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"I'm Sorry, Mississippi": An Argument for Enactment of a Physician Apology Statute by the Mississippi Legislature

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"I'M SORRY, MISSISSIPPI": AN ARGUMENT FOR ENACTMENT OF A PHYSICIAN APOLOGY STATUTE BY THE MISSISSIPPI LEGISLATURE

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I. INTRODUCTION

Imagine this: you are a dedicated orthopedic surgeon who loves her work. You perform a total knee replacement, albeit on a high-risk patient. The patient does not heal properly and complains of an unsteady gait. Upon further analysis, you begin to become concerned that his inability to heal may be due to an improperly placed implant. A corrective surgery will be required. You are distraught by the unanticipated outcome and wish to express your deepest apologies to the patient and his family. Not so fast! Be aware that your moral compass could be leading you into expressing an apology that may be used against you as an admittance of fault in Mississippi.

This article will examine the effect of the lack of a physician apology statute in Mississippi, look at a brief history of apology laws nationwide, compare Mississippi's silence to the protections that other states have afforded medical professionals' apologies, and ultimately advocate that a law protecting physician apologies should be enacted by the Mississippi legislature for the benefit of medical professionals, patients, and the public in general.

A. How do the Mississippi Rules of Evidence treat a physician apology?

The first step to understanding the importance of a physician apology statute[1] is considering how easily a physician apology could be admitted as evidence in a medical malpractice trial under the Mississippi Rules of Evidence. Let us assume that the physician in our hypothetical calls the patient and his family to her office for a post-operative visit and says, "I am incredibly sorry that this happened to you and that the surgery was unsuccessful. I hate to see you in so much pain." Despite the physician's well-intentioned apology, the patient is angry that he did not receive an explanation or an offer of compensation for his injuries, so he files a lawsuit against the physician for medical malpractice. The case goes to trial.

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1. Throughout this article, these laws will be referred to interchangeably as "physician apology statues" and "apology laws." However, the majority of "physician apology statutes" protect not only physicians, but other medical professionals as well. *See* DEL. CODE ANN. tit. 10, § 4318(a)(1) (West 2019) ("'Health care provider' means any person licensed or certified by the State of Delaware to deliver health care services, including, but not limited to, any physician, coordinated care organization, hospital, health care facility, dentist, nurse, optometrist, podiatrist, physical therapist, psychologist, chiropractor or pharmacist and an officer, employee or agent of such person acting in the course and scope of employment or agency related to health care services.")

Such a statement by the physician would most likely pass the relevancy test under Mississippi Rule of Evidence 401. Pursuant to M.R.E. 401, "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the case."[2] The evidence must also be filtered through M.R.E. 403, which provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[3] However, in Mississippi, the threshold for relevant evidence is quite low.[4] In fact, "[i]f it has probative value, the law favors its admission."[5] Thus, the physician's apology is likely to be deemed admissible under the exclusion to the hearsay rule that allows admission of a party's own statements.[6] There is also no claim for physician-patient privilege, because the patient, not the physician, holds the privilege.[7]

Now imagine being a juror at the medical malpractice trial. Despite the defense's best efforts to minimize the relevance of the physician's apology, you cannot understand why a physician would have apologized had they not made a mistake. When it comes time for deliberation, you are unable to erase the apology from your memory, and neither are your fellow jurors. Accordingly, the jury returns a verdict for the patient. Were Mississippi to adopt a physician apology statute, the apology would be protected and deemed inadmissible as evidence of the physician's liability.

B. Why were apology laws enacted?

A brief historical overview of apology laws is beneficial here because it is instructive to know where we have been in order to determine where we should go. In 1986, the State of Massachusetts became the first state to enact apology legislation that specifically addressed accidents.[8] The law read as follows:

> Statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action.[9]

The Massachusetts law was enacted in response to the tragic death of

2. MISS. R. EVID. 401.
3. MISS. R. EVID. 403.
4. *See* Hobbs Auto., Inc. v. Dorsey, 914 So. 2d 148, 151 (Miss. 2005).
5. Holladay v. Holladay, 776 So. 2d 662, 676 (Miss. 2000).
6. MISS. R. EVID. 801(d)(2).
7. MISS. R. EVID. 503(b).
8. Janice Mulligan, Report on Apology Legislation by the Standing Committee on Medical Professional Liability for the American Bar Association (Feb. 2007), https://www.americanbar.org/content/dam/aba/images/medical_liability/med_mal_resolution112.pdf.
9. *Id.* (citing MASS. GEN. LAWS ANN. ch. 233, § 23D (2000)).

Former Massachusetts state senator William L. Saltonstall's daughter.[10] Senator Saltonstall's daughter was killed in a car accident, and the offending driver never apologized because he was afraid that his apology would be used against him in court.[11] Senator Saltonstall and his successor, Robert C. Buell, sought to eradicate this fear by proposing the first apology law.[12]

In response, the State of Texas enacted apology legislation, but specifically excluded from protection any "statement or statements concerning negligence or culpable conduct."[13] And thus began the diverse approaches to apology laws. Shortly thereafter, Colorado became the first state to enact a statute that specifically protected both healthcare providers and their employees.[14] Colorado's statute applies in a medical malpractice action and protects any expression of sympathy or admission of fault by a medical provider who injures a patient.[15]

Interestingly, even prior to the Vermont legislature's enactment of a physician apology statute, the Vermont Supreme Court was particularly reluctant to allow physician apologies to be used as stand-alone evidence in support of a medical malpractice claim. In the 1992 case of *Phinney v. Vinson*, the Vermont Supreme Court ruled that a physician's apology for an "inadequate" operation is not admissible as an admission of liability.[16] In *Phinney*, the physician allegedly admitted to a fellow physician that he performed an "inadequate" transurethral resection of the patient's prostate.[17] The physician also apologized to the patient "for his failure."[18] The Vermont Supreme Court found that these expressions of regret were insufficient to raise a jury question as to the requisite standard of care, breach of that standard, or causation as elements of a medical malpractice claim; thus, the Vermont Supreme Court held that the trial court properly granted the physician's summary judgment motion.[19] Ten years earlier, the Vermont Supreme Court similarly held that an apology for a severe mistake made during surgery does not in and of itself establish an element of a malpractice claim without additional evidence.[20]

Following the enactment of apology legislation by numerous states, on February 12, 2007, the American Bar Association adopted the following recommendation:

> RESOLVED, That the American Bar Association supports enactment of state and territorial legislation that provides that all statements, affirmations, gestures, or conduct expressing apology,

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10. Jeffrey S. Helmreich, *Does "Sorry" Incriminate? Evidence, Harm and the Protection of Apology*, 21 CORNELL J. L. & PUB. POL'Y 567, 575 (2012).

11. *Id.*

12. *Id.*

13. Mulligan, *supra* note 8 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (West 2004 & Supp. 2005)).

14. *Id.* (citing COLO. REV. STAT. § 13-25-135 (2003)).

15. *Id.*

16. Phinney v. Vinson, 605 A.2d 849, 849 (Vt. 1992).

17. *Id.*

18. *Id.*

19. *Id.* at 850.

20. Senesac v. Assocs. in Obstetrics and Gynecology, 449 A.2d 900, 903 (Vt. 1982).

> sympathy, commiseration, condolence, compassion, or a general sense of benevolence which relate only to the pain, suffering, or death of a person which are made by a medical provider or the staff of a medical provider to that person, that person's family, representative or friend, as the 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 for any purpose in a civil action for medical negligence.[21]

While some law review articles have advocated that the Federal Rules of Evidence should be amended to protect apologies,[22] the American Bar Association has recommended that states and territories should be the ones to enact apology legislation and Congress should not interfere.[23]

C. How much protection should the State of Mississippi afford its healthcare providers?

Before the Mississippi legislature adopts a physician apology statute, it will have to decide the extent of protection that it wants to afford medical providers. A case study of the Ohio physician apology statute is particularly helpful to show the difference between the "general" apology statute and the broader "fault" statute, and demonstrates why it is vital for the state legislature to specify what protections are afforded. Ohio's former apology statute provided, in relevant part, the following:

> In any civil action brought by an alleged victim of an unanticipated outcome of medical care or in any arbitration proceeding related to such a civil action, 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.[24]

We will refer to this type of statute as a "general" apology statute. Note that while the statute protects "any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence," there is no reference to a protection for an

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21. Am. Bar Ass'n, Recommendation on the Enactment of State Apology Legislation (Feb. 12, 2007), https://www.americanbar.org/content/dam/aba/images/medical_liability/med_mal_resolution112.pdf.

22. *See* Maria Pearlmutter, *Physician Apologies and General Admissions of Fault: Amending the Federal Rules of Evidence*, 72 OHIO ST. L. J. 687 (2011).

23. Am. Bar Ass'n, *supra* note 21.

24. OHIO REV. CODE ANN. § 2317.43(A) (2004) (*amended* 2019).

expression of fault.[25]

Ohio enacted this apology statute in 2004. When the lower courts of Ohio began to interpret the physician apology statute, they found it to be ambiguous.[26] The lower courts disagreed as to whether the legislature intended for the statute to prohibit the admissibility of statements of fault and statements admitting liability.[27] However, once the case of *Stewart v. Vivian* made its way to the Supreme Court of Ohio, the Court found the physician apology statute to be unambiguous.[28] The *Stewart* Court held that under the plain meaning of the statute, "'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."[29]

In response to the litigation over the statute's intended meaning, the Ohio Legislature amended its physician apology statute to explicitly protect statements of error or fault. As stated *supra*, we will refer to these broader physician apology statutes as "fault" apology statutes, because they protect expressions of fault or liability in addition to general expressions of sympathy.

Effective March 20, 2019, Ohio's physician apology statute reads, in relevant part:

> In any civil action brought by an alleged victim of an unanticipated outcome of medical care or in any arbitration proceeding related to such a civil action, any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, error, fault, or a general sense of benevolence that are made by a health care provider, or an employee of a health care provider, or a representative 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.[30]

The amended Ohio statute is also broadened to include statements made by a representative of a health care provider to the alleged victim.[31] Ohio is not alone in this broader protection of physician apologies and expressions of fault. It now joins a list of seven other states which have extended protection to include

25. *Id.*

26. *See* Davis v. Wooster Orthopaedics & Sports Med., Inc., 952 N.E.2d 1216 (Ohio Ct. App. 2011). *See also* Stewart v. Vivian, 91 N.E.3d 716 (Ohio 2017).

27. *Davis*, 952 N.E.2d at 1220.

28. *Stewart*, 91 N.E.3d at 721.

29. *Id.*

30. OHIO REV. CODE ANN. § 2317.43.

31. *Id.*

expressions of fault or liability.[32] As the case study of Ohio shows, Mississippi would be wise to adopt the broader "fault" apology statute in order to avoid discord in interpretation and promote the true purposes of enactment, which are to foster communication, encourage settlement, and allow for closure.

Some states have both a rule of evidence and a statute that address apologies. For example, the State of Utah has a statute that provides:

> In any civil action or arbitration proceeding relating to an unanticipated outcome of medical care, any unsworn statement, affirmation, gesture, or conduct made to the patient by the defendant shall be inadmissible as evidence of an admission against interest or of liability if it:
>
> (a) expresses:
>
> (i) apology, sympathy, commiseration, condolence, or compassion; or
>
> (ii) a general sense of benevolence; or
>
> (b) describes:
>
> (i) the sequence of events relating to the unanticipated outcome of medical care;
>
> (ii) the significance of events; or
>
> (iii) both.[33]

Utah also has a rule of evidence addressing physician apologies which appears under the same rule prohibiting admissibility of promises to pay medical and other similar expenses.[34] The rule provides:

> Evidence of unsworn statements, affirmations, gestures, or conduct made to a patient or a person associated with the patient by a defendant that expresses the following is not admissible in a malpractice action against a health care provider or an employee of a health care provider to prove liability for an injury;
>
> (1) apology, sympathy, commiseration, condolence, compassion, or general sense of benevolence; or
>
> (2) a description of the sequence of events relating to the unanticipated outcome of medical care or the significance of

32. *See infra* Table B (providing the list of states that have enacted "fault" apology statues).
33. UTAH CODE ANN. § 78B-3-422 (West 2018).
34. UTAH R. EVID. 409.

events.[35]

Interestingly, Utah Code Ann. § 78B-3-422 (West) was adopted on February 7, 2008, less than a year after the Utah Supreme Court held that statements allegedly made by a physician that he "missed something," "jumped the gun," and "shouldn't have done th[e] surgery" were admissible.[36] As demonstrated by both Ohio and Utah, sometimes the consequences of failing to protect physician apologies must be evident before the state legislature will act. Mississippi would be wise to avoid this "wait and see" approach.

An apology law does not necessarily need to be limited to the medical malpractice context in order to serve as a valuable safeguard. The State of California has an apology statute which applies in a broader sense to all accidents and not exclusively to medical malpractice cases.[37] The California law states:

> (a) The portion of statements, writings, 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 and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault, however, which is part of, or in addition to, any of the above shall not be inadmissible pursuant to this section.
>
> (b) For purposes of this section:
>
> (1) "Accident" means an occurrence resulting in injury or death to one or more persons which is not the result of willful action by a party.
>
> (2) "Benevolent gestures" means actions which convey a sense of compassion or commiseration emanating from humane impulses.
>
> (3) "Family" means the spouse, parent, grandparent, stepmother, stepfather, child, grandchild, brother, sister, half brother, half sister, adopted children of parent, or spouse's parents of an injured party.[38]

Notably, California's apology law explicitly excludes statements of fault from protection.[39]

California's Assembly Committee on Judiciary has also provided an interesting comment to its apology legislation, which highlights the reason behind its enactment. An excerpt from the comment provides that:

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35. *Id.*
36. Woods v. Zeluff, 158 P.3d 552, 554 (Utah Ct. App. 2007).
37. CAL. EVID. CODE § 1160 (West 2001).
38. *Id.*
39. *Id.*

> As Judge William Schma of Kalamazoo County (Michigan) Circuit Court has observed, the issue of expressing sorrow or apology represents a defect in a system overemphasizing adversarial relationships. Professor Jonathan Cohen of the University of Florida, College of Law, states that 30 percent of plaintiffs claim no suit would have occurred if a medical doctor in a medical malpractice context had apologized. The California Evidence Code manifestly discourages the human tendency to apologize or express regret over an incident caused by negligence. Yet, apologies reduce the anger of those who otherwise would sue from anger. AB 2804 permits humane, natural sentiments to be uttered by human beings without fear of use against them in litigation . . . . It promotes calming rather than disputatiousness by distinguishing between utterances and gestures of sympathy on the one hand, and admissions of fault on the other hand.[40]

The South Carolina General Assembly similarly included its reasoning for enacting its apology law in the statutory text.[41] South Carolina's law is a "fault" law, and states as follows:

> The General Assembly finds that conduct, statements, or activity constituting voluntary offers of assistance or expressions of benevolence, regret, mistake, error, sympathy, or apology between or among parties or potential parties to a civil action should be encouraged and should not be considered an admission of liability. The General Assembly further finds that such conduct, statements, or activity should be particularly encouraged between health care providers, health care institutions, and patients experiencing an unanticipated outcome resulting from their medical care. Regulatory and accreditation agencies are in some instances requiring health care providers and health care institutions to discuss the outcomes of their medical care and treatment with their patients, including unanticipated outcomes, and studies have shown such discussions foster improved communications and respect between provider and patient, promote quicker recovery by the patient, and reduce the incidence of claims and lawsuits arising out of such unanticipated outcomes. The General Assembly, therefore, concludes certain steps should be taken to promote such conduct, statements, or activity by limiting their admissibility in civil actions.[42]

Because the differences between the two types of apology laws are subtle, the sponsor of California's "general" apology law, Judge Quentin Kopp, offered

40. *Id.* assembly committee on judiciary's note to 2001 amendment.

41. *See* S.C. CODE ANN. § 19-1-190 (2006).

42. *Id.*

helpful hypotheticals to explain the difference between a "general" apology law, like California's, and a "fault" based law, like South Carolina's.

> Hypothetical #1: An automobile accident occurs and one driver says to the other: "I'm sorry you were hurt." -or- "I'm sorry that your car was damaged." Under the bill, these statements would not be admissible in court.
>
> Hypothetical #2: The same accident occurs, and one driver says to the other: "I'm sorry you were hurt, the accident was all my fault." -or- "I'm sorry you were hurt, I was using my cell phone and just didn't see you coming." Under the bill, only the portions of the statements containing the apology would be inadmissible; any other expression acknowledging or implying fault would continue to be admissible, consistent with present evidentiary standards.[43]

If the law is a "general" apology law like California's, consideration of the admissibility of a statement of fault would likely default to the state's rules of evidence.[44]

Some apology laws are more peculiar than others. For example, the State of Vermont only provides protection to a health care provider or facility if an apology or "good faith explanation" is provided "within 30 days of when the provider or facility knew or should have known of the consequences of the error."[45] Additionally, there are several "states with apology laws that do not specifically mention the admissibility of expressions of sympathy to a family member, friend or representative of the patient," such as Vermont, Maryland, South Dakota, Indiana, Hawaii, Oregon and North Carolina.[46]

Table A provides a list of the twenty-seven states and territories where "general" apologies are inadmissible. The laws in most states protect both verbal and non-verbal communications. Still, under the statutes cited in Table A, statements of fault or admissions of liability are not given protection and are admissible unless otherwise deemed inadmissible.

TABLE A

State	Citation and Applicability
Alaska	ALASKA STAT. ANN. § 09.55.544 (West 2014) – only apologies are inadmissible; statement of fault is admissible
Delaware	DEL. CODE ANN. tit. 10, § 4318 (West 2006) –

43. CAL. EVID. CODE § 1160 (West 2001) assembly committee on judiciary's note to 2001 amendment.

44. Nancy L. Zisk, *A Physician's Apology: An Argument Against Statutory Protection*, 18 RICH. J.L. & PUB. INT. 369, 383 (2015) (citing Strout v. Cent. Maine Med. Ctr., 94 A.3d 786 (Me. 2014)).

45. VT. STAT. ANN. tit. 12, § 1912 (West 2006).

46. Nicole Saitta & Samuel D. Hodge, Jr., *Efficacy of a Physician's Words of Empathy: An Overview of State Apology Laws*, 112 J. AM. OSTEOPATHIC ASS'N. 302, 304 (2012).

	apologies inadmissible; expression or admission of liability or fault admissible
District of Columbia	D.C. CODE ANN. § 16-2841 (West 2007) – apologies inadmissible; expression of fault admissible
Guam	10 G.C.A. § 11112 (2008) – apologies inadmissible; statement of fault admissible
Hawaii	HAW. REV. STAT. ANN. § 626-1, Rule 409.5 (West 2007) – apologies inadmissible; statement of fault admissible
Idaho	IDAHO CODE ANN. § 9-207 (West 2006) – apology and explanation are inadmissible; expression of fault admissible
Indiana	IND. CODE ANN. § 34-43.5-1-4 (West 2006) – expression of sympathy inadmissible but IND. CODE ANN. § 34-43.5-1-5 (West 2006) statement of fault admissible
Iowa	IOWA CODE ANN. § 622.31 (West 2007) – apology or sympathy inadmissible
Louisiana	LA. STAT. ANN. § 13:3715.5 (2005) – apology or regret inadmissible; statement of fault admissible
Maine	ME. REV. STAT. tit. 24, § 2907 (2005) – apology inadmissible; fault admissible
Maryland	MD. CODE ANN., CTS. & JUD. PROC. § 10-920 (West 2005) – apology inadmissible; fault admissible
Michigan	MICH. COMP. LAWS ANN. § 600.2155 (West 2011) – apology inadmissible, but fault, negligence and culpable conduct admissible
Missouri	MO. ANN. STAT. § 538.229 (West 2005) – apology inadmissible but fault admissible
Montana	MONT. CODE ANN. § 26-1-814 (West 2005) – apology inadmissible
Nebraska	NEB. REV. STAT. ANN. § 27-1201 (West 2009) – apology inadmissible; fault admissible
New Hampshire	N.H. REV. STAT. ANN. § 507-E:4 (2018) – apology inadmissible; fault admissible
North Carolina	N.C. GEN. STAT. ANN. 8C-1, 413 (2004) – apology inadmissible
North Dakota	N.D. CENT. CODE ANN. § 31-04-12 (West 2007) – apology inadmissible
Oklahoma	OKLA. STAT. ANN. tit. 63, § 1-1708.1H (West 2004) – apology inadmissible
Oregon	OR. REV. STAT. ANN. § 677.082 (West 2003) – expressions of apology or regret inadmissible

Pennsylvania	35 PA. STAT. ANN. § 10228.3 (West 2013) – apology inadmissible, fault/negligence admissible
South Dakota	S.D. Codified Laws § 19-19-411.1 (2005) – apologies inadmissible to prove negligence, but admission against interest may be used for impeachment purposes
Utah	UTAH CODE ANN. § 78B-3-422 (West 2008) – apology inadmissible; case law has interpreted this statute and held it does not cover statements of fault such as "we messed up"
Vermont	VT. STAT. ANN. tit. 12, § 1912 (West 2006) – apology and explanation inadmissible
Virginia	VA. CODE ANN. § 8.01-52.1 (West 2009) – in wrongful death action: apology inadmissible; statement of fault admissible; VA. CODE ANN. § 8.01-581.20:1 (West 2009) – in civil action: apology inadmissible, statement of fault admissible
West Virginia	W. VA. CODE ANN. § 55-7-11a (West 2005) – apology inadmissible
Wyoming	WYO. STAT. ANN. § 1-1-130 (West 2004) – apology inadmissible

Table B provides a list of eight states whose statutes protect not only apologies, but also explicitly protect statements of fault or liability.

TABLE B

State	Citation and Applicability
Arizona	ARIZ. REV. STAT. ANN. § 12-2605 (2005) – statements of either apology or liability are inadmissible
Colorado	COLO. REV. STAT. ANN. § 13-25-135 (West 2003) – statements of either apology or fault are inadmissible
Connecticut	CONN. GEN. STAT. ANN. § 52-184d (West 2006) – statements of either apology or fault are inadmissible
Georgia	GA. CODE ANN. § 24-4-416 (West 2013) – Covers apologies and admissions of mistake, error
Massachusetts	MASS. GEN. LAWS ANN. ch. 233, § 79L (West 2012) – covers apologies, mistakes and errors (also demands open communication between physicians and patients/families)
Ohio	Ohio Rev. Code Ann. § 2317.43 (West) –apologies and statements of error or fault inadmissible
South Carolina	S.C. CODE ANN. § 19-1-190 (2006) – includes both apologies and statements of error/fault – fosters communication between physicians and

	patients/families
Wisconsin	WIS. STAT. ANN. § 904.14 (West) – covers apologies and statements of fault or responsibility made before the commencement of the civil action

Table C provides a list of states whose statutes address accidents generally and are not limited to the medical malpractice context.

TABLE C

State	Citation and Applicability
California	CAL. EVID. CODE § 1160 (West 2001) – apologies only, statements of fault admissible
Florida	FLA. STAT. ANN. § 90.4026 (West) – apologies only, statements of fault admissible
Massachusetts	MASS. GEN. LAWS ANN. ch. 233, § 23D (West 2000) – apologies inadmissible
Tennessee	TENN. R. EVID. 409.1 – statement of sympathy inadmissible, statement of fault admissible
Texas	TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (West 2004) – apologies inadmissible, but excited utterances admissible, as well as statements concerning fault or negligence
Washington	WASH. REV. CODE ANN. § 5.66.010 (West) – apology inadmissible, but statement of fault admissible

D. Current Medical Malpractice Trends in Mississippi

Before considering the potential effect of a physician apology law in Mississippi, it is helpful to apprise oneself of the current trends of medical malpractice suits in the state. In 2004, the Mississippi legislature enacted the Mississippi Tort Reform Act.[47] The law placed a $500,000 cap on non-economic damages for medical liability cases filed on or after January 1, 2003, and a one million dollar cap on non-economic damages in other civil cases filed on or after September 1, 2004.[48] In 2007, the Mississippi Supreme Court held that the cap applies to "all plaintiffs who bring a wrongful-death action pursuant to Mississippi Code Annotated § 11-7-13."[49]

Prior to tort reform, "Mississippi had become known as a lawsuit haven, where sympathetic juries and judges handed out huge awards."[50] Advocates of tort

47. MISS. CODE ANN. § 11-1-60 (2004).

48. *Id.*

49. Estate of Klaus v. Vicksburg Healthcare, LLC, 972 So. 2d 555, 558–59 (Miss. 2007).

50. Geoff Pender, *Mississippi Tort Reform at 10 Years*, THE CLARION LEDGER, (May 5, 2014, 10:10 PM), https://www.clarionledger.com/story/news/2014/05/05/mississippi-tort-reform-years/8750203/.

reform assert that its effect has been stark.[51] According to The Clarion Ledger, "Various reports in recent years have shown large drops in medical lawsuits and doctors' insurance premiums, and in the number of tort cases filed — down to about 3,500 in 2012, compared to more than 10,600 in 2002."[52]

Research compiled by David Belk, MD, a physician who has been researching the true cost of healthcare nationwide, shows that from 2012 to 2016, Mississippi ranked 12th nationwide in the number of annual claims per 100 practicing physicians.[53] During that same time period, Mississippi ranked 29th nationwide in annual claims per one million residents.[54] From 2012-2016, when considering the annual per capita[55] malpractice cost, Mississippi ranked 46th nationwide at only $5.99.[56]

However, Dr. Belk does not necessarily relate Mississippi's low malpractice cost to tort reform. He concluded that:

> Mississippi has had very low medical malpractice costs for more than a decade. Though it's tempting to say that Mississippi's low malpractice costs are a result of their cap on non-economic damages, it should be noted that Alabama has similar costs and fewer paid claims per-capita in spite of having no such cap. Also, the cost of medical malpractice in Mississippi wasn't much higher most of the years before they instated their damage cap.[57]

Regardless of where one stands on tort reform and whether they believe that it has produced fruitful effects in Mississippi, the appeal of adding a physician apology law is undeniable based upon the numerous benefits that protecting physician apologies yields.

E. The Numerous Benefits of Protecting Physician Apologies

Evidence shows that society as a whole may benefit if physician apologies are afforded protection. When physicians are encouraged to express apologies, it allows the physician, the patient, and the patient's family to heal. It should concern the general public that the present practice of medicine often times fails to "compensate patients in a timely manner, and many physicians believe liability concerns cause them to order unnecessary tests and practice so-called 'defensive medicine.'"[58] Nonetheless, society should be encouraged that research shows that

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51. *Id.*

52. *Id.*

53. David Belk, *Mississippi Medical Malpractice Summary and Statistics*, TRUE COST OF HEALTHCARE.ORG http://truecostofhealthcare.org/wp-content/uploads/2018/08/Mississippi-Malpractice.pdf (last visited Feb. 21, 2019).

54. *Id.*

55. *Id.* This reflects the total amount paid in medical malpractice claims in the state each year by the state's population.

56. *Id.*

57. *Id.*

58. James B. Battles et al., *Paving the Way for Progress: The Agency for Healthcare Research and Quality Patient Safety and Medical Liability Demonstration Initiative*, 51 HEALTH SERVS. RES. (Supp. 3) 2401, 2401 (2016).

physician apologies encourage quick settlement, as opposed to a patient waiting the five and a half years that it takes for the average malpractice lawsuit to wind its way through the courts.[59]

For example, when Judge Quentin Kopp delivered a statement in support of his proposed apology bill in California, he advocated for its enactment by stating:

> Commentators and scholars and now courts and legislatures have observed that many lawsuits, although unquantifiable, result from anger which, in turn, results from a failure of another party to express regret or sympathy. Lawyers and insurers regularly advise parties to accidents not to express regret or convey an apology or statement of compassion, commiseration or contrition for fear it will be used against the parties and thereby cause them financial harm.[60]

As Steven Keeva similarly noted, "[d]espite the distinctly human need to convey and receive expressions of regret and contrition, there are legal considerations, including the concern that an apology may be tantamount to an admission of guilt or liability."[61] Further, "A physician who inadvertently injures a patient is immediately thrust into the midst of this catch-22: if she apologizes, this may be used against her in a lawsuit, but if she does not apologize, she is more likely to be sued in the first place."[62] Thus enters the appeal of the physician apology law.

Research shows that Judge Kopp was correct in his conclusions. Jennifer Robbennolt is a Professor of Law and Psychology at the University of Illinois who has studied the strong effect that apologies have on litigation for over ten years. Professor Robbennolt recognized that "Conventional wisdom has been to avoid apologies because they amount to an admission of guilt that can be damaging to defendants in court."[63] By contrast, her "studies suggest apologies can actually play a positive role in settling legal cases."[64]

Professor Robbennolt based her conclusion on a study of 550 people who were engaged in mock settlement negotiations of a hypothetical injury case.[65] She found that "apologies generally reduced financial demands, increasing prospects for an agreement."[66] But the type of apology matters according to her research findings, which appear in a publication of the American Judges Association entitled *Court Review*.[67] "Apologies that accept fault have more impact than

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59. Bette J. Roth, ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 1:16 (Bette J. Roth et al. eds., 2018).

60. CAL. EVID. CODE § 1160 (West 2001) assembly committee on judiciary's note to 2001 amendment.

61. Steven Keeva, *Does Law Mean Never Having to Say You're Sorry?*, 85 A.B.A. 64, 64 (1999).

62. *See* Pearlmutter, *supra* at 22.

63. Denise Cummins, *Are You Big Enough to Apologize?*, PSYCHOLOGY TODAY, (Apr. 1, 2013), https://www.psychologytoday.com/us/blog/good-thinking/201304/are-you-big-enough-apologize.

64. *Id.*

65. *Apologies May Fuel Settlement of Legal Dispute, Study Says*, SCIENCEDAILY, (June 3, 2010), https://www.sciencedaily.com/releases/2010/06/100602121158.htm.

66. *Id.*

67. *See*, Jennifer K. Robbennolt, *Apologies and Settlement*, 45 CT. REV. 90 (2010).

apologies that merely express sympathy, but take no responsibility."[68]

Robbennolt found that apologies that include an acceptance responsibility will have a stronger effect because they give the plaintiff a sense of closure, which makes them less angry and more willing to absolve the physician of liability.[69] "The apology fulfills some of the goals that triggered the suit, such as a need for respect, to assign responsibility and to get a sense that what happened won't happen again," she said.[70] "For defendants, apologies can reduce legal costs as well as damages because cases may settle more quickly."[71]

Even still, the strongest evidence of the effectiveness of physician apology legislation has not come in a mock study, but in real-life hospital initiatives.[72] For example, in 1987, the Veteran's Affairs Medical Center in Lexington, Kentucky implemented a disclosure program that encouraged open communication between physicians, patients, and staff after numerous hefty malpractice verdicts were entered against it.[73] After an unanticipated outcome occurred, the patients were informed, the risk management team was activated, and an investigation ensued. Patients were immediately assisted, whether it be by treatment or offers of compensation. If the risk management team "determined that a hospital employee was at fault, that individual would be present at the meeting and would offer an apology."[74] After this program was implemented, the Veteran's Affairs Medical Center "reported reaching the lowest quartile of medical malpractice payments when compared to other similar hospitals and also reported placing in the bottom sixth with regard to liability per claim through 1996."[75] The University of Michigan Health System has implemented a similar program that has resulted "in annual average savings of over two million dollars."[76]

Protection of physician apologies also allows physicians to safely comply with their ethical requirements.[77] The AMA's Code of Medical Ethics provides in AMA Opinion 8.12 that it is "a fundamental ethical requirement that a physician should at all times deal honestly and openly with patients."[78] The opinion further recognizes that "[s]ituations occasionally occur in which a patient suffers significant medical complications that may have resulted from the physician's mistake or judgment."[79] Nonetheless, "the physician is ethically required to inform the patient of all the facts necessary to ensure understanding of what has occurred."[80] Further, "[c]oncern regarding legal liability which might result following truthful disclosure should not affect the physician's honesty with

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68. *Apologies May Fuel Settlement of Legal Dispute, Study Says*, *supra* note 65.
69. Robbennolt, *supra* note 67, at 92.
70. *Apologies May Fuel Settlement of Legal Dispute, Study Says*, *supra* note 65.
71. *Id.*
72. *See* Pearlmutter, *supra* note 22, at 698.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 699.
77. Nancy L. Zisk, *A Physician's Apology: An Argument Against Statutory Protection*, 18 RICH. PUB. INT. L. REV. 369, 386 (2015).
78. *Id.* (citing AMA OPINION 8.12).
79. *Id.*
80. *Id.*

a patient."[81]

One criticism of apology laws is that laymen may experience frustration because these laws seem to be for the sole benefit of the physician. It is important to remember, however, that physician apology statutes also facilitate settlement.[82] If a physician acknowledges their wrongdoing, the physician will be more likely to follow that apology with an offer of settlement at the outset without draining the plaintiff's recovery with the high cost of litigation.[83]

There is also at least one study that was published in 2017 which suggests that apology laws are not producing the results they intended to promote.[84] A Vanderbilt University research team compiled data from 2004 to 2011 using a data bank that collected all malpractice claims against physicians who practiced in a single specialty and were covered by the samenational malpractice insurer.[85] The researchers concluded that "[a]pology laws have no statistically significant effect on the probability that surgeons experience either a non-suit claim or a lawsuit."[86]

The data showed that of the 3,517 claims used in the study, 2.6 percent of doctors face a malpractice lawsuit a year, and 65.4 percent of those sued end up in court.[87] Of the 65.4 percent sued, 51.4 percent pay the claimant some amount of money and 34.6 percent reach a settlement without involving the courts.[88] After reviewing the data, the researchers essentially determined that there was no decrease in the number of medical malpractice lawsuits filed in states with apology laws, so apology laws must be ineffective.[89] The results are flawed, however, because the researchers admitted that "There is no way for [us] to know how many doctors apologized. For the purpose of the study, it was assumed that apology laws increase the number of apologies."[90]

Put simply, the majority of research available shows that apologies benefit both the receiver and the giver.[91] Apologies convert a desire for revenge into a willingness to forgive and forget.[92]

F. Apology Law "Best Practice"

Research makes the compelling case that "patients view the apology and disclosure processes as inexplicably intertwined, seeking not only an expression of sympathy but also information about the nature of the event and why it

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81. *Id.*

82. *Apologies May Fuel Settlement of Legal Dispute, Study Says*, *supra* note 65.

83. *Id.*

84. Jim Patterson, *Apology Laws Don't Help Doctors Avoid Malpractice Payouts*, VANDERBILT UNIVERSITY (Feb. 1, 2017, 11:43 AM), https://news.vanderbilt.edu/2017/02/01/apology-laws-malpractice-payouts/.

85. *Id.* According to the study, the data was provided on the condition that the specialty and the company not be revealed.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. Beverly Engel, *The Power of Apology*, PSYCHOLOGY TODAY (July 1, 2002), https://www.psychologytoday.com/us/articles/200207/the-power-apology.

92. Cummins, *supra* note 63.

happened, and how reoccurrences will be prevented."[93] By merely expressing sympathy, physicians "may strike patients as insincere, provoking rather than appeasing a potential plaintiff."[94] Thus, the "best practice" is for apology laws to include broad legal protection "in order to encourage comprehensive disclosures and willingness to accept responsibility for error."[95]

Further, "apology laws should not limit protection to a specific time frame," as the Vermont apology law does.[96] The likely reason that the majority of physician apology laws are only "general" apology laws and do not cover fault-based admissions is because of political compromise.[97] Nonetheless, the purpose of a physician apology statute will still be best accomplished by Mississippi's enactment of a "fault" apology statute. Had the physician in our hypothetical apologized, given a timely explanation for the unsuccessful knee replacement, accepted responsibility, and made a fair settlement offer, the patient and his family would have been more likely to accept the physician's apology as genuine.

II. CONCLUSION

As of the date of the drafting of this article, there is no pending legislation in the following states: Alabama, Arkansas, Illinois[98], Kansas, Minnesota, Mississippi, Nevada, New Mexico, and Rhode Island. In the spring of 2018, both Kentucky[99] and New Jersey[100] introduced physician apology bills, but neither passed. The author is convinced that if Mississippi desires to attract the most talented, successful medical professionals, it will adopt a statute protecting physician apologies.

Any potential negative effect of enacting a physician apology statute is outweighed by the benefit of facilitating closure for both the physician and the patient. Research shows that a physician's apology should not be used against him as an admission of liability. It is contrary to human nature to constrain apologies due to fear of litigation.

Upon review, the Mississippi legislature may decide that the "general" apology laws that have been adopted by the majority of states may be more closely aligned with Miss. R. of Evidence Rule 804(b)(3) regarding the admissibility of declarations against interest. Judge Kopp also made this argument in support of California's "general" apology law.[101] The author nonetheless encourages our Mississippi legislature to enact a "fault" physician apology statute in order to

93. Anna C. Mastroiani et al., *The Flaws in State 'Apology' and 'Disclosure' Laws Dilute Their Intended Impact on Malpractice Suits*, 29 HEALTH AFF. NO. 9, 1611, 1614 (2010).

94. *Id.* at 1616.

95. *Id.*

96. *Id.* (referencing VT. STAT. ANN. tit. 12, § 1912 (West)).

97. *Id.*

98. The State of Illinois had a statutory provision protecting physician sympathetic gestures embedded in its broader medical malpractice tort reform statute that capped noneconomic damages in medical malpractice actions. In 2010, the Supreme Court of Illinois held that the statute was unconstitutional because it violated the separation of powers clause of the Illinois Constitution. Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 914 (Ill. 2010).

99. S.B. 20, 2018 Reg. Sess. (Ky. 2018).

100. Assemb. B. 2692, 218th Leg. (N.J. 2018).

101. CAL. EVID. CODE § 1160 (West 2001) assembly committee on judiciary's note to 2001 amendment.

provide the most comprehensive protection, and facilitate open, honest communication between medical professionals and patients. Sometimes an apology is just what the doctor ordered to quell tensions and allow the physician, the patient, and the patient's family to heal.