survival and further opined that it was probably better than that, up to 89 percent survival. (Steele depo. 81, 93.) Yet the decision supporting the judgment in favor of appellee highlights portions of Dr. Steele's testimony that the trial court perceived as weaknesses. The record, however, belies these weaknesses.

{¶ 19} In expressing his opinion, Dr. Steele made two assumptions: first, that in May 1995 the nodes were negative and, second, that in May 1995 there was no metastatic disease. Nevertheless, the trial court commented that Dr. Steele admitted that, due to the lack of diagnostic testing, he had no reliable measure to determine whether, in 1995, Ms. Dougherty's nodes were negative, or whether there was metastatic disease. (Decision at 11.) Earlier in its decision, the trial court found that the failure to conduct such diagnostic testing in 1995 fell below the accepted standard of care and, as a result of this failure, Ms. Dougherty did not get proper medical attention for her condition in a timely manner. (Decision at 8.) The trial court then used this fact as a reason to discount Dr. Steele's opinion. Yet, as Dr. Steele testified: "There's always information you don't have in failure to diagnose cases. You just make the inferences that come from the information you have." (Steele depo. 114.)

{¶ 20} From the information he had, Dr. Steele supported his assumptions of negative nodes and no metastatic disease. He opined to a reasonable medical probability that, in May of 1995, Ms. Dougherty's nodes were not positive, and he gave several reasons as the basis for that opinion. (Steele depo. 82.) First, he indicated that Ms. Dougherty would have "surely been sicker sooner." (Steele depo. 82.) Second, Dr. Steele supported his assumption with his analysis of x-rays taken in 1995 compared to x-rays taken in 1996. The trial court based its judgment in part on perceived flaws in Dr. Steele's assessment that Ms. Daugherty would have been sicker sooner; therefore, we will begin our discussion focusing on this portion of Dr. Steele's testimony.

{¶ 21} The trial court focused on Dr. Steele's inability to opine as to how much sooner Ms. Dougherty would have become symptomatic had her nodes been positive in May 1995 and on his statement that he did not believe he could draw any " 'scientifically meaningful conclusions from how long someone had symptoms and then try to compare

that to the stage of the disease.' " (Decision at 11, quoting Steele depo. 107.) Placed in context, Dr. Steele explained that he could not opine as to how much sooner Ms. Dougherty would have become symptomatic because "[t]here's no literature on untreated lung cancer that's ignored for 17 months. * * * There are no studies where you don't treat them. I mean, that's a Hitlerian study. We don't do those." (Steele depo. 82.) The statement referenced above, quoted by the trial court in its decision, was made in the same context—i.e., that it would be unethical to conduct a study to determine how long it would take cancer to advance to different stages. Dr. Steele stated in his deposition:

> Q. Is there any study that, with scientific reliability, established how long it would take for that cancer to advance to each area; for example, hilar, mediastinal, bone, liver, brain?
>
> A. Without treatment?
>
> Q. Right.
>
> A. It's an ethically undoable study. It comes up every time. The answer is always the same.
>
> Q. Well, there certainly are patients that report with a history of symptoms that would allow one to determine how long they had probably had advanced disease that you could classify; but you are not aware of any study that would allow you to discern that, correct?
>
> A. Yes. I don't think that you could draw any scientifically meaningful conclusions from how long someone had symptoms and then try to compare that to the stage of the disease. I don't think that would be a valid study that you could draw valid conclusions from.

(Steele depo. 106-07.)

{¶ 22} The trial court also focused on Dr. Steele's general comments that: (1) a cough has more to do with where cancer is in the body rather than stage of advancement; (2) weight loss is a poor prognostic sign; (3) chest pain would not reveal anything in particular about the advancement of cancer; and (4) blood in sputum is not very reliable in terms of staging. (Decision at 11.)

{¶ 23} Dr. Steele did indeed agree that "most lung cancers * * * are diagnosed, generally speaking, in advanced stages because they are not symptomatic until they are in an advanced stage." (Steele depo. 33-34.) Nevertheless, again it is important to place this in a proper context. Dr. Steele further testified that, when a patient starts getting more systemic symptoms, "[i]t's just generally a sign of *more advanced disease*." (Emphasis added; Steele depo. 143-44.) He specifically commented that, if Ms. Dougherty's nodes had been positive in May 1995, he would not have expected her to be asymptomatic in November 1996. (Steele depo. 83.)[2]

{¶ 24} Dr. Steele also testified that, if a patient came to him with a concern "that there may be an issue of lung cancer," he would look for the following symptoms: "Cough, dyspnea, weight loss, chest pain, hemoptysis, weakness." (Steele depo. 85.) The evidence shows that, from the time Dr. Woldenberg first found the right lung mass in May 1995 to the time Ms. Dougherty was diagnosed in November 1996: (1) 6 to 17 months passed prior to any indication in the medical records of cough, and sternal pain attributed to cough, first, due to suffering from a cold in January 1996, and then again later in November 1996 (appellant's trial brief, Exhibits No. 1-K and 1-P); (2) the medical records never indicated any shortness of breath[3] (appellant's trial brief, Exhibits No. 1-H, 1-I, 1-J, 1-O, and 1-P); (3) the medical records never indicated any weight loss[4] (appellant's trial brief, Exhibits No. 1-J, 1-O, 1-N); (4) 10 months passed prior to any indication in the medical records of chest "discomfort" in late-March 1996[5] (appellant's trial brief, Exhibit L); (5) 9 to 11

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[2] The original transcript of his deposition quotes Dr. Steele as stating that he "would have" expected Ms. Dougherty to be asymptomatic in November 1996. However, after reviewing the transcript, Dr. Steele indicated that the transcript should be corrected to read, "I would *not* have expected [Ms. Dougherty] to be asymptomatic in November of '96." (Corrections to Steele depo.)

[3] The medical records from mid-June 1995 (appellant's trial brief, Exhibit No. 1-H), July 1995 (appellant's trial brief, Exhibit No. 1-I,), August 1995 (appellant's trial brief, Exhibit No. 1-J,), and March 1996 (appellant's trial brief, Exhibit No. 1-O), specifically indicate no shortness of breath or no significant shortness of breath.

[4] The medical records from October 1994 (appellant's trial brief, Exhibit No. 1-M), May 1995 (appellant's trial brief, Exhibit No. 1-N), August 1995 (appellant's trial brief, Exhibit No. 1-J), and March 1996 (appellant's trial brief, Exhibit No. 1-0), specifically state that Ms. Dougherty weighed 127 lbs.

[5] We note Dr. Steele's specific comments regarding chest pain and what he would have specifically expected to see in Ms. Dougherty. Dr. Steele testified that, because of the location of Ms. Dougherty's tumor, he would have expected she would experience pain "in her upper right chest area," but she did not have any pain. (Steele depo. 103.) He testified that "[s]he didn't have any pain for a long time." (Steele depo. 103.) He noted that chest pain is consistent with invasion of the pleura or chest wall and that would be an indication of significantly advanced disease or mark a patient into the next level. (Steele depo. 88.)

months passed prior to the appearance of blood-streaked sputum, first noted in the medical records from November 1996 (Steele depo. 34); and (6) 17 months passed prior to any indication in the medical records of weakness or malaise in November 1996 (appellant's trial brief, Exhibits No. 1-J, 1-O, 1-N). It is notable that, even with the knowledge of Ms. Dougherty's symptomatology prior to November 1996, Dr. Steele still opined that he would have expected Ms. Dougherty to be symptomatic sooner.

{¶ 25} Finally, we note that, when reviewing all the evidence together, Dr. Lerner seemed to contradict his own opinion that whatever was going to happen to Ms. Dougherty was not going to change with treatment in 1995 when he opined that a person with a 2.5 centimeter tumor that is: (1) stage one, (2) with negative nodes, and (3) no metastasis, has a survival rate of 60 to 80 percent. (Lerner depo. 39.) This is important because Dr. Lerner did not credibly dispute that these three conditions existed in 1995.

{¶ 26} First, with regard to the stage of cancer, appellant's expert, Dr. Steele, opined that Ms. Dougherty was still stage one in 1995. Although Dr. Lerner reviewed Dr. Steele's deposition, at no point did he challenge this estimate of stage or offer his own estimate of the stage of cancer in 1995. Second, with regard to the nodes, although Dr. Lerner challenged Dr. Steele's assumptions that in 1995 the nodes were negative, he admitted that he did not review the x-rays from May 1995 and that he did not have the x-rays from November 1996. (Lerner depo. 23, 41, 45-46.) Therefore, as noted above, he stated that he could not opine as to whether the nodes were negative or positive in 1995. (Lerner depo. 45, 47.) Third, with regard to Dr. Steele's assumption that there was no metastatic disease in 1995, Dr. Lerner did not know whether the same cell types were in the right and left lung, so this could not be the basis of his opinion that there was metastasis in May 1995. Thus, Dr. Lerner's rejection of the second and third assumptions is not credibly supported by his testimony.

{¶ 27} Furthermore, it appears that the only thing Dr. Lerner did know was that Ms. Dougherty eventually succumbed to cancer. This seems to be the basis of his "100 percent or nothing" statistical chance of survival in the 1995 prognosis. (Lerner depo. 36-

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Furthermore, Dr. Steele saw no evidence of invasion into the pleura in the May 1995 films. (Steele depo. 101.)

37.) However, Dr. Lerner's own contradictory opinion based on the three assumptions discussed above would indicate that there was a 20 to 40 percent chance that Ms. Dougherty would have died if her cancer had been diagnosed in 1995. Similarly, pursuant to Dr. Steele's opinion, there was a 30 percent chance that Ms. Dougherty would have died even if she had been treated in 1995. (Steele depo. 81.) Because Dr. Steele's assumptions about Ms. Dougherty's condition in 1995 were essentially unrefuted, we construe Dr. Lerner's 60 to 80 percent survival rate opinion as corroborating Dr. Steele's estimate.

{¶ 28} With all this in mind, we find that, even if believed, Dr. Lerner's testimony does not constitute competent, credible evidence to support the trial court's judgment. Nor does the testimony of appellant's expert, Dr. Steele, constitute some competent, credible evidence to support judgment in favor of appellee. Therefore, we find that the trial court's conclusion is against the manifest weight of the evidence. Appellant's assignment of error is well-taken.

{¶ 29} When the decision of a trial court was the result of a bench trial, rather than a trial by jury, the appellate court may "either weigh the evidence in the record and render the judgment or final order that the trial court should have rendered on that evidence or remand the case to the trial court for further proceedings." App.R. 12(C). *See also Walton v. Dept. of Rehab. & Corr.*, 10th Dist. No. 91AP-935 (June 25, 1992) (remanding with instructions to enter judgment for appellant on issue of liability based on appellate court's conclusion that the trial court's decision was against the manifest weight of the evidence). Even with a bench trial, given the alternatives presented by App.R. 12(C), we would be inclined to remand for further proceedings and thus defer to the trial court regarding factual findings because we respect the trial court's function of generally weighing the evidence. *Id.*, citing *State v. DeHass*, 10 Ohio St.2d 230 (1967). However, here we have unusual circumstances. First, our initial deference to the trial court resulted in our finding that the trial court's decision is not supported by some competent, credible evidence. Second, although we agree that generally the trial court is in the best position to find credibility by viewing voice inflection, demeanor, and gestures, here, the parties agreed to submit the case on documentary evidence and, therefore, the trial judge, in judging credibility, did not have the benefit of viewing voice inflection, demeanor, and

gestures. The trial judge was not in a better position to review and weigh the evidence than this appellate panel. Third, there has been significant delay in this case. The complaint was filed in 1998. The trial court decision was released 13 years later on March 15, 2011. To remand for a new trial would further delay the determination of liability in this case, as well as prolong what has no doubt been a stressful judicial process for all parties involved. Therefore, we find it would be appropriate at this time, pursuant to App.R. 12(C), to weigh the remaining evidence as to the issue of proximate cause and render judgment as to liability.

{¶ 30} We have already examined in significant detail the deposition testimony of Dr. Lerner and the deposition testimony of Dr. Steele regarding his opinion that Ms. Dougherty would have been sicker sooner had her nodes been positive in May 1995. The only remaining evidence to consider and weigh is Dr. Steele's analysis of Ms. Dougherty's x-rays. We note that, in its decision, the trial court did not even mention this evidence, which we find most persuasive. We will examine that evidence now.

{¶ 31} In addition to the fact that Ms. Dougherty was not symptomatic sooner, Dr. Steele supported his assumption of negative nodes and no metastatic disease in May 1995 with his analysis of x-rays taken in 1995. He indicates that he read the chest x-rays and observed there were no enlarged nodes in May 1995. He also commented that "most 2.5's have negative nodes. So if they look normal on the x-ray, they're probably going to be normal anyway." (Steele depo. 27-28.) There was no evidence the cancer had invaded the pleura. Dr. Steele opined "to a reasonable medical probability" that the nodes were negative. (Steele depo. 27-28, 81-82.)

{¶ 32} Dr. Steele also testified that, in his opinion, Ms. Dougherty did have multiple primary cancers, rather than metastasis. He based this on his observations, comparing x-rays from May 1995 to x-rays from November 1996. He noted that the one on the left did not grow. "That's an advantage cancer cells give. Cancers don't just sit there a year and a half without growing. I think it was a scar cancer in '95 that developed into cancer before she was diagnosed. There's no way to explain the thing sitting there." (Steele depo. 25.)

> Q. When you say it sat there without growing, are you able to see the lesion in the left lung on the '95 films as well?

> A. Well, I see an abnormality there. Actually by my measurements, it's a little bit bigger in '95 than it is [in] '96, which is certainly not consistent. The right lobe shows how fast cancer grows when you ignore it.

(Steele depo. 25.) From this observation, Dr. Steele concluded that, in November 1996, Ms. Dougherty had multiple primary lesions. (Steele depo. 24.) He further opined, "[i]n patients who have two primaries, one in each lung and negative nodes, the prognosis of each is as if there weren't the other one." (Steele depo. 26.)

{¶ 33} Dr. Steele also supported his assumption that there was no metastatic disease with the following testimony:

> Q. How do you know that the lesion on the left is not a metastatic lesion?
>
> A. Because there was that scar there to start with, and scar cancers usually are "adeno." It just, oh, it looks, looking at the sequence of events, it makes more sense to me that it was a scar cancer than that the cancer on the right just happened to land smack dab where that scar was and no place else.
>
> Q. Okay. Flip side. How do you know the cancer that's identified on the left is not the primary with the right being a metastatic lesion?
>
> A. Because it never grew. It actually got a little smaller. That just doesn't happen, not with lung cancer.
>
> Q. Really?
>
> A. Hardly with any cancer.
>
> Q. Really?
>
> A. Well, again, we don't sit and watch them on purpose. Sad to say, I have gotten to look at a whole lot. This is something like my ninth case of clerical error of death. We generally, oh -- I mean, not generally. We know cancer doesn't just sit there. It certainly doesn't just sit there while one of its metastases quintuples in size, more than quintuples in size.
>
> Q. Okay.

A. And then gets a little bit smaller.

(Steele depo. 141-42.)

{¶ 34} Considering this additional evidence, we find that appellant did meet the burden of proof as to proximate cause and therefore, pursuant to App.R. 12(C), we render judgment in favor of appellant as to liability.

{¶ 35} For the foregoing reasons, appellant's assignment of error is sustained, the judgment of the Court of Claims of Ohio is reversed, judgment is rendered in favor of appellant as to liability only, and this cause is remanded to that court for further proceedings on the issue of damages.

Judgment reversed and cause remanded with instructions.

BROWN, P.J., concurs.
TYACK, J., dissents.

TYACK, J., dissenting.

{¶ 36} I respectfully dissent.

{¶ 37} The trial court judge who heard this case found that counsel for the plaintiff failed to prove a key portion of the case, namely that the failure of medical personnel to pursue the significance of a one-inch mass seen in an x-ray in May 1995 was the proximate cause of Theresa Dougherty's death. Theresa apparently had more than one cancer. In addition to the cancer in her right lung seen in the May 1995 x-ray, she also had or developed cancer in her left lung. Some medical testimony indicated that the cancer in her right lung seen in the May 1995 x-ray had not metastasized and had not caused the cancer in her left lung. According to this testimony, the left lung cancer had developed on its own. Other testimony indicated a metastasized cancer in 1995.

{¶ 38} Theresa also developed brain cancer. A medical expert for the Medical College of Ohio Hospital testified that both the brain cancer and the left lung were present in 1995, but not detectable.

{¶ 39} The trial judge found:

> Although the experts agree that the proper treatment in May 1995 would have been a surgical procedure to remove the 2.5 centimeter mass in Dougherty's right lung, plaintiff did not

> present sufficient evidence to prove to the court that an earlier diagnosis and surgical intervention in May 1995 would have saved Dougherty's life. Inasmuch as plaintiff bears the burden of proof on the critical element of causation, the court finds that plaintiff has failed to establish, by the preponderance of the evidence, that defendant's negligence was a proximate cause of Dougherty's harm. Specifically, plaintiff has not persuaded the court that defendant's failure to diagnose the 2.5 centimeter mass in Dougherty's lung was the proximate cause of her death. Accordingly, judgment shall be rendered in favor of defendant.

(March 15, 2011 Decision, at 12.)

{¶ 40} If the trial court's factual findings are supported by competent, credible evidence, they apparently must be upheld. However, this standard is not neatly applied in situations where the trial court finds that a plaintiff in a medical negligence case failed to prove something required for a favorable judgment.

{¶ 41} Further, no live testimony was taken in this case. The trial court judge reviewed depositions and written closing arguments. However, the trial court judge was not in a better position to review and weigh the evidence than this appellate panel. Lacking other guidance from the Supreme Court of Ohio as to what standard to apply in this situation, we will affirm the trial court's judgment if it is supported by competent, credible evidence. *See C. E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), and the cases following it.

{¶ 42} The medical expert whose testimony apparently was the source of the trial court finding that the estate had failed to prove that Theresa Dougherty's death was the result of the failure to follow-up on the May 1995 x-ray was Harvey Lerner, M.D. Dr. Lerner gave a telephone deposition on May 22, 2002.

{¶ 43} Dr. Lerner testified that he is almost exclusively retained as an expert by law firms who defend physicians and hospitals in professional negligence, or medical malpractice cases. He acknowledged being approached by firms who represent plaintiffs in such cases, but he did not generate a report for such firms because his opinions regarding delay in the diagnoses of lung or breast cancer was unfavorable to a plaintiff's case. He felt that delay in diagnoses did not affect the medical outcome. Such was also his opinion in Theresa Dougherty's situation.

{¶ 44} Dr. Lerner had been provided a box of exhibits to review before his testimony and a copy of depositions of the primary expert for Theresa Dougherty's estate, Robert J. Steele, M.D. Dr. Lerner also reviewed slides of brain tissue and reports regarding brain studies.

{¶ 45} Based upon the documents provided to him, Dr. Lerner developed a medical history of Theresa Dougherty which included the following: x-ray on May 31, 1995 shows a right upper lobe lesion of approximately 2.5 centimeters; a chest x-ray on November 12, 1996 showing the lesion had "increased in size to 7.7 times 6.5 centimeters"; a left upper lobe lesion of approximately 1.5 centimeters at the same time; a bone scan of December 4, 1996 showing a possible lesion of the left femur; a CT scan on the same December 4 date showing a probable temporal lobe lesion; and, a January 30, 2007 chest x-ray showing an increase in size of one of the chest lesions.

{¶ 46} Dr. Lerner noted Theresa Dougherty had a family history of multiple cancers.

{¶ 47} Dr. Lerner, based upon the information before him, testified that, in his opinion, "the delay in treatment of Theresa Dougherty did not affect the outcome." (Deposition, at 35.) "Whatever was going to happen as far as survival or death was not going to change." (Deposition, at 33.) Stated differently, he felt that she inevitably was going to die as a result of her cancer, partly because the lesions in her other lung and in her brain would have occurred anyway. Earlier treatment would not have prevented this emergence and/or growth, in his opinion.

{¶ 48} Dr. Lerner testified also that, in his opinion, there was cancer in the left lung as well as the right lung in May 1995. He testified the cancer in the left lung simply was not yet recognized in the May 1995 chest x-ray.

{¶ 49} Dr. Lerner did not have an opinion as to whether the cancer had spread to any of the lymph nodes in May 1995. He preferred that a radiologist make the call as to the size of the nodes in May 1995 and November 1996. He indicated that the involvement of the lymph nodes did not change his opinion about the inevitable outcome.

{¶ 50} As indicated above, the trial court found this testimony worthy of credibility.

{¶ 51} At the same time, the trial court had before it a deposition of Dr. Steele. Dr. Steele was of the opinion that Theresa Dougherty could have survived if she had received prompt treatment after the May 1995 x-ray.

{¶ 52} Dr. Steele is board certified in medical oncology. About 97 percent of his time is spent in the clinical practice of medicine in Indiana. He is consulted in professional negligence cases by lawyers for plaintiffs. For a brief period of time, defense lawyers also asked his opinion, but had not done so recently due to his opinions being unfavorable to their case.

{¶ 53} Dr. Steele had full access to Theresa Dougherty's medical records and reviewed medical literature pertinent to the case, especially medical literature pertaining to multiple carcinomas. He believed that Theresa Dougherty did not have multiple primary carcinomas because he did not believe the lesion in Theresa's left lung grew between May 1995 and November 1996. He saw it as a "scar cancer" in 1995 that developed into a "cancer" before she was diagnosed in 1996.

{¶ 54} Dr. Steele testified that in patients who have two primary carcinomas in the lungs and negative nodes, the prognosis for each cancer is the same as if the other did not exist. He acknowledged that Theresa Dougherty's lymph nodes were never sampled for cancer cells, but some were enlarged.

{¶ 55} Dr. Steele felt the nodes were not enlarged at the time of the May 1995 x-ray, based upon his own reading of the films. He testified that most tumors of 2.5 centimeters have negative nodes.

{¶ 56} Dr. Lerner had Dr. Steele's deposition when Dr. Lerner was deposed, so was aware of the possibility that the lymph nodes were not involved in May 1995. To Dr. Lerner, the lymph node involvement was not critical because he viewed Theresa Dougherty as having multiple primary cancers, not a metastasized single cancer with lymph node involvement.

{¶ 57} I cannot say, based upon the conflicting medical testimony before it, that the Court of Claims' decision was against the manifest weight of the evidence. If Dr. Steele and Dr. Lerner were equally credible or incredible, then counsel for the estate did not prove the plaintiff's case by the preponderance of the evidence.

{¶ 58} I, therefore, would overrule the sole assignment of error and affirm the judgment of the Ohio Court of Claims.

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