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

Congratulations to the 2011 Ohio Super Lawyers and Rising Stars*

Left to Right: Christine C. Covey, Patrick J. Murphy, Jeffrey W. Van Wagner, William D. Bonezzi, Steven J. Hupp, John S. Polito, Keith Hansbrough*, Bret C. Perry* Not Pictured: Donald H. Switzer

It's O.K. to Apologize

By Donald J. Richardson, Esq.

One of the more common complaints we hear from plaintiffs during a medical malpractice case is that their doctor did not visit with them following a procedure or treatment to listen to them or explain to them what was happening. It is generally believed that direct communication, compassion and good bed-side manners by physicians may go a long way towards reducing the incidences of medical malpractice claims even when a diagnoses or outcome of a procedure is less than desirable.

Perhaps one of the concerns some doctors may have following an unanticipated outcome is that such expressions of compassion, sympathy or explanation may be used against them as an admission of sub-standard care in a lawsuit. The Ohio General Assembly addressed this issue when it adopted Ohio Revised Code 2317.43, commonly referred to as the "Apology Statute" in 2004. The Apology Statute prohibits the use of a doctor's expression of apology, sympathy, compassion or general sense of benevolence to a patient or a patient's family relative to an unanticipated outcome as an admission of liability against a doctor. The clear purpose of this Statute is to facilitate open and direct communications between doctors and their patients without fear that such conversations will later be used as evidence to prove that a doctor was negligent.

Although the purpose and language of the Apology Statute appears cut and dry, the application of the Statute is not. While some trial courts have taken a hard line by precluding all statements made by a defendant-doctor in the aftermath of an unanticipated outcome, other courts have interpreted the Statute narrowly to only prohibit express statements of apology or sympathy. Earlier this year in Franklin County, a plaintiff testified that the defendant-doctor, "told me he was sorry, he had made a mistake." In applying the Statute, the trial court ruled that only the, "told me he was sorry" portion of the statement was inadmissible while the, "he had made a mistake" portion did not fit within the Statutory exclusion.

Other courts look to the totality of the circumstances in determining the intent and purpose of the statements made by a doctor to his or her patient or patient's family. In a recent case handled by our firm, the trial court excluded the statement, "I take full responsibility" made by the defendant-doctor. The court conducted a *voir dire* examination of the patient's friend who was in the room when the defendant-doctor was consoling the plaintiff following surgery. The friend testified that the plaintiff was upset and uncomfortable and that the doctor was sympathetic and attempted to console and comfort her. The trial court ruled that the gestures and statements made by the doctor were covered by the Statute and the statement was excluded. The Eleventh Appellate District is currently reviewing this issue on appeal.

The standard of review of a trial court ruling on the application of the Apology Statute is an abuse of discretion standard meaning that the appealing party must show that the trial court's ruling represents more than an error of law or judgment, but implies an attitude by the court which is unreasonable, arbitrary or unconscionable. Therefore, it is incumbent upon defense counsel to explore the totality of the circumstances surrounding any statements or gestures of sympathy and apology made by a doctor to a patient to demonstrate that such statements fit within the purview of the Apology Statute and should be excluded.

The practice point for doctors is that good bedside manners, which include direct communication and proper compassion for their patients is not only the right approach to practicing medicine, but is encouraged and supported by statutory law in Ohio.

Donald J. Richardson, Esq.

BSMPH Gives With a Big Heart

This past year, the employees of Bonezzi Switzer Murphy Polito & Hupp, L.P.A. made a conscious effort to raise money for charities and participated in charity events. In particular, BSMPH raised money for the Guardian Ad Litum Project, Unicef and the American Cancer Society. BSMPH looks forward to continuing this important effort in 2011.

The Trouble With Trusts

By Kevin O. Kadlec, Esq.

Harry Kananian was born in Cleveland in 1926, and died of mesothelioma in 2000. He had enlisted in the Army in 1944. While in the service, he began smoking Lucky Strike cigarettes given to him by the Army. In 1952, he switched to Kent cigarettes with a Micronite filter because he relied on advertising by Lorillard Tobacco Company that Kent cigarettes were healthier and safer than regular cigarettes. He obtained an accounting degree and spent his life working for a handful of companies as a payroll and inventory clerk. He spent 47 of his 54 years of work in an office with occasional tours through factories for inventory duties. His occupational exposure to asbestos was sparse and he did not work with Asbestos directly.

The factories that Mr. Kananian walked through typically did not have large amounts of asbestos. However, the filters on the Kent cigarettes he smoked from 1952 to 1956 contained crocidolite asbestos fibers. These types of asbestos fibers were rarely used in asbestos containing products in the United States. Crocidolite fibers were found in significant numbers in Mr. Kananian's lungs posthumously through destructive testing and analysis of his lung tissue, which was documented by plaintiff's expert witnesses.

On paper, Mr. Kananian had a good case against Lorillard Tobacco Company. However, because Mr. Kananian had mesothelioma, the door was wide open to pursue the sellers of asbestos containing products regardless of the fact that Mr. Kananian's occupational exposure to asbestos containing products was miniscule. Mr. Kananian filed a lawsuit in California in 2000 against Lorillard Tobacco Company and various other defendants who either sold asbestos containing products or equipment that used asbestos containing components. In June 2001 a wrongful death complaint was filed in Cuyahoga County after Mr. Kananian passed away.

The *Kananian* case and Judge Harry Hanna gained prominence in this nation's asbestos litigation. The case exposed the stark example of how the growing number of asbestos litigation compensation trust funds established by bankrupt manufacturers and sellers of asbestos containing products have been used by the national plaintiff's bar to benefit their clients and themselves, and to the detriment of the "last man standing" defendants.

In January 2007, Judge Harry Hanna barred a prominent California asbestos personal injury law firm, Brayton Purcell, from practicing before the Cuyahoga County Court of Common Pleas after he found that the firm and one of its partners "failed to abide by our rules." Judge Hanna, in his Order and Opinion, concluded that the lawyers had "not conducted themselves with dignity" and had "not honestly discharged the duties of an attorney in this case." *Kananian v. Lorillard Tobacco Company,* No. CV 442750 (Ohio Cuyahoga County Com. Pl.; Order Opinion dated Jan. 18. 2007; at 19.)

The *Kananian* case is unique because it put the spotlight on the problems that inevitably occur when the tort system and the "trust" system meet in an adversarial lawsuit. Mr. Kananian's lawyers had submitted contradictory claims information to different trusts to maximize the estate's recoveries. They told the Johns Manville Trust that Mr. Kananian had been a shipyard worker in World War II and the Eagle-Picher Trust that he was exposed to asbestos insulation as a pipe welder for a year. Mr. Kananian's lawyers told the UNR Trust that Mr. Kananian handled Unibestos insulation at the San Francisco Naval Shipyard. In actuality, the only time that he had passed through that shipyard was as a rifleman on his way to board a troopship to Japan. They claimed to the Celotex Trust that Kananian "made and handled tools of asbestos." The trusts already had paid the estate as much as $700,000 on the basis of these inconsistent claims.

Privately, Mr. Kananian's lawyers admitted that these trust submissions, including those prepared by another law firm, Early Ludwick & Sweeney of Connecticut, were "rife with outright fabrications." To the court, Mr. Kananian's lawyers conceded that the trust forms were inaccurate and misleading. Ironically enough, they sought to keep the trust claim forms from being considered by a jury on those grounds, an argument that the court flatly rejected unless the Kananian family agreed to return all of the money that it had obtained from the trusts on the basis of these bogus claim forms. Judge Hanna was appalled by plaintiff counsel's conduct and revoked the pro hac vice privileges of Mr. Kananian's California lead counsel. The court did not dismiss Kananian's case because there was no evidence that the Kananian family itself had taken part in its attorneys' misconduct.

The Eight District Ohio Court of Appeals and the Ohio Supreme Court let Judge Hanna's ruling stand. Judge Hanna's ruling received national attention for exposing "one of the darker corners of tort abuse" in asbestos litigation - inconsistencies between allegations made in open court and those submitted to trusts set up by bankrupt companies to pay asbestos related claims. As the *Cleveland Plain Dealer* reported, "Judge Hanna's decision ordering the plaintiff to produce proof of claim forms effectively opened a Pandora's box of deceit . . ." Documents from the six other compensation claims revealed that plaintiff's lawyers presented conflicting versions of how Mr. Kananian acquired his cancer. Emails and other documents from the plaintiff's attorneys also showed that their client had accepted monies from entities to which he was not exposed, and one settlement trust form was "completely fabricated." The *Wall Street Journal* editorialized that Judge Hanna's opinion should be "required reading for other judges" to assist in providing "more scrutiny of 'double dipping' and the rampant fraud inherent in asbestos trusts."

The *Kananian* case represents a remarkable lesson on the mischief that inevitably results from the lack of transparency between and among trusts and the tort system. With a recent proliferation of new trusts flush with funds, there is a significant economic value for claimants and their lawyers to assert inconsistent claims against different trusts in order to be qualified by each trust for payment. There is an economic incentive to delay obtaining trust payments until the tort case is resolved to avoid set offs. Plaintiffs' attorneys in Cuyahoga County vigorously avoid providing any evidence from the trust funds. They argue that all trust-related information is protected from discovery as confidential settlement communications under Ohio Evidence Rule 408. *See Werts v. Goodyear Tire & Rubber Co.,* 2009-Ohio-2581.

The plaintiff's bar has been successful in preventing defendants from obtaining evidence from the trusts in many jurisdictions around the country. It is a tactic in a campaign to prevent the defendants from bringing the corporations that created the trusts to the table to pay their fair share of apportioned liability at trial. In Ohio, we have been able to bring transparency to the process of obtaining the trust funds files due to a courageous and righteous decision by our Judge. Our court has modified the Cuyahoga County Asbestos Case Management Order to require the open exchange of bankruptcy trust information. It took some serious abuse of the legal process to uncover these problems. Consequently, the defendants are better off and can now operate in the light of truth and transparency, unlike many other jurisdictions in this country that are struggling with mass asbestos dockets.

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