

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2012-0014

ON APPEAL FROM

THE ELEVENTH DISTRICT COURT OF APPEALS

PORTAGE COUNTY, OHIO

CASE NO. 2010-P-0050

JEANETTE JOHNSON, et al.

Plaintiffs-Appellees

-vs-

RANDALL H. SMITH, M.D., et al.

Defendants-Appellants.

**MEMORANDUM IN REPOSE TO AND IN OPPOSITION OF DEFENDANTS-
APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION ON BEHALF OF
PLAINTIFFS-APPELLEES JEANETTE JOHNSON, ET. AL.**

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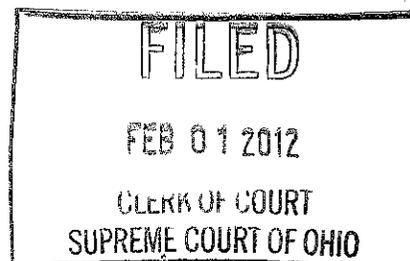
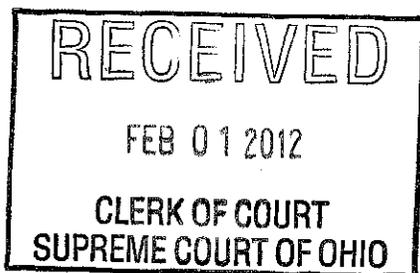


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I. THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

The decision of the Eleventh District Court of Appeals was premised upon the prejudicial error that resulted by retroactively applying R.C. 2317.43 and granting Defendants-Appellees' Motion in Limine prohibiting Plaintiffs-Appellants from introducing any testimony or evidence of Randall Smith, M.D.'s statement "I take full responsibility" for the harm suffered by Mrs. Johnson. As such, only the retroactive application of R.C. 2317.43 is in dispute. This case is neither of public nor of great general interest as the statute was enacted in 2004 and this issue will, therefore, given the applicable statutes of limitation, fail to arise again altogether or will arise again in very few and limited circumstances. The Court of Appeal's decision has not hindered or abridged R.C. 2317.43. Furthermore, the Court's decision neither brought into question the applicability nor the viability of R.C. 2317.43 going forward. Therefore, any concerns that the Court of Appeals' decision will force healthcare providers to forgo attempts at consoling and comforting their patients in fear that their statements will be admissible in evidence in subsequent litigation are insupportable, as the statute is clearly applicable to all such statements made going forward.

Based upon the foregoing, Plaintiffs-Appellees request that this Court deny jurisdiction of this matter.

II. ARGUMENTS IN OPPOSITION TO DEFENDANTS-APPELLANTS' PROPOSITIONS OF LAW

Response to Defendants-Appellants' Proposition of Law No. 1

OHIO REVISED CODE § 2317.43 DOES NOT APPLY TO ANY CAUSE OF ACTION COMMENCED OR FILED AFTER THE ENACTMENT DATE OF THE STATUTE, BUT APPLIES ONLY TO ANY CAUSE OF ACTION BROUGHT AFTER SUCH DATE FOR WHICH THE PROTECTED CONDUCT ALSO OCCURRED AFTER SUCH DATE.

The Ohio legislature enacted R.C. 2317.43 on September 13, 2004. R.C. 2317.44(A) reads as follows:

In any civil action brought by an alleged victim of an unanticipated outcome of medical care or in any arbitration proceeding related to such a civil action, any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence that are made by a health care provider or an employee of a health care provider to the alleged victim, a relative of the alleged victim, or a representative of the alleged victim, and that relate to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care are inadmissible as evidence of an admission of liability or as evidence of an admission against interest.

Appellants contend the language “in any civil action brought” suggests that R.C. 2317.43 applies to any cause of action commenced or filed after the enactment date. Appellees contend, however, that R.C. 2317.47 applies only to civil actions which arise after the date of enactment, and, therefore, protects only conduct which occurs after the date of enactment. Therefore, R.C. 2317.47 is not applicable to the statement made by Dr. Smith in May of 2001, in which he took “full responsibility” for what happened to Mrs. Johnson, as this statement pre-dated the statute by more than three years, as did the date upon which the action arose. Any interpretation contrary to appellees’ is void of reason as the protection of said statement would then be dependent upon the date of filing. In other words, it would be against common sense and notions of fairness to assume the statute protects a statement made in May of 2001 when the action in which such claims are pertinent to are filed on September 12, 2004, but fails to protect such a statement when the action is filed on or after September 13, 2004. In May of 2001, Dr. Smith made such a statement clearly in the absence of reliance upon such statute, as prior to the enactment of R.C. 2317.47, no such statute existed. He should not now be entitled to the

protection of such statute, in the absence of reliance, simply because an action was filed on a particular date.

Furthermore, as noted by the Court of Appeals, “[u]nder Ohio law, the legal ramifications of a person’s conduct is predicated upon the law in effect when the conduct occurred.” *Johnson v. Smith Inc.*, 2001 WL 5829662 (Nov. 21, 2011) (citing *Sines & Sons, Inc.* 1998 Ohio App. LEXIS 4372 at 5 (Sept. 18, 1998)). As such, Dr. Smith’s statement was admissible, as R.C. 2317.43 had not yet been enacted at the time of his statement, and therefore his statement (conduct) could not be subject to such statute (law) even given a prospective application of the statute.

Essentially, appellants’ are arguing that even assuming a prospective application of the statute, the statement is excludable. However, appellants’ arguments in support of such contention actually cut against them. Appellants’ quote the Ohio Supreme Court in *Kiser*, stating the following: “[w]here there is not clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment.” *Kiser v. Coleman*, 28 Ohio St. 3d 259 (1986). Such statement actually supports appellees, as appellees’ case arose prior to the enactment of R.C. 2317.43.

Furthermore, appellants suggest this action was not commenced until July 26, 2007. They rely upon Judge Cannon’s dissent to argue that the commencement date was subsequent to the enactment of the statute and, therefore, the statute must be applied. Appellants’ reasoning is faulty, however. As stated by Judge Cannon, the Ohio Civil Rules provide “a civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant...” See *Johnson v. Smith, Inc.*, 2001 WL 5829662 (Nov. 21, 2011) (dissenting) (citing *Civ. R. 3(A)*). Judge Cannon further states that case law has treated

“brought” synonymously with “commenced.” Id. (citing *Cover v. Hidebran*, 103 Ohio App. 413, 415 (1957)). It follows, then, that Mrs. Johnson’s action was “brought” on August 18, 2002 at which time a complaint was filed with the Court and Defendants were served. As such, the statute is not applicable to the case at bar, as Mrs. Johnson’s action was brought prior to the effective date of the statute.

Finally, assuming arguendo that appellants’ are correct in stating this statute prospectively applies to this case, this statute is still inapplicable because the statement by Dr. Smith does not fall under this statute. Dr. Smith’s statement to Mrs. Johnson that he took full responsibility for what had happened to her is not an “apology” within the protection of R.C. 2317.43, but is an admission of liability and responsibility, which is not covered under R.C. 2317.43. If the legislature intended for R.C. 2317.43 to protect admissions of liability or fault, they would have explicitly said so.

For the foregoing reasons, this Court should deny jurisdiction as it is apparent R.C. 2317.43 is not applicable to all causes of action commenced or filed after the effective date of the enactment of the statute, but is applicable only in instances in which the action is brought after the date of enactment, and the protected conduct also occurs after the date of enactment. Additionally, the statute is not applicable here, regardless of timing, as the conduct in question is not protected by such statute.

Response to Defenants-Appellants’ Proposition of Law No. 2

OHIO REVISED CODE § 2317.43 DOES NOT APPLY RETROACTIVELYAS IT DOES NOT CONTAIN AN EXPRESS STATEMENT THAT RETROACTIVE APPLICATION WAS INTENDED

Pursuant to R.C. § 1.48, unless expressly made retroactive, a statute shall be applied prospectively. Ohio Revised Code § 2317.43 was not expressly made retroactive, and, therefore, it shall only be applied prospectively. Defendants-Appellants claim R.C. 2317.43 is expressly retroactive, yet fail to offer evidence in support of such a claim. Additionally, they accuse the Court of Appeals of failing to address what they refer to as the “seminal issue”—whether the statute in consideration is substantive or remedial. In doing so, appellants attempt to circumvent the dispositive issue—whether the statute is expressly retroactive. It is clear that appellants are attempting to avoid this question, as no reasonable claim can be made that R.C. 2317.43 is expressly retroactive. Appellants’ failure to address both R.C. 1.48 and the first prong of a two prong test, both of which are dispositive upon this proposition of law, suggests that appellants recognize they are incorrect as to this proposition of law.

This Court has previously articulated the two-part test for determining whether a statute should be applied retroactively. See *State v. Cook*, 83 Ohio St.3d 404, 410 (1998). The Court in *Cook*, stated that the issue of whether a statute “may be constitutionally applied retroactively does not arise unless there has been a prior determination that the General Assembly specified that the statute so apply.” *Id.* (citing *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, at syllabus (1988)). The language of the statute and notes of the General Assembly are devoid of any suggestion that R.C. 2317.43 is to be applied retroactively. Therefore, the first prong of this test is dispositive as to the issue of retroactive application.

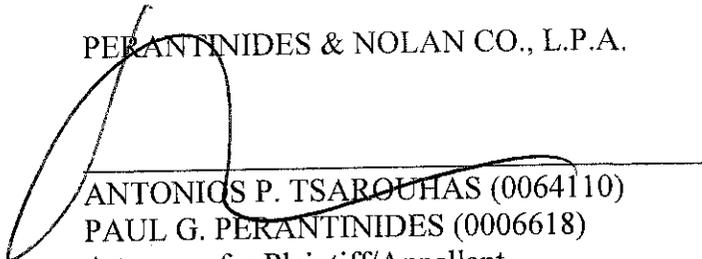
Accordingly, this Court should deny jurisdiction of this matter, as only the prospective application of R.C. 2317.43 is permissible.

III. CONCLUSION

For the foregoing reasons, this Court should deny jurisdiction of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been by regular U.S. mail, on this 31st day of January,

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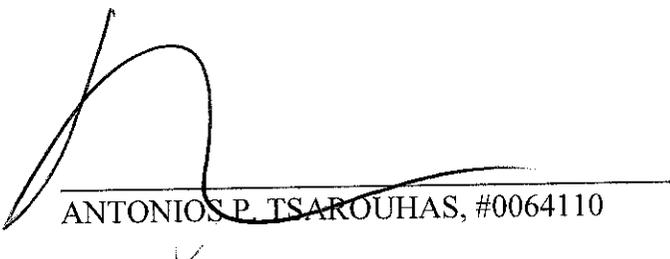
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