

**IN THE SUPREME COURT OF OHIO**

JEANETTE JOHNSON, et al.,	)	Case No. 12-0014
	)	
Plaintiffs-Appellees,	)	On Appeal from the Portage County Court
	)	of Appeals, Eleventh Appellate District,
vs.	)	Court of Appeals Case No. 2010-P-0050
	)	
RANDALL H. SMITH, M.D., et al.	)	
	)	
Defendant-Appellants.	)	

**MERIT BRIEF OF AMICUS CURIAE THE ACADEMY OF MEDICINE OF  
CLEVELAND & NORTHERN OHIO IN SUPPORT OF DEFENDANT-APPELLANTS  
RANDALL H. SMITH, M.D. AND RANDALL H. SMITH, M.D., INC.**

BRET C. PERRY, ESQ. (0073488)  
 JOHN S. POLITO, ESQ. (0017327)  
 JASON A. PASKAN (0085007)  
 BONEZZI SWITZER MURPHY  
 POLITO & HUPP CO., LPA  
 1300 East 9th Street, Suite 1950  
 Cleveland, Ohio 44114  
 Main Phone: 216-875-2767  
 Facsimile: 216-875-1570  
 E-Mail: Bperry@bsmph.com  
 Jpolito@bsmph.com  
 Jpaskan@bsmph.com

ANTONIOS P. TSAROUHAS, ESQ.(0064110)  
 300 Courtyard Square  
 80 South Summit Street  
 Akron, Ohio 44308  
 Telephone: 330-254-5454  
 Attorney for Plaintiffs-Appellees

Attorney for Defendants-Appellants

JENNIFER R. BECKER (0080482)  
 BRIAN F. LANGE (0080627)  
 BONEZZI SWITZER MURPHY POLITO  
 & HUPP CO., LPA  
 1300 East 9th Street, Suite 1950  
 Cleveland, Ohio 44114  
 Main Phone: 216-875-2767  
 Facsimile: 216-875-1570  
 E-Mail: Jbecker@bsmph.com  
 Blange@bsmph.com

Attorneys for Amicus Curiae the Academy  
 of Medicine of Cleveland & Northern Ohio

**FILED**  
 JUL 27 2012  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

**RECEIVED**  
 JUL 27 2012  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

**TABLE OF CONTENTS**

**I. STATEMENT OF INTEREST OF AMICUS CURIAE**.....1

**II. STATEMENT OF FACTS**.....3

**III. ARGUMENT**.....3

Appellant’s Proposition of Law No. 1.....3

    R.C. 2317.43 applies to any civil action filed after the statute’s enactment date, September 13, 2004, and is properly construed broadly to carry out its intended purpose of encouraging trust and transparency in the physician-patient relationship.

Appellant’s Proposition of Law No. 2.....12

    R.C. 2317.43 is remedial in nature and may apply retroactively under Section 28, Article II of the Ohio Constitution.

**IV. CONCLUSION**.....14

## TABLE OF AUTHORITIES

### CASES

<i>Ackison v. Anchor Packing Co.</i> , 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118 (2008) ... ..	13, 14
<i>Bielat v. Bielat</i> , 87 Ohio St.3d 350, 354, 721 N.E.2d 28, 33 (2000) ... ..	13
<i>Cincinnati Ins. Co. v. Consolidated Equipment Co.</i> , 2 <sup>nd</sup> Dist. No. 19390, 2003-Ohio-47 ... ..	5
<i>Cleveland Elec. Illuminating Co. v. City of Cleveland</i> , 37 Ohio St.3d 50, 524 N.E.2d 441 (1988) ... ..	7
<i>Cover v. Hildebran</i> , 103 Ohio App. 413, 145 N.E.2d 850 (2 <sup>nd</sup> Dist. 1957) ... ..	4, 5
<i>Davis v. Wooster Orthopaedics &amp; Sports Medicine, Inc.</i> , 193 Ohio App.3d 581, 2011-Ohio-3199 ... ..	11, 12
<i>Denicola v. Providence Hospital</i> , 57 Ohio St.2d 115, 117-118, 387 N.E. 2d 231, 233 (1979) ... ..	13
<i>In re Adoption of Baby Boy Brooks</i> , 136 Ohio App.3d 824, 737 N.E.2d 1062 (2000) ... ..	8, 9
<i>In re Nevius</i> , 174 Ohio St. 560, 191 N.E.2d 166 (1963) ... ..	13
<i>Johnson, et al. v. Randall Smith, Inc., et al.</i> 196 Ohio App.3d, 2011-Ohio-6000 ... ..	1, 4, 5, 6
<i>Kilbreath v. Rudy</i> , 16 Ohio St.2d 70, 242 N.E. 2d 658 (1968) ... ..	13
<i>McNeil v. Kingsley</i> , 178 Ohio App.3d 674, 2008-Ohio-5536 ... ..	4, 5
<i>State v. Anthony</i> , 96 Ohio St.3d 173, 2002-Ohio-4008, 772 N.E.2d 1167 ... ..	10
<i>State v. Moore</i> , 165 Ohio App.3d 538, 2006-Ohio-114, 847 N.E. 2d 452 (4 <sup>th</sup> Dist.) ... ..	13, 14
<i>State ex rel. Holdridge v. Indus. Comm.</i> , 11 Ohio St.2d 178, 228 N.E. 2d 621 (1967) ... ..	13
<i>State ex rel. Jones v. Conrad</i> , 92 Ohio St.3d 389, 750 N.E.2d 583 ... ..	4
<i>State ex rel. Savarese v. Buckeye Local School Dist. Bd. Of Ed.</i> , 74 Ohio St.3d 543, 660 N.E.2d 463 (1996) ... ..	7, 8, 11
<i>Van Fossen v. Babcock v. Wilcox Co.</i> , 36 Ohio St.3d 100, 522 N.E.2d 489 (1988) ... ..	13

**RULES AND STATUTES**

Civ. R. 3(A).....5  
R.C. 1.49 ... 7, 9, 10  
R.C. 2317.43 ... 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

**CONSTITUTIONAL PROVISIONS**

Ohio Constitution, Article II, Section 28 ... 13, 14

## I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Academy of Medicine of Cleveland & Northern Ohio (“AMCNO”) is a professional medical association serving the Northern Ohio community. AMCNO functions as a non-profit 501(c)6 professional organization in representing Northern Ohio’s medical community through legislative action and community outreach programs. This professional organization has been in existence since 1824, and became known as The Academy of Medicine in 1902. Now known as AMCNO, it has a membership of over 5,000 physicians, residents and medical students making it one of the largest regional medical associations in the entire United States. Simply put, AMNCO is the voice of physicians in Northern Ohio, and has been for over 185 years.

AMCNO strives to provide legislative advocacy for its physician members before the Ohio General assembly, state medical board, and other state and federal regulatory boards. AMCNO sponsors numerous community services initiatives, such as physician referrals and healthlines. AMNCO also works collaboratively with hospitals, chiefs of staffs, and other related organizations, on a myriad of different projects of interest and/or concern to its members.

As this Court is aware, physicians, including those in the Northern Ohio community, are often litigants in a wide variety of civil litigation. Additionally, physicians play a critical role in the outcome of other litigation as expert witnesses and/or treating physician witnesses. In accordance, AMCNO has an interest in the present subject matter because the outcome of this Appeal directly impacts AMCNO membership. AMCNO’s membership has an interest in having this Court issue its decision in accordance with its decision on tort-reform measures which have been previously approved.

Herein, the Eleventh District Court of Appeals, in *Johnson v. Smith*, has eviscerated the purpose of R.C. 2317.43, Ohio’s apology statute, by removing a physician’s ability to discuss in

a candid and sincere manner issues surrounding medical care and treatment which is often necessary in order to contemporaneously effectuate a sincere expression of sympathy for an unanticipated medical event which has caused discomfort, pain and/or death to their patient and family. R.C. 2317.43 was designed to encourage communication in the physician-patient relationship, rather than impinge upon it. A physician must accept responsibility for an unanticipated outcome in a medical procedure, whether inherently or expressly, in order for the intention of the statute to be met. To improperly permit a physician's expression of sympathy during a patient's time of need as direct or inherent proof of an admission of fault in subsequent civil litigation is counterintuitive to the plain language of R.C. 2317.43 and in direct opposition to the General Assembly's intent.

If this Court were to affirm the Eleventh District's decision, doctors would be required to be informed by counsel, their employer and/or insurer that cold, calculated and disingenuous "apologies," completely lacking any type of accountability, would better serve them in the face of litigation rather than a candid and sincere expression of "apology, sympathy, commiseration, condolence, compassion or a general sense of benevolence" which R.C. 2317.43 was designed to protect. The decision of the Eleventh District, if permitted to stand, will result in a chilling effect throughout this State forcing medical providers to forgo commiserating with their patients and family after a medical procedure results in an unexpected outcome in order to prevent those statements from being utilized in subsequent litigation as an admission of fault. Either of these scenarios is unequivocally contrary to the legislative intent of R.C. 2317.43; therefore, the Eleventh District's decision must be reversed.

For all the foregoing reasons, AMCNO has a strong and vested interest in the outcome of this matter. AMCNO urges on behalf of its entire membership that the decision of the Eleventh

District Court of Appeals be reversed, and that this Court uphold the intent of the General Assembly in enacting this tort reform measure.

## II. STATEMENT OF THE FACTS

The relevant facts relating to the present Appeal pending before this Court are set forth in Appellant's Memorandum in support of Jurisdiction and are expected to be set forth again in Appellant's Merit Brief. Those facts are expressly adopted by reference and incorporated herein.

For purposes of this Amicus Curiae Brief, the following facts are most significant:

- Jeanette Johnson underwent surgery for an acute gall bladder attack on April 24, 2001 at Robinson Memorial Hospital.
- The common bile duct was injured during the laparoscopic surgery. The surgery was converted to an "open procedure" to repair the common bile duct. Ms. Johnson and her family were advised of this surgical complication at the time.
- On May 21, 2001, Ms. Johnson was readmitted to Robinson Memorial with complications related to the common bile duct injury.
- After informing Jeanette Johnson that she would be transferred to University Hospitals for further treatment she became visibly upset. Dr. Smith attempted to console Ms. Smith by taking her hand and stating "I take full responsibility in this. Everything will be ok." See (T.p. 8-9.)
- The trial Court excluded the statement as a statement of apology under R.C. 2317.43 after conducting *voire dire* of certain witnesses, including Ms. Smith who conceded that Dr. Smith's conduct was (1) an attempt to console her; (2) intended to calm her nerves; (3) sympathetic; (4) compassionate; and (5) meant to provide a general sense of benevolence to her well-being. See (T.p. 14.)
- The Eleventh District reversed the decision of the trial court finding that the trial court committed prejudicial error by retroactively applying R.C. 2317.43 (See Eleventh District Decision at ¶ 21). The Eleventh District did not address whether Dr. Smith's statement falls under the broad list of covered statements contained in R.C. 2317.43.

### III. LAW AND ARGUMENT

#### Appellant's Proposition of Law No. 1

**R.C. 2317.43 applies to any civil action filed after the statute's enactment date, September 13, 2004, and is properly construed broadly to carry out its intended purpose of encouraging trust and transparency in the physician-patient relationship.**

This case presents the question of whether R.C. 2317.43 can be applied to statements of apology made by a healthcare provide prior to the statute's enactment date. R.C. 2317.43(A) states:

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.

(Emphasis added).

The decision of the Eleventh District Court of Appeals in *Johnson v. Randall Smith, Inc.*, 196 Ohio App.3d 722, 2011-Ohio-6000, incorrectly concluded that to exclude Dr. Smith's statement the Court would need to apply R.C. 2317.43 retroactively, when in fact the statute can be applied prospectively to the subject action. The Eleventh District found that R.C. 2317.43 cannot be applied retroactively and therefore Dr. Randall Smith's statements of sympathy were improperly excluded. This decision is in direct conflict with the plain reading of the Statute.

The subject statute, R.C. 2317.43, applies to any civil actions or cases commenced after the effective date of September 13, 2004. As R.C. 2317.43 applies to civil actions commenced

after the effective date, the relevant question for the Court is not when the subject statements were made, but rather *when the civil action was filed*. In this case, Appellee did not commence this civil action until well after the effective date of R.C. 2317.43 and therefore the statute does apply herein, and serves to preclude the statements of apology made by the Appellant, Dr. Randall Smith, in accordance with the decision made by the trial court.

“When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply the rules of statutory interpretation.” *State ex rel. Jones v. Conrad*, 92 Ohio St.3d 389, 392, 750 N.E.2d 583, (2001). The clear language of R.C. 2317.43 provides that the statute applies to “any civil action brought by any alleged victim.” “An ‘action’ is defined as ‘[a] civil or criminal judicial proceeding,’ whereas a ‘cause of action’ is defined as ‘[a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person.’ Black’s Law Dictionary (8th Ed. 2004) 31, 235.” *McNeil v. Kingsley*, 178 Ohio App.3d 674, 2008-Ohio-5536 at ¶ 49. The word “brought” is synonymous with the word “commenced.” *Cover v. Hildebran*, 103 Ohio App. 413, 415, 145 N.E.2d 850, 852 (2<sup>nd</sup> Dist. 1957); *see also Cincinnati Ins. Co. v. Consolidated Equipment Co.* 2<sup>nd</sup> Dist. No. 19390, 2003-Ohio-47. A civil action is commenced upon the filing of a complaint. Civ. R. 3(A).

Pursuant to Ohio law, it is indisputable that a plain reading of R.C. 2317.43 requires the statute to be applied to any civil judicial proceeding filed after its September 13, 2004 effective date. Appellees filed this medical malpractice action on July 26, 2007, approximately three (3) years after the effective date of R.C. 2317.43; therefore, the plain language of R.C. 2317.43 requires that the Statute be applied prospectively to the subject civil action.

The Eleventh District determined that the “cause of action” accrued in 2002, prior to R.C. 2317.43’s enactment, thereby requiring retroactive application of the statute to the instant case. The Eleventh District determined that such application would be improper and reversed the trial court’s decision on that basis.

The Eleventh District’s error lies in their failure to draw a distinction between the terms “civil action” and “cause of action.” A “cause of action” is defined as the factual allegations that give rise to a basis for filing an action. *McNeil, supra*. The factual allegations giving rise to this suit surround Mrs. Johnson’s gall bladder surgery. However, R.C. 2317.43 does not reference “cause of action” within its statutory text; instead specifying that the statute applies to “any civil action.” See R.C. 2317.43. Therefore, the time period in which Mrs. Johnson’s surgery was performed is irrelevant to the issue of whether R.C. 2317.43 should be applied prospectively or retroactively. Judge Cannon correctly determined in his dissenting opinion that by including the language “in any civil action brought”, the legislature intended for R.C. 2317.47 to apply to any civil judicial proceeding filed after the effective date of the statute.

Appellees first commenced their civil action in 2007. *Johnson, supra* (Cannon, J. dissenting) at ¶ 33. “In 2007, R.C. 2317.43 was in effect and, consequently, applicable to this case.” *Id.* Judge Cannon’s dissent specifically addressed the actual language of R.C. 2317.43 as written, which the majority of the Eleventh District failed to do, correctly determining that the language provides for a prospective application of R.C. 2317.43 when a civil judicial proceeding is filed after the statute’s enactment date. *Id.* As R.C. 2317.43 may be applied prospectively to the subject action, the trial court was correct in excluding Dr. Smith’s statements of sympathy, and the Eleventh District decision should be reversed.

This case also presents the question of whether R.C. 2317.43 is intended to be construed broadly in order to give proper effect and protection to a physician who apologizes to a patient, the patient's family or representative, for the discomfort, pain, suffering, injury or death resulting from the unanticipated outcome of medical care. Specifically, at issue is whether the statute was intended to include statements expressing acceptance of responsibility made in conjunction with the physician's expression of sympathy. The answer to this question is a resounding yes.

In this case, the testimony at issue demonstrates that Dr. Smith's admission of responsibility was entrenched in his statement of apology. He said that he "take[s] full responsibility" in the context of an attempt to console Mrs. Johnson, also stating "everything is going to be ok." R.C. 2317.43 was enacted to prevent these sincere statements of apology and sympathy from being introduced into evidence at trial because these are typical statements of a physician or medical provider after an unanticipated medical outcome such as in the case at hand.

The decision of the Eleventh District limits the effectiveness of a physician's apology by requiring the medical care provider to remove any sense of accountability, admission or expression of responsibility from their statement to the patient or the patient's family. A physician or medical provider would be limited to "I'm sorry," to the exclusion of statements wherein the physician attempts to establish the reason for why they are sorry. By precluding statements of responsibility from the physician's apology, the patient and/or their family are left without a direct explanation as to why the physician is offering a sympathetic statement or affirmation. Although an expression of sympathy is not admissible at trial, anything beyond those words, including an explanation, would be admissible in future litigation and be taken wholly out of context.

“In construing a statute, the court’s paramount concern is legislative intent. In determining legislative intent, the court first looks to the language in the statute and the purpose to be accomplished.” *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Ed.*, 74 Ohio St. 3d 543, 545, 660 N.E.2d 463, 465 (1996). “In matters of construction, it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used. *Cleveland Elec. Illuminating Co. v. City of Cleveland*, 37 Ohio St. 3d 50, 524 N.E.2d 441, 442 (1988), syllabus paragraph three. “Ambiguity in a statute exists only if its language is susceptible of more than one reasonable interpretation. Thus, inquiry into the legislative intent, legislative history, public policy, the consequences of an interpretation, or any of the other factors identified in R.C. 1.49 is inappropriate absent an initial finding that the language of the statute is, itself, capable of more than one meaning.” *In re Adoption of Baby Boy Brooks*, 136 Ohio App. 3d 824, 829, 737 N.E.2d 1062, 1065-66 (2000).

R.C. 2317.43 requires that “any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence” made to the “victim of an unanticipated outcome of medical care” as it relates to “the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care” be excluded from trial. Such expressions are inadmissible as evidence of an admission of liability or an admission against the medical provider’s interest. *Id.* In accordance with the general rules of statutory construction, this Court is required to determine the legislative intent of these invaluable clauses as written. *Savarese, supra.*

The statute is both inherently and expressly broad and ambiguous in scope as it applies the exemption set forth in R.C. 2317.43 to “any and all statements, affirmations, gestures, or

conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence.” This clause is inherently broad and ambiguous in scope as it leaves ample room for interpretation as to what constitutes an expression of “apology, sympathy, commiseration, condolence, [or] compassion.” How one person would express any of these emotions, let alone define the terms listed in R.C. 2317.43(A), is left to a myriad of interpretations; and is therefore, unequivocally ambiguous. Moreover, whether a result is “unanticipated” is also subject to interpretation, especially in the medical context, because it would necessarily encompass complications and/or less than ideal outcomes that the procedure was supposed to produce.

The clause is similarly expressly broad and ambiguous in scope as it applies the exemption to “any and all” expressions listed including a “general sense of benevolence” which is undefined in the statute and open to an unquantifiable number of definitions or characterizations. Whether a person expressed a general sense of benevolence and how this impression was executed is entirely subjective in nature. Notwithstanding, Appellee Jeanette Smith appreciated the general sense of benevolence portrayed in Appellant Dr. Smith’s words and gestures at issue before this Court. See (T.p. 14.). Accordingly, as a whole, the type and scope of expressed sympathy the General Assembly intended to preclude from evidence is ambiguous and therefore this Court must look to “the legislative intent, legislative history, public policy, the consequences of an interpretation, or any of the other factors identified in R.C. 1.49.” *In re Adoption of Baby Boy Brooks, supra.*

R.C. 1.49 states in pertinent part: “If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters: (A) The object sought to be attained; (B) The circumstances under which the statute was enacted; (C) The legislative history;

\*\*\* (E) The consequences of a particular construction[.]” Each of these factors require this Court to apply R.C. 2317.43 in the manner requested by Appellant herein because any other statutory construction would fail to carry-out the intent of the General Assembly in enacting the statute as it would stymie communication and lead physicians and medical providers to avoid their patients and the patient’s families in the event of an unanticipated outcome lest something they inadvertently say in an attempt at offering a sincere apology be used against them as a statement against interest in future litigation.

It is indisputable that the goal sought to be attained in enacting R.C. 2317.43 was to prevent expressions of sympathy from being used against a physician or other medical provider at trial. What is in dispute before this Court is the extent to which a physician or medical provider may express their apology, specifically whether they can accept responsibility for the discomfort, pain or even death the patient or their family are experiencing. Stated differently, the question before this Court is, “What did the General Assembly seek to prohibit from being introduced into evidence?” A broad interpretation of the words and actions included in R.C. 2317.43 permits this Court to give appropriate effect to the statute, and is consistent with the legislative intent and public policy. A broad interpretation also allows the statute to preclude from evidence the type of expressions R.C. 2317.43 was drafted to protect from later use against a physician or medical provider. *See* R.C. 1.49(A) and *State v. Anthony*, 96 Ohio St. 3d 173, 2002-Ohio-4008, 772 N.E.2d 1167, ¶15 (Statute at issue therein not to be interpreted broadly because doing so would undermine legislative intent and would produce absurd results).

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 because they typically participate in the procedure that produced the unanticipated outcome.

There is no question that the General Assembly intended to preclude this type of apology evidence, including the inherent acceptance of responsibility, from being introduced at trial because it is an admission of liability or a statement against interest. See R.C. 2317.43; *see also* R.C. 1.49(A). Why would a physician or medical provider apologize to the patient or the patient's family in the face of an unanticipated medical outcome, which has caused pain, discomfort or death? See R.C. 2317.43(A). The only logical explanation is that the physician or medical provider caused the pain, comfort or death otherwise there would be nothing to apologize for. See R.C. 2317.43. However, this statement is not an admission of negligence and it is not admissible. R.C. 2317.43.

If the General Assembly sought to limit the protection to insincere apologies that lacked any acceptance of fault or an expression of confession then the statute did not have to be drafted using such broad and encompassing language and could have just as easily omitted the sympathy aspect. Without an acceptance of responsibility, the "apology" which is otherwise inadmissible would be meaningless and contrary to the purpose of R.C. 2317.43. Moreover, if the General Assembly intended statements that include inherent confessions to be protected from later use against the physician or medical provider pursuant to R.C. 2317.43, it would be counterintuitive to permit express confessions of responsibility or acceptance of fault to be used against those parties in future litigation. Stated differently, it would be incongruous to exclude inherent acknowledgment of fault from use as a statement of liability or a statement against interest but permit an express statement, similar in nature, to be used against the physician or medical provider.

In interpreting R.C. 2317.43, this Court can look at the legislative intent in drafting the statute. *Savarese, supra*. The Ninth District in *Davis v. Wooster Orthopaedics & Sports*

*Medicine, Inc.*, 193 Ohio App.3d 581, 2011-Ohio-3199 provided an explanation of the legislative history of R.C. 2317.43 as follows:

According to its stated intent, the Ohio General Assembly “enact[ed] section 2317.43...to prohibit the use of a defendant’s statement of sympathy as evidence in a medical liability action...” H.B. 215, 125<sup>th</sup> Gen. Assem. (Ohio 2004). From the time that Sub. H.B. 215 was first introduced in the 125<sup>th</sup> General Assembly, the “Bill Summary” indicated that it would “[p]rohibit the use of a defendant’s statement of sympathy as evidence in a medical liability action.” Sub. H.B. 215, 125<sup>th</sup> Gen. Assem., as reported by H. Insurance (Ohio 2004). As the bill was passed by both the House and Senate, the synopsis explained that it would “prohibit[ ] the use of any statement of sympathy offered by a health care provider ... as evidence of an admission of liability or an admission against interest[.]”

*See Davis supra* at ¶11.

However, the language contained in the legislative history above is not dispositive of whether the General Assembly intended to limit the type of expressions of sympathy available to physicians or medical care providers. *Id.* There is no question that the General Assembly intended to preclude expressions of sympathy from being offered against a physician in future litigation. Therefore, the legislative history is also ambiguous and provides little support for this Court’s decision herein.

As stated at length above, interpreting the statute to exclude an acceptance of responsibility from the protection afforded under R.C. 2317.43 is contrary to the General Assembly’s intent because it would weaken the physician-patient relationship, which requires a sufficient level of trust to be effective. Permitting an expression of responsibility to be used against a physician or medical provider in future litigation would severely undercut the purpose of the statute and cause detrimental harm to the physician-patient relationship. Accordingly, R.C. 2317.43 is intended to be construed broadly and preclude from evidence statements of sympathy

in which an expression of guilt or an acceptance of responsibility are made. The Eleventh District's decision, if left undisturbed, will have a negative effect on the physician-patient relationship by preventing physicians from consoling their patients because of a fear that such expressions would be used against them in future litigation, and further would render the purpose and effect of R.C. 2317.43 moot.

**Appellant's Proposition of Law No. 2**

**R.C. 2317.43 is remedial in nature and may apply retroactively under Section 28, Article II of the Ohio Constitution.**

Although R.C. 2317.43 may be applied prospectively to the facts of the subject action, the AMCNO must address the Eleventh District's error in holding that R.C. 2317.43 cannot be applied retroactively to protect the interests of the AMCNO's membership. The plain language of R.C. 2317.43 shows that the General Assembly intended retroactive application and as the statute is remedial in nature it is constitutionally permissible to apply the statute retroactively.

In determining whether a statute may apply retroactively a court must look at the intent of the General Assembly in enacting the statute as well as whether the statute is remedial or substantive in nature. *Van Fossen v. Babcock v. Wilcox Co.*, 36 Ohio St.3d 100, 522 N.E.2d 489 (1988). The Ohio Constitution prohibits the implementation of retroactive laws that impair substantive rights. Art. II, Sec. 28; see *In re Nevius*, 174 Ohio St. 560, 564, 191 N.E.2d 166, 169-170 (1963). Substantive and remedial laws are defined as follows:

A statute is substantive if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligations, or liabilities to a past transaction or creates a new right. \*\*\* Remedial laws are those affecting only the remedy provided and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right. \*\*\* laws that relate to procedure are ordinarily remedial in nature.

*Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118 (2008) at ¶ 15. “A purely remedial statute does not violate Section 28, Article II of the Ohio Constitution, even when it is applied retroactively.” *Bielat v. Bielat*, 87 Ohio St.3d 350, 354, 721 N.E.2d 28, 33 (2000).

Substantive laws are those that “create duties, rights and obligations, while procedural or remedial law prescribes the method of enforcement of rights or obtaining redress.” *Kilbreath v. Rudy*, 16 Ohio St.2d 70, 242 N.E. 2d 658 (1968); citing *State ex rel. Holdridge v. Indus. Comm.*, 11 Ohio St.2d 178, 228 N.E. 2d 621 (1967). “Remedial laws are those enacted to correct past defects, to redress an existing wrong, or to promote the public good.” *State v. Moore*, 165 Ohio App.3d 538, 2006-Ohio-114, 847 N.E. 2d 452 (4<sup>th</sup> Dist.) at ¶ 21. Remedial laws that limit what evidence may be presented at trial are properly applied when the law is enacted prior to the trial date, even if the law was enacted after the cause of action accrued. *Denicola v. Providence Hospital*, 57 Ohio St.2d 115, 117-118, 387 N.E. 2d 231, 233 (1979).

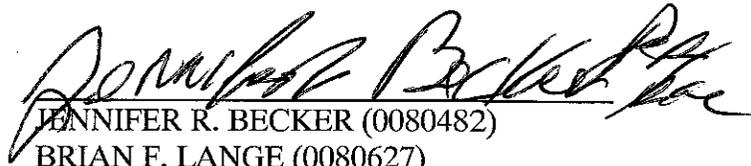
The plain language of R.C. 2317.43 meets the first requirement set forth in *Van Fossen* that the general assembly intended the statute to be applied retroactively. Specifically, R.C. 2317.43 applies to “any civil action” regardless of when the cause of action accrued. By including the “in any civil action” language the General Assembly clearly intended that R.C. 2317.43 be applied to situations in which the statements were already made, but the case has not yet proceeded to trial.

In addition, the second requirement is met because R.C. 2317.43 is a remedial statute. Remedial statutes are generally procedural in nature and are often enacted to promote the public good. *See Ackinson, supra*; and *Moore, supra*. As a remedial statute, R.C. 2317.43 can be applied retroactively without offending Section 28, Article II of the Ohio Constitution. R.C.

2317.43 is procedural in nature in that it provides a more appropriate remedy for an existing right. Specifically, the types of statements outlined in R.C. 2317.43 are already subject to exclusion under Evid. R. 403(A); and thus, R.C. 2317.43 does not provide a defendant doctor with any substantive right or impinging upon a substantive right of the patient. Instead, the statute provides a more appropriate procedural mechanism for excluding evidence of statements of apology. In addition, the Statute promotes the public good by encouraging frank and truthful communication in the physician-patient relationship. As such, the remedial statute is properly applied to any trial that occurs after the effective date of September 13, 2004.

#### **IV. CONCLUSION**

For all the forgoing reasons, Amicus Curiae requests that this Court reverse the decision of the Eleventh District Court of Appeals below, reinstate the trial verdict, find that R.C. 2317.43 can apply either prospectively or retroactively and hold that the statute excludes from trial confessions of responsibility made in conjunction with an expression of sympathy. Further, in the event that the Eleventh District Court of Appeals' decision herein is affirmed, Amicus Curiae requests that this Court instruct the General Assembly and provide guidance as to how R.C. 2317.43 may be redrafted to afford statements of responsibility or acceptance of fault made in conjunction with an expression of sympathy the protection intended by the statute herein.



JENNIFER R. BECKER (0080482)  
BRIAN F. LANGE (0080627)  
BONEZZI SWITZER MURPHY POLITO  
& HUPP CO LPA  
1300 East 9th Street, Suite 1950  
Cleveland, Ohio 44114  
Main Phone: 216-875-2767  
Facsimile: 216-875-1570  
E-Mail: Jbecker@bsmph.com  
Blange@bsmph.com

Attorneys for Amicus Curiae The Academy  
of Medicine of Cleveland & Northern Ohio

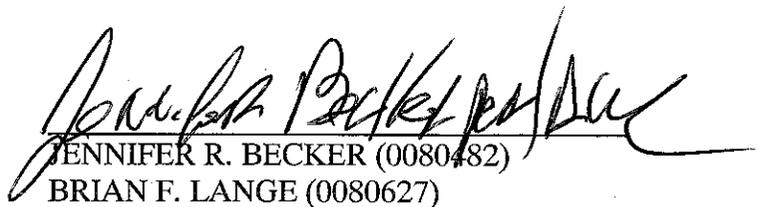
**CERTIFICATE OF SERVICE**

A copy of the foregoing was sent by ordinary United States mail, postage prepaid, on this 26<sup>th</sup> day of July, 2012 to the following:

BRET C. PERRY, ESQ. (0073488)  
JOHN S. POLITO, ESQ. (0017327)  
JASON A. PASKAN (0085007)  
BONEZZI SWITZER MURPHY  
POLITO & HUPP CO., LPA  
1300 East 9th Street, Suite 1950  
Cleveland, Ohio 44114  
Main Phone: 216-875-2767  
Facsimile: 216-875-1570  
E-Mail: Bperry@bsmph.com  
Jpolito@bsmph.com  
Jpaskan@bsmph.com

Attorney for Defendants-Appellants

ANTONIOS P. TSAROUHAS, ESQ.(0064110)  
300 Courtyard Square  
80 South Summit Street  
Akron, Ohio 44308  
Telephone: 330-254-5454  
  
Attorney for Plaintiffs-Appellees



JENNIFER R. BECKER (0080482)  
BRIAN F. LANGE (0080627)