ORIGINAL

No.

In the Supreme Court of Ohio

11-1605

APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
CASE NO. 25337

LEROY E. DAVIS,
Administrator of the Estate of BARBARA E. DAVIS,
Plaintiff-Appellee,

v.

WOOSTER ORTHOPAEDICS & SPORTS MEDICINE, INC., et al.,
Defendants-Appellants.

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS WOOSTER ORTHOPAEDICS & SPORTS MEDICINE, INC. AND MICHAEL KNAPIC, D.O.

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I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

In this appeal from a $3 million wrongful death, medical malpractice verdict, which was returned only after the trial judge administered a "dynamite" charge to break a four-to-four juror deadlock, Defendants-Appellants Michael Knapic, D.O. and Wooster Orthopaedics, & Sports Medicine, Inc. (collectively "Dr. Knapic") ask this Court:

- In a statutory interpretation matter of first impression, to provide guidance on the type of physician statements properly excluded under Ohio's "apology" statute (R.C. 2317.43), passed as part of tort reform;
- To hold that this Court's prior precedent is not properly construed as legitimizing, in negligence actions in which insurance is neither at issue nor mentioned, a jury instruction on the possible effect of liability insurance on jurors' verdicts; and
- To establish the circumstances justifying the admission of gruesome autopsy photographs in civil actions.

First, this Court has yet to construe R.C. 2317.43, which provides that a physician's apology to patients or family members following an unanticipated medical outcome is "inadmissible as evidence of an admission of liability or as evidence of an admission against interest." In an analysis that renders the statute useless and its passage meaningless, the Ninth District held that courts must parse a physician's apology into "expressions of apology" and "admissions of fault" and exclude *only* the former. (App. Op., A-7, ¶13.) To reach the conclusion that the apology statute does not cover acknowledgments of fault, the Court first had to determine that the General Assembly intended to excise acknowledgment of fault from the dictionary definition of "apology." Compare App. Op., A-6, ¶10 (concluding that "the statute was intended to protect

apologies devoid of any acknowledgment of fault") with American Heritage Dictionary ("Apology. 1. An acknowledgment expressing regret or asking pardon for a fault or offense"); Compact Oxford English Dictionary ("Apology. 1. A regretful acknowledgment of an offense or failure"); www.yourdictionary.com ("Apology. * * * 2. An acknowledgment of some fault, injury, insult, etc., with an expression of regret and plea for pardon"); www.merriam-webster.com ("Apology. * * * 2. An admission of error or discourtesy accompanied by an expression of regret"). The Court then had to ignore the plain and overarching intent of the statute to encourage physician-patient communications following an unanticipated or adverse medical event. As the facts of this case demonstrate, the Ninth District's cramped interpretation of Ohio's apology statute is both unworkable and illogical.

The statute became an issue in this case as a result of Dr. Knapic's conversation with family members at the hospital, following the development of a recognized complication (damage to the iliac artery) during Barbara Davis's back surgery. Dr. Knapic moved in limine to exclude deposition testimony from family members that during that conversation, Dr. Knapic:

> "* * * said he was sorry. He said he takes full responsibility, it was his fault, and in the, I want to say five years of surgery, he's never had this happen to him before."

Opposing the in limine motion, Plaintiff made the circular argument that those portions of the apology following "said he was sorry" were admissions of fault (not an apology), and therefore, instead of being *inadmissible* as evidence of an admission of

liability (as required under R.C. 2317.43[1]), were *admissible* as evidence of an admission of liability. The trial court agreed and the "statements admitting fault or liability" (App. Op., A-3, ¶4) were admitted at trial. (The witnesses simply omitted any reference to the "said he was sorry" from their testimony.) The Court of Appeals agreed that any deposition testimony "that Dr. Knapic said he was sorry following the surgery" was "properly excluded," but held that the General Assembly only intended R.C. 2317.43 to protect "pure" expressions of sympathy, and thus affirmed the introduction of testimony from family members that Dr. Knapic "admitted" it was "his fault" and "he takes full responsibility." (Id., A-7, A-8–A-9, ¶¶10, 13.)

Such judicial parsing turns Ohio's apology statute into a semantic land mine that can only have the very effect the General Assembly sought to avoid – doctors refusing to talk to patients or their family members following an unanticipated medical outcome. Because this Court has yet to interpret R.C. 2317.43 in the context of its salutary purpose,

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[1] R.C. 2317.43 provides, in relevant part:

> 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 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.

and because the Ninth District interpretation abrogates legislative intent, this Court should accept jurisdiction and reverse.

Second, the Ninth District panel, in a radical departure from the law of Ohio (and every other jurisdiction) held that it is "not improper" for a trial court to instruct a jury in a negligence action in which there was no issue of insurance, and in which no party and no witness mentioned or alluded to insurance during trial, to disregard the possible effect of insurance on their verdict.[2] It is black letter law that evidence tending to show that an alleged tortfeasor does or does not have insurance to cover a claim is "so incompetent and so dangerous" that a reversal is usually required even though the evidence is stricken and a cautionary instruction given. 42 O.Jur.3d, Evidence, §232, p.493. The peculiarly

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[2] Over objection, the trial court instructed the jury (emphasis added):

> It is a common concern among jurors as to the existence or non-existence of ***insurance***. Some jurors may wish to know if the Defendant has ***insurance*** that will pay any verdict the jurors may award to the Plaintiff, or whether the Defendant will have to pay such an award "out of his own pocket."
>
> In your deliberations, you are not to discuss the issue of whether either party has or had any kind of ***insurance***. You are to decide the issues in this case based upon the evidence presented to you, not upon any considerations concerning ***insurance***.
>
> Any presumption that a party has or does not have ***insurance*** is, first of all, not relevant, and secondly, may be wrong.
>
> You are to resolve all of the issues presented to you based solely upon the evidence that I have admitted and the law that I have provided. In no event may you add to or subtract from any award based on whether either party has or does not have ***insurance***.

prejudicial nature of an implication or suggestion that a defendant is insured arises from the fact that such considerations "might improperly influence a jury to award greater damages than warranted – or even to find liability where unwarranted – because it is an impersonal and wealthy insurance company that will ultimately pay damages instead of the individual defendant." *Hanna v. Redlin Rubbish Removal, Inc.* (Apr. 1, 1992), 9th Dist. No. 15280, 1992 WL 67092 at *2 (citation omitted). The Ninth District has now turned this sound law on its head by adopting as a rule of law that in *every* negligence case it is "not improper" for a court to include a jury charge that even though "[s]ome jurors may wish to know if the Defendant has insurance to pay any verdict the jurors may award to the Plaintiff, or whether the Defendant will have to pay such an award 'out of his own pocket'", they should "not" discuss insurance in their deliberations.

The Court justified its ruling, in part, on the grounds that insurance was "an issue that was inherent in the case" (Recon. Op., A-20), citing *Ede v. Atrium S. OB-GYN, Inc.* (1994), 71 Ohio St.3d 124. In *Ede*, this Court held that a cross-examination of a defense medical witness to establish that he or she shares a "common" insurer with the defendant fits the limited witness bias, interest, or prejudice *exception* to the *exclusion* of insurance evidence under Evidence Rule 411. *Ede* does *not* hold that insurance evidence is allowed in *every* negligence action, much less that "curative" insurance instructions are proper in every negligence action. Further, while even the limited allowance of insurance evidence in *Ede* has been widely rejected by other jurisdictions (see, e.g., *Kansas Medical Mut. Ins. Co. v. Svaty* (Kan. 2010), 244 P.3d 642, 661-63), the Ninth District decision goes far beyond that rule, establishing a rule of law that would make it proper for *any* plaintiff in

any personal injury action to request an extensive "curative" insurance instruction. This Court should accept jurisdiction to confirm that *Ede* does not support a unique rule of law that encourages courts to inject the issue of insurance into negligence proceedings.

Third, this Court's guidance is necessary on the question of whether highly inflammatory autopsy photos with no relevance to liability are admissible solely to prove mental anguish. This Court has long held that the potential unfair prejudice of autopsy photographs requires courts in criminal cases to ascertain whether the purpose and probative nature of the photo outweighs its inherently inflammatory effect. And in *Hiner v. Nationwide Mut. Ins. Co.*, 5th Dist. No. 2005CA00034, 2005-Ohio-6660 (prohibiting evidence that plaintiff's grandmother was killed by a drunk driver), the Fifth District Court of Appeals held that when evidence regarding the circumstances of death would have a tendency to make the jury "more inclined to award damages to [plaintiff] out of moral outrage," and is offered solely to prove mental anguish in a wrongful death action, the evidence should be excluded. (Id. at ¶¶55-56.)

Here, a particularly gruesome autopsy photograph was admitted for the sole purpose of establishing Plaintiff's "mental anguish" damages (which are presumed in a wrongful death action), and was included in the exhibits sent back to the jury room, following Plaintiff's highly emotional closing argument reminding the jury of the "vision that's seared into [Plaintiff's] memory * * * a vision that haunts him and torments him," and which was "[w]ithout a doubt the greatest horror this man will ever see in his life." This Court should accept jurisdiction to determine whether trial courts abuse their discretion when they admit gruesome and graphic autopsy photos that are not offered to

prove liability, but are offered solely for the purpose of proving mental anguish damages in a wrongful death action.

II. STATEMENT OF THE CASE AND FACTS

This case arises from the development of a known complication to back surgery – injury of the iliac artery during the "blind" portion of a lumbar microdiskectomy. Barbara Davis underwent this surgical procedure to remove herniated disk material that was pressing on a spinal nerve and causing her unbearable pain. Portions of the procedure require the surgeon to rely on touch rather than sight to locate and remove disk material with a sharp cutting instrument, called a pituitary rongeur. Because the surgeon must operate "blind," damage to the iliac artery, which is located on the immediate anterior side of the disk space in which the surgeon must operate, is a known complication. Plaintiff did not allege that Barbara Davis was not informed of, or did not consent to, the risk of damage to the iliac artery that accompanies the surgery.

Unfortunately, the iliac was nicked or cut during the blind portion of the surgery. The artery was successfully repaired, but Davis expired from a clotting condition (disseminated intravascular coagulopathy) that causes abnormal bleeding. Plaintiff sued Dr. Knapic and his practice group, alleging that: 1) the known complication constituted a deviation from the applicable standard of care; and 2) had the cut artery been diagnosed "sooner," Davis would have survived.

Prior to trial, Dr. Knapic filed motions in limine to exclude evidence prohibited by Ohio's apology statute (R.C. 2317.43) and graphic autopsy photographs, including Exhibit 7 – a photo depicting intestines "extruding" from a "window dressing" that had

been "stapled" onto the site of the repair surgery to "hold in" Davis's internal organs. Dr. Knapic reiterated his objections at trial and moved to strike both the apology and autopsy photographs, but his objections were overruled and motions denied.

Prior to the conclusion of trial, the trial court informed the parties that it would include among the jury instructions a charge on liability insurance, notwithstanding that insurance was not at issue, and that insurance had never been mentioned during trial. Over Dr. Knapic's objection, the court instructed the jury that some of them "may wish to know if the Defendant has insurance" to pay a verdict or "will have to pay such an award out of his own pocket" and that they were "not" to decide the issues presented based upon "any considerations concerning insurance."

After twelve hours of deliberation, the jury reported it was deadlocked at four-to-four. Even after the trial court administered a "dynamite" charge, the jury took another four hours to return a $3 million verdict in the Plaintiff's favor, at which time the trial court acknowledged "this has been a long and difficult time for you * * * [i]t's written all over your faces * * *."

The Court of Appeals affirmed, finding no error in the trial court's evidentiary rulings and "insurance" charge. As to the latter, the court, in part, relied on its understanding that "a jury instruction quite similar to the one given in this case" (attached to the opinion, A-17–A-18) was recommended by the Ohio State Bar Association's Jury Instructions Committee for use "[w]hen, as in this case, evidence of insurance is *not* at issue in a negligence case." (App. Op., A-14, ¶27, emphasis added.) The cited jury instruction is entitled "Insurance in Evidence" (see A-17) and thus, on its face, is

intended only as a *curative* instruction when insurance *has* become an issue in the case through its improper injection into evidence. But when Dr. Knapic pointed out the clear error in a Motion to Reconsider, the Ninth District concluded that "even if" it had misconstrued the nature of the committee's recommendation, the instruction was nevertheless proper. (Recon Op., A-19.)

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1

R.C. 2317.43 is properly construed broadly to carry out its intended purpose of encouraging trust and transparency in the physician-patient relationship.

As the appellate decision notes, 36 states have adopted apology statutes; five statutes "with language nearly identical to Section 2317.43 * * * have all been adopted within the past eight years * * *." (App. Op., A-5, ¶8.) Those five statutes contain no distinction between statements of sympathy, apology, etc. and admissions of fault, and "apparently have not been frequently litigated." (Id.) In concluding that these statutes should be interpreted as excluding a physician's statement to family members that "I'm sorry," but *not* excluding the physician's accompanying statement that "it was my fault," the Ninth District surmised that interpreting "apology" in the context of "the litany of other sentiments to be excluded under the statute * * * leaves us to believe the General Assembly did not intend to include statements of fault within the statute's ambit of protection." (App. Op., A-6, ¶10.)

The Ninth District's interpretation suffers two primary flaws. First, the text of the statute itself expresses clear legislative intent to exclude statements that, if not excluded,

have a tendency to be improperly perceived as an "admission of liability." (R.C. 2317.43.) A physician's admission of moral "fault," an integral part of an apology, is *precisely* the type of statement that jurors would consciously or unconsciously perceive to be an admission of *liability* in a medical malpractice action. It is for that very reason that Plaintiff fought so hard to have the statements admitted in this hotly contested action.

Second, by effectively excising "apology" from protected statements, the Ninth District's interpretation of R.C. 2317.43 undermines the intent of the General Assembly to strengthen and protect the physician-patient relationship by encouraging transparency and trust. As one commentator explained, absent a statute that protects apologies from being used against them, doctors are encouraged to "remain silent when confronted with a possible medical error or adverse event." Valerie B. Hendrick, The Medical Malpractice Crisis: Bandaging Oregon's Wounded System and Protecting Physicians (2007), 43 Willamette L. Rev. 363, 393. Such silence "negatively affects" three different aspects of the patient-physician relationship – information, trust, and dignity:

> Patients who experience adverse medical events almost inevitably, and quite rightly, desire to know what happened. If the medical provider does not offer that information, some patients or heir families will sue to get it. * * * To be effective, the physician-patient relationship must be rooted in trust * * *. Hence, the anger prompted when a trusted medical care giver becomes silent can be tremendous. * * * When a person injures another, whether on purpose or by accident, the respectful course is for the injurer to apologize. Failing to apologize after injury can itself be a second form of injury.

Id. (citation and footnote omitted). To preserve the General Assembly's intent, R.C. 2317.43, should be interpreted broadly to exclude physician explanation of, and apology for, an unanticipated medical outcome.

Proposition of Law No. 2:

> **A charge instructing the jury to disregard any concern they may have as to whether a plaintiff's verdict will be paid by insurance is improperly given in a negligence action in which insurance is not at issue, and no evidence of, or allusion to, insurance was injected into evidence at trial.**

A Court's duty to instruct the jury applies only to "the actual issues in the case as posited by the evidence and the pleadings." *State v. Guster* (1981), 66 Ohio St.2d 266, 271, 421 N.E.2d 157 ("[A]bstract rules of law or general propositions, even though correct, ought not to be given unless specifically applicable to facts in issue."). The Ninth District ignored the *Guster* decision, however, and in doing so established a new rule that an instruction that injects a wholly irrelevant and prejudicial issue into a case is "not improper." (App. Op., A-15, ¶29.)

Because insurance is considered inherently prejudicial, instructions like the one the trial court administered here are used only as curative mechanisms after insurance evidence was elicited or injected at trial. See, *e.g.*, *Hanna*, 9th Dist. No. 15280, 1992 WL 67092 at *1; *Ockenden v. Griggs*, 10th Dist. No. 07AP-235, 2008-Ohio-2275, at ¶7. But the instruction that the Ninth District approved was not curative. Far from "preventing" insurance from becoming an issue, the trial court unilaterally created a previously non-

existent, inherently prejudicial "elephant in the room" by repeating six times that the jury should "not" to consider something that no one had mentioned at trial.

This expansive change to the law regarding references to insurance at trial conflicts with the long line of precedent carefully guarding jurors from the very mention of insurance. See CV-OJI 101.77 (liability insurance is "rarely proper" in a charge); *Stehura v. Short* (1974), 39 Ohio App.2d 68, 70 (Ohio courts "guard[] juror's ears from statements tending to show that the defendant in a negligence action carried liability insurance"). Compare App. Op., A-14, ¶27 (emphasis added) (advocating use of a *curative* charge "[w]hen, as in this case, evidence of insurance is *not* at issue in a negligence case"). The new rule established by the Ninth District is unsupported, unprecedented, and should be reversed.

Proposition of Law No. 3:

> **Gruesome autopsy photographs are not admissible in a civil action when their minimal relevance to a damages claim is far outweighed by their inherent inflammatory nature.**

The admissibility of autopsy photos generally arises in criminal cases. The steady line maintained by Ohio courts has been to admit autopsy photographs, despite their inherent prejudice, where the photographs are relevant to the circumstances of death necessary to establish guilt beyond a reasonable doubt. Even then, such photographs may cause prejudicial error. See *State v. Keenan* (1993), 66 Ohio St.3d 402, 408:

> Assuming the photographs were admissible, the prosecutor focused not on what the photographs proved, but on the "feelings" and "emotions" they evoked. Worse, he encouraged the jurors to regard those feelings as relevant – indeed central – to their task. In the prosecutor's argument, the role of the photographs was not evidentiary; it was visceral.

This Court has yet to address how this inherently inflammatory evidence may be used in a civil case. The Fifth Appellate District has recognized that "circumstances of death * * * have little to no relevance to mental anguish" damages in a wrongful death case. *Hiner v. Nationwide Mut. Ins. Co.*, 5th Dist. No. 2005CA00034, 2005-Ohio-6660, ¶¶55-56 (prohibiting evidence that plaintiff's grandmother was killed by a drunk driver). Proper evidence of mental anguish includes the plaintiff's testimony, evidence of counseling from a minister or psychologist, etc. Id. Whatever slight relevance gruesome autopsy photographs may have to show mental anguish is clearly outweighed by the prejudicial effect of introduction of the photographs, especially when the plaintiff presents argument in which the role of the photograph is "visceral" (*State v. Keenan*) rather than evidentiary, and the photograph is sent to the jury room. Accordingly, both the trial court and the Ninth District erred in holding that autopsy photographs were admissible as relevant to Plaintiff's mental anguish damages.

IV. CONCLUSION

This Court should accept jurisdiction to address matters of first impression that will provide guidance to courts and ensure that Dr. Knapic and other physicians receive a fair trial in Ohio's courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 19th day of September, 2011, by U.S. Mail, postage prepaid, upon the following:

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APPENDIX

STATE OF OHIO)
) ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

LEROY E. DAVIS, Administrator for
The Estate of Barbara E. Davis

C.A. No. 25337

Appellee

v.

WOOSTER ORTHOPAEDICS &
SPORTSMEDICINE, et al.

Appellants

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 07 08 5379

DECISION AND JOURNAL ENTRY

Dated: June 29, 2011

DICKINSON, Judge.

INTRODUCTION

{¶1} Barbara Davis was 49 years old when she died following back surgery on July 23, 2004. Her husband, Leroy Davis, filed a wrongful death action against her orthopaedic surgeon, Michael S. Knapic, and his practice group, Wooster Orthopaedics & Sports Medicine Inc. Mr. Davis alleged that Dr. Knapic negligently performed a lumbar microdiscectomy by completely severing Mrs. Davis's left common iliac artery and lacerating her iliac vein during the procedure and failing to timely diagnose and treat the medical condition that arose thereafter. At trial, the jury found against Dr. Knapic and awarded a three-million-dollar verdict. Dr. Knapic and his practice group have appealed. This Court affirms the judgment because: (1) the trial court did not admit any evidence of sympathy or apology in violation of Section 2317.43 of the Ohio Revised Code, (2) the trial court exercised proper discretion in weighing the probative value of

the autopsy photograph and related medical testimony against the danger of unfair prejudice under Rule 403(A) of the Ohio Rules of Evidence; and (3) the jury instruction regarding insurance was not improper.

THE APOLOGY STATUTE

{¶2} Dr. Knapic and his practice group's first assignment of error is that the trial court incorrectly admitted apology evidence in violation of Section 2317.43 of the Ohio Revised Code. Mr. Davis has argued that the trial court did not admit any apology evidence at trial and that Section 2317.43 does not prohibit the use of statements of fault, responsibility, or liability as compared to statements of sympathy or condolence. At trial, Mrs. Davis's husband and daughter testified that, after the surgery, Dr. Knapic told them that he had nicked an artery and took full responsibility for it. The jury did not hear any testimony that Dr. Knapic had told them he was sorry.

{¶3} Interpretation of a statute is a question of law that this Court reviews de novo. *State v. Consilio*, 114 Ohio St. 3d 295, 2007-Ohio-4163, at ¶8. "The primary goal of statutory construction is to ascertain and give effect to the legislature's intent in enacting the statute." *State v. Lowe*, 112 Ohio St. 3d 507, 2007-Ohio-606, at ¶9. To determine legislative intent, a court will first look to the plain language of the statute itself. *Id.* (citing *State ex rel. Burrows v. Indus. Comm'n*, 78 Ohio St. 3d 78, 81 (1997)). "Words and phrases [must] be read in context and construed according to the rules of grammar and common usage." R.C. 1.42.

{¶4} Under Section 2317.43(A), "[i]n 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 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." The parties agree that the statute prohibits the admission of a health care professional's statement of sympathy in a medical malpractice case, but disagree regarding whether it also prohibits statements admitting liability or fault. This is an issue of first impression in Ohio.

{¶5} Dr. Knapic has argued that drawing a distinction between an acknowledgment of fault and an expression of sympathy violates the intent of the statute because the word "apology," as commonly defined, includes an expression of fault, admission of error, or expression of regret for an offense or failure. Dr. Knapic has also argued that the statutory intent behind Section 2317.43 is to avoid the obvious detriment to the physician-patient relationship that can follow an adverse medical outcome, especially if the doctor refuses to show some compassion and speak to the patient or the family. According to Mr. Davis, however, a direct admission of fault and responsibility is not what is intended by the plain and unambiguous words of the statute. See R.C. 2317.43(A).

{¶6} Among the 36 states that have adopted similar laws, the majority explicitly distinguish between statements of sympathy and admissions of fault or liability. Under California's apology law, for example, only "[t]he portion of statements . . . or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident . . . shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault . . . which is part of, or in addition to, any of the above shall not be inadmissible pursuant to this section." Cal. Evid. Code § 1160(a) (West

2011). Seventeen of the states that have explicitly distinguished between expressions of sympathy and admissions of fault have chosen to admit expressions of fault while excluding from evidence any part of a statement that expresses sympathy. See, e.g., La. Rev. Stat. Ann. § 13:3715.5 (2010) ("A 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."); see also Cal. Evid. Code § 1160(a) (West 2011); Del. Code. Ann. tit. 10, § 4318 (2011); Fla. Stat. Ann. § 90.4026 (West 2011); Haw. Rev. Stat. Ann. § 626-1, Rule 409.5 (West 2011); Idaho Code Ann. § 9-207 (2011); Ind. Code Ann. § 34-43.5-1-4, §34-43.5-1-5 (West 2011); Me. Rev. Stat. Ann. tit. 24, § 2907 (2011); Md. Code Ann., Cts. & Jud. Proc. § 10-920 (West 2011); Mass. Gen. Laws Ann. ch. 233, § 23D (West 2011); Mich. Comp. Laws Ann. § 600.2155 (West 2011); Mo. Ann. Stat. § 538.229 (West 2011); Neb. Rev. Stat. Ann. § 27-1201 (West 2010); N.H. Rev. Stat. Ann. § 507-E:4 (2011); Tenn. R. Evid. 409.1 (2010); Tex. Civ. Prac. & Rem. Code Ann. § 18.061 (Vernon 2011); Va. Code Ann. § 8.01-52.1. The Hawaii legislature explained its intent by commenting that its rule excluding expressions of sympathy while permitting the use of expressions of fault "favors expressions of sympathy as embodying desirable social interactions and contributing to civil settlements[.]" Haw. Rev. Stat. Ann. § 626-1 (West 2011), Commentary to Rule 409.5.

{¶7} On the other hand, eight of the states that have explicitly made the same distinction between expressions of sympathy and admissions of fault have chosen to exclude both types of statements from evidence. Ariz. Rev. Stat. Ann. § 12-2605 (2011); Colo. Rev. Stat. Ann. § 13-25-135 (West 2011); Conn. Gen. Stat. Ann. § 52-184d (West 2011); Ga. Code Ann. § 24-3-37.1 (West 2010); S.C. Code Ann. § 19-1-190 (2010); Utah Code Ann. § 78B-3-422 (West

2010) (excluding from evidence the sequence and significance of events relating to the unanticipated outcome of medical care); Vt. Stat. Ann. tit. 12, § 1912 (2011); Wash. Rev. Code Ann. § 5.64.010 (2011). For instance, by adding the term "fault" to the same litany of sentiments found in Ohio's statute, Colorado's statute makes it clear that both admissions of fault and expressions of sympathy are inadmissible. In Colorado, "any and all statements . . . expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence which are made by a health care provider . . . to the alleged victim [or] a relative of the alleged victim . . . which relate to the discomfort, pain, suffering, injury, or death of the alleged victim as a result of the unanticipated outcome of medical care shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest." Colo. Rev. Stat. § 13-25-135.

{¶8} Some states, like Ohio, have apology statutes that do not make a clear distinction between an alleged tortfeasor's statement of sympathy and one acknowledging fault. Five states have statutes with language nearly identical to Section 2317.43 of the Ohio Revised Code. These statutes have all been adopted within the past eight years and apparently have not been frequently litigated. This Court has been unable to find a single judicial decision from any of those five states or from an Ohio court interpreting the relevant statutory language. See Mont. Code Ann. §26-1-814 (2009); N.D. Cent. Code §31-04-12 (2009); Ohio Rev. Code. Ann. §2317.43 (West 2011); Okla. Stat. Ann. tit. 63, §1-1708.1H (West 2011); W. Va. Code Ann. §55-7-11a (West 2011); Wyo. Stat. Ann. §1-1-130 (2010).

{¶9} Under Section 2317.43(A) of the Ohio Revised Code, "all statements . . . expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence . . . are inadmissible as evidence of an admission of liability or as evidence of an

admission against interest." The parties appear to agree that statements of "sympathy, commiseration, condolence, compassion, or a general sense of benevolence" do not include an acknowledgment of fault. The question is whether the word "apology," as used in the statute, was intended to include an acknowledgment of fault in addition to an expression of sympathy, condolence, or compassion.

{¶10} As Dr. Knapic 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." *Schaaf v. Kaufman*, 850 A.2d 655, 664 (Pa. Super. Ct. 2004). Thus, looking to the rules of grammar and common usage, the appearance of the term "apology" in Section 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 the General Assembly did not intend to include statements of fault within the statute's ambit of protection. The other five protected sentiments clearly do not convey any sense of fault or liability, indicating that the statute was intended to protect apologies devoid of any acknowledgment of fault.

{¶11} According to its stated intent, the 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 . . . ." H.B. 215, 125th Gen. Assem. (Ohio 2004). From the time that Sub. 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." Sub. H.B. 215, 125th Gen. Assem., 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[.]" Sub. H.B. 215, 125th Gen. Assem., as passed by the Gen. Assem. (Ohio 2004).

{¶12} This explanation, which never changed as the bill traveled through the House and Senate, indicates that the intent was to forbid the use at trial of a medical professional's expression of "sympathy includ[ing] any and all statements . . . expressing apology[.]" Sub. H.B. 215, 125th Gen. Assem., as passed by the Gen. Assem. (Ohio 2004). The General Assembly's decision to define "a statement of sympathy" as including a "statement[ ] . . . expressing apology" demonstrates an intention to use the word "apology" to mean only a statement of condolence or sympathy without including any expression of fault or liability. Further, if the General Assembly had intended to prohibit the use of all statements of fault uttered by medical professionals to injured patients or their families, it could have done so by writing that all "admissions of liability" or "statements against interest" would be excluded rather than limiting its description of the prohibited statements to those "expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence." R.C. 2317.43(A).

{¶13} Based upon the plain language of Section 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 Dr. Knapic of helping to diminish the obvious detriment to the physician-patient relationship following a negative outcome of medical treatment. See, e.g., Haw. Rev. Stat. Ann. § 626-1 (West 2011), Commentary to Rule 409.5. 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.

{¶14} According to the transcript, Mr. Davis testified that, after the surgery, "Dr. Knapic . . . 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 Mrs. Davis's adult daughter, Pamela Bickel, testify that, after the surgery, Dr. Knapic "said 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, during her deposition, Ms. Bickel testified that, following the surgery, Dr. Knapic said "he was sorry[,]" but that the trial court excluded that part of the testimony at trial. The parties did not file Ms. Bickel's deposition, and there is no evidence in the record that Mr. Davis tried to submit evidence at trial that Dr. Knapic told family members that he was sorry.

{¶15} In this case, the testimony 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 Dr. Knapic said he was sorry following the surgery, that testimony was properly excluded from trial. Section 2317.43 of the Ohio Revised Code, 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 Mrs. Davis's husband and daughter in this case. Dr. Knapic's first assignment of error is overruled.

THE AUTOPSY PHOTOGRAPH & TESTIMONY

{¶16} Dr. Knapic and his practice group's second assignment of error is that the trial court incorrectly admitted an autopsy photograph and related testimony from the medical examiner in violation of Rule 403(A) of the Ohio Rules of Evidence. Mr. Davis has argued that the photo is probative of the damages element of his wrongful death claim and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

{¶17} Under Rule 403(A) of the Ohio Rules of Evidence, "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." In applying Rule 403(A), a trial court must, "in its discretion, weigh the probative value of particular evidence against the danger that its admission will cause unfair prejudice." *State v. Hoffmeyer*, 9th Dist. No. 23712, 2008–Ohio–2311, at ¶30. Unless it abused its discretion, this Court will not reverse a trial court's weighing under Rule 403(A). *Id.*

{¶18} "Autopsy photos are inherently prejudicial when they depict gruesome, graphic wounds, but when offered to prove elements of the offense that [the proponent] has the burden of proving, they are usually not *unfairly* prejudicial." *State v. Wade*, 2d Dist. No. 21530, 2007-Ohio-1060, at ¶35; see also *State v. Whitfield*, 2d Dist. No. 22432, 2009-Ohio-293, at ¶120-127. In this case, Mr. Davis has argued that the photograph was probative of the mental anguish element of damages because he saw his wife just before she died, looking the way she is depicted in the photograph. "In determining the amount of damages to be awarded, [in a wrongful death action] the jury . . . may consider all factors existing at the time of the decedent's death that are

relevant to a determination of the damages suffered by reason of the wrongful death." R.C. 2125.02(A)(3)(b)(i). One element of such damages is the mental anguish the death caused the surviving spouse. See R.C. 2125.02(B)(5). In this case, Mr. Davis had the burden to prove damages and, therefore, to offer some evidence of the mental anguish he suffered. He testified that, while they were still working on his wife, the doctors called him in to see her just before she died. He said that he saw "her eyeballs moving back and forth" and she "raised her hand" when he spoke to her. He also said that, at that time, her abdomen was open and he "saw her intestine laying on her stomach[.]"

{¶19} According to the medical examiner, that is the state Mrs. Davis's body was in when the contested photograph was taken by the medical examiner's office. Over Dr. Knapic's objection, the medical examiner testified that, when Mrs. Davis's body arrived in her office, it had a surgical incision "extend[ing] from the bottom of the chest bone down to the pubic bone." She was further permitted to testify that exhibit seven shows Mrs. Davis's small bowel extruded from the surgical incision and covered in a "plastic-like material [that] is stapled in place." The photograph shows Mrs. Davis's body with an open abdominal wound covered with clear plastic.

{¶20} Based on the Fifth District Court of Appeals' decision in *Hiner v. Nationwide Mutual Insurance Company*, 5th Dist. No. 2005CA00034, 2005-Ohio-6660, at ¶55-56, Dr. Knapic has argued that the photograph and testimony by the medical examiner should have been excluded because "circumstances of death . . . have little to no relevance to mental anguish." In *Hiner*, the Fifth District determined that the trial court had exercised proper discretion in excluding, under Evidence Rule 403(A), evidence that the plaintiff's grandmother had been killed by a drunk driver. *Id.* at ¶56. Liability was not at issue in the case, however, so whether

the tortfeasor had been drunk when he caused the car crash that killed the plaintiff's grandmother was wholly irrelevant to the damages issue in that case. *Id.*

{¶21} The same cannot be said of Mr. Davis's case. In this case, Dr. Knapic disputed liability, so the circumstances of Mrs. Davis's death were relevant. The photograph and medical testimony were offered to help the jury understand Mr. Davis's testimony about his last moments with his wife. The emotional trauma Mr. Davis experienced as a result of seeing his wife just moments before her death in the state he described is relevant evidence of the mental anguish he suffered as a result of her death. Because Mr. Davis had seen his wife in the same state, the medical examiner's testimony about how she looked and the autopsy photograph that Dr. Knapic found objectionable were probative of Mr. Davis's mental anguish. Upon review of the record, we conclude that the trial court exercised proper discretion under Evidence Rule 403(A). Although the medical examiner's testimony and the gruesome nature of the photograph may have been prejudicial to Dr. Knapic's case, the question under Rule 403(A) is whether the evidence was unfairly prejudicial, which it was not. Dr. Knapic's second assignment of error is overruled.

JURY INSTRUCTION FORBIDDING SPECULATION REGARDING INSURANCE

{¶22} Dr. Knapic and his practice group's third assignment of error is that the trial court sua sponte offered a jury instruction on liability insurance that incorrectly injected extrajudicial evidence into the jury deliberations. In response, Mr. Davis has argued that he requested and received an instruction that appropriately conveyed the law requiring jurors to consider only the evidence and to discourage them from speculating about the impact of insurance.

{¶23} The trial court gave the following instruction: "It is a common concern among jurors as to the existence or non-existence of insurance. Some jurors may wish to know if the

defendant has insurance that will pay any verdict the jurors may award to the plaintiff, or whether the defendant will have to pay such an award out of his own pocket. In your deliberations, you are not to consider or discuss the issue of whether either party has or had any kind of insurance. You are to decide the issues in this case based upon the evidence presented to you, not upon any considerations concerning insurance. Any presumption that a party has or does not have insurance is, first of all, not relevant; and, secondly, may be wrong. You are to resolve the issues, all the issues presented to you, based solely on the evidence that I have admitted and the law I've provided. I[n] no event may you add to or subtract from any award based on whether either party has or does not have insurance."

{¶24} After the evidence had closed, but prior to giving the jury instructions, the trial court heard arguments in support of Dr. Knapic's objection to the insurance instruction. Dr. Knapic argued that "the word 'insurance' ha[d] [not] even been uttered one time in the presence of the jury . . . [so it] is not even an issue in the case." The trial court overruled the objection, explaining that the instruction is "in common usage in this courthouse" and is based on "judges' experience in talking to jurors after verdicts" and in handling "questions coming from the jury." Dr. Knapic has now argued that the trial court's jury instruction "effectively introduced extrajudicial evidence of insurance into the proceeding."

{¶25} In support of this assertion, Dr. Knapic has cited *4262 Robbins Avenue Restaurant Company v. Slanco*, 11th Dist. No. 89-T-4274, 1991 WL 244648 (Nov. 22, 1991). In *Slanco*, however, the judge summarized for the jury the testimony of two absent witnesses, causing the Eleventh District Court of Appeals to reverse because the jury likely placed "additional emphasis" on the facts stated from the bench. *Id.* at *7. This case is not similar to *Slanco* because the trial court in this case did not provide or restate any facts to the jury. The jury

instruction, quoted above, provides guidance about what the jury may consider (i.e., the evidence) versus what it must not consider (i.e., speculation about issues not raised by the evidence). The trial court's instruction did not introduce any evidence to the jury.

{¶26} Dr. Knapic has also argued that the instruction was improper because "[i]njecting the possibility of liability insurance" into a personal injury action is so inherently prejudicial as to require reversal. In support of this proposition, he has cited cases analyzing the effect of improper testimony regarding liability insurance on juries. In this case, however, there was no improper testimony regarding insurance. Dr. Knapic has also cited *Stehura v. Short*, 39 Ohio App. 2d 68, 70 (1974), for the proposition that Ohio courts zealously guard jurors' ears from statements tending to show that the defendant in a negligence action carried liability insurance. In *Stehura*, after the plaintiff's lawyer asked questions during voir dire regarding whether any prospective jurors were connected with insurance companies, the defendant's lawyer responded by telling the jury that "no other person, firm or corporation [is] involved in this case." *Id.* at 72. The trial court refused to give a requested curative instruction. The Eighth District Court of Appeals reversed because it "would be legally intolerable" to allow the defendant to convey the impression to the jury that his client was not insured, even if he avoids using the word "insurance." *Id.* This is because "[a] trial should be heard and determined by a jury of persons completely unbiased and uninfluenced by extrinsic considerations." *Id.* at 70 (citing *Peart v. Jones*, 159 Ohio St. 137, 140 (1953)).

{¶27} What Dr. Knapic appears to believe is that the trial court caused prejudicial error by saying the word "insurance" to the jury when there had been no evidence taken on the issue of whether either party had any type of insurance that could impact any verdict the jury may render in the case. This Court is not aware of any authority for the proposition that the word

"insurance" may not be uttered in front of a jury in a medical malpractice case, and Dr. Knapic has not cited any. Rule 411 of the Ohio Rules of Evidence provides that "[e]vidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully." It also provides that it "does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership or control, if controverted, or bias or prejudice of a witness." Evid. R. 411. Thus, the word "insurance" and even the words "liability insurance" are admissible under certain circumstances in a negligence case. When, as in this case, evidence of insurance is not at issue in a negligence case, the Ohio State Bar Association's Jury Instructions Committee recommends the use of a jury instruction quite similar to the one given by the trial court in this case. Ohio State Bar Association Jury Instruction II. A. Insurance in Evidence. See appendix attached to this opinion.

{¶28} The jury instruction did not imply that Dr. Knapic had liability insurance, but emphasized quite clearly that the jury must not speculate regarding whether he did have such insurance since no evidence had been heard on that issue. This instruction is not the substantive type that gives the jury the law regarding the impact of certain evidence they have heard on the issues they must determine. On the contrary, this instruction is similar to those given by the trial court in this case that explained the jury's duties under the law. For instance, the trial court instructed the jurors that they had to accept the instructions and apply the law as it was given to them; that the evidence they were to consider did not include the lawyers' opening statements and closing arguments; and that they must not consider as evidence any suggestion included in a question that was not answered or contained in a statement ordered stricken from the record.

{¶29} The court instructed the jury that it must "decide the issues in this case based upon the evidence presented . . . , not upon any considerations concerning insurance." Thus, the court emphasized the fact that there had been no evidence regarding insurance admitted at trial and they must remain uninfluenced by extrinsic considerations. The court warned the jury not to make any assumptions regarding whether either party carried insurance and to "resolve the issues . . . based solely on the evidence . . . and the law . . . [without] . . . add[ing] to or subtract[ing] from any award based on whether either party has or does not have insurance." Seventeen years ago, the Supreme Court pointed out that "[i]t is naïve to believe that today's jurors, bombarded for years with information about health care insurance, do not already assume in a malpractice case that the defendant doctor is covered by insurance." *Ede v. Atrium S. OB-GYN Inc.*, 71 Ohio St. 3d 124, 127 (1994). Because courts realize that juries will be tempted to inappropriately speculate regarding the impact of insurance, it is not improper to include an instruction for the jury that there was no evidence taken on that issue and, therefore, they must not allow speculation about that issue to enter their discussions.

{¶30} The court's instruction in this case neither implied that the defendant carried liability insurance nor did it imply that he did not carry such insurance. See *Stehura v. Short*, 39 Ohio App. 2d 68, 70 (1974). The instruction simply warned jurors in a medical malpractice case not to assume, as courts have recognized that today's jurors tend to do, that the defendant doctor or the plaintiff carried any kind of insurance, or to allow such improper assumptions to impact the verdict. See *Ede v. Atrium S. OB-GYN Inc.*, 71 Ohio St. 3d 124, 127 (1994). The instruction conveyed an accurate statement of the jury's duty under the law and was neither ambiguous nor misleading. Dr. Knapic's third assignment of error is overruled.

CONCLUSION

{¶31} Dr. Knapic's first assignment of error is overruled because the trial court did not violate Section 2317.43 of the Ohio Revised Code. The statute was intended to protect pure expressions of apology, sympathy, commiseration, condolence, compassion or a general sense of benevolence, without excluding from trial a medical professional's admission of fault for a claimed injury. His second assignment of error is overruled because the trial court exercised proper discretion under Rule 403(A) of the Ohio Rules of Evidence in regard to the medical examiner's testimony and the single autopsy photograph admitted at trial. His third assignment of error is overruled because the contested jury instruction was not improper. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

IRENE C. KEYSE-WALKER, and MICHAEL J. RUTTINGER, Attorney at Law, for Appellants.

STEVEN P. OKEY, Attorney at Law, for Appellee.

Appendix

OSBA Jury Instructions

II. TORT LAW

A. GENERAL TORT LAW

INSURANCE IN EVIDENCE

OPTION 1

You are not to consider or discuss whether either party has or had any kind of insurance. You are to decide the issues in this case based upon the evidence presented to you, not upon any considerations concerning insurance.

OPTION 2

It is a common concern among jurors as to the existence or non-existence of insurance. Some jurors may wish to know whether the plaintiff had insurance that paid any of her medical bills, or whether the plaintiff had to pay those bills "out of her own pocket."

Some jurors may wish to know if the defendant has insurance that will pay any verdict the jurors may award to the plaintiff, or whether the defendant will have to pay such an award "out of her own pocket."

In your deliberations, you are not to consider or discuss the issue of whether either party has or had any kind of insurance. You are to decide the issues in this case based upon the evidence presented to you, not upon any considerations concerning insurance.

Any presumption that a party has or does not have insurance is, first of all, not relevant, and secondly, may be wrong.

You are to resolve all of the issues presented to you based solely upon the evidence that I have admitted and the law that I have provided . In no event may you add to or

subtract from any award based on whether either party has or does not have insurance.

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

LEROY E. DAVIS, Administrator for
The Estate of Barbara E. Davis

Appellee

v.

WOOSTER ORTHOPAEDICS &
SPORTSMEDICINE, et al.

Appellants

C.A. No. 25337

JOURNAL ENTRY

Appellants Wooster Orthopaedics & Sports Medicine Inc. and Michael S. Knapic, D.O., have applied for reconsideration of this Court's decision. We review the application to determine if it calls to our attention an obvious error in our decision or if it raises issues that we did not properly consider. *Garfield Hts. City Sch. Dist. v. State Bd. of Educ.*, 85 Ohio App. 3d 117, 127 (1992).

Appellants have argued that we should not have upheld the trial court's instruction on insurance because there was no mention of insurance at trial. We noted in our opinion that "the Ohio State Bar Association's Jury Instructions Committee recommends the use of a jury instruction quite similar to the one given by the trial court in this case." According to Appellants, because the OSBA jury instruction is listed under a heading of "Insurance in Evidence," it was intended as a curative instruction, to be given only "when insurance is 'in evidence' when it should not have

been." They have argued that, if a court offers a curative instruction when there is nothing to cure, the instruction can only cause the very problem is was designed to fix.

Even if we accept Appellants' argument that the OSBA instruction is curative, it does not change our decision. As we noted in our opinion, the Ohio Supreme Court has recognized that "[i]t is naïve to believe that today's jurors, bombarded for years with information about health care insurance, do not already assume in a malpractice case that the defendant doctor is covered by insurance." *Ede v. Atrium S. OB-GYN Inc.*, 71 Ohio St. 3d 124, 127 (1994). Accordingly, it was proper for the trial court to give the instruction to avoid prejudice to either party from an issue that was inherent in the case.

Appellants have failed to show that our decision contains an obvious error or that we did not properly consider an issue. The application for reconsideration is denied.

Clair E. Dickinson, Presiding Judge

Concur:
Moore, J.
Belfance, P.J.