Sympathetic Statements by Healthcare Providers are Inadmissible

In 2004, the General Assembly enacted R.C. 2317.43, now known as “the Apology Statute”, to prevent the admission of certain statements made by healthcare providers to patients and their relatives following an unanticipated outcome of medical care. Specifically, R.C. 2317.43 prohibits a patient from introducing into evidence any sympathetic statements and/or gestures made by a healthcare provider in any civil action brought by an alleged victim of an unanticipated outcome. The prohibition set forth in R.C. 2317.43 was designed to allow healthcare providers to apologize and console patients that experience an unanticipated outcome without fear that their statements will be used against them in a malpractice lawsuit.

Recently, in Estate of Johnson v. Randall Smith, Inc., Slip Op. No. 2013-Ohio-1507, the Supreme Court of Ohio analyzed whether R.C. 2317.43 can be applied to a statement of apology made by a healthcare provider before the statute took effect on September 13, 2004. Estate of Johnson involved a medical malpractice claim brought by Jeannette Johnson following the surgical removal of her gallbladder in April 2001 by Dr. Smith. During the procedure, Ms. Johnson’s common bile duct was injured, a known surgical risk, and repaired by Dr. Smith. One month later, Ms. Johnson returned to the hospital due to complications from the bile duct surgery. Upon being informed she needed to be transferred to another hospital for treatment, Ms. Johnson became visibly upset and emotional. In an effort to console her, Dr. Smith took Ms. Johnson’s hand and attempted to calm her by saying, “I take full responsibility for this. Everything will be okay.”

The Johnsons initially filed a medical malpractice suit against Dr. Smith in August 2002; however, they voluntarily dismissed their claims in August 2006. Subsequently, the Johnsons re-filed their medical negligence claims against Dr. Smith in July 2007. At trial, the court excluded all evidence relating to Dr. Smith’s statement on the grounds that Dr. Smith’s words and gestures indicated an intent to console and express sympathy for Ms. Johnson; therefore, the statement fell within the bounds of R.C. 2317.43 and was inadmissible. The jury returned a verdict in favor of Dr. Smith.

The 11th District Court of Appeals reversed the trial court’s judgment, holding R.C. 2317.43 did not apply to Dr. Smith’s statement, as the alleged malpractice occurred and the statement was made in 2001, well before the statute became effective on September 13, 2004. In its recent reversal of the Court of Appeals’ decision, the Supreme Court of Ohio held that when analyzing whether the prohibitions in R.C. 2317.43 apply, it is the date the lawsuit is filed, not the date the statement at issue was made, that is determinative. Accordingly, the Supreme Court held R.C. 2317.43 applies to any civil action filed after September 13, 2004, the statute’s effective date. Further, the Court held that despite the appearance of Dr. Smith’s statement – “I take full responsibility for this.” – as an expression of liability, not sympathy, the entirety of his statement fell within the purview of R.C. 2317.43. In so holding, the Court noted that at the time the statement was made, Dr. Smith was faced with a distressed patient who was upset and made a statement that was designed to comfort her, which is precisely the type of evidence the Apology Statute was designed to exclude.

Of note, while the Johnson’s had initially filed their lawsuit against Dr. Smith in August 2002, their voluntary dismissal and subsequent re-filing in July 2007 made the relevant filing date July 2007. Accordingly, because R.C. 2317.43 was enacted almost three years prior to the filing of their complaint in July 2007, and because Dr. Smith’s statement fell within the scope of the Apology Statute, Dr. Smith’s statement was inadmissible.

The Supreme Court’s decision in Estate of Johnson is significant as it definitively establishes the date the lawsuit was filed, not the date the statement was made, as the determinative factor when applying R.C. 2317.43. Additionally, the decision suggests the context in which the statement qualifies as an expression of sympathy. Accordingly, unless a case has been pending since September 13, 2004, any and all sympathetic statements and gestures by a healthcare provider are inadmissible.

If you have any questions regarding the Estate of Johnson v. Randall Smith, Inc. decision, or would like a complete copy of the opinion, or have any questions with respect to healthcare liability, please contact a member of our Medical Malpractice Practice Group.

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