



OHIO SUPREME COURT Expands Physician Protections UNDER THE OHIO “APOLOGY STATUTE”

BY JOSEPH M. BUCARO

PHYSICIANS ARE OFTEN tasked with the difficult job of speaking to families after they have lost a loved one. These conversations are never easy, but now physicians in Ohio will be less likely to incur malpractice liability from the statements they make to families due to a recent Ohio Supreme Court decision.

On September 12, 2017 the Ohio Supreme Court issued its opinion in the case *Stewart v. Vivian* which interpreted the language of R.C. 2317.43, better known as the Ohio Apology Statute. The statute says, “any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion or a general sense of benevolence made by a healthcare provider to an alleged victim or alleged victim’s family or friends is inadmissible as evidence of liability on the part of the doctor.” The statute allows a physician to apologize for a negative outcome of patient care without the physician’s statements being used to prove malpractice liability. Until the Ohio Supreme Court’s decision in *Stewart*, it was unclear exactly what types of statements were covered under the statute.

In *Stewart*, a patient attempted suicide in her home, and was transported to a local emergency room. After an initial consultation, Dr. Rodney Vivian ordered that the patient be observed every 15 minutes in the hospital’s psychiatric ward. The next day, the patient again attempted suicide in the psychiatric unit and unfortunately passed away. Dr. Vivian spoke to the family following the patient’s death and said he regretted the “terrible situation” and that he “didn’t know how it happened.” The patient’s

husband brought claims for wrongful death, medical malpractice, loss of spousal consortium, and loss of chance against Dr. Vivian. The husband intended to introduce testimony regarding the conversation he and members of his family had with Dr. Vivian following his wife’s death. The trial court held these statements were an attempt at commiseration by Dr. Vivian, and were therefore inadmissible under the Apology Statute.

After an appeal, the Twelfth District Court of Appeals affirmed the decision of the trial court holding that the Apology Statute was intended to protect both “pure” apologies and apologies where the physician admitted fault. This created a conflict with a decision rendered by the Ninth District Court of Appeals. The Ninth District held in *Davis v. Wooster Orthopaedics & Sports Medicine, Inc.* that only “pure” apologies fell under the statute. The court said that where a physician admitted fault, his or her apology was admissible to prove liability.

The Ohio Supreme Court agreed with the Twelfth District by holding the Apology Statute is unambiguous, and its plain meaning includes statements that are not “pure” apologies. The Court said that physicians can acknowledge the patient’s medical care fell below the standard of care, and the physician’s statement is still inadmissible. This ruling will allow doctors more flexibility during difficult conversations with patient’s families following unexpected outcomes of patient care.

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