THE OHIO SUPREME COURT RESOLVES SPLIT BETWEEN OHIO APPELLATE COURTS INTERPRETING THE OHIO APOLOGY STATUTE

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Despite a healthcare provider's best efforts, a patient may experience an unexpected medical outcome, even death. It is an elemental human characteristic to want to offer some expression of sympathy or benevolence — even to apologize for the unanticipated turn of events. An apology may go a long way to diffuse a difficult situation, facilitate healing, preserve relationships, and even avoid later litigation. Yet a healthcare provider may be wary that any such statements would be used later as evidence of negligence or liability in a malpractice suit. To encourage conversations and transparency between healthcare providers, patients, and their families after unanticipated outcomes, Ohio and more than 30 other states, have adopted what are often referred to as "apology statutes." Ohio's apology statute — R.C. 2317.43 — provides that a healthcare provider's "statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence" that relate to an unanticipated outcome during medical care are inadmissible as evidence when made to the patient, her family, or her representative.

Ohio's statute does not define "apology," or any of the other forms of expression, and does not distinguish between a healthcare provider's statement of sympathy and one acknowledging fault. One appellate court — Wooster Orthopaedics & Sports Medicine, Inc., 193 Ohio App.3d 581,2011-Ohio-3199, 952 N.E.2d 1216 (9th Dist.) — said that statements of apology do not include statements of fault, while another — *Stewart v. Vivian,* 2016-Ohio-2892, 64 N.E.3d 606 (12th Dist.) — said that they do. The Supreme Court agreed to resolve this conflict by accepting *Stewart* for review. In a 5-2 decision released in September 2017, Justice Kennedy, writing for the majority, found that statements admitting liability or fault made during the course of apologizing or commiserating do indeed fall within the statute's protections. *Stewart v. Vivian,* Slip Opinion No. 2016-1013, 2017-Ohio-7526.

Stewart was a medical-malpractice and wrongful-death action filed by Dennis Stewart on behalf of the estate of his wife, Michelle. Following a suicide attempt, Michelle was admitted to Mercy Hospital under the care of Dr. Rodney Vivian, who entered orders requiring hospital staff to visually check on Michelle every 15 minutes. During an unmonitored period, Michelle again attempted suicide. Her attempt caused irreversible brain damage and she eventually died. Dr. Vivian spoke to Dennis and Michelle's sister after the event. Dr. Vivian did not remember the exact conversation, although he later recalled saying he was sorry. Dennis and Michelle's sister provided differing accounts of the statements made by Dr. Vivian.

According to Dennis, Dr. Vivian said 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."

Michelle's sister remembered that Dr. Vivian asked the family what they thought had happened. In response, Dennis said that Michelle "had obviously tried to kill herself." Dr. Vivian commented, "Yeah, she said she was going to do that. She told me she would keep trying."

Despite differences between the family's statements, the trial court nonetheless found that Dr. Vivian's statements were an "attempt at commiseration" and therefore inadmissible under the apology statute. The case proceeded to trial without the statements and the jury eventually returned a defense verdict. The appellate court affirmed, finding that the Ohio General Assembly's intent was to protect all statements of apology, including those admitting fault.

On appeal to the Supreme Court, the Court acknowledged that the statute does not define "apology." The Court therefore relied on its ordinary dictionary meaning — "an acknowledgment intended as an atonement for some improper or injurious mark or act: an admission to another of a wrong or discourtesy done accompanied by an expression of regret." Relying on that dictionary meaning, the statute was "susceptible of only one reasonable interpretation" — i.e., "a statement expressing apology is a statement that expresses a feeling of regret for an unanticipated outcome of the patient's medical care and may include an acknowledgment that the patient's medical care fell below the standard of care." The Court's ruling makes clear that statements of fault come within the evidentiary protections of R.C. 2317.43 and are inadmissible.

Two justices dissented, in part. Chief Justice O'Connor, joined by Justice O'Neill, agreed that statements of fault come within the statute's protections, but disagreed that the statements made by Dr. Vivian were statements of fault. To the Chief Justice, Dr. Vivian merely summarized statements Michelle made to him and "added a description of his own state of mind." She concluded that Dr. Vivian's statements were an expression of shock and surprise that did not have an indicia of apology, commiseration, or regret.

The Chief Justice acknowledged that a healthcare provider need not expressly say "I apologize" or "I sympathize," but expressed concern about relying on the speaker's intent and not on the "actual content" of the statements made. She believes that a healthcare provider "could render any statement inadmissible simply by affirming a subjective intent to apologize or console."

While *Stewart* resolves an important issue regarding the applicability of Ohio's apology statute to statements of fault, Chief Justice O'Connor's dissent is likely to become a focus for further litigation as courts grapple with which statements fall under the statute and which do not. In fact, it already did. Dennis's counsel filed a motion asking the Supreme Court to reconsider the September decision. Counsel did not take issue with the Supreme Court's conclusion that statements of fault come within the statute's protections and are inadmissible.

They claimed — much like the Chief Justice — that Dr. Vivian's statements are not statements of fault. Nevertheless, a majority of the Supreme Court disagreed, denying reconsideration in December 2017.

Stewart has important implications in Ohio, but its holding may affect similar statements made by healthcare providers in other states with apology statutes similar to Ohio's, including Montana, North Dakota, Oklahoma, West Virginia, and Wyoming. Courts in these jurisdictions have not addressed the issue of whether statements of fault are inadmissible and, like the Ohio statute, these terms are not defined. *Stewart* may now serve as persuasive authority to support the exclusion of statements of fault.

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