Will my apology be used against me in court? The Bullet Point: Volume 1, Issue 16

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Stewart v. Vivian, Slip. Op. No. 2017-Ohio-7526.

In this appeal to the Ohio Supreme Court, the court decided whether statements by a health care provider admitting fault or liability during the course of apologizing to a patient or a patient's family are admissible into evidence. The Court held that they are not. In so ruling, the Court noted that for purposes of R.C. 2317.43(A), a "statement[] * * * expressing apology" is a statement that expresses a feeling of regret for an unanticipated outcome of the patient's medical care and may include an acknowledgment that the patient's medical care fell below the standard of care.

The Bullet Point: While admissibility of apologies in most situations is determined on a case-by-case (and often state-by-state) basis, the Ohio Apology Statute protects all apologies made by a doctor for an unintended medical outcome, including apologies that contain an admission of fault or wrongdoing, the court said, thereby leaving in place a jury verdict in favor of a doctor in a suit brought by the family of a deceased patient.

Ohio Revised Code § 2317.43 states:

In any civil action brought by an alleged victim of an unanticipated outcome of medical care * * *, any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence that are made by a health care provider * * * 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.

While lower courts split on what the term "apology" meant, the Supreme Court has determined that it can mean an admission of liability or fault and still be protected from being entered into evidence.

Thomarios v. Hardy Investment Assoc., Ltd., 9th Dist. Summit No. 28396, 2017-Ohio-7597.

This appeal involved a restrictive covenant contained in a land sale contract. The plaintiff purchased land from the defendant, which included a restrictive covenant precluding the property from being used as a retail lumber operation or building supply business for 20 years. After purchasing the property, the plaintiff attempted to sell it to a company that wanted to use it as a building supply business. The deal ultimately fell through because of the restrictive covenant and the plaintiff sued the defendant, seeking a declaration that the restrictive covenant was unenforceable. The trial court ultimately granted summary judgment to the defendant and plaintiff appealed.

The Ninth Appellate District affirmed on appeal, finding the restrictive covenant enforceable and not against public policy.

The Bullet Point: A restrictive covenant is a private agreement that restricts the use or occupancy of real property, especially by specifying lot sizes, building lines, architectural styles, and the uses to which the property may be put. They are not favored under the law, and if there is any ambiguity in a restrictive covenant, a court is supposed to read it in favor of a free use of land. Like contracts in general, courts will consider the language of the restrictive covenant itself to determine if it is ambiguous and/or against public policy.

Sunrise Cooperative, v. Joppeck, 9th Dist. Lorain No. 16CA01984, 2017-Ohio-7654.

This was an appeal of a cognovit note judgment. Defendant had executed a cognovit note with plaintiff to purchase farming equipment. It contained a warrant of attorney. Defendant ultimately defaulted on the note and plaintiff obtained a cognovit note judgment that was subsequently satisfied. Plaintiff then filed a second cognovit complaint based on the same note. Judgment was awarded but for a different amount that was not included in the first judgment. Thereafter, defendant moved to vacate the judgment on the basis of res judicata and the trial court agreed. Plaintiff then appealed.

On appeal, the Ninth Appellate District held that the trial court erred in considering res judicata because it lacked subject matter jurisdiction over the action. Specifically, the court found that the statutory requirements for obtaining a cognovit judgment were not complied with because the plaintiff failed to produce the original warranty of attorney.

The Bullet Point: "[J]urisdiction is a condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void." Because of this, a lack of subject matter jurisdiction can be raised at any time by any party, including by the court on its own. Moreover, a court without subject matter jurisdiction lacks power to even consider or decide an issue in the underlying action.

Underlying this ruling is the legal construct of a "cognovit note." When a business debtor signs a cognovit promissory note, it waives the right to notice and a hearing, allowing the creditor to appoint an attorney to confess judgment against the debtor — waiving most defenses, counter-claims, rights to setoff, and rights of appeal. This is often used in lease situations and/or by creditors dealing with perceived "risky" debtors. A debtor

may agree to a cognovit as consideration for more favorable terms. The creditor, understanding the value of efficient debt collection, may trade credit risk for collection certainty.

Hunt v. Alderman, 9th Dist. Summit No. 28321, 2017-Ohio-7591.

The plaintiff and defendant were SWAT team members who participated in a Taser instruction course. Prior to the course, they were provided a safety briefing. During the training, each SWAT team member played a different role, including that of the "bad guy." Plaintiff was assigned to be the "bad guy" and put on a specially designed suit so that the Taser prongs would not reach his skin. It did not include a helmet. During the training, the defendant came from behind of the plaintiff and struck him in the head with a submachine gun. Defendant claimed he was not aware that plaintiff did not have a helmet. Eventually, plaintiff sued for assault and battery. Defendant argued he was immune from liability as a co-worker of plaintiff. The trial court disagreed and the defendant appealed.

The Ninth Appellate District agreed with the trial court's decision, finding that an issue of fact existed on whether the Defendant was in fact immune from liability.

The Bullet Point: Ohio law states that a county employee is immune from liability for an injury received by another county employee when the injury is compensable by worker's compensation. However, this statute does not extend to intentional torts. An intentional tort as "an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur."

Westport Ins. Group v. Stark Cty. Sanitary Eng. Dept., 5th Dist. Stark No. 2017CA00006, 2017-Ohio-7573.

This was an appeal of a trial court's decision to deny a motion for summary judgment on the basis of sovereign immunity. The dispute arose when an apartment complex flooded. The appellee insured the property and ultimately sued the Sanitary Department for negligence in maintaining the sewer system at the property. The Sanitary Department ultimately moved for summary judgment, claiming that as a political subdivision, it was immune from being sued. The trial court denied the motion and the Sanitary Department appealed.

On appeal the Fifth Appellate District disagreed with the trial court's ruling. It noted that while immunity is not "absolute" and that there are a few statutory exceptions. One such exception is that the political subdivision failed to maintain a proprietary function like a sewer system. Here, the court held the evidence was sufficient to show that the damage was not caused by a negligence maintenance of the sewer system, but excessive rainfall, and thus the Sanitary Department was entitled to immunity from suit.

The Bullet Point: The purpose of Ohio's political subdivision immunity law is the "preservation of the fiscal integrity of political subdivisions." Under this statutory framework, political subdivisions are typically immune from liability for damages "for injury, death, or loss to a person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with the governmental or proprietary function." There are five statutory exceptions to this. To determine whether a

political subdivision is immune from suit involves a three-tier analysis:

Tier 1 is the general rule that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function.

Tier 2 requires a court to determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) apply to expose the political subdivision to liability. If none of the exceptions apply, the analysis is over and the political subdivision is entitled to immunity.

Tier 3. If any of the exceptions to immunity in R.C. 2744.02(B) apply, the third tier requires a determination of whether any of the defenses in R.C. 2744.03 apply.

Reed Elsevier, Inc. v. Carter, 2d Dist. Montgomery No. 27483, 2017-Ohio-7513.

This was an appeal of a decision to dismiss a lawsuit after the defendant paid an agreed-upon settlement amount. The defendant law firm claimed that it was forced to sign the settlement by the trial court and that it did not accurately reflect the settlement terms agreed to by the parties. Specifically, the parties entered into an oral agreement. However, the parties could not ultimately agree on the written settlement language, and eventually both parties filed motions to enforce the settlement with the trial court. After a hearing, the court granted the plaintiff's motion to enforce the settlement, noting that two paragraphs of the disputed language were neither a condition to settlement nor negotiated or agreed upon by the parties.

The Second Appellate District disagreed and affirmed the trial court's decision, noting that the trial court has the authority to craft terms of a settlement agreement when the parties cannot otherwise agree.

The Bullet Point: A settlement agreement is considered a contract and is enforceable if it contains all the essential elements of a contract. However, if not all of the requirement elements are involved, they may be added or resolved by a "later agreement or judicial resolution." Indeed, a court is given wide latitude to finalize an agreed upon settlement if the parties eventually dispute the terms and it may create "those less essential terms that were omitted in order to reach a fair and just result."

Case Previews

Bank of New York Mellon v. Rhiel, 2017-0870.

In 2007, Vodrick Perry refinanced an existing mortgage loan on his property. Both he and his wife initialed each page of the mortgage. Likewise, both Mr. Perry and his wife were identified as "borrowers" on the signature lines of the mortgage. Thereafter, the mortgage was notarized and recorded. Subsequently, the Perrys filed for bankruptcy. In the bankruptcy, the Chapter Seven Trustee challenged the mortgage on the basis that it was a lien on only half of the property, since Mr. Perry's wife was not identified on the first page of the mortgage as a borrower.

The Preview Point: After a trial, the bankruptcy court certified the following two questions to the Ohio Supreme Court for consideration:

1. Whether an individual who is not identified in the body of a mortgage, but who signs and initials the mortgage, is a mortgagor of his or her interest.

2. Is a mortgage signed and initialed by an individual whose name is not identified in the body of the mortgage, but whose signature is properly acknowledged pursuant to Ohio Revised Code Sec. 5301, invalid as a matter of law such that parol evidence is not admissible to determine the intent of the individual in signing the mortgage?

SAS Institute Inc. v. Lee, No. 16-969 (cert granted May 22, 2017).

SAS Institute Inc. (SAS) filed an inter partes review with the Patent Trial and Appeal Board to review the patentability of ComplementSofts' (CS) U.S. Patent No. 7,110,936. The board instituted an IPR proceeding on some, but not all, of the patent claims challenged by SAS' petition, and failed to address those claims in the corresponding written decision.

Below, the Federal Circuit held that the Patent Trial and Appeal Board did not err in issuing a final written decision in an inter partes review that failed to address all the claims in the petition.

The Preview Point: Under 35 U.S.C. section 318(a), is the Patent Trial and Appeal Board required in its final written decision to address every challenged claim in the corresponding petition?

U.S. Bank Nat'l Ass'n v. Village Lakeridge, LLC, No. 15-1509 (cert granted May 27, 2017).

MBP Equity Partners 1, LLC (MBP) decided to sell its claim in The Village at Lakeridge, LLC's (The Village) Chapter 11 bankruptcy to Robert Rabkin (Rabkin). Rabkin testified at a deposition that he maintained a close relationship with a member of MBP's board. After Rabkin rejected U.S. Bank National Association's (U.S. Bank) offer to purchase the claim, U.S. Bank filed a motion to designate Rabkin as a statutory and a non-statutory insider, both of which would preclude Rabkin from voting on the bankruptcy plan.

Below, the bankruptcy court held that Rabkin became a statutory insider in light of his claim purchase from MBP, which the court deemed an insider because the company was an affiliate of Lakeridge, but not a non-statutory insider. Under the clear error standard, the Ninth Circuit reversed the finding that Rabkin was a statutory insider and affirmed the finding that Rabkin was not a non-statutory insider because his relationship with MBP's board member was insufficient.

The Preview Point: Should an appellate court review whether an individual is a non-statutory insider under the clear error standard?