IN THE SUPREME COURT OF OHIO

DENNIS STEWART, INDIVIDUALLY, AND AS THE ADMINISTRATOR OF THE ESTATE OF MICHELLE STEWART, DECEASED,	:	**Case No. 2016-1013**
Plaintiff-Appellant,	:	**On Certified Conflict from Twelfth District Court of Appeals, Clermont County Case No. CA 2015-05-039**
v.	:	
RODNEY E. VIVIAN, M.D.,	:	
Defendant-Appellee.	:	

COMBINED BRIEF OF AMICI CURIAE, OHIO STATE MEDICAL ASSOCIATION, OHIO HOSPITAL ASSOCIATION, OHIO OSTEOPATHIC ASSOCIATION AND THE ACADEMY OF MEDICINE OF CLEVELAND AND NORTHERN OHIO, IN SUPPORT OF DEFENDANT-APPELLEE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST OF AMICI

The statute at issue, R.C. 2317.43, often referred to as "the apology statute," applies specifically and exclusively to Ohio's medical community which was instrumental in getting this law passed (as part of House Bill 215, effective September 13, 2004). Ohio's apology statute, like the more than 30 other apology statutes nationwide, was designed to strengthen the physician-patient relationship by encouraging greater openness and transparency in communications between physicians and their patients and/or patients' families following an unanticipated medical outcome. In short, the statute precludes gestures and statements of apology and other communications, made by doctors or other medical providers to their patients and/or patients' families, from being used to establish liability against them. Hence, Ohio's doctors and hospitals have a strong interest in ensuring that the statute is applied in a manner consistent with its purpose and intent.

The Ohio State Medical Association ("OSMA") is a non-profit professional association of approximately 20,000 physicians, medical residents, and medical students in the State of Ohio. The OSMA's membership includes most Ohio physicians engaged in the private practice of medicine, in all specialties. The OSMA's purposes are to improve public health through education, encourage interchange of ideas among members, and maintain and advance the standards of practice by requiring members to adhere to the concepts of professional ethics.

The Ohio Hospital Association ("OHA") is a private non-profit trade association established in 1915 as the first state-level hospital association in the United States. For decades, the OHA has provided a forum for hospitals to come together to pursue health care policy and quality improvement opportunities in the best interest of hospitals and their communities. The OHA is comprised of 219 hospitals and 13 health systems, all located in Ohio, and works with its member hospitals across the state to improve the quality, safety, and affordability of health care

for all Ohioans. The OHA's mission is to collaborate with member hospitals and health systems to ensure a healthy Ohio.

The Ohio Osteopathic Association ("OOA"), founded in 1898, is a non-profit professional association, that advocates for Ohio's 4,600 licensed osteopathic physicians (DOs), Ohio health care facilities accredited by the American Osteopathic Association's Healthcare Facilities Accreditation Program (HFAP), and the Ohio University College of Osteopathic Medicine in Athens, Ohio. DOs represent twelve percent of the total physicians practicing in Ohio and twenty-six percent of the state's family physicians. OOA's mission includes promoting Ohio's public health and advancing the distinctive philosophy and practice of osteopathic medicine within the state.

The Academy of Medicine of Cleveland and Northern Ohio ("AMCNO")[1] is a non-profit professional association representing Northeastern Ohio's medical community. AMCNO is among the oldest professional organizations in the State of Ohio, originally formed in 1824. It is also one of the largest regional medical associations in the country and has a membership of more than 5,000 physicians, medical residents, and medical students. The mission of AMCNO is to support physicians in being strong advocates for patients and to promote the practice of the highest quality medicine.

The Twelfth District properly concluded that the purpose and intent of Ohio's apology statute require it to be interpreted broadly and simply, without parsing words and creating confusion. Amici request this Court to answer the certified question before it affirmatively, consistent with the Twelfth District's decision.

[1] http://www.amcno.org/

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amici defer to the Statement of the Case and the Statement of Facts as set forth in the merit brief of Defendant-Appellee.

LAW AND ARGUMENT

The certified question before this Court is:

> Whether a health care provider's statements of fault or statements admitting liability made during the course of apologizing or commiserating with a patient or the patient's family are prohibited from admission of evidence in a civil action under Ohio's apology statute, R.C. 2317.43.

The court should answer the question in the affirmative.

A. Summary of Argument

The statute at issue, R.C. 2317.43 ("Ohio's apology statute"), excludes from evidence statements of apology made by doctors to patients or patients' families following an unanticipated medical outcome. Appellant asks the Court to interpret the word "apology" as used in R.C. 2317.43 so as to remove from its definition any expression of fault or liability.[2] This Court should reject Appellant's view because the ordinary and common use of the word "apology" includes statements of fault, as well as statements of sympathy. Thus, statements of fault made by physicians in the course of expressing apology are included within the ambit of the Ohio apology statute by use of the word "apology" itself. As a result, the statute is not ambiguous as the plain language of the statute, including the word "apology," includes fault-statements.

[2] Although the certified question refers to "statements of fault or statements admitting liability," for simplicity this brief generally refers only to statements of fault.

Even if this Court were to determine that the statute is ambiguous based on the other terms proximate to "apology" in R.C. 2317.43 (as did the Ninth District),[3] the statute should still be interpreted broadly to cover both fault-statements and sympathy-statements. Interpreting the statute in this manner is consistent with principles of statutory construction, promotes the intent of the General Assembly in enacting Ohio's apology statute, and provides a workable framework for Ohio's lower courts.

Ohio's apology statute expressly applies to "any and all statements * * * expressing apology," without an exclusion for any common meaning of "apology." R.C. 2317.43. Had the General Assembly intended to exclude fault-statements from the meaning of the word "apology," it would have explicitly excluded fault-statements from coverage under R.C. 2317.43. Consistent with this principle of statutory construction, the majority of other state legislatures seeking to exclude fault statements from the definition of "apology" in their similar statutes have provided an explicit clause or separate statute that distinguishes between fault-statements and sympathy-statements.

Exclusion of fault-statements from R.C. 2317.43's ambit contravenes the General Assembly's purpose in enacting the statute. Apology statutes around the nation were enacted as a response to a changing philosophy of medical care which emphasized a more transparent physician-patient relationship. Apology statutes' policy goal is to facilitate honest conversations among health care providers and patients. They allow physicians to show empathy by explaining, and taking responsibility for, unanticipated outcomes related to medical care. The statute precludes these statements from entering into evidence and thereby shields physicians from liability resulting from honest communication while offering expressions of apology about

[3] *See Davis v. Wooster Orthopaedics & Sports Medicine, Inc.*, 193 Ohio App.3d 581, 2011-Ohio-3199, 952 N.E.2d 1216, ¶ 10.

an unexpected medical outcome. Exclusion of fault-statements from the statute undermines the intent of the General Assembly. Further, a court's dissecting of statements or parsing of words to distinguish between fault-statements and sympathy-statements is an unworkable exercise that will undoubtedly lead to inconsistent application of the statute. It will also lead to a failure to promote the openness and candor the law is intended to promote, as physicians would be forced to speak "artificially" and with extreme caution in their choice of words, always wondering if the words they are choosing will later be construed as expressing empathy or fault.

A narrow interpretation of the statute, as Appellant urges, is not only inconsistent with the General Assembly's chosen language, but also exacerbates the very problem the General Assembly sought to address when enacting R.C. 2317.43. Rather than discourage physicians from meaningful communications with patients after unanticipated medical outcomes, the statute was intended to encourage such communications by eliminating the risk of having such gestures be used against a physician to establish liability. Only a broad interpretation gives effect to the General Assembly's purpose and intent to protect physicians' efforts to explain and apologize for the sequence of events relating to an unanticipated medical outcome.

B. The Statute is Not Ambiguous and Should Be Applied to Fault-Statements

In relevant part, the Ohio apology statute provides:

> 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.

R.C. 2317.43(A) (emphasis added).

The purpose behind the Ohio apology statute is to provide "opportunities for healthcare providers to apologize and console victims of unanticipated outcomes of medical care without fear that their statements will be used against them in a malpractice suit, by making the statements inadmissible as evidence of admission of liability or a statement against interest." *Estate of Johnson v. Randall Smith, Inc.*, 135 Ohio St.3d 440, 2013-Ohio-1507, 989 N.E.2d 35, ¶ 1. In short, if the health care provider makes a statement or other gesture of "apology," to a patient or family member about an injury or death following an unexpected medical outcome, that statement cannot be offered to a factfinder in a malpractice lawsuit.

The certified question before this Court arises from two conflicting views regarding the scope of R.C. 2317.43. On one hand, the Ninth District concluded that the statute ***does not*** include within its ambit statements made by physicians admitting fault when made in the context of the statute. *Davis v. Wooster Orthopaedics & Sports Medicine, Inc.*, 193 Ohio App.3d 581, 2011-Ohio-3199, 952 N.E.2d 1216 (9th Dist.). On the other hand, the Twelfth District concluded that the statute ***does*** include fault-statements. *Stewart v. Vivian*, 2016-Ohio-2892, 64 N.E.3d 606 (12th Dist.). These courts reached opposite conclusions after determining that the statute was ambiguous because of the use of the word "apology" in the statute.[4] But, ***the statute is not ambiguous***. When the word "apology" is given its ordinary meaning, as it should be, there is no ambiguity. And, expressions of fault fall within the protection of the statute.

[4] In *Davis*, the Ninth District determined that the statute was ambiguous because of the word "apology" in the statute, stating "looking to the rules of grammar and common usage, the appearance of the term 'apology' in Section 2317.43(A) creates some ambiguity." *Davis*, at ¶ 10. Amici submit the Ninth District erred in reaching this conclusion. Without any independent analysis on the issue, the Twelfth District "agree[d] with the Ninth District's conclusion that R.C. 2317.43 is ambiguous" but in the same sentence reached the opposite conclusion, finding that "the intent of the statute is to exclude from evidence ***all*** statements of apology – including those statements admitting fault." *Stewart*, at ¶ 47 (emphasis sic).

1. The ordinary meaning of the word "apology" includes statements of fault

"The preeminent canon of statutory interpretation requires [a court] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *Miller v. Miller*, 132 Ohio St.3d 424, 2012-Ohio-2928, 973 N.E.2d 228, ¶ 48 (citing *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149 (1992)). "[I]t is the duty of the court to give effect to the words used, not to delete words used or to insert words not used." *Erb v. Erb*, 91 Ohio St.3d 503, 507, 2001-Ohio-104, 747 N.E.2d 230. If the meaning of a statute is unambiguous, it must be applied as written and no further interpretation is necessary. *See, e.g., State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 1996-Ohio-291, 660 N.E.2d 463; *State v. Miller*, 10th Dist. Franklin No. 06AP-192, 2006-Ohio-5954, ¶ 10. As set forth below, the statute is unambiguous and no further interpretation is necessary.

In construing a statute, a court should first look at the words in the statute. The statute's "words and phrases shall be read in context and construed according to the rules of grammar and common usage" (*see* R.C. 1.42), unless the General Assembly has specified otherwise. More specifically,

> [i]n the construction of statutes the purpose in every instance is to ascertain and ***give effect to the legislative intent***, and it is well settled that none of the language employed therein should be disregarded, and that ***all of the terms used should be given their usual and ordinary meaning and signification except where the lawmaking body has indicated that the language is not so used***.

See Appellant's Merit Brief, at 9-10, citing *Carter v. Div. of Water*, 146 Ohio St. 203, 207, 65 N.E.2d 63, 65 (1946) (emphasis added).

The General Assembly did not indicate that "apology" should be modified or given a meaning other than its usual and ordinary meaning in R.C. 2317.43. Therefore, "apology" as used in R.C. 2317.43 should be given its usual and ordinary meaning. The ordinary meaning of

the word "apology" is unambiguous. The definition of "apology," according to no less than six popular dictionaries, includes statements or other expressions of fault:

- American Heritage Dictionary: "Apology. 1. An acknowledgment expressing regret or ***asking pardon for a fault or offense***" The American Heritage Dictionary of the English Language (5th ed. 2013) available at http://www.yourdictionary.com/apology#americanheritage (emphasis added);

- Oxford Dictionaries "Apology. 1. A regretful ***acknowledgment of an offense or failure***" Oxford Dictionaries (2016) available at https://en.oxforddictionaries.com/definition/ (emphasis added);

- MacMillan Dictionary: "Apology. 1. A statement that tells someone that you are sorry for ***doing something wrong or for causing a problem"*** MacMillan Dictionary (2nd ed. 2007) available at http://www.macmillandictionary.com/us/dictionary/american/apology (emphasis added);

- Merriam-Webster: "Apology. * * * 2. An ***admission of error*** or discourtesy accompanied by an expression of regret" Merriam-Webster's Collegiate Dictionary (11th ed. 2014) available at https://www.merriam-webster.com/dictionary/apology (emphasis added);

- www.dictionary.com: "Apology. A written or spoken expression of one's regret, remorse or sorrow for ***having insulted, failed, injured, or wronged another***" *Apology Definition*, dictionary.com, http://www.dictionary.com/browse/ apology?s=t (last visited Dec. 30, 2016);

- www.yourdictionary.com: "Apology. * * * 2. An ***acknowledgment of some fault, injury,*** insult, etc., with an expression of regret and plea for pardon." *Apology Definition*, yourdictionary.com, http://www.yourdictionary.com/ apology (last visited Dec. 30, 2016) (emphasis added).

Accordingly, the common usage of "apology" includes expressions of fault as well as non-fault.

Because the General Assembly did not alter or modify the meaning of the word "apology" in R.C. 2317.43, it should be construed to include statements or expressions of fault as well as non-fault. *See State v. Miller*, 10th Dist. Franklin No. 06AP-192, 2006-Ohio-5954, ¶ 10 (rejecting argument that statute was ambiguous and holding that ***statute "does not differentiate*** between conduct causing physical harm and conduct causing mental distress. ***Since the General***

Assembly did not make that distinction, neither shall we.") (Emphasis added.) There is no need to add words to the statute in order to exclude all apology statements from evidence.

2. Words proximate to "apology" in the Ohio apology statute confirm that all manifestations of "apology" are covered by the statute

As set forth above, the meaning of "apology," as commonly used, includes expressions of fault. When this common usage is read in the context of the entire statute, the statute includes in its ambit (and therefore excludes from evidence), statements or expressions of fault.

The Ninth District erroneously determined that under the rules of "grammar and common usage, the appearance of the term 'apology' in Section 2317.43(A) creates some ambiguity." *Davis*, 2011-Ohio-3199, at ¶ 10. According to the Ninth District, the words proximate to "apology" in the statute demonstrate that the General Assembly did not intend to include statements of fault "within the statute's ambit of protection." *Id.* Thus, the court stripped "apology" of its common use in expressing fault. In doing so, the Ninth District formulated an interpretation of "apology" that is not "plain and ordinary."

The Ninth District also misapplied an established tool of statutory construction – the maxim *expressio unius est exclusio alterius* ("inclusion of one thing implies the exclusion of the other"). The Ninth District explained that because the word "fault" is not included among the "litany of words expressing empathy" in the statute, the General Assembly could not have intended fault to be covered by the statute. *Id.* This reasoning is flawed because it fails to consider that expressions of fault are already covered by the word "apology" and, therefore, need not be restated to be included. The words, *"**any and all statements***, affirmations, gestures, ***or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence"*** do not require, nor imply, the exclusion of fault.

To the contrary, the words preceding "apology" in the statute illustrate that even if there are multiple manifestations of apology expressions, all such expressions are covered by the statute. The statute unequivocally provides that "***any and all*** * * * statements, * * * gestures or conduct expressing apology" are inadmissible as evidence. R.C. 2317.43(A) (emphasis added). Plainly, "any and all" expressions of "apology" does not mean "except those that may also connote fault." This construction, urged by Appellant, must be rejected.

A court may not "restrict, constrict, qualify, narrow, enlarge, or abridge the General Assembly's wording," and must "accord significance and effect to every word, phrase, sentence, and part of the statute." *State ex rel. Carna v. Teays Valley Local School Dist. Bd. of Edn.*, 131 Ohio St.3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶ 18. Requiring the General Assembly to add words to the statute that are already included in the common usage of the word "apology" is redundant.[5]

3. The General Assembly was required to specifically exclude fault-statements if it so intended; the correct presumption is that R.C. 2317.43 includes fault-statements

Appellant contends that coverage of fault-statements under R.C. 2317.43 requires insertion of the exact word "fault." *See* Appellant's Brief, at 14. That is incorrect. The correct default position is that R.C. 2317.43 already includes fault-statements through the ordinary and usual meaning of the word "apology," and if the General Assembly did not want R.C. 2317.43 to cover fault, then it would have, and was required to, specifically exclude fault-statements. *See Carter v. Div. of Water*, 146 Ohio St. 203, 207, 65 N.E.2d 63, 65 (1946) (holding that courts

[5] While the General Assembly is not required to add redundant words in statutes, nothing prohibits it from doing so. Sometimes the General Assembly amends statutes in an effort to clarify and/or curb the efforts of creative litigants. *See* Am.Sub. S.B. 117 (2006), Section 3 (declaring that the amendment is intended "to clarify the General Assembly's original intent in enacting the Ohio Products Liability Act * * * to abrogate all common law product liability causes of action * * * .")

construing statutes must give words their ordinary meaning "except where the lawmaking body has indicated that the language is not so used").

If the General Assembly enacting R.C. 2317.43 wanted a special and/or unusual meaning of the word "apology" to apply – one that does not include fault – then it was incumbent on the General Assembly to specifically ***exclude*** statements of fault from the protection of the apology statute. In fact, several state legislatures have done exactly that. At least 36 states have enacted apology statutes. *See Davis*, 2011-Ohio-3199, at ¶ 6-8. The majority of these statutes specifically distinguish between fault-statements and no-fault statements.[6] *Id.* The majority of states that distinguish between fault and no-fault statements do so explicitly by excluding words of fault from the exclusionary rule and allowing fault statements to be admitted into evidence. *Id*. In other words, their legislatures expressly provided that statements of fault – which would otherwise be covered by the statute and inadmissible – are admissible. *See Davis*, at ¶ 6, citing, *e.g.*, La.Rev.State.Ann. 13:3715.5 ("Any communication * * * expressing * * * ***apology***, regret, grief, sympathy, commiseration, condolence, compassion, or a general sense of benevolence * * * shall not be admissible[.] * * * ***A statement of fault, however***, which is part of, or in addition to, any such communication ***shall not be made inadmissible*** pursuant to this Section.") (Emphasis added.)

Consistent with the principle of statutory construction that words are to be given their ordinary meaning unless the legislature states otherwise, the default assumption in most states is that apology statutes cover fault-statements. The state legislatures that prefer not to include fault-statements within the ambit of an apology statute specifically provide a separate statute or a specific clause excluding fault-statements from coverage.

[6] Only a few states have apology statutes that do not expressly distinguish between fault-statements and no-fault statements, like Ohio. *See Davis*, at ¶ 8.

Ohio's apology statute should likewise be so construed. Since there is no specific exclusion of fault-statements from Ohio's apology statute, the statute covers such statements, rendering them inadmissible.

When the words and phrases used by the General Assembly are given their ordinary and common usage and read in context, R.C. 2317.43 is unambiguous. As such, it should be applied to exclude a physician's statements of fault in explaining to a patient or a patient's family what transpired relating to an unanticipated medical outcome.

C. If the Statute is Deemed Ambiguous, it Should be Broadly Construed to Include Fault-Statements

In construing a statute, the primary goal "is to ascertain and give effect to the intent of the legislature as expressed in the statute." *Stewart v. Vivian*, 2016-Ohio-2892, 64 N.E.3d 606, ¶ 44. Should this Court determine that R.C. 2317.43 is ambiguous, the statute should be broadly construed to give effect to the General Assembly's intent to encourage physicians to communicate without fear of reprisal.

1. Apology statutes were designed to strengthen the relationship between physicians and patients through greater openness and transparency

If a court determines that a statute is ambiguous after examining its language, then a number of other factors can be considered in determining legislative intent, including:

(A) [t]he object sought to be attained;

(B) [t]he circumstances under which the statute was enacted;

(C) [t]he legislative history;

(D) [t]he common law or former statutory provisions, including laws upon the same or similar subjects;

(E) [t]he consequences of a particular construction; [and]

(F) [t]he administrative construction of the statute.

R.C. 1.49. When the applicable factors are considered here, they result in the Twelfth District's interpretation of the statute – fault-statements are covered by the statute and, therefore, are inadmissible.

Regarding the "object sought to be attained," this Court has already recognized that the purpose of the Ohio apology statute is to provide "opportunities for healthcare providers to apologize and console victims of unanticipated outcomes of medical care without fear that their statements will be used against them in a malpractice suit, by making the statements inadmissible as evidence of admission of liability or a statement against interest." *Estate of Johnson v. Randall Smith, Inc.*, 135 Ohio St.3d 440, 2013-Ohio-1507, 989 N.E.2d 35, ¶ 1.

Regarding "the circumstances under which the statute was enacted," the national milieu of apology statute enactments sheds light on the General Assembly's policy goals in enacting R.C. 2317.43. Across the United States, the purpose of apology statutes is to "encourage open communication between patients and physicians without fear of reprisal." American Medical Association, Advocacy Research Center, I'm Sorry Laws: Summary of State Laws (July 2007). Without a statute to protect physicians from liability for their expressions of apology, physicians remain silent and are discouraged from communicating with patients. Valerie B. Hendrick, *The Medical Malpractice Crisis: Bandaging Oregon's Wounded System and Protecting Physicians*, 43 Willamette L. Rev. 363, 393 (2007).

Apology statutes were passed as part of a national movement to cut the costs associated with medical malpractice lawsuits and strengthen physician-patient relationships through trust and transparency. *Id.* at 381-382, 392-394. The rationale behind this movement is well documented in contemporary journal articles and debates. For example, one commentator stated that the apology law movement was a reaction to changes in modern medical care, which

collectively emphasized making patients "full partners in their healthcare," and required communication covering "outcomes of all care, including an unanticipated outcome." Lee Taft, J.D., M.Div., *Apology and Medical Mistake: Opportunity or Foil?*, 14 Annals Health L. 55, 62 (2005).

Thus, the purpose of apology statutes is to facilitate open and honest communication among physicians and patients, without fear that a physician's words will be used to establish liability against the physician. The General Assembly intended R.C. 2317.43 to remove a major obstacle to that openness – physicians' reasonable fear that apologies and explanations given to families in the aftermath of an adverse medical outcome would come back to haunt them in court.

"[G]iven the language and stated intent of the apology statute" the Twelfth District "conclude[d] that statements of fault are inadmissible under the apology statute." *Stewart v. Vivian*, 2016-Ohio-2892, 64 N.E.3d 606, ¶ 50. In contrast, the result urged by Appellant not only disregards the language and intent of the statute, but creates an unworkable rule that will result in inconsistent application of the statute.

2. Distinguishing between "fault-statements" and "sympathy-statements" leads to inconsistent application of the statute and confuses fact-finders

a. The consequence of Appellant's construction of R.C. 2317.43 undermines the purpose of the statute

In construing statutes, courts also look at the consequences of a particular construction. The Ninth District's construction, used by Appellant, requires a fact-finder to parse through a physician's statements and categorize the expressions as "statements of sympathy" or "statements of fault." However, some statements can be both, and discerning between the two requires fact-finders to dissect sentences and split hairs. For example, the following (and oversimplistic) statements could be characterized as either type of statement, or both:

- I am sorry you had a life-threatening reaction to the medication I prescribed.
- I did not expect the surgical procedure I performed to lead to these severe complications.
- I apologize that the transplant surgery that I recommended for your daughter was not successful.

Further, a health care provider's statement that an adverse result "is my fault" does not mean that the health care provider breached the standard of care or committed medical malpractice. *See, e.g., Schaaf v. Kaufman*, 850 A.2d 655, 664 (Pa. Super. Ct. 2004). In fact, a provider can apologize to a patient's family even though the standard of care has been met.

Another example of the difficulty in parsing statements made after an unanticipated medical outcome are those where a health care provider communicates that he "takes responsibility" for what occurred. *See Johnson v. Smith*, 196 Ohio App.3d 722, 2011-Ohio-6000, 965 N.E.2d 344, ¶ 4 (11th Dist.) (holding that doctor's statement that he "took full responsibility for what happened" while holding an emotional patient's hand upon transferring her to another facility for an additional procedure is admissible under R.C. 2317.43); *Davis v. Wooster Orthopaedics*, 193 Ohio St.3d 581, 2011-Ohio-3199, 952 N.E.2d 1216, ¶ 14-15 (finding admissible doctor's statement that he "takes full responsibility" but not the portion of his statement that he was sorry). Under Appellant's construction, is "taking responsibility" an expression covered by, or excluded from, the apology statute?

And, if only the "I'm sorry" part of the statement is excluded (as in *Davis)* – as Appellant's construction requires – and the rest of the communication is admissible, the jury gets a lopsided view of what transpired. In short, the Ninth District's construction of R.C. 2317.43 is simply unworkable. Rather than create a practical analytical framework, which encourages open communication, the Ninth District's interpretation transforms Ohio's apology law into a trap for the unwary –health care provider, judge, and juror alike.

The Twelfth District's decision, on the other hand, reasonably concludes that "the legislature did not intend to 'parse out' a statement of fault from a statement intended to give comfort." *Stewart v. Vivian*, 2016-Ohio-2892, 64 N.E.3d 606, ¶ 41. Thus, a statement of fault that is part of any communication by a physician to a patient or patient's family member regarding an unanticipated medical outcome is covered by the statute. Under this objective construction, the trial court is not tasked with determining which parts of an expression of "apology" are admissible and which parts are inadmissible. And, the jury is required to decide the case, as it historically has been, based on expert testimony as to whether the defendant breached the standard of care,[7] rather than on a health care provider's attempt to "apologize" and explain an unanticipated outcome.

b. Excluding fault statements from the statute's protection contravenes the policy goal of facilitating open communication and building trust between doctors and patients

The rule created by the Ninth District and advocated by Appellant sends a strong message to health care providers that they should avoid speaking to patients and family members following any unanticipated medical outcome or that they should tread very carefully when communicating and say nothing more than "I'm sorry." Should they fail to do so, they run the risk that a court, following the Ninth District's lead, will parse their words for any hint of culpability and then admit those statements into evidence in a malpractice trial. Under this interpretation, the General Assembly's entire purpose in enacting R.C. 2317.43 is undermined. Doctors will not risk speaking to clients in the future out of fear that their fate will be similar to Dr. Vivian's.

[7] *See Bruni v. Tatsumi*, 46 Ohio St.2d 673, 346 N.E.2d 673 (1976).

Further, if doctors are not able to take responsibility for their actions when speaking to patients, a simple statement of condolence may be worse than saying nothing at all. According to one commentator:

> Where you know you are to blame for injuring another, telling that person simply, "I'm sorry that you are hurt," rather than, "I'm sorry that I hurt you," can be worse than saying nothing at all. It's insulting to merely express sympathy or benevolence when you should be admitting your fault.

Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. Cin. L. Rev. 819, 838 (2002) ("The kinds of expressions protected by statutes [that only protect expressions of sympathy and benevolence] are more akin to botched apologies, apologies that fail precisely because of their generality. While sympathetic expressions may be useful in a fender bender, they are likely to exacerbate pain in situations of catastrophic loss.").

Without an apology that accepts a measure of fault, an "I'm sorry" does not go very far towards repairing the physician-patient relationship following a medical accident or mistake. Here, as in so many contexts, the acceptance of responsibility is the key aspect of an apology. *See* Steven E. Raper, *No Role for Apology: Remedial Work and the Problem of Medical Injury*, 11 Yale J. Health Pol'y L. & Ethics 267, 293 (2011); *see also* Angela M. Eastman, *The Power of Apology and Forgiveness*, 36 Ver. B.J. & L. Dig 55, 55-56 (2010) ("Full apologies have a stronger positive correlation to higher satisfaction rates with settlement than partial apologies, and contribute to more positive attributions from plaintiffs towards defendants, translating into lowered demands for compensation and much higher satisfaction levels for everyone."). A rule encouraging statements of sympathy without allowing doctors to admit fault (or take responsibility) contravenes the General Assembly's intent.

In sum, the consequence of Appellant's interpretation, which requires courts to parse fault-statements from sympathy-statements and allows juries to hear only fault-statements, is

unworkable and contrary to the intent of the statute – to encourage physician-patient communications without fear of reprisal.

3. Proposed changes to R.C. 2317.43 do not alter the legislature's initial intent in enacting it

Although proposed amendments to a statute are not one of the factors delineated in R.C. 1.49 for courts to consider in interpreting a statute, Appellant tries to make much of the fact that the General Assembly has considered amending Ohio's apology statute to specifically include the terms "fault" and "error." *See* Appellant's Merit Brief, at 15-18. Contrary to Appellant's suggestion, proposed changes to a statute by lawmakers in a later legislative term should not be used to construe the meaning of a statute enacted by the prior legislature for several reasons.

First, rather than rely on the evolving and various events following legislative enactments, a court construing a statute should look to the words in the statute. "Courts must presume that a legislature says in a statute what it means and means in a statute what it says there," not what a later legislature may have said or done in relation to the statute. *See Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149 (1992); *accord Miller v. Miller*, 132 Ohio St.3d 424, 2012-Ohio-2928, 973 N.E.2d 228, ¶ 48.

Second, the proposed legislation is just that: proposed legislation, which may or may not become law in some yet-to-be-determined form.

Third, legislatures sometimes amend statutes as a means to clarify what was initially intended when the legislation was first enacted. (*See* Amici Brief, at 10, fn. 5.) Indeed, a completely plausible inference derived from the proposed amendments is that lawmakers are seeking to preclude creative litigants from obfuscating the actual meaning of R.C. 2317.43 through costly and time consuming litigation concerning the use of the word "apology." Any proposed amendment to R.C. 2317.43, should not detract from the Court's reliance on the

language of the statute, which, as shown, covers statements of fault within the plain meaning of the word "apology."

4. R.C. 2317.43 is not a privilege statute "in derogation of common law" and, thus, need not be narrowly construed

Appellant claims that R.C. 2317.43 must be narrowly construed because it is a statutory "privilege" in derogation of common law. *See* Appellant's Merit Brief, at 10, citing *Weis v. Wies,* 147 Ohio St. 416, 428-429, 72 N.E.2d 245 (1947); *Ward v. Summa Health Sys.*, 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514, ¶ 27-28; *State Medical Board v. Miller*, 44 Ohio St.3d 136, 139-140, 541 N.E.2d 602, 605 (1989). This argument should be rejected for three reasons.

First, Appellant did not raise this issue in his merit or reply briefs filed in the court of appeals, nor in his conflict certification motion filed in the court of appeals. As a result, the court of appeals never addressed this issue. It appears that Appellant raised this issue for the first time, as a proposition of law, in his memorandum in support of jurisdiction filed in this Court in connection with his discretionary appeal. *See* Memorandum in Support of Jurisdiction of Appellant Dennis Stewart, filed June 23, 2016, Ohio Supreme Court Case No. 2016-093. The Court declined to accept that discretionary appeal. *See* Entry (declining jurisdiction), filed September 14, 2016, Ohio Supreme Court Case No. 2016-0931. As a result, this issue is not properly before the Court and Appellant's "back door" attempt to get it before the Court should not be condoned.

Second, Appellant has not shown that R.C. 2317.43 creates a privilege that would be required to be construed narrowly because it is "in derogation of common law." A "privilege" is

> a personal right, *i.e.*, the right to preserve the confidentiality of certain private communications. * * * Privilege law, then, is anchored in considerations of policy that exist independently of the usual evidentiary concerns with accuracy and reliability of evidence. Privileges operate to suppress competent, relevant evidence in order to preserve confidential relationships.

Springfield Local School Dist. Bd. of Edn. v. Ohio Assn. of Public School Employees Local 530, 106 Ohio App.3d 855, 868-869, 667 N.E.2d 458 (9th Dist. 1995), quoting Weissenberger, Ohio Evidence (1995), 4 Section 501.3. The confidential relationship preserved under the physician-patient privilege protects a patient's communications to the patient's doctor without fear that such communications can be disclosed without the patient's consent. In contrast, the apology statute does not protect a patient's confidential communications.

"Derogation" is "the partial repeal or abrogation of a law by a later act that limits its scope or impairs its utility and force." Black's Law Dictionary (9th ed. 2009). The phrase "in derogation of common law" invokes a canon of statutory construction in which courts strictly construe statutes that limit or proscribe a common law right. *Miller v. Kyle*, 85 Ohio St. 186, 195, 97 N.E. 372, 373 (1911). The "derogation of common law" construction is not to be invoked without some showing that there exists a common law right that is derogated by the statute. *See Pasquantino v. United States*, 544 U.S. 349, 352, 125 S. Ct. 1766, 1770 (2005) ("This construction of the statute did not derogate from the common-law revenue rule, for the statute derogated from no well-established revenue-rule principle * * * .") Appellant has not identified any common law right that R.C. 2317.43 impairs.

Further, the rule that statutes in derogation of common law must be strictly construed has no application to remedial laws. *See* R.C. 1.11. A remedial law "is enacted to correct past defects, to address an existing wrong, or to promote the public good." *Wright v. State*, 69 Ohio App.3d 775, 779, 591 N.E.2d 1279 (10th Dist. 1990). The apology statute is a remedial law designed to promote the public good. Among other things, the legislative history of R.C. 2317.43 includes a message from the Governor stating the remedial purpose of the statute:

> Signing Senate Bill 187, sponsored by Senator Scott R. Nein (R-Middletown), and House Bill 215, sponsored by Representative Jean Schmidt (R-Loveland),

> completes two parts of Taft's five-point plan to stabilize Ohio's volatile medical malpractice insurance market.
>
> 'Doctors across the state are facing sharp increases in medical malpractice insurance costs, driving them away from practicing medicine, or driving them out of Ohio," said Taft. Signing these bills is a good start to stabilizing the malpractice insurance market and keeping good doctors here in Ohio, but it is only a start.'

OH Gov. Mess., June 14, 2004. Because the apology statute is a remedial law, it should not be narrowly construed.

Third, as discussed below, none of the cases Appellant relies on in arguing that R.C. 2317.43 is a statute in derogation of common law stands for that proposition. In fact, none of Appellant's authorities even mention the apology statute at issue. Instead, all of the cases involve the patient-physician or attorney-client privileges and are inapposite.

Appellant first relies on *Weis v. Weis*, 147 Ohio St. 416, 428-429, 72 N.E.2d 245 (1947), to support his contention that R.C. 2317.43 must be narrowly construed as a privilege statute in derogation of common law. *Weis* involved the physician-patient privilege under the General Code, which is clearly a privilege statute. In *Weis*, this Court held that since a "nurse" was not among "those named in the statute governing privileged communications," her communications were not privileged and she could testify to them. *Id.* The only rule of *Weis* applicable here is that the Court looked at the words of the statute and construed them as written. The statute did not apply to nurses and, thus, the Court did not expand the patient-physician privilege to nurses.[8]

[8] The physician-patient privilege at issue in *Weis* is, on its face, narrower in scope than the Ohio apology statute. Specifically, R.C. 2317.43 ***applies*** to nurses while the physician-patient privilege does not. That is, Ohio's apology statute covers "health care provider[s]," not just physicians, and explicitly defines the term as having the same meaning as R.C. 2317.02(B)(5), which provides that a "health care provider" means a "hospital, ambulatory care facility, long-term care facility, pharmacy, emergency facility, or health care practitioner." Section 2317.02(B)(5)(c)(iii) clarifies that "'health care practitioner' has the same meaning as in section 4769.01 of the Revised Code," which defines the term as including a "registered or licensed

In contrast, here, the Court need not expand the apology statute to reach persons or encompass statements of fault.

Appellant next relies on *Ward v. Summa Health Sys.*, 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514. In *Ward*, a third-party patient was not able to use the physician-patient privilege to avoid personally disclosing his own medical information when that information was relevant to determining whether he was the tortfeasor. *Id.* at ¶ 27-29. "Under the physician-patient privilege, ***a treating physician is prohibited*** from disclosing matters disclosed by the patient to the physician during consultations regarding treatment or diagnosis of the patient." *Id.* (emphasis added). The rationale underlying the physician-patient privilege is to encourage free and frank disclosure by the patient without fear that the doctor will publicly disclose the information. *Id.* But, a patient's own submission of medical records is not referenced in the physician-patient privilege statute. *See* R.C. 2317.02; *Ward*, at ¶ 16-22. *Ward* strictly construed the privilege statute to apply "only to those circumstances specifically named in the statute."[9] *Id.* at ¶ 15. Because the physician-patient privilege statute does not prohibit a patient from disclosing his own medical information, and in light of existing exceptions that require a patient to disclose relevant medical evidence in certain circumstances, the privilege was not applicable to protect the patient from having to disclose the relevant medical information.

In contrast, the apology statute at issue before the Court is not a privilege statute and, thus, need not be strictly construed. However, even if it were so construed, at least one category of expressions explicitly mentioned in R.C. 2317.43 – expressions of "apology" – covers fault-statements. So, unlike *Ward*, the statute is not silent on the matter before the Court.

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practical nurse," and 17 other types of health professionals. Thus, if anything, *Weis* only shows that any "privilege" created by R.C. 2317.43 is broader than that of physician-patient privilege.

[9] This is the same as what Dr. Vivian is asking this Court to do.

The third case Appellant relies on to support his argument that the apology statute must be strictly construed also involves the physician-patient privilege. In *State Medical Board v. Miller,* 44 Ohio St. 3d 136, 139-140, 541 N.E.2d 602, 605 (1989), this Court refused to extend the physician-patient privilege to hinder a licensing board's access to patient records where the board received written consent of the patient. The Court explained that since the physician-patient privilege was intended to create confidentiality such that patients felt comfortable in sharing medical information with doctors, only the patient's rights to confidentiality were relevant for purposes of applying the privilege. *Id*. at 140. The doctor could not claim the patient's right to confidentiality where the patient had agreed to waive such confidentiality.

Miller is applicable here only insofar as it demonstrates that courts interpret statutes to give effect to the policy goals of the legislature, and that is precisely what Dr. Vivian is asking this Court to do. Ohio's apology statute explicitly addresses the rights of health care providers in connection with statements and expressions they have made in the aftermath of unanticipated medical outcomes. The statute should be construed to give effect to those rights.

Finally, Appellant's reliance on *Relizon Co. v. Shelly J. Corp*., 6th Dist. Lucas No. L-02-1377, 2004-Ohio-6884, ¶ 51, is misplaced. *See* Appellant's Merit Brief, at 11. *Relizon* held that the trial court did not abuse its discretion in prohibiting a witness from consulting with counsel during the course of his testimony. *Id*. The inability of a witness to consult with counsel while testifying has nothing to do with narrowing the scope of Ohio's apology statute. The fact that trials serve a truth-seeking function does not mean that R.C. 2317.43 must be interpreted so narrowly as to excise the ordinary meaning of the word "apology" from the statute. At bottom, Appellant provides no support for the proposition that R.C. 2317.43 is a privilege statute in derogation of common law that must be narrowly construed.

The court should not apply the derogation of common law canon in light of the Ohio General Assembly's objective for enacting R.C. 2317.43. The "General Assembly may by legislative enactment change the common-law policy of the state." *In re Tudor*, 342 B.R. 540, 558 (Bankr. S.D. Ohio 2005) (citing *Miller v. Kyle*, 85 Ohio St. 186, 195, 97 N.E. 372, 373 (1911)). The derogation of common law canon does not supplant other considerations for interpretation, such as the legislature's objective in enacting the statute, *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783-84, 72 S. Ct. 1011, 1015 (1952) ("The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure."); *Pierson v. Ray*, 386 U.S. 547, 561, 87 S. Ct. 1213, 1221 (1967) ("Nor should the canon of construction 'statutes in derogation of the common law are to be strictly construed' be applied so as to weaken a remedial statute whose purpose is to remedy the defects of the pre-existing law.")

CONCLUSION

The Ohio General Assembly, like the more than 30 other state legislatures to enact apology statutes, sought to strengthen the relationship between health care providers and patients by designing an exclusionary rule that would encourage transparency and communication. The Twelfth District's interpretation of R.C. 2317.43 does just that, whereas, the Ninth District's construction encourages the opposite.

Amici urge the Court to broadly construe R.C. 2317.43 to give effect to its intended purpose. The certified question should be answered affirmatively.

Respectfully submitted,

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