IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 21, 2022 Session

**SHAY LYNN JEANETTE STARNES v.
OLUKAYODE AKINLAJA, M.D., ET AL.**

**Extraordinary Appeal from the Circuit Court for Hamilton County
Nos. 17C961, 18C1319 W. Jeffrey Hollingsworth, Judge**

No. E2021-01308-COA-R10-CV

D. MICHAEL SWINEY, C.J., with whom KRISTI M. DAVIS, J., joins concurring.

I concur in the decision to affirm the judgment of the trial court as modified. I do so because Tennessee law requires the result reached in the Court's opinion. However, I write separately to state my view that the 2010 amendment to Federal Rule of Civil Procedure 26(b)(4), which protects draft reports and communications of expert witnesses from discovery, is a better approach than that set out in Tennessee Rule of Civil Procedure 26.02 as it is currently written. Tennessee does not offer the same sort of protection from discovery of draft reports and communications of expert witnesses that is provided under the federal rules. As a result, and certainly after this Court's opinion, counsel for both defendants and plaintiffs likely will decline to write down their communications with experts and instead rely exclusively on oral communication. Even more concerning, the experts will communicate with counsel only by oral means leaving counsel, likely not a healthcare provider, not having the benefit of what she is told being in a more detailed writing. Counsel for Dr. Akinlaja candidly acknowledged as much at oral arguments, saying "that is the way that it's done practically."

Such a chill on investigation and communication runs contrary to the very purposes of the Health Care Liability Act, Tenn. Code Ann. § 29-26-101 *et seq*., which is supposed to help rather than hinder the early resolution of health care liability actions. The Tennessee Supreme Court has stated for example, with respect to pre-suit notice, that "Tennessee Code Annotated section 29-26-121 ensures that a plaintiff give timely notice to a potential defendant of a health care liability claim so it can investigate the merits of the claim and pursue settlement negotiations before the start of the litigation." *Runions v. Jackson-Madison Cnty. Gen. Hosp. Dist.*, 549 S.W.3d 77, 86 (Tenn. 2018) (citations omitted). The High Court stated further: "Pre-suit notice benefits the parties by promoting early

resolution of claims, which also serves the interest of judicial economy." *Id*. (citation omitted). Both our General Assembly and our Supreme Court have thus recognized the value of allowing parties to assess early on whether a claim is meritorious. Necessary to that assessment is a full and unrestricted evaluation by the potential trial experts for both sides of the dispute. Under the amendment to Federal Rule of Civil Procedure 26(b)(4), both plaintiffs' and defendants' attorneys are afforded more protection and freedom to gauge the strengths and weaknesses of a potential claim. That is in keeping with judicial economy and the preservation of time and resources for parties and counsel alike. In short, while I concur in the Court's opinion, I believe Tennessee would be well-served by adopting the 2010 amendment to Federal Rule of Civil Procedure 26(b)(4), which protects, with three specific exceptions, draft reports and communications between counsel and trial expert witnesses from discovery.

s/ D. Michael Swiney
D. MICHAEL SWINEY, CHIEF JUDGE