Ohio apology statute covers admissions of fault

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Since 2004, Ohio has had an "apology statute" applicable to health care providers. Ohio's apology statute covers "any and all statements, affirmations, gestures, or conduct expressing apology, sympathy commiseration, condolence, compassion, or a general sense of benevolence." R.C. § 2317.43.

The purpose behind the statute is to provide "opportunities for health care providers to apologize and console" patients and families of patients who have experienced unanticipated outcomes of medical care "without fear that their statements will be used against them in a malpractice suit."[1] Under Ohio's apology statute, statements made by a health care provider are inadmissible as evidence of liability or a statement against interest in a medical negligence lawsuit. Thus, when a health care provider expresses apology to a patient or their family member for an unanticipated medical outcome, jurors are not to be privy to those statements.

On September 12, 2017, in *Stewart v. Vivian*, Slip Opinion No. 2017-Ohio-7526, the Ohio Supreme Court held, in a 5-2 decision, that Ohio's apology statute covers statements where a health care provider acknowledges that the patient's medical care fell below the standard of care.[2]

In *Stewart*, the trial court excluded from evidence the statements made by Dr. Vivian to the family members of a patient under Dr. Vivian's care after the patient attempted to commit suicide in the hospital.[3] Shortly thereafter, the patient died and a lawsuit followed. A jury returned a verdict in favor of Dr. Vivian, concluding that he was not negligent in his assessment and care of the patient.[4]

On appeal, the plaintiff-appellant argued that Dr. Vivian's statements should not have been excluded from evidence because they were admissions of fault, and the Ohio apology statute does not preclude admissions of fault from evidence.[5] The Twelfth District agreed with the trial court.[6] After determining that the statute was ambiguous, the Twelfth District reviewed the statute's legislative history and held that the General Assembly's intent was to protect all statements of apology, including those admitting fault. [7]

The Ninth District previously had held that Ohio's apology statute does not cover statements of fault (and only covers "pure" expressions of apology). Thus, the Court certified a conflict among the district courts.[8]

The question before the Court was: "[Are] a health care providers' statements admitting liability made during the course of apologizing or commiserating with a patient or the patient's family[…]prohibited from admission [into] evidence in a civil action under Ohio's apology statute, R.C. 2317.43?"[9]

The Ohio Supreme Court determined that both the Ninth and Twelfth District were wrong to find the statute ambiguous and then evaluate legislative history to determine the statute's scope.[10] Instead, the Court held that the statute is unambiguous.[11] The Court analyzed the plain meaning of the statute and looked to a dictionary definition of the word "apology." It concluded that Ohio's apology statute covers statements of fault and answered the certified question in the affirmative.

This is good news for health care providers who will no longer have to worry whether their communications with patients and patients' families after an unanticipated medical outcome will be parsed and interpreted before a jury in a way that never was intended.

This publication was written by Anne Marie Sferra and Noorjahan Rahman, who filed a brief on behalf of amici curiae, the Ohio State Medical Association, the Ohio Hospital Association, and the Ohio Osteopathic Association in Stewart v. Vivian.

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[1] *Estate of Johnson v. Randall Smith, Inc., 135 Ohio St.3d 440, 2013-Ohio-1507, ¶ 1*

[2] *2017-Ohio-7526, ¶ 2*

[3] *Id. at ¶ 16*

[4] *Id. at ¶17*

[5] *Id. at ¶ 18*

[6] *Id.*

[7] *Id.*

[8] *Davis v. Wooster Orthopaedics & Sports Medicine, Inc., 193 Ohio App.3d 581, 2011-Ohio-3199*

[9] *2017-Ohio-7256, ¶ 1*

[10] *Id. at ¶ 22*

[11] *Id.*

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