The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 87 (September 17, 2021) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

The Council requests that applicants use the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original hard copy (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts as detailed in the application instructions. Additionally you must submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your original application, or the digital copy may be submitted via email to john.jefferson@tncourts.gov .

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I currently practice law as a member of Rainey, Kizer, Reviere & Bell, PLC in Jackson, TN.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

2002; No. 022268

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee; 2002; No. 022268; Active

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

2003 to present: Attorney at Rainey, Kizer, Reviere & Bell, PLC in Jackson, TN (practice civil defense litigation with an emphasis on healthcare liability defense)

2007 to 2016: Adjunct Faculty Member at Union University in Jackson, TN (taught courses on Medical Ethics and Legal Aspects of Healthcare Administration)

2002 to 2003: Attorney at Paine, Tarwater, Bickers & Tillman, LLP in Knoxville, TN (practiced general civil defense litigation)

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

The bulk of my current law practice regards defending healthcare providers, including physicians, nurses, and hospitals, in healthcare liability cases (and on occasion before licensing boards). I estimate that 85% of my practice pertains to this area. The remainder of my practice regards various other litigation matters, including contract disputes, legal malpractice cases, will contests, and construction cases. I estimate that 15% of my practice pertains to these various other litigation matters.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

I have practiced in Tennessee's trial and appellate courts for over twenty-two years. During that time, I have taken various types of cases to trial, including healthcare liability cases, contract disputes, an automobile accident case, and a will contest. My practice primarily involves cases filed in West Tennessee, but I also handle some cases in Middle Tennessee and occasionally in East Tennessee. Most of the cases I work on are filed in our circuit courts. The bulk of my work has been in our state courts, but I have handled some cases in federal courts, the Tennessee Claims Commission, and before healthcare licensing boards. For example, I am currently working on four federal court cases and one licensing board matter. I have never handled any criminal law or transactional matters.

I have also had a steady appellate practice for many years. I have been involved in over twenty-five state court appeals. I have drafted many appellate briefs and have argued cases in both the Tennessee Court of Appeals and the Tennessee Supreme Court. The bulk of these cases have been in the area of healthcare liability.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

I have been fortunate enough to have been involved in some notable appellate cases, including: *Bidwell ex rel. Bidwell v. Strait*, 618 S.W.3d 309 (Tenn. 2021); *McClay v. Airport Management Serv., LLC*, 596 S.W.3d 686 (Tenn. 2020); and *Calaway v. Schucker*, 193 S.W.3d 509 (Tenn. 2005).

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

Not applicable

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

Not applicable

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

I have served as a member of the Investigatory Committee of the Tennessee Board of Law Examiners since 2014.

During law school, I worked as a summer associate for the United States Attorney's Office in Knoxville and for Farris, Mathews, Branan, Bobango & Hellen, PLC in Memphis.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

None

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

The University of Tennessee College of Law, Doctor of Jurisprudence 2002 (*magna cum laude*)

The University of Memphis, B.A. English 1998 (*magna cum laude*)

PERSONAL INFORMATION

15. State your age and date of birth.

[redacted]

16. How long have you lived continuously in the State of Tennessee?

48 years

17. How long have you lived continuously in the county where you are now living?

21 years

18. State the county in which you are registered to vote.

Madison

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

None

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in them.

Fellowship Bible Church (Member); Humboldt Golf & Country Club (Member); Trinity Christian Academy Booster Club (Member)

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Tennessee Bar Association (Member 2002 to present)(Leadership Law Class of 2009)

Tennessee Bar Journal (Editorial Board Member 2020 to present)

Jackson-Madison County Bar Association (Member 2003 to present)(President 2011 to 2012)

Howell Edmunds Jackson American Inn of Court (Barrister 2010 to 2015)

Tennessee Defense Lawyers Association (Member 2012 to present)(Co-Chair of Professional Negligence/Healthcare Section 2013 to 2016)

Defense Research Institute (Member 2003 to present)

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

Martindale-Hubbell Peer Review Rating of AV-Preeminent (highest level of professional excellence)

Named a "Rising Star" in area of medical malpractice defense by Law & Politics Mid-South Super Lawyers magazine (2009, 2013, 2014, 2015, 2016)

Named a top "40 under 40" professional by The Jackson Sun newspaper (2015)

30. List the citations of any legal articles or books you have published.

Tennessee Bar Journal, "Compensating Fact Witnesses in Tennessee" (Co-author) (July 2015) (cited in *Cremeens v. Cremeens*, No. M2014-01186-COA-R3-CV, 2015 WL 4511921 (Tenn. Ct. App. July 24, 2015))

Trials and Tribulations (DRI Trial Tactics Committee Newsletter), "Maximizing the Use of Depositions at Trial" (Co-author) (Summer 2009)

Tennessee Young Lawyer, "Prejudgment Interest in Personal Injury and Wrongful Death Cases" (Fall 2008)

For the Defense (DRI Magazine), "Vaccine Injury Litigation" (Co-author) (November 2007)

Tennessee Bar Journal, "A Roadmap for Vaccine Injury Litigation in Tennessee" (May 2006)

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Requesting and Summarizing Medical Records CLE (Webcast); Invited speaker for National Business Institute regarding use of medical records in litigation (2024)

Tennessee Health Care Liability Seminar CLE (Nashville, TN); Invited speaker on medical expenses and damages (2024)

National Vaccine Law Conference CLE (Washington, D.C.); Invited speaker on vaccine liability and injury compensation (2022)

The University of Tennessee College of Dentistry (Memphis, TN); Invited speaker on personal values and dental ethics (2020)

Tennessee Nurses Association Annual Conference (Memphis, TN); Invited speaker on current medical-legal topics (2019)

Evidence, Science and the Law CLE (Nashville, TN); Invited speaker for National Business Institute regarding admission of expert testimony (2019)

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Not applicable

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

Please see the attached appellate briefs, which I primarily drafted but that were edited by others. See also the attached article, which I drafted.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

The primary reason I am seeking this position is to use my abilities and education to serve. I sincerely believe that we should use our abilities and talents in service to others. My parents both served in the military and often took on other roles of service. They instilled in me a passion for service to others. Serving as an appellate judge is a way for me to carry out this passion and their legacy.

A secondary reason I am seeking this position is that I greatly enjoy appellate work and practice. I was fortunate enough to have been selected as a member of the National Moot Court team in law school. In that capacity, I developed an affinity for appellate work. As set forth above, since law school, I have been fortunate in my private practice to have a healthy appellate practice. Appellate work has always been one of my favorite areas of law practice.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

During my legal career, I have handled cases on a pro bono basis, as well as on a reduced-fee basis. Those cases involved things such as a name change and small debt disputes. My first trial involved a pro bono case arising from an automobile accident. I have also participated in legal clinic events over the years, such as Wills for Heroes. However, perhaps the best way that I believe I have demonstrated a commitment to equal justice under the law is simply by treating those around me with respect and dignity.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I am seeking a position on the Western Section of the Tennessee Court of Appeals. The Western Section has four members, and it hears the appeals of various civil matters. I believe my selection would positively impact the Court, because of my experience, work ethic, and character. During my time in private practice, I have handled many complex civil cases. I have always had a desire to handle the difficult cases and take on a heavy caseload. I have also been able to practice in many different courts and before many different judges. I believe I would also add some geographical diversity to the Court, as I reside and work in Jackson. I do not believe that any of the current members of the Court reside in the Twenty-Sixth Judicial District (Madison, Henderson, and Chester Counties).

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

Over the years, I have been involved in service projects through the Tennessee Bar Association, the Jackson-Madison County Bar Association, and my law office. I have also served as a youth soccer coach, youth basketball coach, and Sunday School teacher. The area that I have particular interest in is with mock trial and moot court competitions. I have served as a volunteer judge at the high school, college, and law school levels. I believe that one of the best ways to ensure a bright future for our profession is to help younger people develop an appreciation of, and interest in, the law. Participating in mock trial and moot court competitions has been a way for me to do so. As a judge, I would look to become more involved in the community, particularly with the high school and college mock trial competitions.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

My experiences as a lawyer handling complex civil cases in many different counties in Tennessee has provided ample training regarding Tennessee law and procedure. However, the most important part of my legal development has been the people I have worked with. During my career, I have been fortunate to have been surrounded by some wonderful attorneys and mentors. They have taught me to always practice law with a mind towards being respectful, truthful, and courteous to those around you.

As an English major, I have always taken pride in my writing. It was conveyed early on in my legal career that what and how a lawyer writes is of extreme importance. I was told when I first started practicing that many people will judge a lawyer based upon the documents that the lawyer drafts. Many people will not know much about a lawyer besides the documents the lawyer drafts. I believe that possessing the ability to write well is a key attribute of a lawyer, as well as an appellate judge.

It would be difficult to describe my important life experiences without discussing my family. In any position that I have, my family obviously plays a significant part. I would not be able to have a career in the law without them. My parents both worked and supported me through

college and with my desire to attend law school. My wife and I met in high school and married when we were in college. My wife, who is a nurse, worked and supported me while I attended law school. Having my family believe and invest in me has been a strong encouragement and has motivated me to have a strong work ethic and appreciation for being a part of the legal profession.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes, I will uphold the law regardless of my feelings as to the substance of the law at issue. An example of my experience in having to do so pertains to our ethics rules. I have served as the Chair of my law firm's Ethics Committee for several years. In that capacity, I must counsel other attorneys in my office about the Rules of Professional Responsibility. There are occasions where I must counsel against a certain course of action, even though it may appear better to the other attorneys, our law firm, and/or myself. The issue of conflicts arises with some regularity. Telling my law partners that they cannot accept a case, or that they must withdraw from a case, when they do not want to can be difficult. It also may not be financially beneficial to the law firm or myself. However, the Rules of Professional Responsibility must be followed and exist for the overall good of the profession. Therefore, I provide advice and counsel irrespective of my agreement or disagreement with the substance of the Rules.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Marty R. Phillips (law partner and mentor at Rainey, Kizer, Reviere & Bell, PLC); (731) 426-8128; mphillips@raineykizer.com
B. Jerry D. Kizer (law partner and mentor at Rainey, Kizer, Reviere & Bell, PLC); (731) 426-8105; jkizer@raineykizer.com
C. Lisa Vinson (longtime paralegal at Rainey, Kizer, Reviere & Bell, PLC); (731) 423-2414; lvinson@raineykizer.com
D. Tommy D. Gately (close friend since middle school); Chief of Bartlett Fire Department; (901) 828-3907; tgately@cityofbartlett.org
E. Kate E. Rhodes (law school classmate); Attorney at PMB Services in Paris, TN; (731) 695-3999; [redacted]

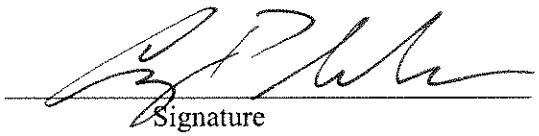
AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Appeals of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: October 23, 2024.



Signature

When completed, return this application to John Jefferson at the Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

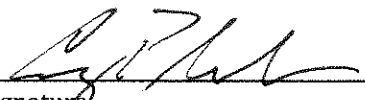
TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Craig P. Sanders

Type or Print Name



Signature

October 23, 2024

Date

022268

BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

Not applicable

ARTICLE: A roadmap for vaccine injury litigation in Tennessee

May, 2006

Reporter
42 Tenn. B.J. 22 *

Length: 2036 words

Author: By Craig P. Sanders

Craig P. Sanders is an associate in the medical malpractice and healthcare group of Rainey, Kizer, Reviere & Bell PLC. He obtained his law degree, magna cum laude, from the University of Tennessee.

Text

[*23] Through the advancement of scientific research, medical professionals can now prevent children from contracting many diseases that once devastated much of society. These diseases include measles, diphtheria, influenza and polio. Vaccinations for these diseases and others are now readily available and required for certain activities such as attending public school. [1] Unfortunately, a small number of children suffer severe adverse reactions to routine vaccines despite the advancements that have been made. These reactions are rarely foreseeable and rarely caused by any negligence on the part of physicians or vaccine manufacturers. For example, less than one in every one million children who receive the Measles, Mumps & Rubella vaccine (MMR) suffer severe adverse reactions. [2] To help these unfortunate few children and their parents cope with the effects of such reactions, Congress developed a no-fault remedial scheme that eases the burden of proof required to recover in the civil tort system. [3]

The National Childhood Vaccine Injury Act

In 1986, Congress enacted the National Childhood Vaccine Injury Act (Vaccine Act). [4] The act's purpose is twofold: (1) to provide swift compensation to persons injured by vaccines, and (2) to free vaccine "manufacturers" and "administrators" from the uncertainty of tort liability; thus, preventing a possible shortage of gravely important vaccines due to rampant tort litigation. [5] The Vaccine Act accomplishes this dual purpose by establishing the National Injury Compensation Program (VICP), which is a no-fault remedial scheme that allows individuals or their parents to pursue damages for all "vaccine-related injuries" through the Court of Federal Claims. [6] A specialized

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[1] *Tenn. Code Ann. §§ 37-10-401*; 49-65001 *et seq.*

[2] *http://www.cdc.gov/nip/publications/VIS/vis-mmr.pdf*

[3] Some state legislatures have also passed legislation regarding recovery for vaccinerelated injuries. *See, e.g., N.C. Gen. Stat. §§ 130A-422 et seq.*

[4] *42 U.S.C. § 300aa-10 et seq.*

[5] H.R. Rep. No. 99-908, 99th Cong. (1986).

[6] *42 U.S.C. § 300aa-10,* 11.

judge deemed a special master hears cases and awards damages if causation is sufficiently proven in these cases. [7]

Anyone claiming to have suffered a "vaccine-related injury" covered by the Vaccine Act must first pursue a claim in the Court of Federal Claims prior to filing a civil lawsuit in state court. [8] The Vaccine Act defines a "vaccine-related injury" as any "illness, injury, condition, or death associated with one or more of the vaccines set forth in the Vaccine Injury Table." [9] Covered vaccines include diptheria, tetanus, pertussis (DTaP), measles, mumps, rubella (MMR), polio (IPV), hepatitis B, and other routine vaccines. The Vaccine Act expressly prohibits the filing of civil lawsuits for more than $ 1,000 against a vaccine "manufacturer" or "administrator" without first filing a petition for available relief in the Court of Federal Claims. [10] If the victim of an alleged "vaccine-related injury" violates this provision and files a civil lawsuit in either state or federal court before filing a petition in the Court of Federal Claims, the court must dismiss the lawsuit. [11]

In the Court of Federal Claims, recovery is expedited and differs from that available in traditional civil litigation. A victim may recover actual un-reimbursable medical and rehabilitative expenses, damages for reduced earning capacity or lost wages, up to $ 250,000 in damages for pain and suffering or emotional distress, and reasonable attorney's fees and costs. [12] Under the Vaccine Act, a claim for "vaccine-related [*24] injuries" includes a claim for medical expenses or any other expenses paid or anticipated to be paid "on behalf of the injured party. [13] Compensation awards under the Vaccine Act are paid from the Vaccine Injury Compensation Trust Fund, which is financed by excise taxes on certain vaccines. [14]

The Vaccine Act does not totally preclude traditional tort remedies for covered damages. After the Court of Federal Claims renders a ruling on a claim, the claimant may accept or reject any award. [15] If the claimant rejects an award, then he or she may sue any vaccine "manufacturers" or "administrators" in state or federal court. [16] A claimant may also sue such defendants in state or federal court if the Court of Federal Claims dismisses the claimant's petition. However, under no circumstance may an individual file a civil lawsuit for injuries covered by the Vaccine Act unless he or she seeks less than $ 1,000.00. [17]

Causes of action not covered by the vaccine act

Despite the language contained in the Vaccine Act, some courts allow plaintiffs to initially file lawsuits arising from vaccine injuries outside the Court of Federal Claims. These courts have held that state law causes of action not

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[7] *42 U.S.C. § 300aa-11*(a)(1).

[8] *42 U.S.C. § 300aa-11*(a)(1)(B).

[9] *42 U.S.C. § 300aa-33*(5).

[10] *42 U.S.C. § 300aa-11*(a)(2)(A).

[11] *42 U.S.C. § 300aa-11*(a)(2)(B).

[12] *42 U.S.C. § 300aa-15.*

[13] *Id.*

[14] *42 U.S.C. § 300aa-15*(i)(2); *26 U.S.C. § 9510*(b)(1).

[15] *42 U.S.C. § 300aa-21.*

[16] *42 U.S.C. § 300aa-11*(a)(2)(A).

[17] *Id.*

expressly covered by the Vaccine Act are unaffected by it. [18] Thus, it is proper for plaintiffs to pursue these claims in state or federal court without first filing for relief in the Court of Federal Claims. The majority of these claims regard causes of action vested in the parents of injured children. According to some courts, parents can pursue relief on their own behalf in this fashion, because they are not qualified petitioners under the Vaccine Act. [19]

Federal courts have uniformly allowed parents to pursue their own claims against vaccine manufacturers and administrators as long as the claims are not expressly covered by the Vaccine Act. For example, federal courts have allowed parents to pursue loss of filial consortium claims, assuming state law recognizes them. [20] However, federal courts have dismissed claims for medical expenses related to a child's vaccine injuries, because the Vaccine Act clearly allows for their reimbursement. [21]

Although Tennessee appellate courts have not had occasion to address what state law claims can be asserted outside the Court of Federal Claims, it is likely that they would follow the lead of the federal courts. However, the available relief in Tennessee is not likely to be significant in most cases. The bulk of parents' independent claims in vaccine injury cases revolve around their child's medical expenses and damages for loss of filial consortium. The Vaccine Act expressly covers medical expenses; therefore, they can only be recovered in the Court of Federal Claims. [22] Furthermore, although the Vaccine Act does not cover loss of filial consortium, Tennessee law does not recognize it except in cases of wrongful death. [23] Thus, parents cannot recover for loss of consortium in most vaccine injury cases. Because of these circumstances, a state law claim may not be viable regardless of federal case law.

One other cause of action that may be viable in Tennessee is infliction of emotional distress. No Tennessee appellate authority exists on whether such an action can be brought without first filing a claim in the Court of Federal Claims. Other jurisdictions have held that claims for infliction of emotional distress are not covered by the Vaccine Act. [24] Accordingly, the claims can be pursued in state or federal court absent proceedings in the Court of Federal Claims.

Assuming Tennessee courts will allow parents to assert infliction of emotional distress claims without first pursuing relief in the Court of Federal Claims, the parents will still face an uphill battle. Parents will find it extremely difficult to prove the elements of either intentional or negligent infliction of emotional distress based upon the manufacture or administration of routine vaccines. The key element of intentional infliction of emotional distress is, of course, "outrageous conduct," *i.e.*, conduct that is intolerable by civilized society. [25] Certainly, it would be difficult to argue that manufacturing or administering vaccines that are mandated by state law for certain activities such as attending public school amounts to intolerable conduct. Furthermore, it would be difficult to argue that manufacturing or

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[18] *See, e.g.,* Moss v. Merck & Co., 381 F.3d 501 (5<th> Cir. 2004); Schafer v. American Cyanamid Co., 20 F.3d 1 (1<st> Cir. 1994).

[19] *Id.*

[20] *See* Moss, 381 F.3d at 501; *Chiles v. American Home Products Corp.*, No. 4:03-CV802-A, 2003 WL 22287527 (N.D. Tex. Oct. 2, 2003).

[21] *Id.*

[22] 22 U.S.C. § 300aa-15.

[23] *See* ***Taylor v. Beard, 104 S.W.3d 507 (Tenn. 2003);*** Jordan v. Baptist Three Rivers Hosp., 984 S.W.2d 593 (Tenn. 1999).

[24] Chiles, 2003 WL 22287527 at * 2.

[25] Miller v. Willbanks, 8 S.W.3d 607, 614 (Tenn. 1999).

administering routine vaccines constitutes negligent conduct. [26] Therefore, any claim for infliction of emotional distress would be difficult, if not impossible, to prove.

Parents who pursue state law causes of action in Tennessee for their own injuries may also face another hurdle. Some courts from other jurisdictions have stayed civil lawsuits that are pending simultaneously with cases in the Court of Federal Claims. [27] These courts have cited many reasons for staying the lawsuits, including avoiding inconsistent judgments and preserving judicial resources. [28] Tennessee trial courts would likely follow suit. Consequently, parents seeking relief for damages not covered by the Vaccine Act may have to await adjudication of claims filed in the Court of Federal Claims on behalf of their children prior to litigating any civil lawsuits in Tennessee state court.

Conclusion

In Tennessee, parents of a child injured by a vaccine covered by the National Vaccine Injury Act must pursue claims on behalf of the child and claims for related medical expenses in the Court of Federal Claims. Once the court definitively rules on the claim, the parents then have the option of pursuing covered relief in state or federal court. While a claim is pending in the Court of Federal Claims, parents may also pursue state law causes of action not covered by the Vaccine Act. However, such causes of action will usually be difficult to effectively pursue in Tennessee, because of the burden associated with proving infliction of emotional distress and the lack of recognition of loss of filial consortium in personal injury cases.

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[26] *Camper v. Minor, 915 S.W.2d 437, 446 (Tenn. 1996).*

[27] *See, e.g.*, Case v. Merck & Co., No. Civ. A. 02-1779, 2003 WL 145427 (E.D.La. Jan. 17, 2003); *Liu v. Aventis Pasteur, Inc., 219 F.Supp.2d 762 (W.D.Tex. 2002).*

[28] *Id.*

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IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

ALOHA POOLS & SPAS OF
OF JACKSON, LLC

Plaintiff/Counter-Defendant/Appellee,
v.

Tenn. Ct. App. No.
W2023-00941-COA-R3-CV

KHALED ELEIWA a/k/a
KEVIN ELEIWA,

Madison Cir. Ct. No.
C-20-6

Defendant/Counter-Plaintiff/Appellant.

BRIEF OF APPELLEE
ALOHA POOLS & SPAS OF JACKSON, LLC

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Oral Argument Requested

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2. Whether the Trial Court acted within its broad discretion in denying Mr. Eleiwa's Rule 60 Motion for Relief from Judgment when the basis for the Motion was alleged "new evidence," which the Trial Court specifically found was produced during discovery and publicly available throughout the duration of the case.

3. Whether the Trial Court correctly applied the terms of the written contract, which Mr. Eleiwa voluntarily entered into, regarding waiver of jury trial, venue, and arbitration, whereby the plain language of the contract expressly provides that the parties waive the right to trial by jury, that venue shall be in Madison County, and that arbitration is not mandatory.

4. Whether the Court of Appeals should award appellate attorney's fees to Aloha and remand the case so the Trial Court can determine the amount of such fees whereby the written contract at issue expressly provides for an award of attorney's fees.

STATEMENT OF THE FACTS AND CASE

The case regards the construction of a residential swimming pool. (R. Vol. 1 at 1-2). On December 5, 2018, Defendant/Counter-Plaintiff/Appellant Khaled Eleiwa a/k/a Kevin Eleiwa (hereafter "Mr. Eleiwa") entered into a written contract with Plaintiff/Counter-Defendant/Appellee Aloha Pools and Spas of Jackson, LLC (hereafter "Aloha") for the construction of an in-ground swimming pool at his home in Lakeland, Tennessee. (R. Vol. 1 at 29-30, 140). The written contract provided that Mr. Eleiwa would pay Aloha "the total sum $67,730.00" for the swimming pool project. (R. Vol. 1 at 30). It is undisputed that Mr. Eleiwa entered into and signed the written contract on December 5, 2018. (R. Vol. 1 at 85).

Pursuant to the contract, Mr. Eleiwa made a down payment of $16,932.50, which amounted to 25% of the total sum. (R. Vol. 1 at 30). Three additional payments of $16,932.50 were to be paid at various points, with the last payment being due upon completion. (R. Vol. 1 at 30). The contract provided for payment of a finance charge of 1.5% per month for "past due" balances. (R. Vol. 1 at 29). It also provided for the payment of court costs and "reasonable attorney's fees" should Aloha have to sue to obtain any outstanding amounts. (R. Vol. 1 at 29).

After Mr. Eleiwa made the initial down payment, Aloha began construction of the swimming pool. (R. Vol. 1 at 26). In the middle of construction, Mr. Eleiwa decided that he wanted to modify the project by having Aloha add more concrete decking around the swimming pool. (R. Vol. 2 at 178). On April 6, 2019, Mr. Eleiwa signed a Change Order showing the modification. (R. Vol. 2 at 182). The additional concrete

added $12,973.00 to the price of the project as set forth in the Change Order. (R. Vol. 2 at 178). Therefore, the total sum of the swimming pool project increased from $67,730.00 to $80,703.00. (R. Vol. 2 at 178).

Aloha completed construction of the swimming pool, including the additional concrete decking, around June 19, 2019. (R. Vol. 2 at 208). Mr. Eleiwa and his family began using the pool at some point thereafter. (R. Vol. 1 at 80, 86, 89). However, Mr. Eleiwa failed to pay for the pool. (R. Vol. 2 at 178). Mr. Eleiwa made some payments towards the swimming pool, but he failed to pay the entire amount due under the contract. (R. Vol. 2 at 178). When added with the down payment, Mr. Eleiwa's total payments equated to $48,000.00. (R. Vol. 2 at 178). He failed to pay the remaining $32,703.00 despite requests from Aloha for collection of payment. (R. Vol. 2 at 178).

Instead of making payments, Mr. Eleiwa made complaints. (R. Vol. 2 at 209). He asserted various minor complaints about the pool during and after construction. (R. Vol. 2 at 209). For example, he complained that: (1) the "pool was dirty," (2) the vinyl liner in the pool had some "wrinkles," (3) the pool pump was "unreasonably loud," (4) there were "cracks" in his twenty year-old concrete driveway allegedly due to the construction crews, (5) crews did not "clean the street" in front of his house, (6) the pool stairs and handrails had some "rusting" on them, and (7) the pool slide "needed to have stones . . . built around it" so it would be approved by the homeowner's association. (R. Vol. 1 at 89-90, R. Vol. 2 at 177-180).

Aloha had crew members address these issues to the extent they could "at no additional charge." (R. Vol. 1 at 80, 177-180). Mr. Eleiwa

acknowledges that "Aloha was able to resolve some of those issues." (R. Vol. 1 at 140). Aloha even addressed complaints from Mr. Eleiwa that were not in the contract just to try and appease him, including pressure washing Mr. Eleiwa's driveway, adding additional filtration equipment, and assisting in having the homeowner's association approve the pool slide. (R. Vol. 1 at 80, 177-180). Each time Aloha would address a complaint, Mr. Eleiwa seemed to come up with a new one. (R. Vol. 2 at 209).

Despite Aloha's efforts at addressing the various complaints, and the fact that the contract required payment regardless of them, Mr. Eleiwa failed to pay the balance of the contract. (R. Vol. 2 at 176-188). Aloha, therefore, filed suit against Mr. Eleiwa for breach of contract on January 9, 2020. (R. Vol. 1 at 1). Aloha sought $32,703.00, which was the amount still owed on the contract. (R. Vol. 1 at 2). Aloha also sought finance charges of 1.5% per month, as well as attorney's fees, pursuant to the contract. (R. Vol. 1 at 2). Aloha amended the Complaint to also seek "a judgment for possession for all pool components and accessories." (R. Vol. 1 at 26-28).

Mr. Eleiwa responded to the Complaint by filing a Motion to Dismiss. (R. Vol. 1 at 7). Mr. Eleiwa argued that the Trial Court should dismiss the case for various reasons, including improper venue and mandatory arbitration.[1] (R. Vol. 1 at 7-8). The Trial Court denied the Motion based upon the express language in the contract. (R. Vol. 1 at

[1] Mr. Eleiwa also raised insufficiency of service of process; however, he did not appeal this issue. (R. Vol. 1 at 7-8; Appellant's Brief at 1-29).

32). Regarding venue, the contract provides: "The undersigned agree to the jurisdiction and venue of any disputes arising from this Agreement being in the courts of Madison County, Tennessee." (R. Vol. 1 at 4). Regarding arbitration, the contract provides: "Any controversy or claim arising out of or relating to this Agreement or to the breach thereof, shall be settled by arbitration" but "Arbitration shall not be mandatory for this Contractor (Aloha) to pursue its legal rights as to collection or repossession of any materials, supplies, or parts." (R. Vol. 1 at 4). Accordingly, the Trial Court (Judge Roy B. Morgan, Jr.) ruled that "the Contract allows for the matter to be heard in the courts of Madison County, Tennessee" and "the Contract between the parties does not require arbitration for the claims brought by Plaintiff." (R. Vol. 1 at 32).

Mr. Eleiwa thereafter filed his Answer, along with a Counter-Claim against Aloha. (R. Vol. 1 at 35). Via the Counter-Claim, Mr. Eleiwa alleged breach of contract, fraud/misrepresentation, and violations of the Tennessee Consumer Protection Act (TCPA). (R. Vol. 1 at 39-44). According to Mr. Eleiwa, Aloha breached the contract by "fail[ing] to timely complete the swimming pool and related accessories" in "a workmanlike manner." (R. Vol. 1 at 40). Mr. Eleiwa also alleged that Aloha fraudulently forged his name on the Change Order for the additional concrete decking, which increased the price of the pool by $12,973.00. (R. Vol. 1 at 40). Mr. Eleiwa asserted that these alleged acts equated to unfair and deceptive trade practices in violation of the TCPA. (R. Vol. 1 at 39-44).

In his Answer, Mr. Eleiwa also demanded a trial by jury. (R. Vol. 1 at 38, 44). Aloha responded by filing a Motion to Strike Mr. Eleiwa's

jury demand based upon the terms of the contract, which provides: "The parties voluntarily waive their right to a jury trial." (R. Vol. 1 at 29. 106-110). The Trial Court granted the Motion to Strike and ruled: "Plaintiff and Defendant voluntarily entered into a contract related to Plaintiff installing a pool at Defendant's residence" and "[p]ursuant to the plain language of the parties' contract, the parties voluntarily waived their right to trial by jury." (R. Vol. 1 at 128). The Trial Court further ruled: "Because the parties do not dispute the validity of the contract, the terms set forth in the contract are binding on them." (R. Vol. 1 at 128).

On June 22, 2022, the Trial Court conducted a bench trial regarding Aloha's Complaint and Mr. Eleiwa's Counter-Claim. (R. Vol. 2 at 176). The Trial Court heard testimony from numerous live witnesses, including Mr. Eleiwa and representatives of Aloha. (R. Vol. 2 at 176-184). The Trial Court also considered various exhibits, including video recordings of the pool project, the written contract at issue, and the executed Change Order. (R. Vol. 2 at 176-177). The Trial Court assessed the credibility of the witnesses as well. (R. Vol. 2 at 177-184).

The Trial Court found the witnesses from Aloha, including the "Owner," a "long-time salesman," the "Chief Financial Officer," and the "project manager," to be "credible witness[es]." (R. Vol. 2 at 177-179). In contrast, the Trial Court found that Mr. Eleiwa was not a credible witness. (R. Vol. 2 at 179-181). According to the Trial Court, Mr. Eleiwa's "credibility was impeached on cross-examination" for various reasons, including that Mr. Eleiwa "admit[ted] that he had recently

pled guilty to felony conspiracy to defraud the United States Internal Revenue Service in federal court in Memphis." (R. Vol. 2 at 180-181).

After hearing the live testimony of the witnesses and reviewing all of the exhibits, the Trial Court ruled in favor of Aloha. (R. Vol. 2 at 181-184). The Trial Court determined: (1) that Mr. Eleiwa contracted for the services rendered, including the additional concrete decking, (2) that Aloha adequately performed its contracted services and the pool installation, (3) that Aloha established the essential elements of its breach of contract claim, and (4) that Mr. Eleiwa failed to prove any counter-claim or to establish a violation of the TCPA by Aloha. (R. Vol. 2 at 181-184). Therefore, the Trial Court entered a judgment in favor of Aloha in the amount of $32,703.00, plus court costs, post-judgment interest at the statutory rate, and "reasonable attorney's fees." [2] (R. Vol. 2 at 184). The Final Order and Judgment was entered on August 19, 2022. (R. Vol. 2 at 184).

On January 31, 2023, Mr. Eleiwa filed a Motion for Relief from Judgment pursuant to Tennessee Rule of Civil Procedure 60. (R. Vol. 2 at 191). Mr. Eleiwa claimed that "newly discovered evidence" entitled him to relief from the Judgment. (R. Vol. 2 at 193). According to Mr. Eleiwa, the "newly discovered evidence" was that Aloha failed to obtain

[2] The Trial Court instructed Aloha to "submit an affidavit of fees to the Court for hearing and/or approval." (R. Vol. 2 at 184). Aloha later filed an Affidavit of Counsel regarding the amount of its attorney's fees, and the Trial Court awarded Aloha $36,771.00 in attorney's fees. (R. Vol. 2 at 153, 211).

a final permit for the swimming pool project and that the pool failed inspection. (R. Vol. 2 at 191-192).

The Trial Court (now Judge Joseph T. Howell due to Judge Roy B. Morgan, Jr.'s transition to Senior Judge after the trial of this case) denied Mr. Eleiwa's Motion for Relief from Judgment following a hearing on May 15, 2023. (R. Vol. 2 at 210). The Trial Court found that the alleged "newly discovered evidence" asserted by Mr. Eleiwa "does not qualify as new evidence as information on the permits were requested and provided in discovery and are a matter of public record and were available to both parties." (R. Vol. 2 at 210-211). As noted by the Trial Court, Aloha had provided Mr. Eleiwa with the building permit information during discovery. (R. Vol. 2 at 206). Furthermore, the contract expressly provided that Mr. Eleiwa, not Aloha, was the one responsible for "obtain[ing] all necessary permits."[3] (R. Vol. 2 at 187).

On June 26, 2023, Mr. Eleiwa filed a Notice of Appeal as to the Order Denying Motion for Relief from Judgment only. (R. Vol. 2 at 212). The Notice of Appeal provides that only the Order "filed on May 30, 2023," which is the Order Denying Motion for Relief from Judgment, is being appealed. (R. Vol. 2 at 212).

[3] The alleged permit that Mr. Eleiwa referenced regarded a "pool house" and "garage," which are things that Aloha did not even construct. (R. Vol. 2 at 197).

STANDARD OF REVIEW

The standard of review for a trial court's denial of a motion for relief from judgment is abuse of discretion. Henry v. Goins, 104 S.W.3d 475, 479 (Tenn. 2003). Thus, the standard of review as to the Trial Court's Order Denying Mr. Eleiwa's Rule 60 Motion for Relief from Judgment is abuse of discretion. Such is found "only when the trial court applied incorrect legal standards, reach an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employed reasoning that causes an injustice to the complaining party." State v. Jordan, 325 S.W.3d 1, 39 (Tenn. 2010)(quoting State v. Banks, 271 S.W.3d 90, 116 (Tenn. 2006)).

The standard of review of a judgment following a bench trial is *de novo* with a presumption of correctness as to all factual findings of the trial court. Armbrister v. Armbrister, 414 S.W.3d 685, 692 (Tenn. 2013)(citing Tenn. R. App. P. 13(d)). No presumption of correctness attaches to the trial court's legal conclusions. Id. Thus, the standard of review as to the trial court's Final Order and Judgment is *de novo* with a presumption of correctness as to the findings of fact, and no presumption of correctness as to the legal conclusions, including interpretation of contractual provisions. See Estate of Hunt v. Hunt, 389 S.W.3d 755, 759 (Tenn. Ct. App. 2012).

ARGUMENT

I. The only issue properly before the Court of Appeals is whether the Trial Court acted within its broad discretion in denying Mr. Eleiwa's Rule 60 Motion for Relief from Judgment.

Tennessee Rule of Appellate Procedure 3 governs appeals as of right and notices of appeal. Regarding the "Content of the Notice of Appeal," Rule 3 provides: "The notice of appeal shall specify the party or parties taking the appeal by naming each one in the caption or body of the notice . . ., shall designate the judgment from which relief is sought, and shall name the court to which the appeal is taken." Tenn. R. App. P. 3(f)(emphasis added). Therefore, an appellant must specifically set forth the particular judgment from which relief is sought to effectuate an appeal.

An appellant must set forth which particular judgments are being appealed for the appellate court to have jurisdiction. An appellate court lacks jurisdiction over judgments not specifically appealed from. "Tenn. R. App. P. 3(f) limits the scope of appellate review to the judgment or order designated." Cox v. Shell Oil Co., 196 S.W.3d 747, 760 (Tenn. Ct. App. 2005)(citing Goad v. Pasipanodya, 1997 Tenn. App. LEXIS 858, NO. 01A01-9509-CV-00426 (Tenn. Ct. App. Dec. 5, 1997)). "Tenn. R. App. P. 3(f) limits the scope of appellate review to the judgment or order designated by the notice." Id.

In this case, Mr. Eleiwa clearly designated in his Notice of Appeal what judgment or order he was appealing. The Notice of Appeal provides that only the Order "filed on May 30, 2023" is being appealed.

(R. Vol. 2 at 212). The "May 30, 2023" Order is the Order Denying Motion for Relief from Judgment. (R. Vol. 2 at 212). Mr. Eleiwa did not appeal the Final Order and Judgment, which was filed on August 19, 2022. (R. Vol. 2 at 176). Therefore, Mr. Eleiwa filed a Notice of Appeal as to the Order Denying Motion for Relief from Judgment only, and the Court of Appeals only has jurisdiction over the Trial Court's decision to deny Mr. Eleiwa's Motion for Relief from Judgment.

A similar scenario occurred in the case of Hall v. Hall, 772 S.W.2d 432 (Tenn. Ct. App. 1989). In Hall, the case was "heard on its merits by the Trial Judge." Id. at 433. After entry of the final judgment, the defendant filed a "Motion to Amend or New Trial" and a "Petition to Modify Judgment," which were denied by the trial court. Id. at 434. The defendant filed a Notice of Appeal as to the judgment "entered May 13, 1987," and "[t]here was no reference . . . to the order entered on October 9, 1987." Id. at 435. The Court of Appeals ruled that the defendant failed to appeal anything other than the judgment specifically listed in the Notice of Appeal.

The explicit language of Tennessee Rule of Appellate Procedure 3(f) dictated the result. The Court of Appeals directed: "the clear and specific wording of the notices of appeal limits the issues on this appeal to the judgment designated in the notices." Id. at 436. As stated by the Court of Appeals, Tennessee Rule of Appellate Procedure 3(f) "requires" that the "notice of appeal . . . shall designate the judgment from which relief is sought. . . ." Id. at 435 (quoting Tenn. R. Civ. P. 3(f)). See also Cox v. Shell Oil Co., 196 S.W.3d 747, 761 (Tenn. Ct. App. 2005)(directing that the "notice purposes" of Tenn. R. App. P. 3(f)

require a party appealing a judgment to specify which particular judgment or order is being appealed; otherwise, other parties are left "to guess" whether other orders are being appealed.); but see Cox v. Tenn. Farmers Mut. Ins. Co., 297 S.W.3d 237 (Tenn. Ct. App. 2009)(finding that the Court of Appeals did have jurisdiction over other issues even though "the notice only designated the final judgment.").

A similar scenario also occurred in the case of Goad v. Pasipanodya, 01A01-9509-CV-00426, 1997 Tenn. App. LEXIS 858 (Tenn. Ct. App. Dec. 5, 1997). The plaintiff in Goad filed a Notice of Appeal that "identifie[d] only the trial court's June 19, 1995 order and [did] not mention the March 17, 1995 order." Id. at *5. According to the Court of Appeals, "Tenn. R. App. P. 3(f) limit[ed] his appeal to the June 19, 1995 order." Id.; see also Grigsby v. Univ. of Tenn. Med. Ctr., E2005-01099-COA-R3-CV, 2006 Tenn. App. LEXIS 108 (Tenn. Ct. App. Feb. 22, 2006)(directing that the appellant failed to appeal any judgment besides the one "entered in this action the 10th day of March 2005," because it is the only one he set forth in his Notice of Appeal).

The same result is required here. Tennessee Rule of Appellate Procedure 3(f) is explicit. It provides that a notice of appeal "shall designate the judgment from which relief is sought." Tenn. R. App. P. 3(f)(emphasis added). As the Court of Appeals has directed: "Parties seeking to perfect an appeal to this Court ignore the requirements of Tenn. R. App. P. 3 at their peril." Howse v. Campbell, M1999-01580-COA-R3-CV, 2001 Tenn. App. LEXIS 311 at *8 (Tenn. Ct. App. May 2, 2001). Mr. Eleiwa specifically set forth that he sought to appeal only the "May 30, 2023" Order Denying Motion for Relief from Judgment. (R.

Vol. 2 at 212). The Notice of Appeal is specific and clear. As in Hall discussed above, "the clear and specific wording of the notices of appeal limits the issues on this appeal to the judgment designated in the notice[ ]." 772 S.W.2d at 436.

An appeal of any orders other than the Motion for Relief from Judgment would be untimely anyway. Tennessee Rule of Appellate Procedure 4 governs the "Time for Filing Notice[s] of Appeal." See Tenn. R. App. P. 4. The Rule provides: "in an appeal as of right to the . . . Court of Appeals . . . , the notice of appeal required by Rule 3 shall be filed with the clerk of the appellate court within 30 days after the date of entry of the judgment appealed from. . . ." Id. (emphasis added). As stated by the Court of Appeals, "Tenn. R. App. P. 4(a) requires that notices of appeal must be 'filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from'." Gribsby, 2006 Tenn. App. LEXIS 108 at *5. Notably, "[t]he notice of appeal requirement is jurisdictional and mandatory in all civil cases. If the notice of appeal is not filed as required by Rule 4, an appellate court is without jurisdiction to hear the issues raised on the defective appeal." Id. at *6-*7 (quoting Hutcheson v. Barth, 178 S.W.3d 731, 733 (Tenn. Ct. App. 2005)(footnotes omitted)).

Mr. Eleiwa failed to timely appeal the Final Order and Judgment in this case. The Trial Court entered the Final Order and Judgment on August 19, 2022.[4] (R. Vol. 2 at 176). Plaintiff waited for over five

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[4] Mr. Eleiwa may argue that the Final Order and Judgment was not final until the Trial Court entered the amount of attorney's fees on May

months to file a post-judgment motion. (R. Vol. 2 at 191). On January 31, 2023, Mr. Eleiwa filed a Motion for Relief from Judgment pursuant to Tennessee Rule of Civil Procedure 60. (R. Vol. 2 at 191). Thus, more than 30 days passed before the filing of the Motion, and the opportunity to appeal lapsed.

The time for Mr. Eleiwa to appeal the Final Order and Judgment, including any pre-trial rulings, expired thirty days after entry. As noted by the Court of Appeals, "[a] Rule 60 motion,[5] however, does not toll the time within which to bring an appeal." Oakley v. State, W2002-00095-COA-R3-CV, 2003 Tenn. App. LEXIS 14, *11 (Tenn. Ct. App. Jan. 8, 2003)(citing Tenn. R. Civ. P. 60.02). For an appeal of the Final Order and Judgment to have been timely, Mr. Eleiwa had to file a Notice of Appeal (or a Rule 59 motion, which he never did) within thirty days of its entry. See Tenn. R. App. P. 4(a), (b). He failed to do so, as he filed his only Notice of Appeal on June 28, 2023. (R. Vol. 2 at 215). Such Notice of Appeal was only timely as to appealing the Motion for Relief from

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30, 2023. (R. Vol. 2 at 210). Any such argument would be inaccurate, as the Trial Court awarded attorney's fees via the Final Order and Judgment. (R. Vol. 2 at 184). The later Order simply set the amount of the attorney's fees, which Mr. Eleiwa has not even raised as an issue in his Brief. (See generally Brief of Appellant).

[5] A motion filed pursuant to Tennessee Rule of Civil Procedure 59, which must be filed within thirty days of the Judgment, does extend the time for appeal. However, "[t]hese motions are the only motions contemplated in these rules for extending the time for taking steps in the regular appellate process." Tenn. R. Civ. P. 59.01 (emphasis added). Notably, Mr. Eleiwa filed a Rule 60 Motion, not a Rule 59 Motion. (R. Vol. 2 at 191).

Judgment, and the Court of Appeals only has jurisdiction over the Trial Court's Order on this issue.

II. The Court of Appeals should affirm the Trial Court's denial of Mr. Eleiwa's Rule 60 Motion for Relief from Judgment, because the alleged "new evidence" cited as a basis was produced during discovery and publicly available throughout the case.

The Trial Court acted well within its discretion in denying Mr. Eleiwa's Motion for Relief from Judgment. A motion for relief pursuant to Rule 60 is limited to specific and exceptional circumstances, such as: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud, misrepresentation, or other misconduct of an adverse party; or (3) any other reason that justifies relief from the operation of the judgment. Tenn. R. Civ. Proc. 60.02. One basis for a motion under Rule 60.02 is "new evidence." However, "new evidence" is defined as that which "was not known to the moving party prior to or during trial and that [which] could not have been known to him through the exercise of reasonable diligence." In re I.G., M2015-01974-COA-R3-JV, 2017 Tenn. App. LEXIS 50 at *10 (Tenn. Ct. App. Jan. 27, 2017)(quoting Pryor v. Rivergate Meadows Ap. Assocs. L.P., 338 S.W.3d 882, 887 (Tenn. Ct. App. 2009)). Despite Mr. Eleiwa's argument, no "new evidence" exists in this case.

The purported "new evidence" herein consisted of alleged hearsay statements from an undisclosed inspector from Memphis and Shelby County Code Enforcement. (R. Vol. 2 at 191-192). Mr. Eleiwa claimed that such statements showed that Aloha failed to obtain a final permit for the pool project. (R. Vol. 2 at 192). Moreover, Mr. Eleiwa claimed

that the inspector allegedly marked that the pool failed inspection, pointing to a Building Department Inspections card. (R. Vol. 2 at 192). Notably, this card mentions a "sunroom" and "garage," which Aloha did not build and that were not part of the contract at issue. (R. Vol. 2 at 187, 197).

The Trial Court specifically found that the alleged "new evidence" cited by Mr. Eleiwa was anything but "new." As stated by the Trial Court, "the new evidence asserted by [Mr. Eleiwa] does not qualify as new evidence as information on the permits were requested and provided in discovery . . . ." (R. Vol. 2 at 210-211). The specific permit numbers were expressly identified in Aloha's discovery responses. (R. Vol. 2 at 206). The Trial Court also noted that information about the permits were "a matter of public record and were available to both parties" throughout the case. (R. Vol. 2 at 211).

Therefore, there was no "new evidence." Rather, there was simply information that Mr. Eleiwa failed to attempt to utilize until after he lost at trial. Mr. Eleiwa had information about the permits throughout the case; yet, he failed to call anyone at trial or attempt to present evidence about them at trial. (R. Vol. 2 at 206). His failure to utilize this information prior to or during trial does not now make it "new evidence." The Trial Court certainly acted within its broad discretion in denying the Rule 60 Motion in light of these facts.

Furthermore, there was nothing in the Building Department Inspections card submitted post-trial by Mr. Eleiwa that indicates the pool even failed inspection. (R. Vol. 2 at 197). Rather, the card referenced a "pool house" and "garage," which are things that Aloha did

not construct and that were not part of the contract at issue. (R. Vol. 2 at 187, 197). The contract also expressly provides that Mr. Eleiwa, not Aloha, was the one responsible for "obtain[ing] all necessary permits." (R. Vol. 2 at 187). These facts set forth in the record provide further reason and support for the Trial Court's denial of Mr. Eleiwa's Rule 60 Motion for Relief from Judgment.

In sum, Mr. Eleiwa's entire argument in his Rule 60 Motion was reliant on evidence that he had, or easily could have had, prior to trial. Tennessee law is very clear that "new evidence" is not that which is known by the moving party prior to or during trial or that could have been available to the moving party prior to or during trial. See In re I.G., 2017 Tenn. App. LEXIS 50 at *10. The failure on Mr. Eleiwa's part to utilize information available to him regarding the permits was not grounds to set aside the Final Order and Judgment entered by the Trial Court following a full trial.

III. Even if Mr. Eleiwa properly appealed the actual Judgment of the Trial Court, the Court of Appeals should still affirm, because the Trial Court conducted a full trial and correctly enforced the terms of the written contract the parties voluntarily entered into.

Mr. Eleiwa filed this appeal, yet he failed to provide the Court of Appeals with a transcript of the proceedings. (R. Vol. 2 at 220). This failure is fatal as to any review of the Trial Court's Final Order and Judgment. See Huddleston v. O'Deneal, W2001-02064-COA-R3-CV, 2002 Tenn. App. LEXIS 206 at *6 (Tenn. Ct. App. March 19, 2002)("The burden is likewise on the appellant to provide the Court with a transcript of the evidence or a statement of the evidence from which

this Court can determine if the evidence does preponderate for or against the findings of the trial court."). Mr. Eleiwa had his day in court, and he does not even seem to take issue with the Trial Court's findings of fact.

Instead, Mr. Eleiwa takes issue with the Trial Court's pre-trial rulings as to the application of the contract he admittedly signed. (Brief of Appellant at 17-25; R. Vol. 1 at 77-78). Mr. Eleiwa stated during the pendency of the case that he "admits that the contract speaks for itself." (R. Vol. 1 at 79). However, now that he lost at trial, he wants to argue that the contract does not do so. He suggests that the Trial Court erred by applying the contract as written regarding jury trial, venue, and arbitration. (Brief of Appellant at 17-25). As found by the Trial Court, Mr. Eleiwa's position is contrary to express terms of the contract.

A. The Trial Court correctly ruled that the parties waived their right to trial by jury as expressly set forth in the plain language of the contract.

Mr. Eleiwa argues that he should have been permitted a jury trial as opposed to a bench trial. (Brief of Appellant at 18-21). However, the contract that Mr. Eleiwa admittedly signed is clear on the issue. It provides: "The parties voluntarily waive their right to a jury trial." (R. Vol. 2 at 187). As found by the Trial Court, this language is plain and unequivocal. (R. Vol. 1 at 128).

It has long been held in Tennessee that parties may waive the right to a jury trial. See, e.g., Russell v. Hackett, 230 S.W.2d 191 (Tenn. 1950). As highlighted by the Court of Appeals in the case of Poole v. Union Planters Bank, a "pre-dispute contractual jury waiver can be

enforced upon motion at any time up to the eve of trial." 337 S.W.3d 771, 778 (Tenn. Ct. App. 2010). The Court of Appeals in Poole was tasked with deciding whether a pre-dispute contractual waiver of a party's right to trial by jury is enforceable in Tennessee. The Court of Appeals flatly rejected the notion that contractual waiver of a jury trial should be prohibited in Tennessee. Id. at 778. As stated by the Court of Appeals: "the decision to contractually waive the right to trial by jury is one that courts should respect unless the agreement violates public policy." Id.

Once the parties sign a contract waiving their right to a jury trial, then that right is forfeited. As stated by the Court of Appeals, "[a] party who has freely waived the right to trial by jury has relinquished said right; it no longer exists under our constitution. . . . A motion to strike jury demand, therefore, is an appropriate mechanism by which to assert contractual waiver of the right to jury trial under Rule 39.01(b)." Id. at 781-82. In line with the holding in Poole, the Trial Court properly enforced the contract, specifically including the waiver of the right to trial by jury.

Mr. Eleiwa asserts several arguments as to why he should be an exception and receive a jury trial despite admittedly signing the contract expressly waiving it. First, he argues that the jury waiver provision in the contract was not "conspicuous." (Brief of Appellant at 20). Second, Mr. Eleiwa argues that he lacked the "business acumen" to know what the contractual language meant and lacked legal representation when he signed the contract. (Brief of Appellant at 20).

Finally, Mr. Eleiwa argues that he lacked any "bargaining power" and was, therefore, compelled to sign the contract. (Brief of Appellant at 20).

These arguments are unpersuasive and come nowhere close to meeting the burden of voiding the contract or its provisions. See Poole, 337 S.W.3d at 783-784. First, as found by the Trial Court, the jury waiver provision is "plain" and clear. (R. Vol. 1 at 128). It is set forth on the first page of a contract that is barely over a single page. (R. Vol. 2 at 187-188). "If the contract language is unambiguous, the 'literal meaning of the language controls the outcome of contract disputes'." Tennison v. Penn. Warranty Corp., No. M2004-02605-COA-R3-CV, 2005 Tenn. App. LEXIS 734 at *5 (Tenn. Ct. App. Nov. 22, 2005)(citations omitted).

Second, Mr. Eleiwa is certainly not an unsophisticated party and any suggestion of such is disingenuous. He is admittedly a "business owner" and lives in a house that he estimated is worth Eight Hundred Thousand Dollars ($800,000.00). (R. Vol. 1 at 83; R. Vol. 2 at 180). There is nothing in the record suggesting that he could not, or did not, read the contract or that he did not understand its plain terms. Mr. Elewia could have hired counsel to review the contract should he have wanted as well. There is nothing in the record suggesting that he could not have done so. Accordingly, his alleged lack of "business acumen" is an invalid excuse for trying to avoid the plain terms of the contract. See Moody Realty Co. v. Heustis, 237 S.W.3d 666, 676 (Tenn. Ct. App. 2007)("One who signs a contract cannot later plead ignorance of its contents if there was opportunity to read it before signing. . . . The law will not allow a party to enter a contract and then seek to avoid

performance because he did not read the agreement or know its contents.").

Third, Mr. Eleiwa was not forced to sign the contract regardless of his alleged lack of "bargaining power." The contract was for a swimming pool to be built at his residence. (R. Vol. 2 at 180). Mr. Eleiwa did not have to purchase a pool at all. Also, he could have purchased a pool from another pool company if he did not like the terms of the contract with Aloha. Mr. Eleiwa sought out Aloha and was not forced to enter into the contract. He did so of his own free will, and now he must abide by its terms.

B. The Trial Court correctly ruled that Madison County was the appropriate venue as expressly set forth in the plain language of the contract.

Mr. Eleiwa also argues that he should have been able to litigate the case in Shelby County as opposed to Madison County. (Brief of Appellant at 23-25). However, the contract that Mr. Eleiwa admittedly signed expressly provides: "The undersigned agree to the jurisdiction and venue of any disputes arising from this Agreement being in the courts of Madison County, Tennessee." (R. Vol. 2 at 187). As with the jury trial provision, Mr. Eleiwa wants to rewrite the contract despite the fact that he already received a fair trial.

To try and avoid application of this express provision in the contract, Mr. Eleiwa argues that venue is only proper in Shelby County, because the lawsuit is a "local action" as opposed to a "transitory action." (Brief of Appellant at 23-25). This argument distorts Tennessee law and is unpersuasive.

First, the action is "transitory," not "local." The action does not involve quieting title or trespass. Instead, it involves the construction of a pool, which can be contracted for and constructed anywhere. The case of Kampert v. Valley Farmers Co-op rejects the very argument asserted by Mr. Eleiwa. No. M2009-02360-COA-R10-CV, 2010 Tenn. App. LEXIS 657 (Tenn. Ct. App. Oct. 19, 2010). In Kampert, the plaintiffs contracted with the defendant to construct an operational diary facility, including barns and milking facilities, on the plaintiffs' farm. Id. at *2. The plaintiffs' farm was in Giles County. Id. However, the construction contract entered into by the parties provided that "any litigation" shall be filed in McMinn County. Id.

Despite the contractual venue provision, the plaintiffs filed suit in Giles County where their property was located. Id. Like Mr. Eleiwa, the plaintiffs sued for breach of contract and violation of the TCPA. Id. at *2-*3. The defendant then filed a motion to dismiss for improper venue based upon the contract. Id. at *3. In response, the plaintiffs argued that the action was "local;" therefore, it had to be filed in Giles County despite the contract. Id. The trial court agreed with the plaintiffs and denied the defendant's motion regarding venue. Id. at *4.

The Court of Appeals reversed and flatly rejected the plaintiffs' argument, which is the precise argument made by Mr. Eleiwa. According to the Court of Appeals, the action was "transitory," not "local," because it involved construction on the plaintiffs' property, not true "injury to land." Id. at *9-*10. The Court of Appeals directed:

> If we were to hold this to be a local action, it would effectively make all actions on construction contracts local,

> and it would render void any forum selection clause in a construction contract that designates venue in a county other than the one where the construction takes place. Such a deviation from current well-established law would not only overturn settled precedent, it would contradict the statutory implication that contracts for improvement to real estate may include choice of venue provisions.

Id. at *11-*12.

The Court of Appeals relied upon Tennessee statutory law regarding venue in reaching this decision. The venue statutes "implicitly recognize[ ] that parties can stipulate to a particular venue for resolution of transitory actions." Id. at *6-*7. They also provide that there is no prohibition on venue selection provisions regarding improvement to real property in Tennessee. Id. at *12. As stated by the Court of Appeals:

> In accordance with the canon's dictates, we may legitimately infer that by rendering void only those venue selection provisions which send litigation involving contracts for the improvement of real property in this state to forums in other states, our legislature was implicitly recognizing the presumptive validity of venue selection clauses in those construction contracts that provide for venue in a particular forum in this state.

Id. at *13-*14. The same reasoning and result is required in this case, which regards a construction contract providing for venue in a particular forum in this state.

Mr. Eleiwa suggests that his Counter-Claim makes his case different than Kampert, because he accused Aloha of damaging his driveway and concrete during the pool construction project. (Brief of Appellants at 24-25). This argument is unpersuasive. Anytime there is construction and improvement to real property, there is going to be disturbances and perceived damage to the existing property. That is the nature of construction. However, if such transformed every action regarding a construction project from a transitory one to a local one, then all actions regarding improvements to real property would be local. This is precisely what the Court of Appeals ruled in Kampert, in citing to Tennessee's venue statutes, should be avoided.

Furthermore, Mr. Eleiwa waived any argument regarding venue as to the claims he asserted via the Counter-Claim by failing to raise them in the Trial Court. Mr. Eleiwa never filed a motion as to venue in the Trial Court after he filed his Counter-Claim. At the time he filed his Motion to Dismiss regarding the venue issue, he had not yet filed his Counter-Claim. (R. Vol. 1 at 7-8, 35). The only pending action was that for collection of payment for the pool filed by Aloha.[6] (R. Vol. at 1-2).

Mr. Elewia voluntarily filed his Counter-Claim in the Madison County Circuit Court, not the Shelby County Circuit Court, and asked for a "trial" in Madison County. (R. Vol. 1 at 35, 44). He also never filed a motion as to venue after he did so. Therefore, Mr. Eleiwa waived any perceived venue argument regarding his Counter-Claim. See Martin v.

[6] An action for collection of payment is certainly not "local."

Rolling Hills Hospital, LLC, 600 S.W.3d 322, 337 (Tenn. 2020)(stating that issues not raised in the trial court are generally deemed waived).

C. The Trial Court correctly ruled that arbitration was not required as set forth in the plain language of the contract.

Mr. Eleiwa lastly argues that he should not have received a trial at all. (Brief of Appellant at 21-23). He suggests that the case should have been arbitrated. (Brief of Appellant at 21-23). He avers that his "counter claim should have triggered arbitration" via the terms of the contract. (Brief of Appellant at 21). As with his other arguments, this one is directly contrary to the language of the contract that he signed. As found by the Trial Court: "the Contract between the parties does not require arbitration . . . ." (R. Vol. 1 at 32). In addition, Mr. Eleiwa waived any argument as to arbitrating his Counter-Claim by failing to properly raise it in the Trial Court.

The contract signed by Mr. Eleiwa does provide for arbitration in some circumstances. As he notes, the contract states: "Any controversy or claim arising out of or relating to this Agreement or the breach thereof, shall be settled by arbitration." (Brief of Appellant at 21; R. Vol. 1 at 4). However, it further states: "Arbitration shall not be mandatory for the Contractor to pursue its legal rights as to collection or repossession of any materials, supplies, or parts." (R. Vol. 2 at 187). As such, the parties agreed, per the terms of the contract, that arbitration would not be required if Aloha had to sue to recover monies owed to it or repossess supplies, which is the relief clearly requested in the Complaint and Amended Complaint. (R. Vol. 1 at 1-2, 27).

Mr. Eleiwa suggests that at least the claims he asserted via the Counter-Claim should have been arbitrated. (Brief of Appellant at 21). However, Mr. Eleiwa waived this argument. First, Mr. Eleiwa voluntarily filed his Counter-Claim in the Madison County Circuit Court and even asked for a "trial." (R. Vol. 1 at 35, 44). Second, he never filed a motion for arbitration or sought such after he filed his Counter-Claim. The only time Mr. Eleiwa sought arbitration in the Trial Court was when Aloha's claims for collection and repossession of pool supplies were pending. (R. Vol. 1 at 1-2, 12). At the time the Trial Court ruled on Mr. Elewia's Motion to Dismiss, which was based in part on seeking arbitration, only Aloha's claim was pending. (R. Vol. 1 at 1-2, 32, 35). Mr. Eleiwa cannot now argue that he should have been able to arbitrate his claims when he never sought to do so in the Trial Court. See Martin, 600 S.W.3d at 337 (stating that issues not raised in the trial court are generally deemed waived).

IV. The Court of Appeals should award appellate attorney's fees to Aloha and remand the case to the Trial Court to determine the amount of such fees.

As found by the Trial Court, Aloha is entitled to recover attorney's fees from Mr. Eleiwa pursuant to the written contract executed by the parties. The Trial Court specifically found that Aloha is entitled to attorney's fees under the contract and awarded Aloha "reasonable attorney's fees" incurred in the trial court proceedings. (R. Vol. 2 at 184). Aloha should also be able to recover its attorneys' fees incurred in defending this appeal, which Mr. Eleiwa instituted. The contractual provision at issue applies equally to attorneys' fees incurred during the

trial court proceedings and appellate court proceedings. (R. Vol. 2 at 187)("Any breach of this Agreement, including but not limited to the failure to pay Contractor for services provided, shall result in Owner paying the cost of collection fees, including . . . reasonable attorney's fees of Contractor and court costs.").

Appellate courts have the authority to award appellate attorney's fees. When a party requests an award of appellate attorney's fees, the appellate court may: "(1) deny the request; (2) grant the request and set the amount; (3) grant the request and remand to the trial court to set the amount; or (4) remand to the trial court to determine whether the award should be made and, if so, in what amount." G.T. Issa Constr., LLC v. Blalock, E2020-00853-COA-R3-CV, 2021 Tenn. App. LEXIS 459 at *31-*32 (Tenn. Ct. App. Nov. 23, 2021)(citing Killingsworth v. Ted Russell Ford, Inc., 205 S.W.3d 406, 411 n.2 (Tenn. 2006)). When the parties have a valid and enforceable contract that requires an award of attorney's fees, then "appellate courts must enforce that agreement." Id. (citing Eberbach v. Eberbach, 535 S.W.3d 467, 478 (Tenn. 2017)).

As found by the Trial Court, the parties in this case entered into a valid and enforceable written contract that expressly provides for an award of attorney's fees. (R. Vol. 2 at 184). The Trial Court awarded attorney's fees to Aloha after the trial of the matter on this basis. (R. Vol. 2 at 184). The Court of Appeals should award appellate attorney's fees to Aloha as well. The case can then be remanded for a determination of an amount.

CONCLUSION

This Court should affirm the ruling of the Trial Court, which ruled for Aloha and denied Defendant's Motion for Relief from Judgment. This Court should grant Aloha's request for appellate attorney's fees and remand the case to the Trial Court for a determination of the amount to be awarded.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Section 3, Rule 3.02(c) of Tenn. Sup.Ct. R. 46, the undersigned certifies that this brief complies with the requirements set forth in Section 3, Rule 3.02 of Rule 46. Number of words contained in this brief: 8177.

s/ Craig P. Sanders

CERTIFICATE OF SERVICE

I certify that on October 13, 2023 an exact copy of the foregoing was served via the Court's electronic filing system. Attorneys who are not registered users will be mailed, first class postage prepaid, a copy at:

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Electronically RECEIVED on May 15, 2024
Appellate Court Clerk

Electronically FILED on May 15, 2024
Appellate Court Clerk

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

Payton Castillo, surviving spouse of her husband, Marshall Robert Castillo, Deceased, and Payton Castillo Individually,	)	Tennessee Supreme Court E2022-00322-SC-R11-CV
Plaintiff/Appellee, vs.	)	Tennessee Court of Appeals E2022-00322-COA-R9-CV
David Lloyd Rex, M.D., Virtual Radiologic Professionals of Minnesota, P.A., Virtual Radiologic Professionals, LLC, Virtual Radiologic Services, LLC, Thomas R. Rimer, M.D., Diagnostic Imaging Consultants, P.C., Memorial Health Care System, Inc. d/b/a CHI Memorial,	)	Hamilton County Circuit Court 20C1270
Defendants/Appellants.	)	

BRIEF OF AMICUS CURIAE
TENNESSEE HOSPITAL ASSOCIATION

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STATEMENT OF THE ISSUES

1. Whether information related to the quality review process, which is specifically protected by the Tennessee Patient Safety and Quality Improvement Act (TPSQIA) from "discovery" or from being used "in any judicial or administrative proceeding," can be discovered and used in litigation whereby someone who knows of the information relays it to someone else, *i.e.* whether the quality review privilege can be waived.

2. Whether the Court of Appeals' decision, which judicially amends the TPSQIA to allow for waiver of the quality review privilege in contrast to precedent from this Court, will undermine the clear purpose of the TPSQIA and harm the quality of healthcare in Tennessee by discouraging the quality review process.[1]

[1] While the parties set forth slightly different questions that are specific to this case, these two questions are the broader ones that this Court must answer and that will impact countless hospitals, providers, and patients in Tennessee moving forward.

INTEREST OF AMICUS CURIAE

The Tennessee Hospital Association (THA) is an organization consisting of over 160 member hospitals and systems. Members of the THA routinely utilize quality improvement processes and deal with the Tennessee Patient Safety and Quality Improvement Act (TPSQIA) codified at Tennessee Code Annotated § 68-11-272. The THA seeks to improve the quality of healthcare and patient safety in Tennessee. The THA believes that the use of confidential and privileged quality improvement processes is vital to doing so. The THA voices the concerns and views of Tennessee's hospitals and systems as to the importance of the quality review process and the significance of confidentiality and protections surrounding the process in order to ensure candid review and a high level of patient safety.

ARGUMENT

I. The Court of Appeals erred in this case by effectively holding that the protections afforded by the Tennessee Patient Safety and Quality Improvement Act (TPSQIA) can be waived, which undermines the text and purpose of the Act.

A. The privilege afforded by the TPSQIA, which protects the confidentiality of the quality review process, is critical to ensuring high quality healthcare in Tennessee.

It is well-documented that medical errors and mistakes sometimes occur and, unfortunately, can cause patients to have negative health outcomes. See Institute of Medicine, To Err Is Human: Building a Safer System at 1 (2000). The medical profession has historically tried to minimize such outcomes by regulating itself using institutional-based processes designed to identify and remedy substandard care. See Lee Med., Inc. v. Beecher, 312 S.W.3d 515, 533 (Tenn. 2010). The "peer review" or "quality review process" has long been what the medical profession "firmly believes" is the best way to minimize such errors and to ensure the quality of healthcare. Id.

However, the rise in malpractice litigation in the United States hampered these processes. Fear of discovery in civil lawsuits discouraged hospitals, doctors, and other providers from recording or sharing information about adverse events and near misses. See Institute of Medicine, To Err Is Human: Building a Safer System at 43 (2000). Rather than using data and research to explore the causes of medical errors and to identify potential solutions, medical providers often failed to do so due to fear of its use in litigation. Id. In sum, the

fear of medical malpractice litigation had the effect of suppressing evidence-based analysis and candid evaluation of healthcare outcomes.

To help foster an environment where hospitals and medical providers could investigate negative outcomes and help ensure the quality of healthcare without fear of reprisal, federal and state legislatures started taking action and passing "peer review statutes" beginning in the 1960's. See Lee Med., Inc., 312 S.W.3d at 534-35. All fifty states eventually enacted statutes providing some form of privilege to the peer review process. See id. at 535 & n.73. The obvious purpose of these statutes was to encourage "peer review" and "quality review" processes by shielding them from use in litigation and cloaking them with confidentiality.

In Tennessee, the General Assembly passed the Tennessee Peer Review Law (TPRL) in 1967. See Tenn. Code Ann. § 63-6-219. The TPRL protected "peer review proceedings involving a physician's professional conduct, competence, or ability to practice medicine." Lee Med., Inc., 312 S.W.3d at 536. It created a "privilege" that placed "peer review proceedings" off limits to those outside the process. Id. Because "confidentiality of peer review proceeding is essential to this process," the TPRL "creat[ed] a privilege that shield[ed] certain information furnished to or generated by the peer review process from discovery from a peer review committee during a civil proceeding." Stratienko v. Chattanooga-Hamilton County Hosp. Auth., 226 S.W.3d 280, 283 (Tenn. 2007). "The purpose of the [TPRL] [was] 'to encourage committees made up of Tennessee's licensed physicians to candidly, conscientiously and objectively evaluate and review their peers' professional conduct,

competence, and ability to practice medicine'." Id.; see also Eyring v. Fort Sanders Parkwest Med. Ctr., Inc., 991 S.W.2d 230, 234 (Tenn. 1999).

The General Assembly replaced the TPRL with the broader law we have today, the TPSQIA,[2] in 2011. See Tenn. Code Ann. § 68-11-272. The TPSQIA created more expansive protections that allow healthcare providers to internally evaluate, share, and study medical error data in a manner that is aggregated, anonymous, and privileged. Id. The obvious goal is to encourage a culture of safety and assistance to effectively minimize patient risk. According to the TPSQIA:

> It is the policy of this state to encourage the improvement of patient safety, the quality of patient care and the evaluation of the quality, safety, cost, processes and necessity of healthcare services by hospitals, healthcare facilities and healthcare providers. Tennessee further recognizes that certain protections **must be** available to these entities to ensure that they are able to effectively pursue these measures.

Id. (emphasis added).

The text of the TPSQIA affords substantial and extremely broad protections for the process of quality review. The TPSQIA provides in part:

> Records of a QIC (Quality Improvement Committee) and testimony or statements by a healthcare organization's officers, directors, trustees, healthcare providers, administrative staff, employees or other committee members or attendees **relating to** activities of the QIC **shall be**

[2] The TPSQIA is also known as the Healthcare Quality Improvement Act (HCQIA).

> **confidential and privileged** and **shall be protected from direct or indirect means of discovery, subpoena or admission into evidence in any judicial or administrative proceeding**. Any person who supplies information, testifies or makes statements as part of a QIC may not be required to provide information as to the information, testimony or statements provided to or made before such a committee or opinions formed by such person as a result of committee participation.

Id. (emphasis added). To induce provider participation in quality review, the TPSQIA ensures that the entire quality review process is privileged and confidential. Anything simply "relating to" the QIC process receives such protection. Id.

Moreover, the term QIC was broadly defined by the General Assembly. It includes: a committee of "one (1) or more individuals" "formed or retained by a healthcare organization" to "evaluate the safety, quality, processes, costs, appropriateness or necessity of healthcare services by performing functions," such as: (A) "[e]valuation and improvement of the quality of healthcare services rendered," (B) "[d]etermination that health services rendered were professionally indicated and were performed in compliance with the applicable standards of care," or (C) "[e]valuation of the quantity, quality and timeliness of healthcare services rendered to patients." Id. The TPSQIA is designed to ensure that any activity simply "related to" such functions is privileged and off limits for other purposes.

The TPSQIA serves to facilitate an environment in which health care providers are able to discuss errors openly and learn from them by enabling all health care providers to share data within a protected setting without the threat of information subsequently being used

against them. Confidentiality of the quality review process is critical to the goal of fostering a culture of safety that provides feedback and assistance to effectively minimize patient risk. See Powell v. Cmty. Health Sys., 312 S.W.3d 496, 513 (Tenn. 2010)("The proper functioning of the peer review process hinges on the assurance to all persons participating in it – the members of the peer review committees, the persons under review, and the persons who provide information and opinions during the peer review process – that the information and opinions will remain confidential."). Without the protection of the quality review privilege, providers would be discouraged from gathering information that critically assesses the performance of physicians, hospitals, and other healthcare providers. In other words, if the privilege is not applied to the full extent defined by the General Assembly, the quality of care in Tennessee would be negatively impacted.

B. The privilege afforded by the TPSQIA belongs to everyone involved in the quality review process, and as this Court has recognized in a similar context, cannot be waived.

In this case, the Court of Appeals effectively amended the TPSQIA to include a waiver provision that does not exist. The Court of Appeals held that information related to the quality review process was no longer privileged, because it was subsequently disclosed by medical personnel during a CANDOR meeting.[3] Castillo v. Rex, 2023 Tenn. App.

[3] "CANDOR," which stands for Communication and Optimal Resolution, regards a meeting with a patient or patient's family to discuss a negative outcome. Id. at *3. As in this case, such meetings are often

LEXIS 411 at *12 (Tenn. Ct. App. Oct. 4, 2023)(perm. app. granted March 8, 2024). Although the Court of Appeals did not recognize that it found the privilege was "waived," that is the necessary result of its holding. The Court of Appeals found that information from the quality review process that was subsequently disclosed to a patient during a CANDOR meeting itself was not privileged under the TPSQIA. Id. (noting that the TPSQIA privilege "simply does not apply to statements made at the CANDOR meeting whether or not such statements were based upon information obtained from a QIC proceeding" and holding that "statements made by representatives of Memorial in a CANDOR meeting, **which are based on information obtained in a QIC proceeding** are not privileged pursuant to Section 68-11-272.") (emphasis added). The Court of Appeals reasoned that the statements made at the CANDOR meeting, even if they "related to" a QIC, were not protected, because they were freely disclosed. Regardless of the labels the Court of Appeals uses, that is a finding of waiver.

The Court of Appeals' decision equates to a finding of waiver whether it is stated as such or not. It is undisputed that the discussions and information taking place during the QIC process were initially protected from discovery and use in a judicial proceeding by the quality review privilege. See Tenn. Code Ann. § 68-11-272. But for the CANDOR meeting, the information would have continued to be

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"related to" the quality review process and based on information from the process. Accordingly, the TPSQIA should protect CANDOR meetings such as the one in this case. See Tenn. Code Ann. § 68-11-272(c)(1)(stating that any "[r]ecords," "testimony," or "statements" . . . "relating to activities of the QIC shall be confidential and privileged.").

privileged even under the Court of Appeals' analysis. The Court of Appeals' decision allows plaintiffs to make an end run around the protections of the TPSQIA.

The quality review process is of little or no value if the quality review privilege can be waived by a participant or anyone else. This Court has already analyzed the issue of waiver in the context of peer review. As noted above, before the enactment of the TPSQIA, information derived from the quality review process was privileged under a different statute, the Tennessee Peer Review Law (TPRL). See Tenn. Code Ann. § 63-6-219. In Powell v. Cmty. Health Sys., Inc, this Court evaluated the concept of waiver in the context of peer review and articulately explained that none of the participants in a peer review proceeding held the privilege individually, because it was not created for the benefit of any specific individual. 312 S.W.3d 496, 512 (Tenn. 2010). Rather, it was "intended to benefit the entire peer review process." Id. This Court explained:

> [t]he proper functioning of the peer review process hinges on the assurance to all persons participating in it - the members of the peer review committees, the persons under review, and the persons who provide information and opinions during the peer review process - that the information and opinions provided and discussed during the proceeding will remain confidential. Any breach in this confidentiality undermines the process.

Id. at 513.

With regard to the issue of waiver, this Court observed that when dealing with a statutory privilege, as opposed to one arising from

common law, it was up to the General Assembly to account for waiver. "We must not take the matter of waiver of this privilege lightly," because weakening it could undermine the confidentiality that it was intended to protect. Id. at 512. This Court went on to express its hesitance to empower persons participating in the process to waive confidentiality unilaterally when the General Assembly itself had recognized no exceptions to the confidentiality requirement. Id. at 513. This Court directed: "Therefore, we are hesitant to empower persons participating in the process to waive confidentiality unilaterally when the General Assembly itself has recognized no exceptions to the confidentiality requirement." Id. at 513.

Under Tennessee law, waiver of a statutory privilege should not be permitted if waiver undermines the public policy decision of the General Assembly or impairs the rights of third parties. Id. In this context, this Court explained:

> [p]ermitting participants in a peer review proceeding to waive the privilege -- no matter how meritorious the justification -- not only undermines the efficacy of the peer review process but also adversely affects those who provided information or opinions to the peer review committee in reliance on the statutory assurance of confidentiality. Other courts construing peer review statutes similar to Tennessee's that do not contain express waiver provisions have concluded that judicially-created waivers are inappropriate.

Id. (citations omitted). Ultimately, this Court concurred with those decisions and "concluded that the proper course is to defer to the General Assembly, as the author of the peer review privilege, to

determine if and under what circumstances the privilege may be waived." Id. As the TPRL contained no mention of waiver, it was obvious that the General Assembly did not wish to include one.

Just a few years later in Pinkard v. HCA Health Servs. of Tennessee, Inc., the Tennessee Court of Appeals applied this Court's reasoning in Powell to the TPSQIA. 545 S.W.3d 443, 454 (Tenn. Ct. App. 2017). In so doing, the Court of Appeals held that the privilege applicable to information and documents in quality review under the TPSQIA is likewise not subject to waiver. Id. The Court of Appeals found decisions interpreting the former TPRL persuasive, including this Court's decision in Powell, because the TPRL was similar in nature to the TPSQIA in six material respects:

> First, each statute expressly states that its purpose is to promote confidentiality within a hospital's quality improvement process to ensure effective evaluation measures. See Tenn. Code Ann. § 63-6-219(b)(1); see also Tenn. Code Ann. § 68-11-272(a). Second, both statutes establish a presumption that healthcare entities have conducted the peer review process in good faith and without malice. See Tenn. Code Ann. § 63-6-219(d)(3); see also Tenn. Code Ann. § 68-11-272(g). Third, under the TPRL and the HCQIA, all participants within the peer review process are entitled to immunity from damages unless the plaintiff rebuts the presumption. See Tenn. Code Ann. § 63-6-219(d)(1); see also Tenn. Code Ann. § 68-11-272(g). Fourth, the privilege created by the HCQIA mirrors the privilege created by the TPRL. Fifth, both statutes contain an "original source" exception to the privilege. See Tenn. Code Ann. § 63-6-219(e); see also Tenn. Code Ann. § 68-11-272(c)(2). **Sixth, neither contains a provision that expressly authorizes the waiver of the statutory privilege.**

Id. at 455 (emphasis added).

Following the rationale of Powell, the Court of Appeals in Pinkard explained that the purpose of the statute was to protect the quality review participants, including those who provide information or testimony to the QIC. Id. at 457. Consequently, neither the individuals involved in the quality review process nor the hospital itself could waive the privilege on behalf of another:

> Moreover, '[a]ny person who supplies information, testifies or makes statements as part of a QIC may not be required to provide information as to the information, testimony or statements provided to or made before such a committee or opinions formed by such person as a result of committee participation.' **Thus, the beneficiaries of the statutory privilege are all who participate in or provide information to a QIC**. Summit is merely one of the beneficiaries. As a consequence, Summit is not "the holder" of the HCQIA peer review privilege. **Because it is not the holder of the privilege, Summit cannot waive the privilege**.

Id. (quoting Tenn. Code Ann. § 68-11-272(c)(1)) (emphasis added). Relying on Powell, the Court of Appeals summarized its holding as follows:

> Based on the reasoning in Powell and the substantial similarities in the two statutory schemes, we have concluded that no individual is the holder of the HCQIA privilege and that the HCQIA privilege cannot be waived. The fact that the privilege cannot be waived is problematic; nevertheless, we may not take the peer review privilege lightly 'because weakening this privilege could undermine the confidentiality that the privilege is intended to protect.' Id. at 512. **In this case, no person is the holder of the privilege and the HCQIA statutory scheme does not expressly authorize the waiving of**

the privilege. Therefore, we affirm the trial court's ruling that the privilege cannot be waived.

Id. at 457 – 58 (emphasis added).

The holdings in Powell and Pinkard are logical and well-reasoned. If anyone with knowledge of the quality review process could waive the statutory privilege, then it would not only violate the rights of the providers whose conduct was being reviewed and any third-party participants, but it would also frustrate the statute's undisputed public policy goal of improving patient care. The TPSQIA itself states that "it is the policy of this state to encourage the improvement of patient safety, the quality of patient care and the evaluation of the quality, safety, cost, processes and necessity of healthcare services by hospitals, healthcare facilities and healthcare providers." Tenn. Code Ann. § 68-11-272(a). The holding by the Court of Appeals in this case, which is logically and in practical effect a finding of waiver, is contrary to its prior holding in Pinkard and to this Court's reasoning in Powell.

Because there is no waiver provision under the TPSQIA, and because information "relating to" quality review is expressly protected from "direct or indirect means of discovery," it should make no difference to the outcome whether the quality review information is subsequently disclosed outside of the quality review process or not. The information remains privileged and cannot be waived. The TPSQIA sets forth a "statutory privilege" rather than one under "common law." See Powell, 312 S.W.3d at 512. The statute contains no waiver provision, so the Court should not read one into it. Id. ("Our waiver analysis must begin with the statute itself [which] does not contain a provision expressly permitting the

waiver of the privilege."). Even if a hospital or provider intended to waive the privilege on their own behalf, they could not do so without violating the rights of every provider who was the subject of the quality review and all other participants. A holding that one defendant can waive the privilege for everyone involved in the quality review process would severely undermine the confidentiality that the privilege is intended to protect.

As this Court has recognized, by enacting the TPRL, the General Assembly made a "considered judgment that the harm caused by the disclosure of peer review information exceeds the benefit to be gained by permitting disclosure of the information." Powell, 312 S.W.3d at 512. The General Assembly only furthered this intent by enacting the strengthened protections for quality review information contained in the TPSQIA, and the same logic this Court applied in Powell applies with equal force here. Thus, this Court should find that the privilege for quality review information in the TPSQIA cannot be waived and reverse the decision of the Court of Appeals in this case.

II. The Court of Appeals' holding harms the quality of healthcare in Tennessee by discouraging quality review and candid assessment of bad outcomes in healthcare settings.

A. Hospitals and medical providers will likely be forced to curtail or end the essential practice of quality review if the privilege can be waived as found by the Court of Appeals.

The express purpose of the General Assembly in passing the TPSQIA was to ensure the high quality of healthcare for all Tennesseans. See Tenn. Code Ann. § 68-11-272(a). The General

Assembly sought to do so by giving protections to hospitals and providers to encourage them to candidly assess their practices and outcomes without the fear of reprisal in litigation. The holding of the Court of Appeals undermines this public policy decision of the General Assembly. If permitted to stand, the holding will likely forestall not only CANDOR meetings, but also quality review in general.

If the quality review privilege can be waived, then hospitals and medical providers will rightfully be fearful of the quality review process being used against them in litigation. See Institute of Medicine, To Err Is Human: Building a Safer System at 111 (2000). If anyone with knowledge of the process disclosed what was said or found during the quality review process, then it could be used against the providers in subsequent litigation – which is precisely what the plaintiff is attempting to do in this case. The natural and logical consequence of this would be that the quality review process would become less effective, as hospitals and providers would undertake the quality review process with an eye towards potential litigation.

Compounding this problem, if waiver is permitted, then a significant increase in the disclosure of quality review information will be encouraged and will likely occur frequently, further eroding the effectiveness of the process. In other words, the quality review process will become a sword for those whose actions are found to be appropriate and within the standard of care. For example, if the actions of multiple providers involved in the care of a patient are assessed during the quality review process, then one of the providers may try to use the process to his or her benefit (and to the detriment of the other provider).

If the actions of one of the providers were found in the quality review process to have been reasonable, while the actions of another were not, then the one would have great incentive to disclose that finding – for example, during a CANDOR meeting. If the providers are both later sued, under the Court of Appeals' ruling in this case, the one whose conduct was found reasonable could divulge so during the discovery process. This would help that particular provider's defense in the litigation, but it would be extremely harmful to the other. In sum, a finding of waiver would inject the quality review process into malpractice litigation, which the General Assembly has decided should not be permitted.

The problem with the Court of Appeals' ruling can also be expected to negatively impact medical malpractice plaintiffs in many instances. The actions of all medical providers involved in a patient's care are frequently found to have been reasonable and appropriate following a quality review process. When that is the case, one or more of the medical providers would have every incentive to divulge such – for example, during a CANDOR meeting – in case they are later sued. In that subsequent litigation, the medical providers would be able to use the quality review process as a shield to defend their care. They could voluntarily waive the findings of the quality review process anytime they are in their favor. In other words, it is not simply plaintiffs who might benefit during litigation from a judicially created waiver. That is simply not the purpose of the quality review process.

The above examples highlight why the General Assembly did not include a waiver provision in the TPSQIA and why this Court

previously held that the Tennessee's former Peer Review Law could not be waived. A plaintiff and defendant in a healthcare liability case should have to prove, and defend, the case with their own expert witnesses based upon the provisions of the Tennessee Healthcare Liability Act (HCLA). See Tenn. Code Ann. § 29-26-115. By passing both the HCLA and the TPSQIA, the General Assembly balanced the rights of patients to sue their medical providers with the need for confidentiality of quality review in the healthcare setting. See Reynolds v. Gray Med. Inv'rs, LLC, 578 S.W.3d 918, 923 (Tenn. Ct. App. 2018)("Our General Assembly made the policy decision to protect acts taken in furtherance of improving healthcare."). The Court of Appeals eviscerated this balance, which was the public policy prerogative of the General Assembly, by effectively amending the TPSQIA to include a waiver provision in this case.

Furthermore, there is no need for a waiver provision in the TPSQIA for a plaintiff to obtain all necessary information to pursue a healthcare liability action. The TPSQIA already contains an "original source" exception. It provides in this regard:

> Any information, documents or records, which are not produced for use by a QIC or which are not produced by persons acting on behalf of a QIC, and are otherwise available from original sources, shall not be construed as immune from discovery or use in any judicial or administrative proceeding merely because such information, documents or records were presented during proceedings of such committee.

Tenn. Code Ann. § 68-11-272(c)(2). This part of the TPSQIA allows a plaintiff to obtain information from original sources, as long as it is not

otherwise privileged. See Powell, 312 S.W.3d at 510; Pinkard, 545 S.W.3d at 452 ("Pursuant to this exception, any information, documents or records that were not produced for use by a QIC, or which were not produced by persons for use by a QIC, or which were not produced by persons acting on behalf of a QIC, and are available from original sources, are not immune from discovery or admission into evidence even if the information was presented during a QIC proceeding. Furthermore, persons who provided testimony or information to or part of a QIC are not exempt from discovery and are not prohibited from testifying as to their knowledge of facts or their opinions") (citations omitted). Accordingly, plaintiffs can obtain all of the information that they need to pursue a healthcare liability claim without delving into the quality review process. Plaintiffs should not be able to obtain and use information that "originated" in the quality review process, even if it is divulged outside of such process, which is what the plaintiff seeks to do in this case. See Powell, 312 S.W.3d at 510 (noting that information is privileged if it "originated" in the peer review process).

B. Contrary to recent precedent from this Court, the Court of Appeals' holding could force unwilling medical providers to be expert witnesses against their colleagues in healthcare liability cases.

Another problematic result of the Court of Appeals' decision is that medical providers could be forced to be expert witnesses against their colleagues even when they do not wish to be. Physicians and other providers may be required by their participation in the care of a patient, or due to their position in a hospital, to participate in what is believed

to be a confidential and protected quality review process. Such participation should not cause these providers to then be expert witnesses, for a plaintiff or defendant, in a subsequent lawsuit should one later be filed. However, that is precisely what could happen if the Court of Appeals' decision is affirmed. At the very least, the confidential opinions and statements of participants in the quality review process could be divulged and utilized even if the participants do not want to testify in the case or to provide expert opinions for it. That would inevitably erode the effectiveness of the quality review process.

Under the Court of Appeals' analysis, a plaintiff or defendant could discover and use the opinions of providers involved in the quality review process to their advantage should they find them out through someone's disclosure of them. If someone, either intentionally or unintentionally, waives the quality review privilege by divulging information related to the quality review process, then such information could be used in litigation. This information certainly could include confidential statements by physicians and other medical personnel about the reasonableness and appropriateness of another provider's care. Neither plaintiffs nor defendants should be able to use the quality review process to further their interest in lawsuits, especially when the participants are not knowingly and willingly giving opinions for use in litigation.

This result would be in direct contradiction to this Court's recent decision in Borngne ex rel. Hyter v. Chattanooga-Hamilton Cnty. Hosp. Auth., 671 S.W.3d 476 (Tenn. 2023). In Borngne, this Court decided whether a physician could be compelled against his will to be an expert

witness against a colleague in a healthcare liability case. Id. at 480. This Court ruled that a medical provider "cannot be compelled to provide expert opinion testimony about another. . . provider's standard of care or deviation from that standard" and "may not be compelled to give his or her expert opinion because a private litigant is simply not entitled to a healthcare professional's expert views." Id. at 483. The rationale for this ruling included that compelling someone to be an expert witness in litigation against his or her will was "unfair[ ]" and would place "strain" on "relationships between colleagues." Id. at 485.

Plaintiff in this case is attempting to do this very thing. She is attempting to discover, and presumably use at trial, the opinions of the medical providers who participated in the quality review process to further her healthcare liability lawsuit. The TPSQIA was not passed for this purpose, and it should not be utilized for it.

This result is contrary to the express provisions of the TPSQIA as well. The TPSQIA specifically provides that those involved in the quality review process cannot be forced to provide opinions or statements outside of the quality review process. The statute provides: "Any person who supplies information, testifies or makes statements as part of a QIC may not be required to provide information as to the information, testimony or statements provided to or made before such a committee or opinions formed by such person as a result of committee participation." Tenn. Code Ann. § 68-11-272. It would be grossly unfair to those involved in the quality review process for their confidential opinions, including those about their colleagues, to be discovered and used in litigation without their knowledge or consent, especially when

the General Assembly intended to protect them from that very outcome by passing the TPSQIA.

As noted above, the General Assembly specifically passed the HCLA, not the TPSQIA, to set forth how a plaintiff can prove a healthcare liability case. See Tenn. Code Ann. § 29-26-101 *et seq.* Pursuant to the HCLA, a plaintiff can retain his or her own expert witnesses to meet the required elements. Id. However, a plaintiff cannot force someone against his or her own will to be an expert, even someone who had to participate in a quality review. The same result and rationale in Borngne should apply in this scenario. A plaintiff should not be able to circumvent the quality review process by utilizing it for purposes of litigation.

CONCLUSION

For these reasons, this Court should reverse the decision of the Tennessee Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Section 3, Rule 3.02(c) of Tenn. Sup.Ct. R. 46, the undersigned certifies that this brief complies with the requirements set forth in Section 3, Rule 3.02(a)1. Number of words contained in this brief: 6139.

s/ Craig P. Sanders

CERTIFICATE OF SERVICE

I certify that on May 15, 2024 an exact copy of the foregoing was served via the Court's electronic filing system. Attorneys who are not registered users will be mailed, first class postage prepaid, a copy at:

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