

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2012-0014

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ON APPEAL FROM  
THE ELEVENTH DISTRICT COURT OF APPEALS

PORTAGE COUNTY, OHIO

CASE NO. 2010-P-0050

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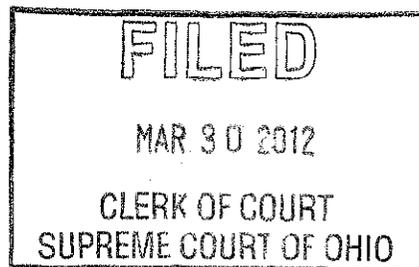
JEANETTE JOHNSON, et al.

Plaintiff-Appellees,

-vs-

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

Defendants-Appellants.



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**MOTION FOR RECONSIDERATION ON BEHALF OF DEFENDANTS-APPELLANTS  
RANDALL H. SMITH, M.D. AND RANDALL H. SMITH, M.D., INC.**

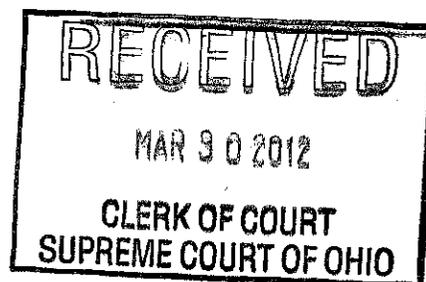
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## MOTION FOR RECONSIDERATION

Pursuant to S. Ct. Prac. R. XI, §2(B)(1), Defendants-Appellants, Randall H. Smith, M.D. and Randall H. Smith, M.D., Inc., by and through counsel, hereby move this Honorable Court to reconsider its March 21, 2012 decision declining to accept jurisdiction in this matter. This Court should reconsider its decision because this Court was denied the opportunity to consider R.C. 2317.43 in *Davis v. Wooster Orthopaedics & Sports Medicine, Inc.* 130 Ohio St. 3d 1493, 2011-Ohio-6556, 958 N.E.2d 956 because the parties dismissed the appeal following acceptance of jurisdiction by this Court. In reconsidering, and accepting jurisdiction herein, this Court would be afforded its first opportunity to construe R.C. 2317.43 and provide the courts of the State of Ohio with much needed guidance as to the intent of the statute – an opportunity denied because of the premature dismissal in *Davis*.

On December 21, 2011, this Court, in a 5-2 decision, accepted Proposition of Law No. 1 in the matter of *Davis, supra*, thereby agreeing to consider whether “R.C. 2317.43 is properly construed broadly to carry out its intended purpose of encouraging trust and transparency in the physician-patient relationship.” See Appendix at p. A. In support of jurisdiction, the appellant in *Davis* detailed why the viability and application of R.C. 2317.42 is a matter of public or great general interest, as follows:

First, this Court has yet to construe R.C. 2317.43, which provides that a physician’s apology to patients or family members following an unanticipated medical outcome is “inadmissible as evidence of an admission of liability or as evidence of an admission against interest.” In an analysis that renders the statute useless and its passage meaningless, the Ninth District held that courts must parse a physician’s apology into “expressions of apology” and “admissions of fault” and exclude *only* the former. To reach this conclusion that the apology statute does not cover acknowledgements of fault, the Court first had to determine that the General Assembly intended to excise acknowledgement of fault from the dictionary definition of “apology.”

Appendix at p. 1, emphasis in original.

This issue remains one of great public or general interest despite the premature resolution of the *Davis* matter, denying this Court the opportunity to render the definitive decision on the statutory intent of R.C. 2317.43 Ohio courts and medical malpractice litigants had anticipated when this Court accepted *Davis* for appeal. Accordingly, this Court has been presented with a uniquely fortuitous opportunity to examine an issue which it previously agreed to consider, but which was denied as a result of the *Davis* resolution. (See Court's Docket). By accepting the jurisdiction of this case for the same reasons *Davis, supra*, was accepted, it would provide this Court its first chance to construe R.C. 2317.43, thereby providing Ohio courts with definitive guidance and instruction as to the application and scope of R.C. 2317.43 and the admissibility of a healthcare provider's sincere apology in a medical malpractice action.

Briefly, and mindful that "[a] motion for reconsideration shall be confined strictly to the grounds urged for reconsideration, \*\*\* "the trial court recognized the purpose of R.C. 2317.43, and in accordance with its inherent discretion, precluded Plaintiffs-Appellees improper attempts at injecting the sympathetic statements, expressions and gestures of Defendant-Appellant Randall H. Smith, M.D. at trial." See S. Ct. Prac. R. XI, §2(B)(1). The trial court appropriately concluded that R.C. 2317.43 applied to the facts of this case, thus, precluding Plaintiffs-Appellants impermissible attempts at poisoning the jury by inferring that Dr. Smith's gestures and statements, admittedly designed to comfort his patient during her time of need, were an admission of negligence or fault.

The Eleventh District reversed the decision of the trial court noting that in order to R.C. 2317.43 to apply herein, the statute needed to be applied retrospectively, in violation of Section 28, Article II of the Ohio Constitution, despite a well supported dissent from Judge Cannon, who

offered a prospective analysis that reasoned R.C. 2317.43 applied to a case filed after the effective date of the statute and urged that the decision of the trial court be affirmed.

It is clear from the procedural history in this case that under a prospective application of R.C.2317.43, as proposed by Judge Cannon, the Eleventh District reversed the discretionary ruling of the trial court absent a finding that there had been an abuse of discretion. Furthermore, similarly to *Davis, supra*, such an analysis by the Eleventh District would carry with it two primary flaws:

First, the text of the statute itself expresses clear legislative intent to exclude statements that, if not excluded, have a tendency to be improperly perceived as an “admission of liability.” A physician’s admission of moral “fault,” an integral part of an apology, is *precisely* the type of statement that jurors would consciously or unconsciously perceive to be an admission of *liability* in a medical malpractice action. \*\*\*

Second, by effectively excising “apology” from protected statements, the [Eleventh] District’s interpretation of R.C. 2317.43 undermines the intent of the General Assembly to strengthen and protect the physician-patient relationship by encouraging transparency and trust. As one commentator explained, absent a statute that protects apologies from being used against them, doctors are encouraged to “remain silent when confronted with a possible medical error or adverse event.”

Appendix at p. 9-10. Emphasis added, citation omitted.

Unlike the scenario provided by the commentator above, Ohio enacted R.C. 2317.43 to foster trust and transparency in the physician-patient relationship. By permitting the Eleventh District’s decision herein to stand, in addition to allowing the decision of the Ninth District to remain unchecked despite this Court’s previous willingness to consider this issue in *Davis*, R.C. 2317.43 would be eviscerated until this Court is provided with yet another opportunity to construe this statute. The decisions of the Court of Appeals discussed herein have left R.C.

2317.43, as interpreted, unworkable, illogical and having no real world application. See Appendix at p. 2.

Specifically, the Ninth District offered the following analysis in support of its decision:

As Dr. Knapic has pointed out, the word “apology” could reasonably include at least an implication of guilt or fault. On the other hand, “when hearing that someone’s relative has died, it is common etiquette to say, ‘I’m sorry,’ but no one would take that as a confession of having caused the death.”

*Davis v. Wooster Orthopaedics & Sports Med., Inc.*, 193 Ohio App. 3d 581, 2011-Ohio-3199, 952 N.E.2d 1216, ¶10 (9<sup>th</sup> Dist.).

It is clear that the scenario posed by the Ninth District undervalues the real-world application of R.C. 2317.43, because when a physician or medical provider expresses an apology to a “victim of an unanticipated medical outcome” there is always an “implication of guilt or fault” in the apology as they typically participate in the procedure which produced the unanticipated outcome. Thus, contrary to the example set forth by the Ninth District, there will be an inherent confession by a physician or medical provider for having caused the pain, discomfort or death of the patient or any other unanticipated outcome, which R.C. 2317.43 was enacted to preclude from evidence.

The decision of the Eleventh District at issue herein is just as implausible, is not suited for everyday application and will impinge upon the physician-patient relationship as a physician would be better suited avoiding their patient, or the patient’s family, after an unexpected outcome lest a sincere apologetic statement be utilized in future litigation. This is the exact scenario that the trial court in this case attempted to prevent, but the overreaching decision of the Eleventh District Court of Appeals, as well as the “unanswered” questions posed by Proposition of Law No. 1 in *Davis v. Wooster Orthopaedics & Sports Medicine, Inc.*, 130 Ohio St. 3d 1493 (2011), have prevented such protections from being as liberal as the General Assembly intended.

Instead of precluding the introduction of statements of apology made by physicians to their patients and families after an unanticipated medical outcome, trial courts will be required to parse out only those parts of the apology where the physician says “I’m sorry” while permitting all other statements and gestures, part and parcel to the apology, to be admitted at trial. The implications of such a ruling would require physicians to be made aware of that fact, leaving the patient or their family with a seemingly insincere expression of sympathy, i.e. solely “I’m sorry,” without an explanation as to why the physician is sorry or what happened during the procedure to cause such an apology to be uttered.

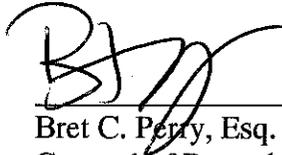
This Court is presented with the rare and unique opportunity to consider R.C. 2317.42 after being once denied same in *Davis* as a result of dismissal. This Court has already accepted jurisdiction to construe the issues set forth in *Davis*; however, those issues remain unanswered thereby demanding guidance and consideration in the instant matter. By accepting jurisdiction of this case, this Court would be able to resolve these pertinent issues and determine the applicability and scope of R.C. 2317.43 and provide litigants, and the lower courts, guidance going forward.

### **CONCLUSION**

For these reasons, Defendants-Appellants move this Court to reconsider its decision declining jurisdiction in this case for the purpose of providing the courts of Ohio and medical malpractice litigants with controlling guidance as to the proper application of R.C. 2317.43; specifically, as to what qualifies as an inadmissible apology thereunder and if the statute applies to the case herein. This Court previously accepted jurisdiction on these issues in *Davis v. Wooster Orthopaedics & Sports Medicine, Inc.*, 130 Ohio St. 3d 1493 (2011), to only be subsequently denied the opportunity to construe R.C. 2317.43 due to the parties dismissal of the

appeal. This Court has been afforded a timely opportunity to revisit this issue and provide definitive guidance related to the scope and applicability of R.C. 2317.43 to ensure that the intent of the General Assembly is maintained.

Respectfully submitted,



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### CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing Motion for Reconsideration on behalf of Defendants-Appellants, Randall H. Smith, M.D. and Randall H. Smith, M.D., Inc., has been served via ordinary U.S. Mail this  day of March, 2012 upon the following:

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**APPENDIX**

No.

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**In the Supreme Court of Ohio**

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**11-1605**

APPEAL FROM THE COURT OF APPEALS  
NINTH APPELLATE DISTRICT  
SUMMIT COUNTY, OHIO  
CASE No. 25337

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LEROY E. DAVIS,  
Administrator of the Estate of BARBARA E. DAVIS,  
*Plaintiff-Appellee,*

v.

WOOSTER ORTHOPAEDICS & SPORTS MEDICINE, INC., et al.,  
*Defendants-Appellants.*

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**MEMORANDUM IN SUPPORT OF JURISDICTION OF  
APPELLANTS WOOSTER ORTHOPAEDICS & SPORTS MEDICINE, INC.  
AND MICHAEL KNAPIC, D.O.**

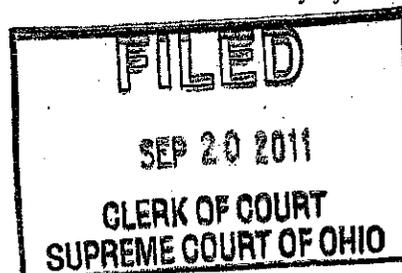
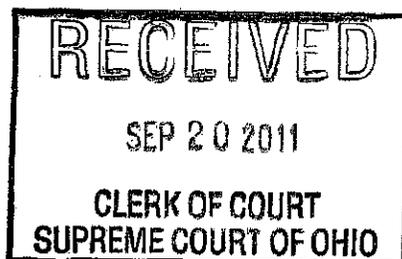
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I. **EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

In this appeal from a \$3 million wrongful death, medical malpractice verdict, which was returned only after the trial judge administered a “dynamite” charge to break a four-to-four juror deadlock, Defendants-Appellants Michael Knapic, D.O. and Wooster Orthopaedics, & Sports Medicine, Inc. (collectively “Dr. Knapic”) ask this Court:

- In a statutory interpretation matter of first impression, to provide guidance on the type of physician statements properly excluded under Ohio’s “apology” statute (R.C. 2317.43), passed as part of tort reform;
- To hold that this Court’s prior precedent is not properly construed as legitimizing, in negligence actions in which insurance is neither at issue nor mentioned, a jury instruction on the possible effect of liability insurance on jurors’ verdicts; and
- To establish the circumstances justifying the admission of gruesome autopsy photographs in civil actions.

First, this Court has yet to construe R.C. 2317.43, which provides that a physician’s apology to patients or family members following an unanticipated medical outcome is “inadmissible as evidence of an admission of liability or as evidence of an admission against interest.” In an analysis that renders the statute useless and its passage meaningless, the Ninth District held that courts must parse a physician’s apology into “expressions of apology” and “admissions of fault” and exclude *only* the former. (App. Op., A-7, ¶13.) To reach the conclusion that the apology statute does not cover acknowledgments of fault, the Court first had to determine that the General Assembly intended to excise acknowledgment of fault from the dictionary definition of “apology.” Compare App. Op., A-6, ¶10 (concluding that “the statute was intended to protect

apologies devoid of any acknowledgment of fault”) with American Heritage Dictionary (“Apology. 1. An acknowledgment expressing regret or asking pardon for a fault or offense”); Compact Oxford English Dictionary (“Apology. 1. A regretful acknowledgment of an offense or failure”); www.yourdictionary.com (“Apology. \* \* \* 2. An acknowledgment of some fault, injury, insult, etc., with an expression of regret and plea for pardon”); www.merriam-webster.com (“Apology. \* \* \* 2. An admission of error or discourtesy accompanied by an expression of regret”). The Court then had to ignore the plain and overarching intent of the statute to encourage physician-patient communications following an unanticipated or adverse medical event. As the facts of this case demonstrate, the Ninth District’s cramped interpretation of Ohio’s apology statute is both unworkable and illogical.

The statute became an issue in this case as a result of Dr. Knapic’s conversation with family members at the hospital, following the development of a recognized complication (damage to the iliac artery) during Barbara Davis’s back surgery. Dr. Knapic moved in limine to exclude deposition testimony from family members that during that conversation, Dr. Knapic:

“\* \* \* said he was sorry. He said he takes full responsibility, it was his fault, and in the, I want to say five years of surgery, he’s never had this happen to him before.”

Opposing the in limine motion, Plaintiff made the circular argument that those portions of the apology following “said he was sorry” were admissions of fault (not an apology), and therefore, instead of being *inadmissible* as evidence of an admission of

liability (as required under R.C. 2317.43<sup>1</sup>), were *admissible* as evidence of an admission of liability. The trial court agreed and the “statements admitting fault or liability” (App. Op., A-3, ¶4) were admitted at trial. (The witnesses simply omitted any reference to the “said he was sorry” from their testimony.) The Court of Appeals agreed that any deposition testimony “that Dr. Knapic said he was sorry following the surgery” was “properly excluded,” but held that the General Assembly only intended R.C. 2317.43 to protect “pure” expressions of sympathy, and thus affirmed the introduction of testimony from family members that Dr. Knapic “admitted” it was “his fault” and “he takes full responsibility.” (Id., A-7, A-8-A-9, ¶¶10, 13.)

Such judicial parsing turns Ohio’s apology statute into a semantic land mine that can only have the very effect the General Assembly sought to avoid – doctors refusing to talk to patients or their family members following an unanticipated medical outcome. Because this Court has yet to interpret R.C. 2317.43 in the context of its salutary purpose,

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<sup>1</sup> R.C. 2317.43 provides, in relevant part:

In any civil action brought by an alleged victim of an unanticipated outcome of medical care \* \* \* 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.

and because the Ninth District interpretation abrogates legislative intent, this Court should accept jurisdiction and reverse.

Second, the Ninth District panel, in a radical departure from the law of Ohio (and every other jurisdiction) held that it is “not improper” for a trial court to instruct a jury in a negligence action in which there was no issue of insurance, and in which no party and no witness mentioned or alluded to insurance during trial, to disregard the possible effect of insurance on their verdict.<sup>2</sup> It is black letter law that evidence tending to show that an alleged tortfeasor does or does not have insurance to cover a claim is “so incompetent and so dangerous” that a reversal is usually required even though the evidence is stricken and a cautionary instruction given. 42 O.Jur.3d, Evidence, §232, p.493. The peculiarly

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<sup>2</sup> Over objection, the trial court instructed the jury (emphasis added):

It is a common concern among jurors as to the existence or non-existence of *insurance*. Some jurors may wish to know if the Defendant has *insurance* that will pay any verdict the jurors may award to the Plaintiff, or whether the Defendant will have to pay such an award “out of his own pocket.”

In your deliberations, you are not to discuss the issue of whether either party has or had any kind of *insurance*. You are to decide the issues in this case based upon the evidence presented to you, not upon any considerations concerning *insurance*.

Any presumption that a party has or does not have *insurance* is, first of all, not relevant, and secondly, may be wrong.

You are to resolve all of the issues presented to you based solely upon the evidence that I have admitted and the law that I have provided. In no event may you add to or subtract from any award based on whether either party has or does not have *insurance*.

prejudicial nature of an implication or suggestion that a defendant is insured arises from the fact that such considerations “might improperly influence a jury to award greater damages than warranted – or even to find liability where unwarranted – because it is an impersonal and wealthy insurance company that will ultimately pay damages instead of the individual defendant.” *Hanna v. Redlin Rubbish Removal, Inc.* (Apr. 1, 1992), 9th Dist. No. 15280, 1992 WL 67092 at \*2 (citation omitted). The Ninth District has now turned this sound law on its head by adopting as a rule of law that in *every* negligence case it is “not improper” for a court to include a jury charge that even though “[s]ome jurors may wish to know if the Defendant has insurance to pay any verdict the jurors may award to the Plaintiff, or whether the Defendant will have to pay such an award ‘out of his own pocket’”, they should “not” discuss insurance in their deliberations.

The Court justified its ruling, in part, on the grounds that insurance was “an issue that was inherent in the case” (Recon. Op., A-20), citing *Ede v. Atrium S. OB-GYN, Inc.* (1994), 71 Ohio St.3d 124. In *Ede*, this Court held that a cross-examination of a defense medical witness to establish that he or she shares a “common” insurer with the defendant fits the limited witness bias, interest, or prejudice *exception* to the *exclusion* of insurance evidence under Evidence Rule 411. *Ede* does *not* hold that insurance evidence is allowed in *every* negligence action, much less that “curative” insurance instructions are proper in every negligence action. Further, while even the limited allowance of insurance evidence in *Ede* has been widely rejected by other jurisdictions (see, e.g., *Kansas Medical Mut. Ins. Co. v. Svaty* (Kan. 2010), 244 P.3d 642, 661-63), the Ninth District decision goes far beyond that rule, establishing a rule of law that would make it proper for *any* plaintiff in

any personal injury action to request an extensive "curative" insurance instruction. This Court should accept jurisdiction to confirm that *Ede* does not support a unique rule of law that encourages courts to inject the issue of insurance into negligence proceedings.

Third, this Court's guidance is necessary on the question of whether highly inflammatory autopsy photos with no relevance to liability are admissible solely to prove mental anguish. This Court has long held that the potential unfair prejudice of autopsy photographs requires courts in criminal cases to ascertain whether the purpose and probative nature of the photo outweighs its inherently inflammatory effect. And in *Hiner v. Nationwide Mut. Ins. Co.*, 5th Dist. No. 2005CA00034, 2005-Ohio-6660 (prohibiting evidence that plaintiff's grandmother was killed by a drunk driver), the Fifth District Court of Appeals held that when evidence regarding the circumstances of death would have a tendency to make the jury "more inclined to award damages to [plaintiff] out of moral outrage," and is offered solely to prove mental anguish in a wrongful death action, the evidence should be excluded. (Id. at ¶¶55-56.)

Here, a particularly gruesome autopsy photograph was admitted for the sole purpose of establishing Plaintiff's "mental anguish" damages (which are presumed in a wrongful death action), and was included in the exhibits sent back to the jury room, following Plaintiff's highly emotional closing argument reminding the jury of the "vision that's seared into [Plaintiff's] memory \* \* \* a vision that haunts him and torments him," and which was "[w]ithout a doubt the greatest horror this man will ever see in his life." This Court should accept jurisdiction to determine whether trial courts abuse their discretion when they admit gruesome and graphic autopsy photos that are not offered to

prove liability, but are offered solely for the purpose of proving mental anguish damages in a wrongful death action.

## II. STATEMENT OF THE CASE AND FACTS

This case arises from the development of a known complication to back surgery – injury of the iliac artery during the “blind” portion of a lumbar microdiscectomy. Barbara Davis underwent this surgical procedure to remove herniated disk material that was pressing on a spinal nerve and causing her unbearable pain. Portions of the procedure require the surgeon to rely on touch rather than sight to locate and remove disk material with a sharp cutting instrument, called a pituitary rongeur. Because the surgeon must operate “blind,” damage to the iliac artery, which is located on the immediate anterior side of the disk space in which the surgeon must operate, is a known complication. Plaintiff did not allege that Barbara Davis was not informed of, or did not consent to, the risk of damage to the iliac artery that accompanies the surgery.

Unfortunately, the iliac was nicked or cut during the blind portion of the surgery. The artery was successfully repaired, but Davis expired from a clotting condition (disseminated intravascular coagulopathy) that causes abnormal bleeding. Plaintiff sued Dr. Knapic and his practice group, alleging that: 1) the known complication constituted a deviation from the applicable standard of care; and 2) had the cut artery been diagnosed “sooner,” Davis would have survived.

Prior to trial, Dr. Knapic filed motions in limine to exclude evidence prohibited by Ohio’s apology statute (R.C. 2317.43) and graphic autopsy photographs, including Exhibit 7 – a photo depicting intestines “extruding” from a “window dressing” that had

been “stapled” onto the site of the repair surgery to “hold in” Davis’s internal organs. Dr. Knapic reiterated his objections at trial and moved to strike both the apology and autopsy photographs, but his objections were overruled and motions denied.

Prior to the conclusion of trial, the trial court informed the parties that it would include among the jury instructions a charge on liability insurance, notwithstanding that insurance was not at issue, and that insurance had never been mentioned during trial. Over Dr. Knapic’s objection, the court instructed the jury that some of them “may wish to know if the Defendant has insurance” to pay a verdict or “will have to pay such an award out of his own pocket” and that they were “not” to decide the issues presented based upon “any considerations concerning insurance.”

After twelve hours of deliberation, the jury reported it was deadlocked at four-to-four. Even after the trial court administered a “dynamite” charge, the jury took another four hours to return a \$3 million verdict in the Plaintiff’s favor, at which time the trial court acknowledged “this has been a long and difficult time for you \* \* \* [i]t’s written all over your faces \* \* \*.”

The Court of Appeals affirmed, finding no error in the trial court’s evidentiary rulings and “insurance” charge. As to the latter, the court, in part, relied on its understanding that “a jury instruction quite similar to the one given in this case” (attached to the opinion, A-17–A-18) was recommended by the Ohio State Bar Association’s Jury Instructions Committee for use “[w]hen, as in this case, evidence of insurance is *not* at issue in a negligence case.” (App. Op., A-14, ¶27, emphasis added.) The cited jury instruction is entitled “Insurance in Evidence” (see A-17) and thus, on its face, is

intended only as a *curative* instruction when insurance *has* become an issue in the case through its improper injection into evidence. But when Dr. Knapic pointed out the clear error in a Motion to Reconsider, the Ninth District concluded that “even if” it had misconstrued the nature of the committee’s recommendation, the instruction was nevertheless proper. (Recon Op., A-19.)

### III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

#### Proposition of Law No. 1

**R.C. 2317.43 is properly construed broadly to carry out its intended purpose of encouraging trust and transparency in the physician-patient relationship.**

As the appellate decision notes, 36 states have adopted apology statutes; five statutes “with language nearly identical to Section 2317.43 \* \* \* have all been adopted within the past eight years \* \* \*.” (App. Op., A-5, ¶8.) Those five statutes contain no distinction between statements of sympathy, apology, etc. and admissions of fault, and “apparently have not been frequently litigated.” (Id.) In concluding that these statutes should be interpreted as excluding a physician’s statement to family members that “I’m sorry,” but *not* excluding the physician’s accompanying statement that “it was my fault,” the Ninth District surmised that interpreting “apology” in the context of “the litany of other sentiments to be excluded under the statute \* \* \* leaves us to believe the General Assembly did not intend to include statements of fault within the statute’s ambit of protection.” (App. Op., A-6, ¶10.)

The Ninth District’s interpretation suffers two primary flaws. First, the text of the statute itself expresses clear legislative intent to exclude statements that, if not excluded,

have a tendency to be improperly perceived as an “admission of liability.” (R.C. 2317.43.) A physician’s admission of moral “fault,” an integral part of an apology, is *precisely* the type of statement that jurors would consciously or unconsciously perceive to be an admission of *liability* in a medical malpractice action. It is for that very reason that Plaintiff fought so hard to have the statements admitted in this hotly contested action.

Second, by effectively excising “apology” from protected statements, the Ninth District’s interpretation of R.C. 2317.43 undermines the intent of the General Assembly to strengthen and protect the physician-patient relationship by encouraging transparency and trust. As one commentator explained, absent a statute that protects apologies from being used against them, doctors are encouraged to “remain silent when confronted with a possible medical error or adverse event.” Valerie B. Hendrick, *The Medical Malpractice Crisis: Bandaging Oregon’s Wounded System and Protecting Physicians* (2007), 43 *Willamette L. Rev.* 363, 393. Such silence “negatively affects” three different aspects of the patient-physician relationship – information, trust, and dignity:

Patients who experience adverse medical events almost inevitably, and quite rightly, desire to know what happened. If the medical provider does not offer that information, some patients or heir families will sue to get it. \* \* \* To be effective, the physician-patient relationship must be rooted in trust \* \* \*. Hence, the anger prompted when a trusted medical care giver becomes silent can be tremendous. \* \* \* When a person injures another, whether on purpose or by accident, the respectful course is for the injurer to apologize. Failing to apologize after injury can itself be a second form of injury.

Id. (citation and footnote omitted). To preserve the General Assembly's intent, R.C. 2317.43, should be interpreted broadly to exclude physician explanation of, and apology for, an unanticipated medical outcome.

**Proposition of Law No. 2:**

**A charge instructing the jury to disregard any concern they may have as to whether a plaintiff's verdict will be paid by insurance is improperly given in a negligence action in which insurance is not at issue, and no evidence of, or allusion to, insurance was injected into evidence at trial.**

A Court's duty to instruct the jury applies only to "the actual issues in the case as posited by the evidence and the pleadings." *State v. Guster* (1981), 66 Ohio St.2d 266, 271, 421 N.E.2d 157 ("[A]bstract rules of law or general propositions, even though correct, ought not to be given unless specifically applicable to facts in issue."). The Ninth District ignored the *Guster* decision, however, and in doing so established a new rule that an instruction that injects a wholly irrelevant and prejudicial issue into a case is "not improper." (App. Op., A-15, ¶29.)

Because insurance is considered inherently prejudicial, instructions like the one the trial court administered here are used only as curative mechanisms after insurance evidence was elicited or injected at trial. See, e.g., *Hanna*, 9th Dist. No. 15280, 1992 WL 67092 at \*1; *Ockenden v. Griggs*, 10th Dist. No. 07AP-235, 2008-Ohio-2275, at ¶7. But the instruction that the Ninth District approved was not curative. Far from "preventing" insurance from becoming an issue, the trial court unilaterally created a previously non-

existent, inherently prejudicial “elephant in the room” by repeating six times that the jury should “not” to consider something that no one had mentioned at trial.

This expansive change to the law regarding references to insurance at trial conflicts with the long line of precedent carefully guarding jurors from the very mention of insurance. See CV-OJI 101.77 (liability insurance is “rarely proper” in a charge); *Stehura v. Short* (1974), 39 Ohio App.2d 68, 70 (Ohio courts “guard[] juror’s ears from statements tending to show that the defendant in a negligence action carried liability insurance”). Compare App. Op., A-14, ¶27 (emphasis added) (advocating use of a *curative* charge “[w]hen, as in this case, evidence of insurance is *not* at issue in a negligence case”). The new rule established by the Ninth District is unsupported, unprecedented, and should be reversed.

**Proposition of Law No. 3:**

**Gruesome autopsy photographs are not admissible in a civil action when their minimal relevance to a damages claim is far outweighed by their inherent inflammatory nature.**

The admissibility of autopsy photos generally arises in criminal cases. The steady line maintained by Ohio courts has been to admit autopsy photographs, despite their inherent prejudice, where the photographs are relevant to the circumstances of death necessary to establish guilt beyond a reasonable doubt. Even then, such photographs may cause prejudicial error. See *State v. Keenan* (1993), 66 Ohio St.3d 402, 408:

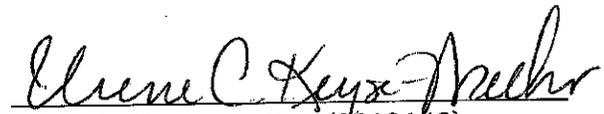
Assuming the photographs were admissible, the prosecutor focused not on what the photographs proved, but on the “feelings” and “emotions” they evoked. Worse, he encouraged the jurors to regard those feelings as relevant – indeed central – to their task. In the prosecutor’s argument, the role of the photographs was not evidentiary; it was visceral.

This Court has yet to address how this inherently inflammatory evidence may be used in a civil case. The Fifth Appellate District has recognized that “circumstances of death \* \* \* have little to no relevance to mental anguish” damages in a wrongful death case. *Hiner v. Nationwide Mut. Ins. Co.*, 5th Dist. No. 2005CA00034, 2005-Ohio-6660, ¶¶55-56 (prohibiting evidence that plaintiff’s grandmother was killed by a drunk driver). Proper evidence of mental anguish includes the plaintiff’s testimony, evidence of counseling from a minister or psychologist, etc. *Id.* Whatever slight relevance gruesome autopsy photographs may have to show mental anguish is clearly outweighed by the prejudicial effect of introduction of the photographs, especially when the plaintiff presents argument in which the role of the photograph is “visceral” (*State v. Keenan*) rather than evidentiary, and the photograph is sent to the jury room. Accordingly, both the trial court and the Ninth District erred in holding that autopsy photographs were admissible as relevant to Plaintiff’s mental anguish damages.

**IV. CONCLUSION**

This Court should accept jurisdiction to address matters of first impression that will provide guidance to courts and ensure that Dr. Knapic and other physicians receive a fair trial in Ohio's courts.

Respectfully submitted,



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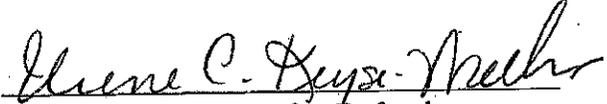
**CERTIFICATE OF SERVICE**

A copy of the foregoing has been served this 19th day of September, 2011, by

U.S. Mail, postage prepaid, upon the following:

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