

Doctor's Sympathetic Statement to Patient Cannot Be Used as Evidence of Liability

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[Full text of the Court's opinion](#)

On April 23, 2013, the Ohio Supreme Court issued its opinion in *Estate of Johnson v. Randall Smith, Inc.*, Slip Opinion No. 2013-Ohio-1507. In *Johnson*, the Court made clear that R.C. 2317.43, Ohio's "apology statute," applies to all civil actions filed after its effective date.

R.C. 2317.43, applicable to medical malpractice actions, precludes admission of a health care provider's statement of apology or expression of sympathy as evidence of liability in cases filed after its effective date, September 13, 2004.

Here, Dr. Randall Smith performed gallbladder surgery on Jeanette Johnson in 2001. After surgery, Mrs. Johnson returned to the hospital for surgery-related complications. Her complications required that she be transferred to another hospital. Upon learning this news, Mrs. Johnson became upset and emotional. Dr. Smith attempted to console her. In the context of transferring her, he took her hand and stated, "I take full responsibility for this. Everything will be okay."

Mrs. Johnson and her husband filed a medical malpractice action in 2002. The case was voluntarily dismissed in 2006 and refiled in 2007.

Dr. Smith submitted a motion in limine to prohibit the introduction of any evidence regarding the statement of apology or empathy he made to Mrs. Johnson. The trial court conducted a hearing on the motion in limine at which Mrs. Johnson, her daughter and her friend — all of whom were present when Dr. Smith made the statement at issue — testified. After the hearing, the trial court held that Dr. Smith's statement was not admissible under R.C. 2317.43.

On appeal, the Eleventh District Court of Appeals reversed the trial court's decision, holding that the trial court erred when it applied the statute to preclude Dr. Smith's apology because the statute could not be applied retroactively. The court reasoned that because the statement was made in 2001, prior to the enactment of the statute in 2004, the statute was not applicable and thus, the statement was inadmissible.

The Ohio Supreme Court's opinion, written by Justice Lanzinger, began with an analysis of R.C. 2317.43. The first line of the statute provides, "[i]n any civil action *brought* by an alleged victim . . ." The Court found this language to be clear and unambiguous. Accordingly, the Court held that R.C. 2317.43 applies to any civil action filed after the effective date of the statute.

Next, the Court addressed when the plaintiffs "brought" their civil action — when they initially filed their complaint in 2002 or when they refiled the complaint in 2007. Because Ohio law treats previously filed actions as if they never existed, the Johnsons' refiled complaint was the proper case to consider. When the Johnsons refiled their case in 2007, R.C. 2317.43 had been in effect for almost three years.

The Court found the Eleventh District's concern over the retroactive application of the statute "unnecessary." Because there is no clear indication that R.C. 2317.43 was intended to apply retroactively, the Court held it was proper to prospectively apply the statute.

Regarding the substance of Dr. Smith's statement, the Court reversed the Eleventh District because it did not review the trial court's decision under an abuse of discretion standard of review. The Court held that the trial court's determination that Dr. Smith made the statement in an effort to comfort Mrs. Johnson is precisely the type of evidence that R.C. 2317.43 was designed to exclude as evidence of liability in a medical malpractice case.

While the apology statute was ultimately applied as it was intended, this case demonstrates that Ohio's lower courts sometimes need guidance from the Ohio Supreme Court, even where seemingly clear statutes are involved.

Bricker & Eckler LLP represented amici curiae, Ohio Hospital Association, Ohio State Medical Association and Ohio Osteopathic Association, urging reversal of the Eleventh District's decision.

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