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## Sorry seems to be the hardest word: Ohio's apology statute for healthcare providers

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In 2004, Ohio General Assembly joined several other state legislatures in adopting an "apology statute" for health care providers. (Sometimes these types of statutes are referred to as "I'm sorry" statutes.) The statute, R.C. 2317.43, prevents a patient of an unanticipated medical outcome from entering into evidence a health care provider's statement or conduct "expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence" made to the alleged victim relating to the unanticipated medical outcome. R.C. 2317.43. Simply put, the statute makes such statements inadmissible.

Even though the statute has been on the books for more than 10 years, to date only three appellate districts have opined on the application of the statute and all three cases made their way to the Ohio Supreme Court. Currently two of the cases are before the Ohio Supreme Court as a result of a certified conflict. See *Stewart v. Vivian*, Ohio Supreme Court Case No. 2016-1013 (conflict certified with *Davis v. Wooster Orthopaedics & Sports Medicine, Inc.*, 193 Ohio App.3d 581, 2011-Ohio-3199, 952 N.E.2d 1216 (9th Dist.)). Before addressing the current issues before the

Ohio Supreme Court, let's start at the beginning of the Ohio apology statute.

When Ohio adopted its apology statute in 2004, it became one of nearly 20 states (at that time) to adopt this type of a statute. Ohio's apology statute, like the now more than 30 apology statutes nationwide, was designed to strengthen the physician-patient relationship by encouraging greater openness and transparency in communications between physicians and their patients and/or patients' families following an unanticipated medical outcome. Apology statutes around the nation were enacted as a response to a changing philosophy of medical care which emphasized a more transparent physician-patient relationship. Apology statutes' policy goal is to facilitate honest conversations among health care providers and patients. They allow physicians to show empathy by explaining, and taking responsibility for, unanticipated outcomes related to medical care. The statute precludes these statements from entering into evidence and thereby shields physicians from liability resulting from honest communication while offering expressions of apology about an unexpected medical outcome.

*Johnson v. Randall Smith, Inc.*

The first Ohio appellate court to consider the apology statute was the Eleventh District in *Johnson v. Randall Smith, Inc.*, 196 Ohio App. 3d 722, 2011-Ohio-6000, 965 N.E.2d 344 (11th Dist.) It determined that R.C. 2317.43 did not apply to a doctor's statement of apology made before the statute was enacted. The Eleventh District explained that R.C. 2317.43 could only be applied prospectively — to statements made after the effective date of the statute -- because the General Assembly did not expressly provide for retroactive application. *Id.* The Ohio Supreme Court disagreed and held that the apology applies to any cause of action filed after September 13, 2004, the effective date of R.C. 2317.43, regardless of when the statement was made. *Estate of Johnson v. Randall Smith, Inc.*, 135 Ohio St.3d 440, 2013-Ohio-1507, 989 N.E. 2d 35. The language of R.C. 2317.43 makes clear that a doctor's statement of apology must be excluded if a medical malpractice action is brought after the effective date of the statute. *Id.*

*Davis v. Wooster Orthopaedics & Sportsmedicine, Inc.*

Next, the Ninth District opined that the Ohio apology statute covered a physician's expression of sympathy, but not a statement that could be construed as an admission of fault. *Davis v. Wooster Orthopaedics & Sportsmedicine, Inc.*, 193 Ohio App. 3d 581, 2011-Ohio-3199, 952 N.E.2d 1216 (9th Dist.). At trial, the plaintiff testified that "Dr. Knapic \* \* \* said the back surgery went okay but he nicked an artery, and he takes full responsibility and it was [his] fault." *Id.* at ¶ 14. The trial court admitted the statement into evidence, and Dr. Knapic appealed, arguing that the trial court erred in not excluding it under R.C. 2317.43. The Ninth District affirmed.

The Ninth District first looked to the application of apology statutes across the nation to determine the scope of Ohio's apology statute. At that time, 36 states had adopted

apology statutes. Id. at ¶ 6. Seventeen states explicitly distinguish and exclude admissions of fault from coverage by the statute. Id. Eight states explicitly include admissions of fault within the ambit of the statute (excluding them from evidence). Id. at ¶ 7. The remaining states, including Ohio, do not make a clear distinction. Id. at ¶ 8. Davis concluded that no clear guidance could be ascertained from national trends or analysis of similarly-worded apology statutes of other states.

Then, the Ninth District scrutinized the meaning of the word “apology” in the statute and asked: Is the word “apology” as used in the statute “intended to include an acknowledgement of fault in addition to an expression of sympathy, condolence, or compassion”? Id. at ¶ 9. The Ninth District looked to the word apology in “context with the litany of other statements to be excluded under the statute” (namely statements of “sympathy, commiseration, condolence, compassion, or a general sense of benevolence”). Id. at ¶ 10; R.C. 2317.43. It concluded that the General Assembly did not intend to include any statement of fault within the ambit of R.C. 2317.43 because the words surrounding “apology” connoted sympathy and not fault or liability. Id. at ¶ 10, 13.

Further, the Ninth District looked to the “Bill Summary” prepared by the Legislative Service Commission which stated that the General Assembly enacted R.C. 2317.43 “to prohibit the use of a defendant’s statement of sympathy as evidence in a medical liability action.” Id. at ¶ 11 (emphasis added). The Ninth District concluded that had the General Assembly intended R.C. 2317.43 to cover fault-statements, it would have done so explicitly by including “admissions of liability” or “statements against interest” in the list of expressions covered by the statute. Id. at ¶ 12. The Ohio Supreme Court accepted the discretionary appeal but the parties dismissed the appeal before briefing.

#### Stewart v. Vivian

Five years later, the same issue was presented to the Twelfth District: Does R.C. 2317.43 cover statements of fault? In *Stewart v. Vivian*, 12th Dist. No. CA 2015-05-039, 2016-Ohio-2892, 64 N.E.3d 606, family members of a mentally ill patient who committed suicide at a hospital brought suit against Dr. Vivian. The family members wanted the court to admit statements made by Dr. Vivian where he admitted knowledge of the patient’s expressed desire to kill herself. A family member testified at a motion in limine that Dr. Vivian entered a room where the family was mourning and “I just remember [Dr. Vivian] saying that he didn’t know how it happened; it was a terrible situation, but she had just told him that she still wanted to be dead, that she wanted to kill herself.” Id. at ¶ 37. Dr. Vivian testified that he had gone into the ICU room to “express how deeply sorry I am.” Id. at ¶ 39. The trial court concluded that “Dr. Vivian’s statements were an ‘ineffective attempt at commiseration,’” and that an “[a]pology can be made because you’re trying to take responsibility for your own actions.” Id. at ¶ 41. On appeal, the Twelfth District affirmed and excluded the statements from evidence.

In its analysis, the Twelfth District agreed with the Ninth District's conclusion that R.C. 2317.43 is ambiguous as to scope, but found that the General Assembly intended for the statute to exclude "all statements of apology — including those statements admitting fault." *Id.* at ¶ 47 (emphasis in original). First, the Twelfth District looked to the plain meaning of the word "apology" as it is defined in Webster's Third New International Dictionary. According to the dictionary definition, "apology" includes "an acknowledgment intended as an atonement for some improper or injurious remark or act: an admission to another of a wrong or discourtesy done him accompanied by an expression of regret." *Id.* at ¶ 47. In fact, expressions of fault or liability are included within the meaning of the word "apology" in no less than seven popular dictionaries.<sup>1</sup> Second, the court noted that the General Assembly "chose to include the word 'apology' in the statute with knowledge of its general usage." *Id.* at ¶ 49. And "[h]ad the General Assembly intended to exclude statements of fault from being encompassed in the statute, it could have done so by expressly stating so in the statute." Thus, the Twelfth District held that Dr. Vivian's statements were properly excluded under Ohio's apology statute. *Id.* at ¶ 50.

Stewart moved to certify a conflict with the Ninth District's decision in *Davis*. The Twelfth District certified the conflict and the Ohio Supreme Court agreed to resolve the conflict. The certified question before the Court is:

Whether a health care provider's statements of fault or statements admitting liability made during the course of apologizing or commiserating with a patient or the patient's family are prohibited from admission of evidence in a civil action under Ohio's apology statute, R.C. 2317.43.

A salient question for the Ohio Supreme Court to consider is the default presumption for the scope of R.C. 2317.43. Does inclusion of fault statements require a court to "write in" fault-statements coverage into the plain language of the statute (as suggested by the Ninth District)? Or does the ordinary meaning of the word "apology" already cover fault-statements (as concluded by the Twelfth District), and thereby require courts to proactively limit the scope of R.C. 2317.43 to exclude such statements? Dr. Vivian and his amici (including the Ohio State Medical Association) support the latter proposition because the ordinary meaning of the word "apology" includes statements of fault.

If the goal of statutory interpretation is to effectuate the policy goals of the General Assembly, the answer should be clear: Ohio's apology statute must include fault-statements, not only because the plain meaning of the word "apology" includes statements of fault, but also because parsing a health care provider's statements to discern between fault statements and expressions of sympathy is an impractical exercise as many expressions fall into both categories. Distinguishing between fault-statements and sympathy statements inserts a highly-subjective test into high-stakes litigation, and increases the cost of resolving a dispute. It may be for this very reason that there have been multiple attempts to amend R.C. 2317.43 to include explicit

fault statement language.<sup>2</sup>

The Twelfth District's decision, on the other hand, reasonably concludes that "the legislature did not intend to 'parse out' a statement of fault from a statement intended to give comfort." *Stewart v. Vivian*, 12th Dist. No. CA 2015-05-039, 2016-Ohio-2892, 64 N.E.3d 606, ¶ 41. Under this objective construction, the trial court is not tasked with determining which parts of an expression of "apology" are admissible and which parts are inadmissible. And, the jury is required to decide the case, as it historically has been, based on expert testimony as to whether the defendant breached the standard of care,<sup>3</sup> rather than on a health care provider's attempt to "apologize" and explain an unanticipated outcome.

What will the Supreme Court conclude? Oral argument has been scheduled in *Stewart v. Vivian* on April 6, 2017.

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<sup>1</sup> American Heritage Dictionary: "Apology. 1. An acknowledgment expressing regret or asking pardon for a fault or offense" The American Heritage Dictionary of the English Language (5th ed. 2013) available at <http://www.yourdictionary.com/apology#americanheritage> (emphasis added); Oxford Dictionaries "Apology. 1. A regretful acknowledgment of an offense or failure" Oxford Dictionaries (2016) available at [https:// en.oxforddictionaries.com/definition/](https://en.oxforddictionaries.com/definition/) (emphasis added); MacMillan Dictionary: "Apology. 1. A statement that tells someone that you are sorry for doing something wrong or for causing a problem" MacMillan Dictionary (2nd ed. 2007); Merriam Webster: "Apology. \* \* \* 2. An admission of error or discourtesy accompanied by an expression of regret" Merriam-Webster's Collegiate Dictionary (11th ed. 2014) available at <https://www.merriam-webster.com/dictionary/apology> (emphasis added); www.dictionary.com: "Apology. A written or spoken expression of one's regret, remorse or sorrow for having insulted, failed, injured, or wronged another" Apology Definition, dictionary.com, <http://www.dictionary.com/browse/apology?s=t> (last visited Dec. 30, 2016); www.yourdictionary.com: "Apology. \* \* \* 2. An acknowledgment of some fault, injury, insult, etc., with an expression of regret and plea for pardon." Apology Definition, yourdictionary.com, <http://www.yourdictionary.com/apology> (last visited Dec. 30, 2016) (emphasis added).

<sup>2</sup> Current H.B. 559 proposes an amendment to 2317.43 to explicitly exclude statements of error and fault.

<sup>3</sup> See *Bruni v. Tatsumi*, 46 Ohio St.2d 673, 346 N.E.2d 673 (1976).