

HEALTH CARE ALERT

JAN. 23, 2017

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Briefing continues in *Stewart v. Vivian*, the certified conflict case concerning Ohio's Apology Statute, R.C. 2317.43



Briefing is continuing in *Stewart v. Vivian*, Case No. 2016-1013 in the Supreme Court of Ohio. *Stewart* is the certified conflict case presently pending before the Supreme Court concerning Ohio's apology statute, R.C. 2317.43. Briefing is shedding light on the arguments the parties are advancing concerning the meaning and breadth of Ohio's Apology Statute.

Appellant Dennis Stewart, individually and as the administrator of the estate of Michelle Stewart, deceased, filed his merit brief on Nov. 28, 2016. Mr. Stewart is contending before the Supreme Court that the apology statute is narrower than the 12th Appellate District found below. First, Mr. Stewart contends that statements of fault, error or liability are *not* excluded from admission into evidence by R.C. 2317.43, regardless of whether or not they are made during the course of apologizing or commiserating with a patient or a patient's family. He further argues that the term "apology" as used in R.C. 2317.43 does *not* include statements

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of fault, error or liability. Mr. Stewart is seeking to have a jury hear certain statements made by the medical provider, Dr. Vivian, which he interprets as statements admitting fault.



So, it looks likely that the Supreme Court will, in 2017, weigh in on the interpretation and breadth of Ohio's Apology Statute.

Appellee Rodney E. Vivian, M.D. filed his merit brief on Jan. 17, 2017. In addition, the combined brief of *Amici Curiae*, the Ohio State Medical Association, the Ohio Hospital Association, the Ohio Osteopathic Association, and the Academy of Medicine of Cleveland and Northern Ohio was also filed on Jan. 17, 2017. Dr. Vivian is seeking the affirmance of the 12th Appellate District's decision which affirmed the trial court's exclusion of Dr. Vivian's statements to the decedent's family under Ohio's apology statute. Dr. Vivian argues that R.C. 2317.43 is not ambiguous as the common meaning of "apology" includes statements of fault or statements admitting liability and, therefore, such statements are not admissible at trial. Dr. Vivian also argues more broadly that R.C. 2317.43 is a remedial statute that is to be construed to give effect to its object to exclude any and all statements from admissibility at trial, including statements of fault or statements admitting liability, should a trial court determine that such statements were made by a health care provider during the course of apologizing or commiserating with a patient or a patient's family.

Mr. Stewart will have the opportunity to file a reply brief to conclude the briefing before the Supreme Court of Ohio. Oral argument will likely follow. So, it looks likely that the Supreme Court will, in 2017, weigh in on the interpretation and breadth of Ohio's Apology Statute, R.C. 2317.43.

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