

HEALTH CARE ALERT

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Joe Elliott

614.227.2120

jelliott@porterwright.com

Bob McAdams

614.227.2091

rmcadams@porterwright.com

Ohio's Apology Statute, R.C. 2317.43, prohibits admission of statements of fault or statements admitting liability



On May 9, 2016, the Court of Appeals for the 12th Appellate District of Ohio issued its opinion in *Dennis Stewart, Individually and as the Administrator of the Estate of Michelle Stewart, Deceased v. Rodney E. Vivian, M.D.*, 2016-Ohio-2892. In *Stewart*, the Court concluded that R.C. 2317.43, Ohio's "apology statute," excludes from evidence all statements of apology, including those statements admitting fault.

R.C. 2317.43, applicable to medical malpractice actions, precludes admission of a health care provider's statement of apology or expression of sympathy as evidence of liability in cases filed after its effective date, Sept. 13, 2004.

Here, Michelle Stewart attempted suicide by overdosing on drugs. She was treated for the overdose at Mercy Mt. Orab Hospital. A treating physician at Mercy Mt. Orab determined Mrs. Stewart should be placed on a 72-hour psychiatric hold. Because Mt. Orab did not have a psychiatric

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HEALTH CARE ALERT

unit, Mrs. Stewart was transferred to Mercy Clermont Hospital. Rodney E. Vivian, M.D. was her admitting and treating physician. Upon an assessment conducted by a registered nurse, Mrs. Stewart indicated a high degree of



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lethality. Following that assessment, Dr. Vivian ordered that Mrs. Stewart be placed on "15-minute checks," a level of observation that required a hospital staff member to visually check Mrs. Stewart every 15 minutes. There were other types of observation Mrs. Stewart could have been placed under, including arm's length observation, one-to-one observation and constant observation. In the evening of the day of her admission, Mrs. Stewart was found unconscious and discolored hanging from a ligature attached to the bathroom door of her hospital room. The ligature had been fashioned out of bed sheets. An unresponsive Mrs. Stewart was transferred to Mercy's intensive care unit (ICU) for treatment. There, she was visited by family, friends and Dr. Vivian. Medical tests revealed that Mrs. Stewart was brain dead. She survived on life support for a few days before eventually expiring four days after her admission to Mercy Clermont Hospital. Plaintiff claimed that Dr. Vivian made statements to Mrs. Stewart's family in the ICU showing that Mrs. Stewart had told Dr. Vivian that she intended to kill herself at Mercy Clermont Hospital.

Mr. Stewart, on his own behalf and on behalf of Michelle's estate, filed suit against the hospital and Dr. Vivian in 2011. Plaintiff asserted claims of medical malpractice and wrongful death, among others. In January 2013, Plaintiff dismissed his claims against the hospital after those parties reached a settlement. Plaintiff then proceeded with his claims against Dr. Vivian.

Dr. Vivian submitted a motion in limine to prohibit the introduction of any evidence relating to statements he made to Michelle's family when visiting Michelle in the ICU. Dr. Vivian argued that any statements he made were inadmissible pursuant to Ohio's apology statute, R.C. 2317.43. Dr. Vivian

HEALTH CARE ALERT

contended that anything he may have said while visiting Michelle in the ICU was inadmissible as evidence of liability as his statements had been offered to Michelle's family in condolence, commiseration and sympathy. Mr. Stewart opposed Dr. Vivian's motion, arguing that certain statements made by Dr. Vivian in the ICU were not designed to comfort Michelle's family, but rather were statements against interest, or "fault statements," that were admissible under Ohio law. Specifically, Mr. Stewart sought to introduce statements showing that Michelle had told Dr. Vivian she had intended to kill herself at Mercy Clermont Hospital. The trial court conducted a hearing on the motion in limine at which Dr. Vivian, Mr. Stewart, and Michelle's sister testified about Dr. Vivian's visit to Michelle's ICU room when he made the statements. After the hearing, the trial court held that Dr. Vivian's statements were an "ineffective attempt at commiseration" and that such statements were inadmissible pursuant to the apology statute. A jury trial was held and the jury returned a verdict in favor of Dr. Vivian, concluding that he was not negligent in his assessment, care, or treatment of Mrs. Stewart.

On appeal, the 12th District Court of Appeals affirmed the trial court's decision, holding that the trial court did not err when it applied the apology statute to preclude Dr. Vivian's ICU statements 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." The 12th District concluded that, given the language and stated intent of the apology statute, statements of fault are inadmissible under the apology statute.

The 12th District's opinion began with an analysis of R.C. 2317.43. The Court indicated that in construing this statute, the goal is to ascertain and give effect to the intent of the legislature as expressed in the statute. The Court determined that the statute was ambiguous, but that its intent is to exclude from evidence all statements of apology—including those admitting fault.

The 12th District did note that only one other court has examined the apology statute to determine whether it prohibits statements of fault or statements admitting liability from being admitted at trial. See *Davis v. Wooster Orthopaedics & Sports Medicine, Inc.*, 193 Ohio App.3d 581, 2011-Ohio-3199 (9th Dist.). In *Davis*, the 9th District recognized that Ohio's apology statute, unlike the majority of other states' apology statutes, does not make a clear distinction between an alleged tortfeasor's statement

HEALTH CARE ALERT

of sympathy and one acknowledging fault. In *Davis*, the 9th District concluded that the intent of the legislature was to protect pure expressions of apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence, but not admissions of fault. Therefore, under the circumstances of that case, the Court held that a surgeon's statement to a patient's husband and daughter that he had "nicked an artery and * * * took full responsibility for it" was admissible evidence at trial, and not barred from admission by Ohio's apology statute.

Obviously, the 12th District's holding in *Stewart* is of particular importance to hospitals and other health care practitioners in medical malpractice actions when faced with statements allegedly made to the patient or family members of the patient. Defense counsel should carefully examine plaintiffs, family, and friends in deposition to determine if any statements are alleged to have been made by the health care providers. Then, motions in limine may be appropriate to prohibit the introduction into evidence of such statements under *Stewart*, even in instances where the statements may be characterized as admissions against interest or statements of fault or blame.

However, there has been a recent development since the 12th District issued its opinion in *Stewart*. On Sept. 14, 2016, the Supreme Court of Ohio on review of an order certifying a conflict, determined that a conflict exists between *Stewart* and *Davis*. The question for certification is as follows: 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. The merit brief for Plaintiff-Appellant Dennis Stewart was filed Nov. 28, 2016. The merit brief for Defendant-Appellee Rodney E. Vivian, M.D. is due to be filed on or before Jan. 17, 2017. Consequently, sometime in 2017, the Ohio Supreme Court may speak to the apology statute and determine the exact breadth of its preclusion of evidence.

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