

IN THE SUPREME COURT OF OHIO

CASE NO. 12-0014

ON APPEAL FROM

THE ELEVENTH DISTRICT COURT OF APPEALS

PORTAGE COUNTY, OHIO

CASE NO. 2010-P-0050

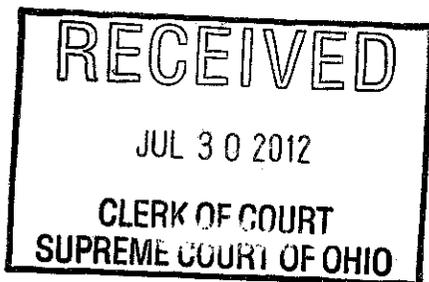
JEANETTE JOHNSON, et al.

Plaintiff-Appellees,

-vs-

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

Defendants-Appellants.



**MERIT BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS RANDALL H. SMITH,
M.D. AND RANDALL H. SMITH, M.D., INC.**

Bret C. Perry, Esq. (0073488)
Counsel of Record
John S. Polito, Esq. (0017327)
Jason A. Paskan, Esq. (0085007)
Bonezzi Switzer Murphy Polito
& Hupp, Co., LPA
Cleveland, Ohio 44011
Telephone: 216-875-2767
Facsimile: 216-875-1570
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

Counsel for Plaintiffs-Appellees

Counsel for Defendants-Appellants
Randall H. Smith, M.D. and Randall H. Smith, M.D., Inc.

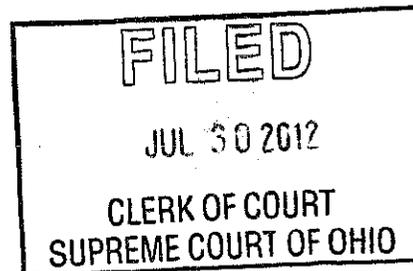


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INTRODUCTION

At issue in this case is the application of R.C. 2317.43, Ohio's healthcare provider apology statute, which was enacted to permit healthcare providers to make statements or other expressions of sympathy to their patients, or the patient's family, after an unanticipated outcome resulting from a medical procedure, without fear that such conduct would be improperly admitted in future litigation as evidence of an admission against interest, liability or fault. In reversing the trial court's decision herein, the Eleventh District Court of Appeals, has judicially legislated what it has unilaterally determined to constitute an apology while simultaneously ignoring the clear and unequivocal statutory language set forth in R.C. 2317.43. Absent review and reversal by this Honorable Court, healthcare providers throughout this State will be left to console their patients in calculated manners for fear that the statements, gestures and expressions provided during an emotional time of need will be admitted in future litigation. R.C. 2317.43 was enacted to permit genuine expressions of sympathy and condolence by medical providers without the fear of reprisals. However, The Eleventh District's decision, if left undisturbed, will undoubtedly result in a chilling effect rendering the protections afforded by R.C. 2317.43 meaningless.

By enacting R.C. 2317.43, Ohio joined a number of states with similar statutes, but there is an inherent divide among those jurisdictions as to what constitutes an apology. This Court is presented with the opportunity to issue a cornerstone opinion regarding the application of R.C. 2317.43 which in turn will permit medical care providers to freely express their condolences to persons who have sustained an unexpected injury or outcome and enable the healthcare providers to accept responsibility for the harm or loss suffered during the procedure in an effort to comfort the patient or family with a sincere heartfelt apology. In order for such apologies to be offered,

medical care providers must be assured that the same will not be utilized to establish liability or fault, in accordance with the purpose and intent of R.C. 2317.43, in the event that a medical malpractice suit is instituted. Otherwise, the persons who have suffered loss or injury as the result of an unforeseen outcome of a medical procedure will be provided empty sympathies, i.e. “I’m sorry”, and left without substantive explanations as to what transpired or acknowledgements of responsibility, resulting in anger and future litigation.

In this case, the record is clear that the recipients of the sympathies and expressions of responsibility rendered by Appellant-Defendant Randall H. Smith, M.D. were intended to be, and received as, expressions of apology made in an effort to console his patient, Appellee-Plaintiff Jeanette Johnson, during a stressful and emotional time of need. The trial court appropriately prohibited Appellees-Plaintiffs attempts at poisoning the jury and improperly inferring that the statements, gestures, and comments, rendered by Dr. Smith constituted an admission of liability or fault. The Eleventh District’s decision to substitute judgment for that of the trial court and vacate an otherwise valid verdict in favor of Appellees-Defendants should be reversed by this Honorable Court. Accordingly, this Court should restore the trial verdict in favor of Appellants-Defendants Randall H. Smith, M.D. and Randall H. Smith, M.D., Inc. because the apologies and condolences offered to Appellee-Plaintiff and her friends and family were properly precluded from trial pursuant to a prospective application of R.C. 2317.43 in accordance with the intent of the Ohio legislature in enacting the same.

I. STATEMENT OF FACTS

Plaintiff-Appellee, Jeanette Johnson (“Appellee”), suffered from long standing gall bladder disease. On April 24, 2001, surgery was performed at Robinson Memorial Hospital by Defendant-Appellant, Randall H. Smith, M.D. (“Dr. Smith”), to treat Appellee for an acute gall

bladder attack. This surgery was scheduled to be performed laparoscopically. During the course of the procedure, the common bile duct was injured and appropriately recognized resulting in the surgery being converted to an “open procedure” in order to correct the injury. An injury to the common bile duct during the performance of this procedure is a known and recognized risk of the procedure as agreed to by all experts testifying in this matter.

Following the surgery, Appellee was advised of the injury to the common bile duct. Dr. Smith explained to Appellee the manner in which the injury occurred, and the manner in which the common bile duct injury was repaired.

Approximately one-month later, on May 21, 2001, Appellee was readmitted to Robinson Memorial Hospital with complications related to the surgically corrected common bile duct injury. At this time, a decision was made to transfer Appellee to University Hospitals of Cleveland for further treatment. Prior to transfer, Appellee became very upset and emotional. In an effort to console his patient, Dr. Smith took Appellee’s hand and attempted to calm her as described by Appellee’s family friend, Amy Semprock at the time of her *voir dire* examination:

- Q. Okay. Can you relate to us, generally, what you recall about the conversation?
- A. Mrs. Johnson was - - Mrs. Johnson was very upset as to the transfer that was supposed to occur. **She began crying and sobbing. I tried to console her, and Dr. Smith came over to her bed, and he tried to console her also, and she really began to cry harder, so he held her hand and he tried to console her.** And, ah, we waited for a minute and then Dr. Smith said, “I take full responsibility in this. Everything will be okay.” And he kind of patted her hand. And, ah, then that was it.
- Q. Did you view that as an act of apology by Dr. Smith towards Mrs. Johnson, that he was apologizing to her?
- A. No, not really. **I - - to me, it was consoling her. He was consoling her. He was trying to, ah, ah, settle her down a little bit, because she was really crying.**

(Emphasis added.)(T.p. 8-9.)

Similarly, Appellee testified during her *voir dire* examination that she understood Dr. Smith's gestures to constitute an attempt to console her during this time of need. Appellee testified as follows with respect to her impression of Dr. Smith's conduct at the time of her *voir dire* examination:

Q. * * *. Would you agree that Dr. Smith was attempting to console you at that point in time?

A. Yes.

Q. Calm your nerves?

A. Yes.

Q. He was sympathetic?

A. I guess.

Q. He was compassionate?

A. He was trying to be.

Q. He had a general sense of benevolence and concern for your well-being?

A. Well, I guess. * * *.

(T.p. 14.)

The Ohio General Assembly enacted R.C. 2317.43, effective on September 13, 2004, which states, in part:

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.

On July 26, 2007, Jeanette Johnson and Harvey Johnson (“Appellees”) refiled this medical malpractice action against Randall H. Smith, M.D. and Randall H. Smith, M.D., Inc. as Case No. 2007-CV-01006.¹ Appellees alleged that Dr. Smith was negligent in the performance of laparoscopic gall bladder procedure and that his negligence proximately caused injury to Appellee Jeanette Johnson.

Based on the aforementioned testimony elicited during the trial court’s *voir dire* examination of these witnesses, the trial court properly exercised its discretion and precluded Appellees’ attempts to improperly elicit testimony and evidence relative to Dr. Smith’s gestures and expressions of sympathy directed toward his patient pursuant to R.C. 2317.43 for the improper purpose of inferring, directly or indirectly, that Dr. Smith’s comments, gestures and expressions were an admission of fault and/or liability.

Specifically, the trial court stated:

“* * *Miss Johnson was distressed, that she obviously was not comfortable, she was suffering, upset, and that Dr. Smith, in a compassionate manner, came over and was sympathetic and acted to comfort her. He took her hand, and in doing so, stated that he took responsibility for the situation in having her transferred. It’s the Court’s opinion that the statements and gestures and actions are covered under R.C. 2317.43 [effective September 13, 2004], and, therefore, I am going to grant the motion in limine and exclude the statement.

(T.p. 20-21.)

¹ This action was originally filed on August 19, 2002 and voluntarily dismissed without prejudice pursuant to Civ.R. 41(A) on September 11, 2006.

On June 19, 2010, the jury found in favor of Appellants finding that Dr. Smith did not violate the accepted standard of care in the performance of the laparoscopic gall bladder procedure at issue. The jury did not reach the issue of proximate causation or damages.

On appeal to the Eleventh District Court of Appeals, Appellees asserted that the trial court erred in applying R.C. 2317.43 retroactively, and prohibiting the admission of testimony regarding Dr. Smith's conduct on May 21, 2001, thereby constituting reversible error warranting vacating the jury's verdict and a new trial. The Eleventh District, in a 2-1 decision, reversed the jury's verdict, finding that the trial court erred in excluding the sympathetic statements at issue ordering a new trial on the merits. (See November 21, 2011, Opinion attached as Appendix "A" at ¶28). Specifically, the Eleventh District found that the trial court erred in applying R.C. 2317.43 retroactively finding there was not an expression of intent for retroactive application as required by Ohio law. (Appendix A at ¶¶19-22). Therefore, the Eleventh District Court of Appeals concluded that the trial court erred in excluding the sympathetic statements and gestures of Dr. Smith at the time of trial.

In reversing the jury's verdict, the Eleventh District held that the statements of Dr. Smith could permit a juror to conclude that Dr. Smith was admitting fault and that the probative value of the sympathetic statements substantially outweighed the danger of undue prejudice despite the prior determinations of the trial court during *voire dire* examination of each witness pursuant to R.C. 2317.43 and Evid. R. 403(A) that gestures and statements were designed to console the Appellee during her time of need. (Appendix A at ¶24).

In his dissent, Judge Cannon, noted that a prospective application of R.C. 2317.43, as applied to the facts of this case, required deference to the trial court's decision to exclude the statements at issue as the refiled case arose subsequent to the enactment of R.C. 2317.43.

(Appendix A at ¶¶32-39). Accordingly, even when applying R.C. 2317.43 prospectively, the facts of this case require that the sympathetic statements at issue be excluded as determined by the trial court. (*Id.*) Judge Cannon explained the plain language of R.C. 2317.43 applies to this case as it was not brought until after the effective date of the statute (*Id.* at ¶31) and therefore the statements of Appellant Dr. Smith were properly excluded. (*Id.* at ¶39).

II. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1

OHIO REVISED CODE § 2317.43 APPLIES TO ANY CAUSE OF ACTION COMMENCED OR FILED AFTER THE ENACTMENT DATE OF THE STATUTE AND SERVES TO PRECLUDE THE INTRODUCTION INTO EVIDENCE A HEALTHCARE PROVIDER'S SYMAPTHETIC STATEMENTS AND GESTURES.

PROPOSITION OF LAW NO. 2

OHIO REVISED CODE § 2317.43 IS PROCEDURAL IN NATURE AND APPLIES RETROACTIVELY TO PRECLUDE THE INTRODUCTION INTO EVIDENCE A HEALTHCARE PROVIDER'S SYMAPTHETIC STATEMENTS AND GESTURES.

Although stylized as two distinct Propositions of Law for this Court's review, the aforementioned issues in this case reduce to one question: Whether R.C. 2317.43 applies to the apologetic statements and gestures provided by Dr. Smith in his attempt to console his patient? The answer to this question is a resounding yes, because R.C. 2317.43 is a procedural statute which applies prospectively to any and all civil actions brought after the effective date of the statute, therefore the rules concerning the constitutional retroactivity issues as discussed by the Eleventh District are irrelevant to this Court's consideration. It is indisputable that the statements at issue were intended to be, and received as, sympathetic or apologetic in nature as a means of consoling Appellee in a stressful situation stemming from an unanticipated medical outcome and

the trial court appropriately prohibited Appellees improper attempts to mischaracterize Dr. Smith's comments and gestures as an admission of fault or liability.

The Ohio legislature, in enacting R.C. 2317.43, sought to prohibit the introduction of any sympathetic statements and gestures rendered by a healthcare provider in any civil action brought by an alleged victim of an unanticipated outcome of medical care. The statute as enacted applies to any action commenced after the effective date of R.C. 2317.43.² Specifically, the effective date for application of R.C. 2317.43 is as follows: "In any *civil action brought* by an alleged victim * * *." In accordance with the language of the statute, while the sympathetic statements and gestures attributable to Dr. Smith were rendered prior to the enactment of the statute, the fact remains that the *Appellee did not commence this action until after the effective date of R.C. 2317.43*, and therefore, the conduct and statements of sympathy made by Dr. Smith were required to be precluded from trial.

As duly noted by Judge Cannon in his dissent:

[T]he statute's language is clear and unambiguous and, therefore, we apply the statute as written, giving effect to its plain meaning. "An 'action' is defined as 'a civil or criminal judicial proceeding.'" *McNeil v. Kingsley*, 178 Ohio App.3d. 674 at ¶49, quoting Black's Law Dictionary (8 Ed.Rev.2004) 31, 235. 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 entitled one person to obtain a remedy in court from another person.'" *Id.* Further, case law has treated "brought" synonymously with "commenced." *Cover v. Hildebran* (1957), 103 Ohio App. 413, 415. (Under the Ohio Civil Rules, "a civil action is commenced by filing a

² There is a general presumption that R.C. 2317.43, as with any other statute enacted by the General Assembly, is to be applied prospectively pursuant to R.C. 1.48. The Eleventh District, in its majority opinion, failed to consider R.C. 1.48 and erred in analyzing the facts herein utilizing solely a retroactive analysis of the statute.

complaint with the court, if service is obtained within one year from such filing upon a named defendant * * *.” Civ. R. 3(A).)

(App. ¶132.)

Herein, Appellees filed their medical malpractice case on July 26, 2007, and it did not proceed to trial until June 15, 2010. The effective date of R.C. 2317.43 was September 13, 2004, nearly three (3) years prior to the commencement of Appellees’ cause of action and almost six (6) years prior to the trial of this matter. Furthermore, there is no dispute that R.C. 2317.43 is remedial in nature or that it impinges upon substantive rights which would prohibit application to the facts of this case.

“Where there is no 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, 503 N.E.2d 753 (1986). (Emphasis added). Similarly, in *Kilbreath v. Rudy*, 16 Ohio St. 2d, 242 N.E.2d 658 (1968) this Court held that “[l]aws of a remedial nature providing rules of practice, courses of procedure, or methods of review are applicable to any proceedings conducted after the adoption of such laws.” *Id.* at paragraph two of syllabus. Applying the same reasoning in *Denicola v. Providence Hospital*, 57 Ohio St. 2d 115, 387 N.E.2d 231 (1979), this Court determined that a law that was enacted after the cause of action but before the trial of the case was properly applied prospectively, in accordance with R.C. 1.48. *Denicola*, at 117-118. See also *Buckeye Candy & Tobacco Co., Inc. v. Limbach*, 28 Ohio St. 3d 40, 501 N.E.2d 1202 (1986) at 41 (“It is true that a procedural law is generally considered to be applied prospectively when it is applied to proceedings in which the particular procedural aspect regulated by the law has not yet occurred.”) and *State ex rel. Holdridge v. Industrial Commission*, 11 Ohio St. 2d 175, 228 N.E.2d 621 (1967) at syllabus paragraph one.

In accordance with well settled Ohio law, it was unnecessary for the trial court or the Eleventh District to apply R.C. 2317.43 retroactively because a prospective application would demand that Dr. Smith's statements of sympathy be excluded as appropriately noted by Judge Cannon in his dissent. (App. A.) Simply put, the Eleventh District was incorrect in determining that (1) R.C. 2317.43 does not apply to the facts of this case as this procedural and remedial statute was enacted well before the commencement of Appellees' cause of action and (2) a prospective application of Ohio's apology statute warrants preclusion of all statements, affirmations and conduct of a medical care provider to the victim of an unanticipated medical outcome.

The same is true despite a previous filing and voluntary dismissal of Appellees' cause of action pursuant to Civ. R. 41(A). As Judge Cannon succinctly stated, in his dissent:

As enacted, the language used by the legislature concerning the effective date for application of R.C. 2317.43 is "In any *civil action brought* by an alleged victim ***." The statute's language is clear and unambiguous and, therefore, we apply the statute as written, giving effect to its plain meaning. "An 'action' is defined as 'a civil or criminal judicial proceeding.'" 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 entitled one person to obtain a remedy in court from another person.'" Further, case law has treated "brought" synonymously with "commenced." Under the Ohio Civil Rules, "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 ***." Civ. R. 3(A).

(Appendix A at ¶32, citations omitted).

In this case, because Appellees' civil action was not commenced until July 26, 2007, and/or trial did not begin until June 15, 2010, after the effective date of R.C. 2317.43, "[Appellee Jeanette Johnson] did not have an action, i.e., a civil judicial proceeding, until the complaint was filed in 2007 *** [at which time] R.C. 2317.43 was in effect and, consequently, applicable to this

case.” (Appendix A at ¶33). Accordingly, utilizing a prospective application of R.C. 2317.43, it is without question that the trial court was acting with discretion when it excluded Appellant Dr. Smith’s statements of sympathy. See *State v. Davis, supra*.

The trial court granted Dr. Smith’s Motion in *Limine*, thereby precluding Appellees from utilizing the sympathetic statements for purposes of establishing liability in accordance with R.C. 2317.43 following an extensive *voir dire* examination of each witness outside the presence of the jury. Specifically, the trial court determined “**Miss Johnson was distressed, that she obviously was not comfortable, she was suffering, upset, and that Dr. Smith, in a compassionate manner, came over and was sympathetic and acted to comfort her. He took her hand, and in doing so, stated that he took responsibility for the situation in having her transferred.** It’s the Court’s opinion that the statements and gestures and actions are covered under R.C. 2317.43 ***.” (T.p. 20-21, *supra*).

This Court has defined a motion *in limine* as “[a] pretrial motion requesting [the] court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to [the] moving party that curative instructions cannot prevent [a] predispositional effect on [the] jury.’ Black’s Law Dictionary, *supra*, at 1013. The purpose of a motion *in limine* “is to avoid injection into [the] trial of matters which are irrelevant, inadmissible and prejudicial[,] and granting of [the] motion is not a ruling on evidence and, where properly drawn, granting of [the] motion cannot be error.’ *Id.* at 1013–1014. See *State v. Maurer* (1984), 15 Ohio St.3d 239, 259, 15 OBR 379, 396, 473 N.E.2d 768, 787.” *State v. French*, 72 Ohio St.3d 446, 449-450, 650 N.E.2d 887 (1995).

“Ordinarily, a trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of

procedure and evidence. *** An appellate court which reviews the trial court's admission or exclusion of evidence must limit its review to whether the lower court abused its discretion. As this court has noted many times, the term "abuse of discretion" connotes more than an error of law; it implies that the court acted unreasonably, arbitrarily or unconscionably." *Rigby v. Lake County*, 58 Ohio St. 3d 269, 271, 569 N.E.2d 1056, 1058 (1991). (Internal citations omitted). See also *Calderon v. Sharkey*, 70 Ohio St.2d 218, 219-220, 436 N.E.2d 1008 (1982).

In this case, it is clear that the trial court determined that the statements, actions and gestures of Dr. Smith, *in toto*, and based on the *voir dire* examination of the fact witnesses present at the time of the events, finding that the comments, gestures and statements were clearly within the protections afforded under R.C. 2317.43 and utilized its discretion in excluding the same from trial. Notably, the Eleventh District never analyzed whether the trial court acted unreasonably, arbitrarily or unconscionably in reaching this conclusion, thereby failing to review the exclusion of the sympathetic statements at issue under an abuse of discretion standard. See *State v. French, supra*. Rather, the Eleventh District erroneously determined that R.C. 2317.43 could not be applied retroactively despite its remedial nature and therefore, the application of the statute to the specific facts of this case were moot. See *Johnson v. Randall Smith, Inc.*, 196 Ohio App. 3d 722, 2011-Ohio-6000, 965 N.E.2d 344 (11th Dist.) at ¶22 attached as Appendix A.

However, given the consideration of the statements made by Appellee Jeanette Smith and her friends and family during *voir dire*, there is nothing unreasonable, arbitrary or unconscionable in the trial court's decision. The trial court appropriately determined that Dr. Smith was faced with a distressed patient who was suffering and upset and made statements and gestures that were designed to comfort his patient in a compassionate manner. *Supra*. Based

upon a plain reading of R.C. 2317.43, this is precisely the type of evidence the statute was designed to preclude from evidence in a medical malpractice case.

The effects of construing R.C. 2317.43 similar to the Eleventh District at issue herein, as well as the Ninth District in *Davis v. Wooster Orthopaedics & Sports Medicine, Inc.*, 193 Ohio App. 3d 581, 2011-Ohio-3199, 952 N.E.2d 1216 (9th Dist.), would result in a disparate application on a case by case basis failing to account for the myriad of emotions involved in these intense situations where a patient has suffered an unanticipated medical outcome from the procedure performed by the medical care provider. By requiring trial courts to excise only statements of condolence, i.e. "I'm sorry" or similar verbiage, but permitting into evidence expressions of responsibility or remorse, medical providers would be faced with having statements, taken wholly out of context, used against their interest before the jury without sufficient explanation as to what precipitated or surrounded such expressions.

A clear example of an improper application of R.C. 2317.43 was utilized by the Ninth District in *Davis, supra*:

Based upon the plain language of R.C. 2317.43, the intent was to protect pure expressions of apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence, but not admissions of fault. This interpretation comports with the explanation of Ohio's General Assembly as well as the policy espoused by the majority of states that have adopted apology statutes with an explicit distinction between sympathy and fault. A rule protecting a physician's expression of sympathy, but not his admission of fault, from use at trial accomplishes the goal suggested by [Appellant physician] of helping to diminish the obvious detriment to the physician-patient relationship following a negative outcome of medical treatment. Under Ohio's statute, a physician may speak with a patient and/or a patient's family members and express his heartfelt sympathy for their pain following a negative outcome without risk of that expression of sympathy being used against him in court.

According to the transcript, [Appellee] testified that after the surgery, “[Appellant physician] * * * said the back surgery went okay but he nicked an artery, and he takes full responsibility and it was my fault.” Later, the jury heard [the decedent’s] adult daughter *** testify that after the surgery, [Appellant physician] said that “as far as the back surgery, everything went fine, but * * * when they rolled her over that her blood pressure started to drop and they did an ultrasound and s[aw] that she was bleeding, that at some point an artery was nicked * * *. And he said, ‘It’s my fault. I take full responsibility.’ And he said, ‘In my five years I’ve never had anything like this happen.’ ” The parties seem to agree that (1) during her deposition, [the decedent’s daughter] testified that following the surgery, [Appellant physician] said he was sorry, and (2) the trial court excluded that part of the testimony at trial. The parties did not file [the decedent’s daughter’s] deposition, and there is no evidence in the record that [Appellee] tried to submit evidence at trial that [Appellant physician] told family members that he was sorry.

In this case, the testimony that the court admitted at trial did not include any expression of apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence. If there was testimony that [Appellant physician] said he was sorry following the surgery, that testimony was properly excluded from trial. R.C. 2317.43, however, does not require the exclusion of admissions of liability or fault by a medical professional. Therefore, the trial court correctly admitted the testimony of [Appellee] and [the decedent’s] daughter in this case.

Davis, at ¶¶13-15. (Internal citations omitted, emphasis added).

In *Davis*, the jury was presented with the fact that the appellant-physician told the family what had happened during the surgery, that it was his fault and that he took responsibility for his patient’s death. *Id.* Although the trial court excluded the apologetic statements, it permitted the expressions of responsibility and fault to be admitted into evidence despite the fact that the overarching intent of the expressions was taken completely out of context. While an outright expression of fault by a medical provider may be admissible into evidence, when couched in terms of sympathy or condolence the same becomes inadmissible under R.C. 2317.43, otherwise

the meaning of the gesture is lost. See *Davis, supra*. Stated differently, sanitizing a medical care provider's sincere statements of apology made after an unanticipated medical outcome may prove detrimental to them in future litigation if the "I'm sorry" is removed while the "It's my fault" remains in the record. Such a result would prove contrary to the intent of R.C. 2317.43.

An expression of accepting responsibility for the outcome made to console a patient or their family is not dispositive of whether there was in fact underlying negligence as Ohio law requires expert testimony to establish standard of care and causation. *Bruni v. Tatsumi*, 46 Ohio St.2d 127 (1976) and *Schlachet v. Cleveland Clinic Foundation* (1995), 104 Ohio App.3d 160. However, expressions similar to those made by Dr. Smith herein would undoubtedly cause the jury to question the medical care provider's liability despite the presence of compelling expert testimony that no negligence had in fact occurred, especially if such statements were taken out of context. Using this case as an example, if this Court were to affirm the Eleventh District's decision, during the new trial Dr. Smith would be required to defend his rationale for stating "I take full responsibility for this" without permitting him the benefit of contextualizing his statement with the circumstances and gestures surrounding Dr. Smith's words which were intended to console Appellee during a stressful time as admitted by Appellee and her family.

Furthermore, misapplication of R.C. 2317.43 is evinced by the anecdote provided by the Ninth District in an attempt to analyze the ambiguity of the statute and remedy legislative intent of the General Assembly:

As [appellant-physician] 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." Thus, looking to the rules of grammar and common usage, we note that the appearance of the term "apology" in R.C. 2317.43(A) creates some

ambiguity. Reading the term in context with the litany of other sentiments to be excluded under the statute, however, leads us to believe that the General Assembly did not intend to include statements of fault within the statute's ambit of protection.

Davis, at ¶10. (Internal citation omitted).

However, unlike the above hypothetical, when a medical care provider expresses an apology or makes a gesture of condolence to a patient or their family after an unanticipated medical outcome, the apologizing individual generally was involved in the unanticipated medical outcome. The inconsistency with the perceived intent of R.C. 2317.43 and the actual language used therein is further exacerbated because the statute requires that the sympathetic statements or gestures of condolence pertain to the subject of “discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care.” It would be difficult, if not impossible, to reconcile the courteous expression of condolences considered by the Ninth District with the real world application of the intent of R.C. 2317.43 as the statute does not contemplate medical care providers making random apologies to patient’s or their families without some inclination or involvement in the procedure which would deem the subjective need to apologize necessary.

Despite its incorrect conclusion, Ninth District in *Davis, supra*, provided an in depth review of the three categories of state statutes similar to that of R.C. 2317.43. Notably, the *Davis* court recognized that California’s apology statute specifically differentiated between statements of apology and statements of fault. *Davis, supra*, at ¶6. Accordingly, the California legislature concluded that statements of fault or responsibility were inherent in statements of apology and specifically excluded the former from the definition. Likewise, seventeen additional states have explicitly distinguished between statements of apology and statements of responsibility or fault,

further demonstrating the assumption that statements of sympathy generally include statements of responsibility or fault. *Id.*

Moreover, an additional eight states which have made this explicit distinction between the aforementioned categories have excluded each from evidence under the guise of “apology.” *Id.* at ¶7. The Ninth District pointed out that Colorado added the term “fault” to the litany of apologetic adjectives, making it clear that Colorado’s apology statute was intended to preclude statements of fault from evidence when made during an expression of sympathy. *Id.* However, as it is clear from the Ninth District’s analysis, such a distinction is unnecessary given the overwhelming assumption that statements of responsibility or fault are part and parcel to an expression of condolence or apology in the event of an unanticipated medical outcome. These statements are not intended to constitute an admission of liability.

It is incumbent upon this Court to issue the cornerstone opinion for not only Ohio courts, but as well as those states utilizing similar language as expressed in R.C. 2317.43. In consideration of the assumption made by the vast majority of the state legislatures enacting similar statutes, i.e. that the definition of apology or sympathy inherently includes statements of responsibility or fault, this Court should affirm the trial court’s decision to exclude the statements made by Dr. Smith and reinstate the jury verdict in this case, so that the courts of this State may permit the commonly accepted definition of apology and sympathy to apply when determining what must be precluded from evidence under R.C. 2317.43.

Instead of comporting with “common etiquette” as proposed by the Ninth District, a medical care provider’s affirmation of sympathy, after an adverse and unforeseen medical outcome, carries with it an inherent, or, as in this case, an express acceptance of responsibility which falls under the protection of R.C. 2317.43; to rule otherwise would undoubtedly result in

the medical care provider's callous and scripted "I'm sorry" in passing, or total avoidance of the patient or their family in order to prevent such discussions from being brought up during trial should litigation ensue. Such a result would be inapposite to the intent and plain language of R.C. 2317.43 as:

[T]he 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." Sub.H.B. No. 215, 150 Ohio Laws, Part III, 4146 ("H.B. 215"). From the time that H.B. 215 was first introduced in the 125th 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." H.B. 215, 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[.] * * * For this purpose, a statement of sympathy includes any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence[.]" H.B. 215.

Davis, at ¶11.

Removed from the Ninth District's consideration of the legislative intent, as well as the application of R.C. 2317.43 by the Eleventh District at issue herein, is the appreciation that "any and all" encompasses the general manner in which the medical care provider offers their apology, inclusive of explanations, condolences and acceptance of responsibility and fault. Specifically, Appellee Jeanette Smith and Amy Semprock conceded that Dr. Smith's expressions and gestures in their entirety were meant to console his patient. Furthermore, although not explored at the time, it is entirely possible that without Dr. Smith's acceptance of responsibility, the apology would not have accomplished its goal of consolation; however, it is indisputable that

with such an affirmation of responsibility, both Appellee and Ms. Semprock perceived his intent to offer heartfelt solace. *Supra*.

Simply put, when Dr. Smith was faced with a patient who was in dire need of reassuring words, he appropriately offered an expression of sympathy and apologized for the unanticipated medical result which had occurred, accepting responsibility for his role which was causing Appellee's pain, discomfort, suffering and injury. As such, Dr. Smith's actions and expressions were precluded, pursuant to R.C. 2317.43, from the medical malpractice allegation levied against him as the witnesses questioned on the issue, including Appellee Jeanette Smith, conceded that Dr. Smith was attempting to console his patient. The trial court therefore appropriately exercised its discretion and granted the pending motion in *limine* upon determining that Dr. Smith's words and gestures were afforded protection under the statute.

As previously discussed, the "[a]pplication of a statute that affects procedural rather than substantive rights to causes arising prior to the statute's effective date but tried thereafter is not an impermissible retroactive application." *Dunn v. Dunn*, 12th Dist. No. CA 99-09-103, 137 Ohio App. 3d 117 (2000) citing *Denicola and Kilbreath, supra*. See also *Mead v. Lakewood School Dist. Bd. of Educ.*, 5th Dist. No. 97 CA 113, 1998 WL 516290 (1998), ("A procedural or remedial statute should be applied to all actions which come to trial after the effective date of such statute where the cause of action arose before such effective date.") and *Carr v. Armstrong*, 5th Dist. No. 98CA0032, 1998 WL 549369 (1998), ("A procedural or remedial statute shall be applied to actions which come to trial after the effective date of such statute where the cause of action arose before the effective date.") The *Dunn* court continued, noting that "[T]he application of a statute affecting procedural rights to all causes tried after the effective date of the statute 'constitutes prospective operation as, in such instances, the date of the trial is the reference point from which

prospectivity and retroactivity are measured.” *Dunn*, at 124 citing *Rummery v. Myles*, 3rd Dist. No. 7-83-1, 1983 WL 7315 (1983).

R.C. 2317.43 precludes the introduction of expressions of sympathy, gestures and actions which is consistent with a function of the Rules of Evidence. The Rules of Evidence regulate the means of carrying on a suit and the machinery required to carry on a suit is procedural in nature rather than substantive. See *Ackison v. Anchor Packing Co.*, 120 Ohio St. 3d 228 at 231, 897 N.E.2d 1118 (2008), at 231-232. R.C. 2317.43 prevents potentially prejudicial statements of sympathy expressed by the physician from being admitted as evidence so that improper inferences regarding fault may not be made, especially those which will be taken out of context as referenced above. *Davis, supra*. Substantially prejudicial evidence is excluded pursuant to Evid. R. 403(A) and R.C. 2317.43 is merely a specific statute designed to effectuate this goal. R.C. 2317.43 does not create a substantive right; rather it is a procedural mechanism that enforces Evid. R. 403 by expressly precluding statements of sympathy when such statements are at issue. As such, the Eleventh District’s retrospective analysis is of no consequence to the determination as to whether R.C. 2317.43 applies herein.

In fact, the reasoning behind the enactment of R.C. 2317.43 was to allow physicians to commiserate with and console their patients without fear that such expressions would be used against them in future litigation. See H.B. 215 “[R.C. 2317.43] Prohibits the use of a Defendant’s statement of sympathy as evidence in a medical liability action.” By reversing the trial court’s decision, the Eleventh District has rendered the purpose and effect of R.C. 2317.43 moot thereby permitting overwhelmingly prejudicial evidence to be admissible despite the protections the statute was intended to afford healthcare providers in Ohio. In this case, the trial court properly excluded the evidence related to Dr. Smith’s gestures and expressions of sympathy due to the

highly prejudicial nature of this evidence. See R.C. 2317.43 and Evid. R. 403(A). To permit evidence relative to these statements would serve to only confuse and mislead the jury resulting in prejudicial error. See Evid. R. 403(A).

Most damaging, for purposes of this Court's decision, is the unequivocal fact that the decision of the Eleventh District will result in a chilling effect throughout Ohio forcing healthcare providers to forgo any attempt at consoling or sympathizing with their patients due to the fear that their actions, gestures, and statements would later be utilized in a civil action for the purpose of improperly infer fault. See R.C. 2317.43. Absent the application of R.C. 2317.43 in the manner requested herein, it is indisputable that confusion will arise in the courts of this State as they will be left to determine whether or not a sympathetic statement made is to be excluded under the statute or admissible because the statute does not apply, to the prejudice of the physician who was merely attempting to console their patient after an unanticipated outcome from a medical procedure occurred.

Accordingly, this Court should reverse the decision of the Eleventh District and reinstate the jury's verdict in favor of Appellants-Defendants, concluding that R.C. 2317.43 is a procedural in nature and therefore prospective or retroactive application is permissible.

III. CONCLUSION

The trial court correctly determined that R.C. 2317.43 was enacted to preclude any and all statements and gestures of sympathy and condolence, inclusive of those statements wherein the medical care provider accepts responsibility for the unanticipated medical outcome. To construe the statute in the manner in which the Eleventh and Ninth Districts have in recent months will leave trial courts, as well as medical care providers, with an unworkable statute that fails to accomplish its intended goal and will require medical care providers to be informed as to

what they can and cannot say lest the statement be used against them in future litigation. The impact that such a decision would have upon the medical community would render R.C. 2317.43 meaningless.

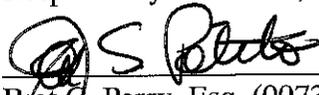
While it is anticipated that Appellees will argue that the statute only requires the exclusion of statements and gestures which are synonymous with apology and sympathy, i.e the rationale utilized by the Ninth District in *Davis, supra*. However, the General Assembly undoubtedly intended R.C. 2317.43 to preclude statements and actions similar to those made by Dr. Smith in this case as they were part and parcel to the expressions and gestures or sympathy he conveyed to Ms. Johnson. The General Assembly ostensibly recognized that it should not dictate how a medical care provider should apologize as a one-size fits all application would be impossible given the complex medical procedures performed in the State of Ohio on a daily basis, which do not always yield positive results. Given the variables and unique circumstances of each procedure and patient, it would be impossible to prescribe a statute which would accurately detail each and every aspect and nuance of an apology which could be made in a medical setting.

Rather than provide a set list of approved apologetic statements and sympathetic gestures, the General Assembly used encompassing language that would permit medical care providers console their patients without fear that such efforts could be used against them in future litigation. Furthermore, by including the “any and all” language in R.C. 2317.43, trial courts are not required to excise the “apology” portion from the medical care provider’s conversation with the patient or their family as the total interaction may be part and parcel to the expression of sympathy, contrary to the Ninth District’s decision in *Davis, supra*. By prohibiting the sympathetic statements and gestures *in toto* from being used as a statement against interest, it

allows the medical care provider to make a judgment call as to how to best effectuate a sincere apology when the outcome was not anticipated.

For these reasons, Appellants Randall H. Smith, M.D. and Randall H. Smith, M.D., Inc. request that this Court reverse the decision of the Eleventh District and restore the trial verdict in favor of Appellants.

Respectfully submitted,



Bret C. Perry, Esq. (0073488)

Counsel of Record

John S. Polito, Esq. (0017327)

Jason Paskan, Esq. (0085007)

Bonezzi Switzer Murphy Polito
& Hupp Co. L.P.A.

1300 East Ninth Street, Suite 1950

Cleveland, Ohio 44114-1501

Telephone: (216) 875-2767

Facsimile: (216) 875-1570

Counsel for Defendants

Randall H. Smith, M.D. and

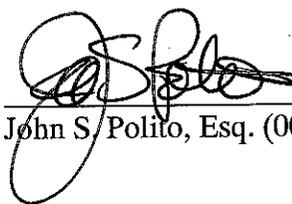
Randall H. Smith, M.D., Inc.

CERTIFICATE OF SERVICE

I certify that a true copy of the forgoing was sent by ordinary United States Mail on this 27th day of July, 2012, to:

Antonios P. Tsarouhas, Esq.
Paul G. Perantinides, Esq.
300 Courtyard Square
80 South Summit Street
Akron OH 44308

Counsel for Plaintiffs



Handwritten signature of John S. Polito in black ink, consisting of a large, stylized 'J' and 'P' followed by a horizontal line.

John S. Polito, Esq. (0017327)

APPENDIX

APPENDIX "A"

NOV 21 2011

LINDA K FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO

JEANETTE JOHNSON, et al.,	:	OPINION
	:	
Plaintiffs-Appellants,	:	CASE NO. 2010-P-0050
	:	
- vs -	:	
	:	
RANDALL SMITH, INC., et al.,	:	
	:	
Defendants-Appellees.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2007 CV 1006.

Judgment: Reversed and remanded.

Antonios P. Tsarouhas, Perantinides & Nolan Co., L.P.A., 300 Courtyard Square, 80 South Summit Street, Akron, OH 44308 (For Plaintiffs-Appellants).

John S. Polito and Bret C. Perry, Bonezzi, Switzer, Murphy, Polito & Hupp, Co., L.P.A., 1300 East Ninth Street, #1950, Cleveland, OH 44114-1501 (For Defendants-Appellees).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from a final order of the Portage County Court of Common Pleas. The trial court entered judgment in favor of appellees, Dr. Randall H. Smith and Randall H. Smith, M.D., Inc., on both claims in the underlying civil action. In seeking reversal of this determination, appellants, Jeanette and Harvey Johnson, challenge the propriety of the trial court's pretrial ruling on appellees' motion in limine.

{¶2} In April 2001, Dr. Smith performed a laparoscopic procedure on Jeanette

Johnson's gall bladder. Certain complications arose during the course of the operation, and it became necessary for Dr. Smith to place a "t-tube" in the common duct of the gall bladder. As a result of the complications, Ms. Johnson experienced a condition in which the opening of her common duct narrowed in size.

{¶3} Although Ms. Johnson was released from the local hospital soon after the procedure, she had to be readmitted within three weeks for jaundice and an obstruction of a bile duct. Following further consultation, it was decided that Ms. Johnson should be transferred to another hospital for an endoscopic procedure on her gall bladder. During the next eleven months, it was necessary for her to undergo six separate procedures for the problems associated with her gall bladder.

{¶4} At the time Dr. Smith informed Ms. Johnson of the need to transfer her to a new facility, she was in her hospital room with her daughter and a family friend. Upon learning that she had to have another procedure, Ms. Johnson became very emotional. In response, Dr. Smith held Ms. Johnson's hand and said to her that he took full responsibility for what had happened to her.

{¶5} Within seventeen months of the initial procedure performed by Dr. Smith, Ms. Johnson and her husband, appellants, filed a medical malpractice case against the doctor and the corporate entity under which he conducted his practice. This first action remained pending for approximately four years until September 2006, at which time it was voluntarily dismissed under Civ.R. 41(A). Ten months later, appellants re-filed the action, asserting claims in negligence and loss of consortium. The primary allegation supporting both claims was that Dr. Smith negligently cut the common duct of Ms. Johnson's gall bladder during the April 2001 procedure.

{¶6} After the parties engaged in considerable discovery, a jury trial on the final merits was scheduled for June 2010. Approximately ten days before trial, Dr. Smith and his corporate entity, appellees, submitted a motion in limine to prohibit the introduction of any evidence regarding the statement he made to Ms. Johnson prior to her transfer to the second hospital. As the grounds for the motion, appellees contended that Dr. Smith's statement constituted an expression of sympathy which could not be admitted into evidence under R.C. 2317.43.

{¶7} Appellants filed two responses to appellees' motion in limine. In the first response, they argued that Dr. Smith's statement should not be viewed as an apology or a mere expression of sympathy, but rather an admission of negligence. In their second response, they maintained that R.C. 2317.43 was not applicable to Dr. Smith's statement because the statute was enacted three years after their claims against appellees arose and after the disputed statement was made.

{¶8} Prior to the outset of the jury trial, the trial court held a separate hearing on the motion in limine, during which Ms. Johnson, her daughter, and their friend testified as to the exact nature of the doctor's statement and the general context in which it had been made. Each witness quoted Dr. Smith as expressly stating that he would take full responsibility for the matter. At the close of this testimony, the trial court concluded that no evidence regarding the statement would be allowed at trial. As the basis for its oral ruling, the court first held that R.C. 2317.43 could be applied retroactively to Dr. Smith's statement because the statute was remedial in nature. Second, the court found that the statute mandated the exclusion of the statement because the doctor was only trying to console Ms. Johnson and was merely taking responsibility for the transfer.

{¶9} Once the trial court disposed of appellees' motion in limine, a two-day trial ensued. The jury ultimately returned a general verdict against appellants on their two claims. After the trial court rendered its final judgment on the jury verdict, appellants filed this appeal. In now limiting the scope of their arguments to the merits of the motion in limine, appellants have assigned the following as error:

{¶10} "[1.] The trial court committed prejudicial error in 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 based upon its opinion that R.C. 2317.43 excluded the statement.

{¶11} "[2.] The trial court committed prejudicial error 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."

{¶12} Because the resolution of the second assignment is controlling, it will be addressed first. Under that assignment, appellants submit that the trial court should have denied appellees' motion in limine because the governing statute, R.C. 2317.43, could not be applied retroactively to the verbal statement he made in May 2001. In support, they maintain that, in enacting the statute in 2004, the Ohio General Assembly did not include language indicating that retroactive application was intended.

{¶13} As was noted above, appellees' motion regarding Dr. Smith's statement was predicated entirely upon R.C. 2317.43, which covers the use of a defendant's prior statement of sympathy as evidence in a medical malpractice action. Our review of the

legislative history of this statute indicates that its present version originally took effect in September 2004, and that the Ohio Revised Code did not have a provision pertaining to its subject matter prior to that date. Throughout the entire six-year period in which R.C. 2317.43 has been in effect, subsection (A) of the statute has provided:

{¶14} “(A) 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.”

{¶15} In attempting to interpret the foregoing language as it relates to the issue of retroactivity, appellees state that the use of the phrase “in any civil action” is sufficient to indicate that the legislature meant for the evidentiary exclusion to apply to any action regardless of when the underlying claims arose. On the other hand, appellants contend that none of the quoted language is sufficiently specific to definitively demonstrate that a retroactive application was intended.

{¶16} Under Ohio law, a two-prong test is employed to determine if a section of the Revised Code can be applied retroactively. *Watkins v. Stevey*, 11th Dist. No. 2009-T-0022, 2009-Ohio-6854, at ¶15. Under the first prong, the language of the provision is reviewed to see whether it contains an express statement that a retroactive application

was intended; if the legislature did not include such a statement, it is presumed under R.C. 1.48 that only a prospective application was envisioned. *Brannon v. Austinburg Rehab. & Nursing Ctr.*, 11th Dist. No. 2009-A-0029, 2010-Ohio-5396, at ¶29. If the statutory language does expressly provide for retroactive application, it must then be determined whether such an application is permissible under Section 28, Article II of the Ohio Constitution, which specifically forbids the state legislature from enacting any retroactive law. “A retroactive statute is unconstitutional if it retroactively impairs vested substantive rights, but not if it is merely remedial in nature.” *Watkins*, 2009-Ohio-6854, at ¶15, quoting *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, at ¶7.

{¶17} Recently, this court was required to employ the foregoing test in deciding whether a separate “medical malpractice” statute, R.C. 2305.113, could be retroactively applied. In *Brannon*, 2010-Ohio-5396, we indicated at the outset of our legal discussion that the earlier version of the disputed statute had defined the term “medical claim” to encompass “any claim that is asserted in any civil action against a *physician, podiatrist, or hospital*, against any employee or agent of a physician, podiatrist, or hospital, or against a registered nurse or physical therapist, and that arises out of the medical diagnosis, care, or treatment of any person.” (Emphasis sic.) *Id.* at ¶24, quoting former R.C. 2305.11(D)(3). Our opinion further noted that when the disputed statute had been both renumbered and amended in 2005, only the phrase “residential facilities” had been added to the quoted language. *Id.*

{¶18} In deciding whether the 2005 amendments could be applied retroactively, the *Brannon* court concluded that only the first prong of the “retroactivity” test had to be considered to resolve the question. Specifically, the *Brannon* court held that, because

the wording of R.C. 2305.113 was essentially “silent” as to the extent of its application, the statute could only be applied prospectively in accordance with R.C. 1.48. *Id.* at ¶29. Pursuant to this analysis, it was unnecessary to determine if the statute was substantive or remedial, since the lack of any clear language dictating a retroactive application was controlling.

{¶19} As was stated previously, in contending that the language of R.C. 2317.43 is sufficient to establish a “retroactive” intent on the part of the Ohio General Assembly, appellees rely solely upon the presence of the phrase “in any civil action” in the statute. However, in *Brannon*, the existence of that identical phrase in the disputed language did not lead this court to conclude that the requisite intent for retroactivity had been shown. At best, the phrase in question merely creates a slight ambiguity concerning whether a retroactive application was intended. Pursuant to the foregoing precedent, an express statement of such an intent must be stated in the statutory language before the general presumption of prospective application can be overcome under R.C. 1.48.

{¶20} As the basis of its oral ruling on the motion in limine, the trial court found that R.C. 2317.43 could be applied retroactively because it was remedial in nature, not substantive. Even if the trial court’s characterization of the statute were correct, it is simply irrelevant under the two-part test for retroactivity. Regardless of the nature of a statute, it can only be applied prospectively when the state legislature has failed to expressly provide for retroactive application. To this extent, the trial court’s analysis of R.C. 2317.43 was erroneous.

{¶21} Under Ohio law, the legal ramifications of a person’s conduct is predicated upon the “law” that was in effect when the conduct occurred. *Sines & Sons, Inc.* (Sept.

18, 1998), 11th Dist. No. 96-G-2042, 1998 Ohio App. LEXIS 4372, at *5. In the instant case, the evidence before the trial court readily established that Dr. Smith's statement to Ms. Johnson was made in May 2001, more than two years before the present version of R.C. 2317.43 took effect. Thus, because that statement could not be properly excluded from evidence solely under the statute, appellants' second assignment of error states a valid reason for reversing the trial court's ruling on the motion in limine.

{¶22} Under their first assignment, appellants contend that the trial court misapplied R.C. 2317.43 to the *specific facts* of the instant matter. In light of our holding under the second assignment that the statute could not be retroactively applied to *any* cases predating its enactment, the merits of the trial court's interpretation of the statute in this particular case and context have become moot. Accordingly, since there is no need to address the substance of the first assignment, the issue before this court becomes whether Dr. Smith's statement to Ms. Johnson was admissible under the Ohio Rules of Evidence.

{¶23} As was previously discussed, each of the three witnesses who testified in the separate hearing regarding the motion in limine quoted Dr. Smith as saying that he would take "full responsibility" for the predicament which Ms. Johnson was facing. As an initial point, this court would emphasize that the disputed statement was not hearsay. Evid.R. 801(D)(2)(a) provides that a statement is not considered hearsay if it was made by a party to the action and is being offered against that party. Under the facts of this case, both requirements were met; therefore, the general rule governing the exclusion of hearsay does not apply.

{¶24} Moreover, given that appellants sought to introduce the statement in the

context of a civil action in which it was alleged that Dr. Smith acted negligently in performing the original procedure on Ms. Johnson's gall bladder, the statement was readily relevant to the ultimate facts in the litigation. Therefore, as both sides aptly note in their respective briefs, the controlling point in this aspect of the analysis is whether, under Evid.R. 403(A), the probative value of the statement in question was substantially outweighed by the danger of undue prejudice.

{¶25} As part of its oral ruling on appellees' motion in limine, the trial court found that Dr. Smith had made the statement in a specific attempt to show compassion to Ms. Johnson at a time when she was especially upset. While a review of the transcript does demonstrate that one of the three witnesses did characterize Dr. Smith's basic act as an attempt to console Ms. Johnson, the exact wording of his statement did not support the finding that he was only expressing his sympathy to her. That is, the use of the phrase "take full responsibility" can readily be interpreted to mean that he felt that he had been at fault in causing the problem with Ms. Johnson's gall bladder.

{¶26} In conjunction with the foregoing point, this court would further note that, in stating its ruling, the trial court found that the "responsibility" statement had been made solely in relation to Ms. Johnson's transfer to another hospital. However, our review of the submitted testimony indicates that none of the three witnesses stated that Dr. Smith expressly referenced the transfer, as compared to the original procedure. Instead, the testimony of all three witnesses could only be construed to mean that the statement was made in a general sense, which could encompass the original procedure.

{¶27} In light of the general context in which the disputed statement was made, a reasonable juror could find that Dr. Smith was admitting that he was at fault. Under

such circumstances, the jury must be permitted to hear all of the pertinent testimony and draw its own conclusion.

{¶28} Because Dr. Smith's "responsibility" statement could be construed as an admission against his interest regarding the question of his alleged negligence, its probative value in the underlying case would be considerable. Furthermore, since appellees and their counsel would have the opportunity to explain why Dr. Smith made the statement, the probative value of the statement is not substantially outweighed by the danger of undue prejudice. Hence, this court holds that the testimony concerning Dr. Smith's statement must be admitted into evidence as part of the new trial upon remand.

{¶29} Consistent with the foregoing analysis, it is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is reversed, and the matter is hereby remanded for a new trial on the merits.

MARY JANE TRAPP, J., concurs,

TIMOTHY P. CANNON, P.J., dissents with Dissenting Opinion.

TIMOTHY P. CANNON, P.J., dissenting.

{¶30} I respectfully dissent from the opinion of the majority.

{¶31} As stated by the majority, the legislature did not expressly provide for the retroactive application of the statute and, therefore, R.C. 2317.43 is to be applied prospectively. The question remains, however, whether the statute, which was not enacted at the time of Dr. Smith's conduct but was in effect at the time the complaint

was filed, is applicable to the instant case. The majority focuses on when the statements of Dr. Smith were made. Thus, the majority concludes that since the conduct occurred in 2001, the statements could not be properly excluded under the statute. However, this interpretation does not give effect to the plain meaning of the statute. I find R.C. 2317.43 applicable to this case, as Johnson's "civil action" was not "brought" until 2007, after the effective date of the statute.

{¶32} As enacted, the language used by the legislature concerning the effective date for application of R.C. 2317.43 is: "In any *civil action brought* by an alleged victim ***." The statute's language is clear and unambiguous and, therefore, we apply the statute as written, giving effect to its plain meaning. "An 'action' is defined as 'a civil or criminal judicial proceeding.'" *McNeil v. Kingsley*, 3d Dist. No. 9-08-13, 178 Ohio App.3d 674, at ¶49, quoting Black's Law Dictionary (8 Ed.Rev.2004) 31, 235. 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 entitled one person to obtain a remedy in court from another person.'" *Id.* Further, case law has treated "brought" synonymously with "commenced." *Cover v. Hildebran* (1957), 103 Ohio App. 413, 415. (Under the Ohio Civil Rules, "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 ***." Civ.R. 3(A).)

{¶33} Here, Dr. Smith performed surgery on Johnson and subsequently made the statement at issue in 2001, giving rise to Johnson's cause of action. Although Johnson originally filed suit before the effective date of the statute, she voluntarily dismissed the complaint on September 11, 2006, after the effective date of the statute. Johnson refiled the complaint in 2007, within the time proscribed by the savings statute,

R.C. 2305.19. Therefore, Johnson did not have an action, i.e., a civil judicial proceeding, until the complaint was filed in 2007. In 2007, R.C. 2317.13 was in effect and, consequently, applicable to this case.

{¶34} Although this case was originally “brought” in 2002, before the enactment of the statute, it was dismissed in 2006, after its effective date. R.C. 2317.43 applies to all “civil actions” “brought” or filed after the effective date in September 2004. This interpretation gives effect to the plain meaning of the statute. Applying the statute at issue to this case is further consistent with case law. “If there is no clear indication of retroactive application, then the statute may only apply to *cases which arise subsequent to its enactment.*” *Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 262. (Emphasis added).

{¶35} “Case” is defined as “a civil or criminal proceeding, action, suit or controversy at law or equity.” Black’s Law Dictionary (8 Ed.Rev.2004) 228. To conclude the majority’s position under the facts of this case, the law would provide that the statute may only be applied to “causes of action” arising subsequent to its enactment. “Cases” and “causes of action” are two distinct concepts. Though the majority concludes that the “statute could not be retroactively applied to *any* cases predating its enactment,” I believe this does not address the appropriate distinction between “cases” and “causes of action.”

{¶36} Moreover, the comment made by Dr. Smith that he takes “full responsibility” is, under these circumstances, a statement to be excluded under the statute. As Johnson’s surgeon, Dr. Smith had no choice but to take responsibility. However, a bad result does not equate to medical negligence. Being responsible is not

the same as admitting to legal liability.

{¶37} The instant case is inapposite to the case cited to by Johnson in her notice of supplemental authority. In *Davis v. Wooster*, 193 Ohio App.3d 581, 2011-Ohio-3199, the physician noted that the bad result was his “fault,” which is not excluded under R.C. 2317.43.

{¶38} Although the trial court excluded the statement of Dr. Smith, it employed a different analysis. The trial court found that the statute could be applied retroactively, employing a substantive versus remedial analysis. The trial court determined the “statements and gestures and actions” of Dr. Smith were covered under R.C. 2317.43.

{¶39} While I believe the statement of Dr. Smith was properly excluded, the application of the statute to this case was simply a prospective application based upon the clear direction stated therein.

STATE OF OHIO)
)SS.
COUNTY OF PORTAGE)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

JEANETTE JOHNSON, et al.,
Plaintiffs-Appellants,

JUDGMENT ENTRY

- vs -

CASE NO. 2010-P-0059
FILED
COURT OF APPEALS

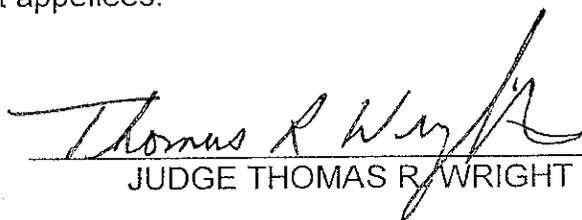
RANDALL SMITH, INC., et al.,
Defendants-Appellees.

NOV 21 2011

LINDA K FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

For the reasons stated in the opinion of this court, appellants' second assignment of error has merit. It is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is reversed, and this matter is remanded to the trial court for further proceedings consistent with the opinion.

Costs to be taxed against appellees.



JUDGE THOMAS R. WRIGHT

MARY JANE TRAPP, J., concurs,

TIMOTHY P. CANNON, P.J., dissents with Dissenting Opinion.

APPENDIX "B"

NOTICE OF APPEAL FROM A COURT OF APPEALS
IN THE SUPREME COURT OF OHIO

12-0014

Jeanette Johnson, et. al.,

Plaintiff-Appellee,

vs.

Randall H. Smith, M.D., et al.

Defendants-Appellants.

On Appeal from Eleventh Appellate District,
Portage County, Ohio

Court of Appeals Case No. 2010-P-0050

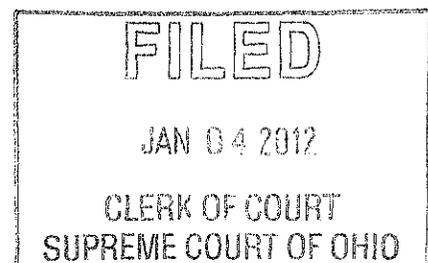
**NOTICE OF APPEAL OF DEFENDANTS-APPELLANTS RANDALL H. SMITH, M.D.
AND RANDALL H. SMITH, M.D., INC.**

Bret C. Perry, Esq. (0073488)
Counsel of Record
John S. Polito, Esq. (0017327)
Jason A. Paskan, Esq. (0085007)
Bonezzi Switzer Murphy Polito
& Hupp, Co., LPA
Cleveland, Ohio 44011
Telephone: 216-875-2767
Facsimile: 216-875-1570
bperry@bsmph.com
jpolito@bsmph.com
jpaskan@bsmph.com

Antonios P. Tsarouhas, Esq.
300 Courtyard Square
80 South Summit Street
Akron, Ohio 44308
Telephone: 330-253-5454

Counsel for Plaintiffs-Appellees

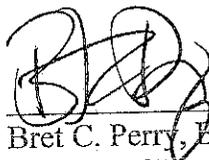
Counsel for Defendants-Appellants
Randall H. Smith, M.D. and Randall H. Smith, M.D., Inc.



NOTICE OF APPEAL OF DEFENDANTS-APPELLANTS

Defendants/Appellants, Randall H. Smith, M.D. and Randall H. Smith, M.D., Inc., hereby give Notice of Appeal to the Supreme Court of Ohio from the judgment of the Eleventh Appellate District, Portage County, journalized in Court of Appeals Case No. 2010-P-0050 on November 21, 2011. (Attached hereto as Appendix A.)

This case raises a substantial constitutional question and is one of public and greater general interest.



Bret C. Perry, Esq. (0073488)

Counsel of Record

John S. Polito, Esq. (0017327)

Jason Paskan, Esq. (0085007)

Bonezzi Switzer Murphy Polito
& Hupp Co. L.P.A.

1300 East Ninth Street, Suite 1950

Cleveland, Ohio 44114-1501

Telephone: (216) 875-2767

Facsimile: (216) 875-1570

Counsel for Defendants

Randall H. Smith, M.D. and

Randall H. Smith, M.D., Inc.

CERTIFICATE OF SERVICE

3rd I certify that a true copy of the forgoing was sent by ordinary United States Mail on this day of January, 2011, to:

Antonios P. Tsarouhas, Esq.
Paul G. Perantinides, Esq.
300 Courtyard Square
80 South Summit Street
Akron OH 44308

Counsel for Plaintiffs



Bret C. Perry, Esq. (0073488)
Counsel of Record

NOV 21 2011

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO

LINDA K FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

JEANETTE JOHNSON, et al., : OPINION
Plaintiffs-Appellants, :
- vs - : CASE NO. 2010-P-0050
RANDALL SMITH, INC., et al., :
Defendants-Appellees. :

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2007 CV 1006.

Judgment: Reversed and remanded.

Antonios P. Tsarouhas, Perantinides & Nolan Co., L.P.A., 300 Courtyard Square, 80 South Summit Street, Akron, OH 44308 (For Plaintiffs-Appellants).

John S. Polito and Bret C. Perry, Bonezzi, Switzer, Murphy, Polito & Hupp, Co., L.P.A., 1300 East Ninth Street, #1950, Cleveland, OH 44114-1501 (For Defendants-Appellees).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from a final order of the Portage County Court of Common Pleas. The trial court entered judgment in favor of appellees, Dr. Randall H. Smith and Randall H. Smith, M.D., Inc., on both claims in the underlying civil action. In seeking reversal of this determination, appellants, Jeanette and Harvey Johnson, challenge the propriety of the trial court's pretrial ruling on appellees' motion in limine.

{¶2} In April 2001, Dr. Smith performed a laparoscopic procedure on Jeanette

Johnson's gall bladder. Certain complications arose during the course of the operation, and it became necessary for Dr. Smith to place a "t-tube" in the common duct of the gall bladder. As a result of the complications, Ms. Johnson experienced a condition in which the opening of her common duct narrowed in size.

{¶3} Although Ms. Johnson was released from the local hospital soon after the procedure, she had to be readmitted within three weeks for jaundice and an obstruction of a bile duct. Following further consultation, it was decided that Ms. Johnson should be transferred to another hospital for an endoscopic procedure on her gall bladder. During the next eleven months, it was necessary for her to undergo six separate procedures for the problems associated with her gall bladder.

{¶4} At the time Dr. Smith informed Ms. Johnson of the need to transfer her to a new facility, she was in her hospital room with her daughter and a family friend. Upon learning that she had to have another procedure, Ms. Johnson became very emotional. In response, Dr. Smith held Ms. Johnson's hand and said to her that he took full responsibility for what had happened to her.

{¶5} Within seventeen months of the initial procedure performed by Dr. Smith, Ms. Johnson and her husband, appellants, filed a medical malpractice case against the doctor and the corporate entity under which he conducted his practice. This first action remained pending for approximately four years until September 2006, at which time it was voluntarily dismissed under Civ.R. 41(A). Ten months later, appellants re-filed the action, asserting claims in negligence and loss of consortium. The primary allegation supporting both claims was that Dr. Smith negligently cut the common duct of Ms. Johnson's gall bladder during the April 2001 procedure.

{¶6} After the parties engaged in considerable discovery, a jury trial on the final merits was scheduled for June 2010. Approximately ten days before trial, Dr. Smith and his corporate entity, appellees, submitted a motion in limine to prohibit the introduction of any evidence regarding the statement he made to Ms. Johnson prior to her transfer to the second hospital. As the grounds for the motion, appellees contended that Dr. Smith's statement constituted an expression of sympathy which could not be admitted into evidence under R.C. 2317.43.

{¶7} Appellants filed two responses to appellees' motion in limine. In the first response, they argued that Dr. Smith's statement should not be viewed as an apology or a mere expression of sympathy, but rather an admission of negligence. In their second response, they maintained that R.C. 2317.43 was not applicable to Dr. Smith's statement because the statute was enacted three years after their claims against appellees arose and after the disputed statement was made.

{¶8} Prior to the outset of the jury trial, the trial court held a separate hearing on the motion in limine, during which Ms. Johnson, her daughter, and their friend testified as to the exact nature of the doctor's statement and the general context in which it had been made. Each witness quoted Dr. Smith as expressly stating that he would take full responsibility for the matter. At the close of this testimony, the trial court concluded that no evidence regarding the statement would be allowed at trial. As the basis for its oral ruling, the court first held that R.C. 2317.43 could be applied retroactively to Dr. Smith's statement because the statute was remedial in nature. Second, the court found that the statute mandated the exclusion of the statement because the doctor was only trying to console Ms. Johnson and was merely taking responsibility for the transfer.

{¶9} Once the trial court disposed of appellees' motion in limine, a two-day trial ensued. The jury ultimately returned a general verdict against appellants on their two claims. After the trial court rendered its final judgment on the jury verdict, appellants filed this appeal. In now limiting the scope of their arguments to the merits of the motion in limine, appellants have assigned the following as error:

{¶10} "[1.] The trial court committed prejudicial error in 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 based upon its opinion that R.C. 2317.43 excluded the statement.

{¶11} "[2.] The trial court committed prejudicial error 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."

{¶12} Because the resolution of the second assignment is controlling, it will be addressed first. Under that assignment, appellants submit that the trial court should have denied appellees' motion in limine because the governing statute, R.C. 2317.43, could not be applied retroactively to the verbal statement he made in May 2001. In support, they maintain that, in enacting the statute in 2004, the Ohio General Assembly did not include language indicating that retroactive application was intended.

{¶13} As was noted above, appellees' motion regarding Dr. Smith's statement was predicated entirely upon R.C. 2317.43, which covers the use of a defendant's prior statement of sympathy as evidence in a medical malpractice action. Our review of the

legislative history of this statute indicates that its present version originally took effect in September 2004, and that the Ohio Revised Code did not have a provision pertaining to its subject matter prior to that date. Throughout the entire six-year period in which R.C. 2317.43 has been in effect, subsection (A) of the statute has provided:

{¶14} "(A) 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."

{¶15} In attempting to interpret the foregoing language as it relates to the issue of retroactivity, appellees state that the use of the phrase "in any civil action" is sufficient to indicate that the legislature meant for the evidentiary exclusion to apply to any action regardless of when the underlying claims arose. On the other hand, appellants contend that none of the quoted language is sufficiently specific to definitively demonstrate that a retroactive application was intended.

{¶16} Under Ohio law, a two-prong test is employed to determine if a section of the Revised Code can be applied retroactively. *Watkins v. Stevey*, 11th Dist. No. 2009-T-0022, 2009-Ohio-6854, at ¶15. Under the first prong, the language of the provision is reviewed to see whether it contains an express statement that a retroactive application

was intended; if the legislature did not include such a statement, it is presumed under R.C. 1.48 that only a prospective application was envisioned. *Brannon v. Austinburg Rehab. & Nursing Ctr.*, 11th Dist. No. 2009-A-0029, 2010-Ohio-5396, at ¶29. If the statutory language does expressly provide for retroactive application, it must then be determined whether such an application is permissible under Section 28, Article II of the Ohio Constitution, which specifically forbids the state legislature from enacting any retroactive law. “A retroactive statute is unconstitutional if it retroactively impairs vested substantive rights, but not if it is merely remedial in nature.” *Watkins*, 2009-Ohio-6854, at ¶15, quoting *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, at ¶7.

{¶17} Recently, this court was required to employ the foregoing test in deciding whether a separate “medical malpractice” statute, R.C. 2305.113, could be retroactively applied. In *Brannon*, 2010-Ohio-5396, we indicated at the outset of our legal discussion that the earlier version of the disputed statute had defined the term “medical claim” to encompass “any claim that is asserted in any civil action against a *physician, podiatrist, or hospital*, against any employee or agent of a physician, podiatrist, or hospital, or against a registered nurse or physical therapist, and that arises out of the medical diagnosis, care, or treatment of any person.” (Emphasis sic.) *Id.* at ¶24, quoting former R.C. 2305.11(D)(3). Our opinion further noted that when the disputed statute had been both renumbered and amended in 2005, only the phrase “residential facilities” had been added to the quoted language. *Id.*

{¶18} In deciding whether the 2005 amendments could be applied retroactively, the *Brannon* court concluded that only the first prong of the “retroactivity” test had to be considered to resolve the question. Specifically, the *Brannon* court held that, because

the wording of R.C. 2305.113 was essentially "silent" as to the extent of its application, the statute could only be applied prospectively in accordance with R.C. 1.48. *Id.* at ¶29. Pursuant to this analysis, it was unnecessary to determine if the statute was substantive or remedial, since the lack of any clear language dictating a retroactive application was controlling.

{¶19} As was stated previously, in contending that the language of R.C. 2317.43 is sufficient to establish a "retroactive" intent on the part of the Ohio General Assembly, appellees rely solely upon the presence of the phrase "in any civil action" in the statute. However, in *Brannon*, the existence of that identical phrase in the disputed language did not lead this court to conclude that the requisite intent for retroactivity had been shown. At best, the phrase in question merely creates a slight ambiguity concerning whether a retroactive application was intended. Pursuant to the foregoing precedent, an express statement of such an intent must be stated in the statutory language before the general presumption of prospective application can be overcome under R.C. 1.48.

{¶20} As the basis of its oral ruling on the motion in limine, the trial court found that R.C. 2317.43 could be applied retroactively because it was remedial in nature, not substantive. Even if the trial court's characterization of the statute were correct, it is simply irrelevant under the two-part test for retroactivity. Regardless of the nature of a statute, it can only be applied prospectively when the state legislature has failed to expressly provide for retroactive application. To this extent, the trial court's analysis of R.C. 2317.43 was erroneous.

{¶21} Under Ohio law, the legal ramifications of a person's conduct is predicated upon the "law" that was in effect when the conduct occurred. *Sines & Sons, Inc.* (Sept.

18, 1998), 11th Dist. No. 96-G-2042, 1998 Ohio App. LEXIS 4372, at *5. In the instant case, the evidence before the trial court readily established that Dr. Smith's statement to Ms. Johnson was made in May 2001, more than two years before the present version of R.C. 2317.43 took effect. Thus, because that statement could not be properly excluded from evidence solely under the statute, appellants' second assignment of error states a valid reason for reversing the trial court's ruling on the motion in limine.

{¶22} Under their first assignment, appellants contend that the trial court misapplied R.C. 2317.43 to the *specific facts* of the instant matter. In light of our holding under the second assignment that the statute could not be retroactively applied to *any* cases predating its enactment, the merits of the trial court's interpretation of the statute in this particular case and context have become moot. Accordingly, since there is no need to address the substance of the first assignment, the issue before this court becomes whether Dr. Smith's statement to Ms. Johnson was admissible under the Ohio Rules of Evidence.

{¶23} As was previously discussed, each of the three witnesses who testified in the separate hearing regarding the motion in limine quoted Dr. Smith as saying that he would take "full responsibility" for the predicament which Ms. Johnson was facing. As an initial point, this court would emphasize that the disputed statement was not hearsay. Evid.R. 801(D)(2)(a) provides that a statement is not considered hearsay if it was made by a party to the action and is being offered against that party. Under the facts of this case, both requirements were met; therefore, the general rule governing the exclusion of hearsay does not apply.

{¶24} Moreover, given that appellants sought to introduce the statement in the

context of a civil action in which it was alleged that Dr. Smith acted negligently in performing the original procedure on Ms. Johnson's gall bladder, the statement was readily relevant to the ultimate facts in the litigation. Therefore, as both sides aptly note in their respective briefs, the controlling point in this aspect of the analysis is whether, under Evid.R. 403(A), the probative value of the statement in question was substantially outweighed by the danger of undue prejudice.

{¶25} As part of its oral ruling on appellees' motion in limine, the trial court found that Dr. Smith had made the statement in a specific attempt to show compassion to Ms. Johnson at a time when she was especially upset. While a review of the transcript does demonstrate that one of the three witnesses did characterize Dr. Smith's basic act as an attempt to console Ms. Johnson, the exact wording of his statement did not support the finding that he was only expressing his sympathy to her. That is, the use of the phrase "take full responsibility" can readily be interpreted to mean that he felt that he had been at fault in causing the problem with Ms. Johnson's gall bladder.

{¶26} In conjunction with the foregoing point, this court would further note that, in stating its ruling, the trial court found that the "responsibility" statement had been made solely in relation to Ms. Johnson's transfer to another hospital. However, our review of the submitted testimony indicates that none of the three witnesses stated that Dr. Smith expressly referenced the transfer, as compared to the original procedure. Instead, the testimony of all three witnesses could only be construed to mean that the statement was made in a general sense, which could encompass the original procedure.

{¶27} In light of the general context in which the disputed statement was made, a reasonable juror could find that Dr. Smith was admitting that he was at fault. Under

such circumstances, the jury must be permitted to hear all of the pertinent testimony and draw its own conclusion.

{¶28} Because Dr. Smith's "responsibility" statement could be construed as an admission against his interest regarding the question of his alleged negligence, its probative value in the underlying case would be considerable. Furthermore, since appellees and their counsel would have the opportunity to explain why Dr. Smith made the statement, the probative value of the statement is not substantially outweighed by the danger of undue prejudice. Hence, this court holds that the testimony concerning Dr. Smith's statement must be admitted into evidence as part of the new trial upon remand.

{¶29} Consistent with the foregoing analysis, it is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is reversed, and the matter is hereby remanded for a new trial on the merits.

MARY JANE TRAPP, J., concurs,

TIMOTHY P. CANNON, P.J., dissents with Dissenting Opinion.

TIMOTHY P. CANNON, P.J., dissenting.

{¶30} I respectfully dissent from the opinion of the majority.

{¶31} As stated by the majority, the legislature did not expressly provide for the retroactive application of the statute and, therefore, R.C. 2317.43 is to be applied prospectively. The question remains, however, whether the statute, which was not enacted at the time of Dr. Smith's conduct but was in effect at the time the complaint

was filed, is applicable to the instant case. The majority focuses on when the statements of Dr. Smith were made. Thus, the majority concludes that since the conduct occurred in 2001, the statements could not be properly excluded under the statute. However, this interpretation does not give effect to the plain meaning of the statute. I find R.C. 2317.43 applicable to this case, as Johnson's "civil action" was not "brought" until 2007, after the effective date of the statute.

{¶32} As enacted, the language used by the legislature concerning the effective date for application of R.C. 2317.43 is: "In any *civil action brought* by an alleged victim ***." The statute's language is clear and unambiguous and, therefore, we apply the statute as written, giving effect to its plain meaning. "An 'action' is defined as 'a civil or criminal judicial proceeding.'" *McNeil v. Kingsley*, 3d Dist. No. 9-08-13, 178 Ohio App.3d 674, at ¶49, quoting Black's Law Dictionary (8 Ed.Rev.2004) 31, 235. 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 entitled one person to obtain a remedy in court from another person.'" *Id.* Further, case law has treated "brought" synonymously with "commenced." *Cover v. Hildebran* (1957), 103 Ohio App. 413, 415. (Under the Ohio Civil Rules, "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 ***." Civ.R. 3(A).)

{¶33} Here, Dr. Smith performed surgery on Johnson and subsequently made the statement at issue in 2001, giving rise to Johnson's cause of action. Although Johnson originally filed suit before the effective date of the statute, she voluntarily dismissed the complaint on September 11, 2006, after the effective date of the statute. Johnson refiled the complaint in 2007, within the time proscribed by the savings statute,

R.C. 2305.19. Therefore, Johnson did not have an action, i.e., a civil judicial proceeding, until the complaint was filed in 2007. In 2007, R.C. 2317.13 was in effect and, consequently, applicable to this case.

{¶34} Although this case was originally “brought” in 2002, before the enactment of the statute, it was dismissed in 2006, after its effective date. R.C. 2317.43 applies to all “civil actions” “brought” or filed after the effective date in September 2004. This interpretation gives effect to the plain meaning of the statute. Applying the statute at issue to this case is further consistent with case law. “If there is no clear indication of retroactive application, then the statute may only apply to *cases which arise subsequent to its enactment.*” *Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 262. (Emphasis added).

{¶35} “Case” is defined as “a civil or criminal proceeding, action, suit or controversy at law or equity.” Black’s Law Dictionary (8 Ed.Rev.2004) 228. To conclude the majority’s position under the facts of this case, the law would provide that the statute may only be applied to “causes of action” arising subsequent to its enactment. “Cases” and “causes of action” are two distinct concepts. Though the majority concludes that the “statute could not be retroactively applied to *any* cases predating its enactment,” I believe this does not address the appropriate distinction between “cases” and “causes of action.”

{¶36} Moreover, the comment made by Dr. Smith that he takes “full responsibility” is, under these circumstances, a statement to be excluded under the statute. As Johnson’s surgeon, Dr. Smith had no choice but to take responsibility. However, a bad result does not equate to medical negligence. Being responsible is not

the same as admitting to legal liability.

{¶37} The instant case is inapposite to the case cited to by Johnson in her notice of supplemental authority. In *Davis v. Wooster*, 193 Ohio App.3d 581, 2011-Ohio-3199, the physician noted that the bad result was his “fault,” which is not excluded under R.C. 2317.43.

{¶38} Although the trial court excluded the statement of Dr. Smith, it employed a different analysis. The trial court found that the statute could be applied retroactively, employing a substantive versus remedial analysis. The trial court determined the “statements and gestures and actions” of Dr. Smith were covered under R.C. 2317.43.

{¶39} While I believe the statement of Dr. Smith was properly excluded, the application of the statute to this case was simply a prospective application based upon the clear direction stated therein.

STATE OF OHIO)
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IN THE COURT OF APPEALS
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- VS -

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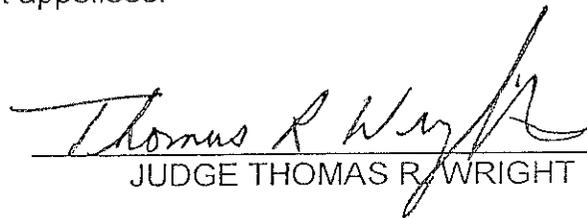
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Defendants-Appellees.

NOV 21 2011

LINDA K FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

For the reasons stated in the opinion of this court, appellants' second assignment of error has merit. It is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is reversed, and this matter is remanded to the trial court for further proceedings consistent with the opinion.

Costs to be taxed against appellees.



JUDGE THOMAS R. WRIGHT

MARY JANE TRAPP, J., concurs,

TIMOTHY P. CANNON, P.J., dissents with Dissenting Opinion.

APPENDIX "C"

2317.43 Medical liability action - defendant's expression of sympathy for victim inadmissible.

(A) 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.

(B) For purposes of this section, unless the context otherwise requires:

(1) "Health care provider" has the same meaning as in division (B)(5) of section 2317.02 of the Revised Code.

(2) "Relative" means a victim's spouse, parent, grandparent, stepfather, stepmother, child, grandchild, brother, sister, half brother, half sister, or spouse's parents. The term includes said relationships that are created as a result of adoption. In addition, "relative" includes any person who has a family-type relationship with a victim.

(3) "Representative" means a legal guardian, attorney, person designated to make decisions on behalf of a patient under a medical power of attorney, or any person recognized in law or custom as a patient's agent.

(4) "Unanticipated outcome" means the outcome of a medical treatment or procedure that differs from an expected result.

Effective Date: 07-01-1971