

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

RICHARD F. STOKES  
JUDGE

SUSSEX COUNTY COURTHOUSE  
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December 2, 2016

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RE: *Cheryl DeBussy v. Glenn E. Graybeal, M.D., Glenn E. Graybeal, M.D., P.A.,*  
C.A. No. S14C-03-034 RFS

Submitted: November 28, 2016

Decided: December 2, 2016

Upon Defendant's Motion *in Limine* to Preclude Post-Surgical Conversations of Apology.  
Granted in part and denied in part.

Dear Counsel:

Before the Court is the Motion *in Limine* of Defendants Glenn E. Graybeal, M.D. and Glenn E. Graybeal M.D., P.A. (collectively Dr. Graybeal) to Preclude Post-Surgical Conversations of Apology. This Motion is **DENIED** in part and **GRANTED** in part.

**Facts**

This is a medical malpractice case in which Cheryl Debussy ("DeBussy" or "Plaintiff") alleges that she received negligent care when Dr. Graybeal performed a laparoscopic

cholecystectomy (gallbladder removal) on her. On April 18, 2012, during the surgery, Dr. Graybeal transected her common bile duct and then attempted to repair the damage by performing a primary end-to-end repair. Allegedly, the proper procedure to repair a transected common bile duct is a Roux-en-Y hepaticojejunostomy, but this procedure was not performed. As a result, DeBussy has suffered multiple complications from the common bile duct injury and alleged improper repair including a temporary bile drain, multiple stent procedures, and an increased risk of additional future complications.

DeBussy and her family members have testified that Dr. Graybeal spoke with them after the surgery and informed them he had made a “mistake” by cutting into the “wrong place,” the common bile duct. However, neither DeBussy nor any of her family members have ever stated that Dr. Graybeal admitted to making a surgical error through negligence or otherwise admitted that he breached the standard of care. Bethany DeBussy-Davis, DeBussy’s daughter, also testified that Dr. Graybeal was very apologetic about the complications from the surgery. This Motion concerns whether or not these statements regarding the complications are protected under 10 *Del. C.* § 4318(b) (“Apology Statute”). This statute precludes evidence of a health care provider’s apology to the patient or the patient’s family unless it is an “expression or admission of liability or fault.”<sup>1</sup>

### **Parties’ Contentions**

In the instant motion, Dr. Graybeal claims that all statements he made after the operation concerning the transection of the common bile duct are protected under the Apology Statute. While Dr. Graybeal admits that he injured DeBussy’s common bile duct, he does not admit that

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<sup>1</sup> 10 *Del. C.* §4318(b).

this complication was a breach of the standard of care. Thus, by stating that he made a “mistake” Dr. Graybeal was only acknowledging that he had transected the common bile duct, not that he was somehow liable or at fault for negligently making this mistake. Dr. Graybeal also argues that holding these statements to be protected under the apology statute will preserve the public policy interests underpinning the statute.

Conversely, DeBussy argues that this issue was conclusively settled by *Honey v. Bayhealth Ctr. Inc.* Therefore, the Court should find, in accordance with that case, that any statements expressing sympathy and benevolence should be precluded under the statute, but that any statements admitting to a “mistake” (i.e., fault or liability) should be allowed into evidence. As a result, DeBussy contends that the remarks made by Dr. Graybeal admitting to a “mistake” are admissible, regardless of whether the statements were admitting a breach of the standard of care or merely admitting a “mistake.”

### **Discussion**

The Court’s decision in *Honey* settles this Motion. The central issue in that case, as well as in the instant case, concerned the distinction between an “apology” and an “admission of fault or liability.” The *Honey* Court stated that this is a determination that is factually intensive inquiry to be made on a case-by-case basis.<sup>2</sup> The Court also favorably cited a California case which gave guidance on the distinction between an apology and an admission of fault or liability:

The portion of statements or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain...of a person...shall be inadmissible as evidence of an admission of liability in a civil action. A statement

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<sup>2</sup> *Honey v. Bayhealth Ctr. Inc.*, 2015 WL 310660, at \*5 (Del. Super. Ct. Jan. 23, 2015).

of fault, which is part of, or in addition to, any of the above shall not be inadmissible.<sup>3</sup>

Using this analysis, the *Honey* Court found that the doctor's statements such as, "I am so sorry, would you please forgive me..." and "I am so sorry [for] what I have done and, believe me, I will be here by her side to take her back to where she was before" were inadmissible apologies. Yet, the doctor's statement that the "cut" he made was a "miscalculation" and that he "made a mistake" were admissible admissions of fault or liability.<sup>4</sup>

It is clear that Dr. Graybeal's statements admitting to a "mistake" or that he cut the "wrong place" are analogous to the statements there were admissible in *Honey*. Such statements were not merely offered to console or offer sympathy to DeBussy. They were admissions of fault or liability, and are, therefore, admissible. However, any statements that he made only expressing an apology will be inadmissible.

For the foregoing reasons, the Defendants' Motion is **DENIED** in part and **GRANTED** in part.

**IT IS SO ORDERED.**

Very truly yours,

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Richard F. Stokes, Judge

Cc: Prothonotary  
Kelley M. Huff, Esq.  
Francis J. Murphy, Esq.  
Joshua H. Meyeroff, Esq.  
Richard Galperin, Esq.

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<sup>3</sup> *Id.* (internal citations omitted).

<sup>4</sup> *Id.*

