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Raising the Bar

The Newsletter of the Young Lawyers Committee

December 18, 2017 Volume 13 Issue 11

Ohio Supreme Court Resolves Appellate Court Split: Statements of Fault Are Inadmissible Under 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 & Sportsmedicine, Inc., 193 Ohio App.3d 581, 2011-Ohio-3199, 952 N.E.2d 1216 (9th Dist.), has 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.), has said that they do. The Supreme Court agreed to resolve this conflict by accepting Stewart for review. In a 5-2 decision released on September 12, 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. 2017-Ohio-7526, para. 2.

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 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." Id. at para 13-15.

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. Id. at para 16. The case proceeded to trial without the statements and the jury eventually returned a defense verdict. Id. at para 17. The appellate court affirmed, finding that the Ohio General Assembly's intent was to protect all statements of apology, including those admitting fault. Id. at para 18.

On appeal to the Supreme Court, the Court acknowledged that the statute does not define "apology." Id. at para 26. 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." Id. at para 27-28. 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 before the standard of care." Id. 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. Id. at para 33. To the Chief Justice, Dr. Vivian merely summarized statements Michelle made to him and "added a description of his own state of mind." Id. at para 41. 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. Id. at para 42.

The Chief Justice acknowledged that a healthcare provider need not expressly say "I apologize" or "I sympathize," but she 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." Id. at para 43.

But this conclusion fails to consider that the statute's protections are not limited to statements expressing apology or sympathy, but include statements expressing commiseration, compassion, and a general sense of benevolence. However Dr. Vivian's statements are construed, there should be no doubt that statements made by a healthcare provider after an unanticipated outcome that are consistent with commiseration, compassion, and benevolence—as well as statements of apology and fault—are inadmissible under the statute. The statements Dr. Vivian made here fall within those parameters and the statute's protections.

In any event, 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 has. Dennis's counsel filed a motion asking the Supreme Court to reconsider the September 12 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 claim—much like the Chief Justice—that Dr. Vivian's statements are not statements of fault. The Court has yet to rule on the motion.

While Stewart has important implications in Ohio, it also affects similar statements made by healthcare providers in other states with statutes identical to Ohio's, such as 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 the plain language of these statutes – like Ohio's – provides no guidance. Thus, when the issue arises, Courts in these jurisdictions can now cite Stewart as compelling persuasive authority to support the exclusion of statements of fault.

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