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

In this health care liability action, the trial court granted the defendants' motions to compel the plaintiff to produce expert witness materials despite the plaintiff's claim of the work product doctrine. The trial court subsequently denied the plaintiff's motion for interlocutory appeal. Upon the plaintiff's application, this Court granted leave for an extraordinary appeal. Determining that the plaintiff has waived any privilege or protection for specific materials requested by the defendants, including expert witnesses' notes, draft reports, and communications with counsel, we affirm the trial court's grant of the defendants' motions to compel, inclusive of the trial court's proviso allowing the plaintiff to present specific materials for review if she believes they contain mental impressions of her counsel. However, also determining the trial court's order to be overly broad, we modify the language of the order to more closely track the language of Tennessee Rule of Civil Procedure 26.02(4)(A)(i) and the defendants' specific requests.

Tenn. R. App. P. 10 Extraordinary Appeal; Judgment of the Circuit Court Affirmed as Modified; Case Remanded

THOMAS R. FRIERSON, II, J., delivered the opinion of the court. D. MICHAEL SWINEY, C.J., filed a separate concurring opinion, in which KRISTI M. DAVIS, J., joined.

Richard D. Piliponis, Benjamin J. Miller, and Zachary L. Gureasko, Nashville, Tennessee, for the appellant, Shay Lynn Jeanette Starnes.

Joshua A. Powers, Emily M. Roberts, and Derek W. Mullins, Chattanooga, Tennessee, for the appellee, Olukayode Akinlaja, M.D.

Joshua R. Walker, Associate General Counsel, University of Tennessee, Knoxville, Tennessee, for the appellee, State of Tennessee.

OPINION

I. Factual and Procedural Background

This action arose from post-surgical complications suffered by the plaintiff, Shay Lynn Jeanette Starnes, following a caesarean section performed at Erlanger Medical Center in Chattanooga on April 28, 2016. Ms. Starnes filed a complaint in the Hamilton County Circuit Court ("trial court") on August 23, 2017, naming as defendants the Chattanooga-Hamilton County Hospital Authority d/b/a Erlanger Medical Center ("Erlanger"); Olukayode Akinlaja, M.D.; and Joseph H. Kipikasa, M.D.[1] According to the complaint, Ms. Starnes was twenty-nine weeks into her pregnancy when she was admitted to Erlanger two days prior to her surgery with a diagnosis of pre-eclampsia. Ms. Starnes alleged that during the surgery, her bowel was partially transected and that the defendant physicians either "failed to recognize" or "failed to acknowledge" that the partial transection had occurred. Ms. Starnes averred that upon her experiencing complications, an exploratory laparotomy performed on May 2, 2016, revealed that her "bowel near the terminal ileum was 80% transected" with "[m]ultiple thick plaques of infection" and that she "endured resection of the bowel and anastomosis" on the same day and a subsequent surgery for drainage of an abscess. Ms. Starnes also averred that following discharge from Erlanger, she endured ongoing "bowel and wound problems," necessitating hospitalizations, and that she ultimately "underwent another exploratory laparotomy for take down of the enterocutaneous fistula, extensive lysis of adhesions and an ileocecectomy" on November 9, 2016. Ms. Starnes further averred that she continued "to experience urgency and frequency of bowel movements" and continued to require medical care for these issues.

Requesting a jury trial, Ms. Starnes asserted a claim for medical negligence; requested general, specific, and punitive damages; and raised a challenge to the constitutionality of non-economic damages caps, specifically challenging Tennessee Code Annotated § 29-39-102 (2012). She contended that Erlanger was vicariously liable "under the theory of *respondent superior* for the acts or omissions of its employees and/or agents."

Based on Erlanger's affiliation with the State of Tennessee ("the State"), Ms. Starnes also filed a claim with the Tennessee Claims Commission ("Claims Commission"). Dr. Akinlaja states in her appellate brief that the trial court entered an agreed order of consolidation on March 26, 2019, upon a motion to consolidate for purposes of discovery and trial that had been filed by the State. We note that this agreed

[1] Dr. Kipikasa is not participating in this appeal.

order and the materials transferred from the Claims Commission are not in the appellate record.

On July 19, 2021, in what it noted was a consolidated action upon transfer from the Claims Commission, the State filed in the trial court a "Motion to Compel Claimant to Produce Correspondence to and from Her Expert Witnesses, Draft Reports of Expert Witnesses, and any Similar Materials" pursuant to Tennessee Rules of Civil Procedure 26, 34, and 37. The State averred that upon Ms. Starnes's disclosure of her intent to call four expert witnesses, including Gerald R. Harpel, M.D.; Mark D. Anderson, M.D.; Mark Boatner, M.Ed.; and Charles L. Alford, III, Ph.D., the defendants had proceeded with depositions. According to the State's motion, "[d]uring the deposition of [Ms. Starnes's] third disclosed expert witness, Dr. Mark Anderson, [the State] learned for the first time that [Ms. Starnes] had withheld certain information pertaining to her expert witnesses, including correspondence and perhaps a draft of a report or opinions."

Relying primarily on Tennessee Rule of Civil Procedure 26.02, the State argued in its motion that (1) relevant information is discoverable, (2) testifying experts are not among the individuals whose work product is protected, (3) Tennessee has not amended its Rule 26.02 to adopt a 2010 amendment to Federal Rule of Civil Procedure 26(b)(4) that protects draft reports and communications of expert witnesses, (4) Tennessee's Rule 26.02 does not limit discovery of expert witnesses, (5) communications between an expert witness and counsel are discoverable under Tennessee evidentiary rules concerning cross-examination, and (6) Ms. Starnes's counsel waived attorney work product protection in attorney-expert communications by voluntarily disclosing information to a testifying expert. The State requested that the trial court compel Ms. Starnes "to produce all correspondence to and from her testifying expert witnesses, all reports, including drafts, created by, for, or on behalf of any expert, all notes of any expert, and any other materials reviewed or created by any testifying expert that have not already been produced."

The State attached to its motion to compel Ms. Starnes's responses to the State's first set of interrogatories and requests for production, a transcript excerpt of Dr. Anderson's deposition, an order entered by the Claims Commission in another case granting the State's motion to compel expert witness materials in that cause, and email correspondence among counsel for the parties. The transcript excerpt indicated that during the deposition, Dr. Anderson testified that after reviewing materials sent to him by Ms. Starnes's counsel, he had prepared and sent an email to counsel with his thoughts stated in several bullet points. During the deposition, Ms. Starnes objected to discovery of communication between Dr. Anderson and Ms. Starnes's counsel on the basis of the work product doctrine.

On July 23, 2021, Dr. Akinlaja filed a "Motion to Compel Communications of Plaintiff's Expert Witness," expressly adopting and incorporating the State's arguments. In her motion and supporting memorandum of law, Dr. Akinlaja "address[ed] an additional argument by comparing Rule 26(b)(4) of the Federal Rules of Civil Procedure before and after the 2010 amendments" to Tennessee Rule of Civil Procedure 26.02(4), noting a distinction in both rules between testifying and consulting experts. Dr. Akinlaja attached to her motion, *inter alia*, multiple examples of federal case law.

Ms. Starnes filed a response opposing the motions to compel on July 30, 2021, arguing that the expert witness documents sought by the defendants were "explicitly protected from discovery" by operation of Tennessee Rule of Civil Procedure 26.02(3). She further argued that the defendants had not attempted to demonstrate that they had a "substantial need of the materials in the preparation of the case" or that they were "unable without undue hardship to obtain the substantial equivalent of the materials by other means." *See* Tenn. R. Civ. P. 26.02(3). As noted by the State and Dr. Akinlaja (collectively, "Defendants") on appeal, Ms. Starnes did not present any list (or "privilege log"), pursuant to Rule 26.02(5), of specific documents purportedly exempt from discovery.

Following a hearing, the trial court granted Defendants' motions to compel in an order entered on August 18, 2021. Finding the motions to be "well taken," the court determined that "[n]one of the materials sought by Defendants—including but not limited to communications between [Ms. Starnes's] counsel and [Ms. Starnes's] expert witnesses, draft reports, notes made by the experts" were "privileged or protected" under Tennessee Rule of Civil Procedure 26.02. Directing Ms. Starnes to produce "all materials sought by Defendants in the motions to compel," the court included a proviso that Ms. Starnes could raise an issue "separately by way of a privilege log and/or presentation to the Court for in camera review" if she believed that any of the material contained "mental impressions" of her counsel.

Ms. Starnes filed a timely motion for interlocutory appeal, pursuant to Tennessee Rule of Appellate Procedure 9, arguing overall that "immediate review [was] warranted to prevent irreparable injury; prevent needless, expensive, and protracted litigation; and to develop a uniform body of law and prevent the work product doctrine from being eroded." The State and Dr. Akinlaja filed separate responses opposing the Rule 9 motion. Following a hearing, the trial court entered an order denying Ms. Starnes's motion for interlocutory appeal on October 14, 2021. Attaching a copy of the hearing transcript as an exhibit to the order, the court concluded, *inter alia*, that Ms. Starnes had failed to establish criteria for interlocutory appeal and that the court "believe[d] its original decision granting Defendants' Motions to Compel was correct."

Ms. Starnes filed with this Court a timely application for Tennessee Rule of Appellate Procedure 10 extraordinary review. The State and Dr. Akinlaja filed separate responses opposing the application. In an order entered on March 1, 2022, this Court granted Ms. Starnes's application for Rule 10 review.

II. Issue Presented

In this extraordinary appeal, granted pursuant to Tennessee Rule of Appellate Procedure 10, "'the issues are limited to those specified in this court's order granting the extraordinary appeal.'" *See Culbertson v. Culbertson*, 455 S.W.3d 107, 127 (Tenn. Ct. App. 2014) (quoting *Heatherly v. Merrimack Mut. Fire Ins. Co.*, 43 S.W.3d 911, 914 (Tenn. Ct. App. 2000)) (emphasis omitted). This Court's order granting Ms. Starnes's application for an extraordinary appeal designated the following issue for our review:

> Whether the Trial Court erred in granting the defendants' motions to compel.

III. Standard of Review

"In an extraordinary appeal, appellate courts apply the same standard of review that would have been applied to the issues in an appeal as of right." *Schrick v. Durham School Servs., L.P.*, No. E2020-00744-COA-R10-CV, 2022 WL 1040909, at *4 (Tenn. Ct. App. April 7, 2022) (citing *Chapman v. DaVita, Inc.*, 380 S.W.3d 710, 712 (Tenn. 2012); *Culbertson*, 455 S.W.3d at 124). Ms. Starnes has challenged the trial court's grant of the State's and Dr. Akinlaya's motions to compel discovery of all of her expert witnesses' communications with counsel and materials related to this case. "Decisions regarding discovery issues address themselves to a trial court's discretion, as do decisions regarding the application of the attorney-client privilege and the work product doctrine." *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 211 (Tenn. Ct. App. 2002) (internal citations omitted).

As our Supreme Court has elucidated concerning the abuse of discretion standard of review:

> The abuse of discretion standard of review envisions a less rigorous review of the lower court's decision and a decreased likelihood that the decision will be reversed on appeal. *Beard v. Bd. of Prof'l Responsibility*, 288 S.W.3d 838, 860 (Tenn. 2009); *State ex rel. Jones v. Looper*, 86 S.W.3d 189, 193 (Tenn. Ct. App. 2000). It reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives. *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 708 (Tenn. Ct.

App. 1999). Thus, it does not permit reviewing courts to second-guess the court below, *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999), or to substitute their discretion for the lower court's, *Henry v. Goins*, 104 S.W.3d 475, 479 (Tenn. 2003); *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998). The abuse of discretion standard of review does not, however, immunize a lower court's decision from any meaningful appellate scrutiny. *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 211 (Tenn. Ct. App. 2002).

Discretionary decisions must take the applicable law and the relevant facts into account. *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008); *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996). An abuse of discretion occurs when a court strays beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision. *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007). A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence. *State v. Ostein*, 293 S.W.3d 519, 526 (Tenn. 2009); *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.*, 249 S.W.3d at 358; *Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville*, 154 S.W.3d [22,] 42 [(Tenn. 2005)].

To avoid result-oriented decisions or seemingly irreconcilable precedents, reviewing courts should review a lower court's discretionary decision to determine (1) whether the factual basis for the decision is properly supported by evidence in the record, (2) whether the lower court properly identified and applied the most appropriate legal principles applicable to the decision, and (3) whether the lower court's decision was within the range of acceptable alternative dispositions. *Flautt & Mann v. Council of Memphis*, 285 S.W.3d 856, 872-73 (Tenn. Ct. App. 2008) (quoting *BIF, a Div. of Gen. Signal Controls, Inc. v. Service Constr. Co.*, No. 87-136-II, 1988 WL 72409, at *3 (Tenn. Ct. App. July 13, 1988) (No Tenn. R. App. P. 11 application filed)). When called upon to review a lower court's discretionary decision, the reviewing court should review the underlying factual findings using the preponderance of the evidence standard contained in Tenn. R. App. P. 13(d) and should review the lower court's legal determinations de novo without any presumption of correctness. *Johnson v. Nissan N. Am., Inc.*, 146 S.W.3d 600, 604 (Tenn. Ct. App. 2004); *Boyd v. Comdata Network, Inc.*, 88 S.W.3d at 212.

Lee Med., Inc. v. Beecher, 312 S.W.3d 515, 524-25 (Tenn. 2010).

However, "[g]enerally, the issue of whether a party has waived a privilege is a mixed question of law and fact, subject to *de novo* review." *Culbertson*, 455 S.W.3d at 125. As this Court has explained:

> In applying this standard, we first determine whether the facts on which the claimed waiver is based are supported by a preponderance of the evidence in the record. We then determine, as a question of law, whether the facts as supported by a preponderance of the evidence constitute a waiver of the privilege. *See Knipe Land Co. v. Robertson*, 151 Idaho 449, 259 P.3d 595, 603-04 (2011); *Cullen v. Valley Forge Life Ins. Co.*, 161 N.C. App. 570, 589 S.E.2d 423, 428 (2003) (quoting *Hicks v. Home Sec. Life Ins. Co.*, 226 N.C. 614, 39 S.E.2d 914 (1946)); *see also Advantor Capital Corp. v. Yeary,* 136 F.3d 1259, 1267 (10th Cir. 1998) ("Whether facts on which a claim of waiver is based have been proved, is a question for the trier of the facts, but whether those facts, if proved, amount to a waiver is a question of law."); *Johnson v. Rogers Mem. Hosp., Inc.*, 283 Wis. 2d 384, 700 N.W.2d 27, 36 (2005) (noting that, when relevant facts are undisputed, issue of whether patient waived therapist-patient privilege is pure question of law).

Id. at 125-26.

Finally, the issue raised in this extraordinary appeal requires that we interpret and apply Tennessee Rules of Civil Procedure. Our Supreme Court has set forth the following standard in this regard:

> Interpretation of the Tennessee Rules of Civil Procedure is a question of law, which we review de novo with no presumption of correctness. *Lacy v. Cox*, 152 S.W.3d 480, 483 (Tenn. 2004). Although the rules of civil procedure are not statutes, the same rules of statutory construction apply in the interpretation of rules. *See Crosslin v. Alsup*, 594 S.W.2d 379, 380 (Tenn. 1980); *see also* 1 Tenn. Juris., Rules of Court § 2 (2004). Our goal "'is to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope.'" *Overstreet v. TRW Commercial Steering Div.*, 256 S.W.3d 626, 630 (Tenn. 2008) (quoting *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002)). We determine legislative intent by giving words their natural and ordinary meaning. *Green v. Johnson,* 249 S.W.3d 313, 319 (Tenn. 2008). In construing the rules of this Court, however, our goal is to

> ascertain and give effect to this Court's intent in adopting its rules. *See State v. Mallard*, 40 S.W.3d 473, 480-81 (Tenn. 2001) ("[T]he [Tennessee] Supreme Court has the inherent power to promulgate rules governing the practice and procedure of the courts of this state."); *see also* Tenn. Code Ann. § 16-3-401 & 402 (1994).

Thomas v. Oldfield, 279 S.W.3d 259, 261 (Tenn. 2009).

IV. Trial Court's Grant of Motions to Compel

Ms. Starnes contends that the trial court erred by entering its order granting Defendants' motions to compel because the order is overly broad and because it "ostensibly stand[s] for the proposition that materials from Rule 26 expert witnesses are not entitled to work product protection." Although they have filed separate appellate briefs, Defendants both essentially contend that the trial court's order is proper because under Tennessee Rule of Civil Procedure 26.02, all information related to the formation of expert witnesses' opinions is relevant and should be discoverable, particularly to facilitate cross-examination, and because Ms. Starnes waived her objections by failing to timely object to requests for expert witness materials or to provide a privilege log of the materials for which she was claiming protection from discovery.

Upon careful review of the record and applicable authorities, we conclude that Ms. Starnes has waived her claims of privilege or protection for expert witness materials and that the trial court did not abuse its discretion in compelling Ms. Starnes to produce her expert witnesses' draft reports, notes made in forming opinions, and communications with her counsel. However, we further conclude that the trial court's order is overly broad in its statement that "none" of the materials sought by Defendants, "not limited to" the foregoing, "are privileged or protected" and must be produced. We accordingly determine that the language of the order should be modified.

"The law favors making all relevant evidence available to the trier of fact." *Boyd*, 88 S.W.3d at 212. Regarding the scope of discovery, Tennessee Rule of Civil Procedure 26.02(1) generally provides in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and electronically stored information . . . .

Ms. Starnes does not dispute that the materials sought by Defendants related to her expert witnesses are relevant to the subject matter involved in this action. *See Jernigan v. Paasche*, 637 S.W.3d 746, 755 (Tenn. Ct. App. 2021) (noting that in a health care liability action, "expert proof is required to establish the recognized standard of acceptable professional practice in the profession" (quoting *Ellithorpe v. Weismark*, 479 S.W.3d 818, 829 (Tenn. 2015) (in turn citing Tenn. Code Ann. § 29-26-115(b))).

Specifically concerning discovery involving trial preparation and expert witnesses, Tennessee Rule of Civil Procedure 26.02(4) provides in relevant part:

> **(4) TRIAL PREPARATION: EXPERTS.** Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. In addition, upon request in an interrogatory, for each person so identified, the party shall disclose the witness's qualifications (including a list of all publications authored in the previous ten years), a list of all other cases in which, during the previous four years, the witness testified as an expert, and a statement of the compensation to be paid for the study and testimony in the case.
>
> (ii) A party may also depose any other party's expert witness expected to testify at trial.

In contrast to the discovery delineated above for testifying expert witnesses, Rule 26.02(4)(B) precludes discovery of a consulting expert's identity, facts known, or opinions held "except as provided in Rule 35.02 [regarding reports of examining physicians] or upon a showing that the party seeking discovery cannot obtain facts or opinions on the same subject by other means." *See White v. Vanderbilt Univ.*, 21 S.W.3d 215, 225 (Tenn. Ct. App. 1999) ("Identifying an expert as a testifying witness in accordance with Tenn. R. Civ. P. 26.02(4)(A) has the practical effect of waiving the

protection of Tenn. R. Civ. P. 26.02(4)(B) and of making the expert available to be deposed.") (internal citations omitted).

It is undisputed that Rule 26.02(4)(A) applies to the expert witness materials at issue here because Ms. Starnes identified Dr. Anderson and three other testifying experts—Dr. Harpel, Dr. Alford, and Mr. Boatner—as "TRCP 26.02(4) experts" when disclosing her experts to Defendants. The parties differ, however, in their views of whether Rule 26.02(3) has any application to discovery of materials involving Ms. Starnes's expert witnesses. Rule 26.02(3) provides in pertinent part:

> **(3) TRIAL PREPARATION: MATERIALS.** Subject to the provisions of subdivision (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

(Emphasis added.)

Defendants assert that Rule 26.02(3) has no application to testifying experts. Ms. Starnes, however, posits that the underlined language above, "[s]ubject to the provisions of subdivision (4) of this rule," indicates that "the provisions of sub[division] (3) defer to sub[division] (4)." We agree with Ms. Starnes on this point. *See Hammock v. Sumner Cnty.*, No. 01A01-9710-CV-00600, 1997 WL 749461, at *2 (Tenn. Ct. App. Dec. 5, 1997) ("Tenn. R. Civ. P. 26.02(4)(A)(ii) permits parties to depose other parties' testifying experts as a matter of right, and Tenn. R. Civ. P. 26.02(3) permits the discovery of relevant documents upon a showing that the party seeking discovery has a substantial need for the requested materials and will be unable to obtain their equivalent without undue hardship."). We will therefore review the parties' discovery process as to Ms. Starnes's testifying experts according to the interplay of subdivisions (3) and (4) while keeping in mind that the requirements of subdivision (3) are subject to those of subdivision (4) for discovery of expert witness information.

The State and Dr. Akinlaja filed their respective motions to compel in July 2021 following Dr. Anderson's June 2021 deposition. Based on the discovery materials leading up to Dr. Anderson's deposition that appear in the appellate record as attachments to the parties' various pleadings, we can construct the following sequence of events. In February 2018, Ms. Starnes responded to the State's "First Sets of Interrogatories and Requests for Production," which had been served in the Claims Commission action prior to consolidation of the two actions in the trial court. In response to the State's request for identification of and curricula vitae of expert witnesses, Ms. Starnes responded that she had "not identify[ied] experts because she and her counsel [had] not yet determined which expert(s) will testify." Ms. Starnes proffered the same response to a request for "copies of any and all written reports, opinions, summaries of opinions, correspondence, statements, or documents that have been reviewed, considered or provided by any expert identified in [her] responses"; a request for "copies of all documents or things furnished to any expert witness identified in response to the preceding Interrogatories, including but not limited to any correspondence, memoranda, medical literature, medical records, witness statements, etc."; and a request for "copies of all documents or things that set forth the facts or basis of the opinion(s) of any testifying expert witness identified in response to the preceding Interrogatories, or upon which such experts rely in forming their opinions." In her responses, Ms. Starnes did not raise any other objection to these interrogatories and requests related to expert witnesses.

On February 12, 2021, Ms. Starnes served Defendants with her expert disclosures, including, for each of the four testifying experts identified, the expert's qualifications, statement of the subject matter of expected testimony, list of records reviewed by the expert, and a summary of expected testimony. She also attached a curriculum vitae for each expert and a statement of prior testimony given in other cases and compensation. On June 7, 2021, Dr. Akinlaja served a notice of Dr. Anderson's deposition, which included a statement that "[t]he materials the witness is to produce at the deposition is [sic] set forth in attached **Exhibit A**." This "Exhibit A" set forth an exhaustive list of materials for the expert to provide, including, *inter alia*, all materials relied upon in reviewing the instant matter, all reports and drafts produced, and "[a]ll correspondence, telephone message slips, email, and any and all other records reflecting any and all communication between the witness and [Ms. Starnes] or [her] counsel."

On June 9, 2021, Ms. Starnes served Defendants' counsel with a supplemental expert disclosure for Dr. Anderson, listing an additional record received and further describing his expected testimony. On the day of the deposition, Ms. Starnes's counsel sent an email message to Defendants' counsel, stating: "Attached are documents being produced for purposes of today's deposition." This communication is in the record with counsel's pre-engagement email to Dr. Anderson attached, and Defendants do not dispute that Ms. Starnes's counsel also produced two of Dr. Anderson's invoices.

Dr. Anderson testified via deposition on June 22, 2021. When questioned regarding what materials he had reviewed in preparation for testifying, he listed Ms. Starnes's medical records, Ms. Starnes's complaint in this lawsuit, and Ms. Starnes's deposition testimony. Dr. Anderson stated that he had not understood that the notice of hearing included a request that he bring the materials listed in Exhibit A. When questioned regarding whether he had prepared a report for Ms. Starnes's counsel, Dr. Anderson testified that he had. Ms. Starnes's counsel then stated that he did not "have anything that [he] would consider a report" but that Dr. Anderson and he "had e-mail dialogue," which included a message wherein Dr. Anderson had set forth a bullet-point list. Dr. Anderson also testified that he had a page of handwritten notes about the case in his vehicle.

An exchange ensued among counsel during which Dr. Akinlaya's counsel stated that he did not know if he could continue with the deposition "without having that email where he's got his bullet points with respect to what his thoughts are." The State's counsel also posited that Defendants were entitled to such communication between the expert witness and counsel. Ms. Starnes objected to producing these communications. Defendants then filed their respective motions to compel in July 2021.

Returning to the procedure set forth in Rule 26.02(4)(A), the State, through the interrogatories and request for production it promulgated, requested that Ms. Starnes identify each expert witness, attach the witness's curriculum vitae, "state the subject matter on which the expert is expected to testify[,] and a summary of the grounds for each opinion." *See* Tenn. R. Civ. P. 26.02(4)(A)(i). Additionally, the State requested materials inclusive of the "communications between [Ms. Starnes's] counsel and [her] expert witnesses, draft reports, [and] notes made by experts" that Defendants subsequently requested in their motions to compel. We note that these materials are not specifically delineated in Rule 26.02(4)(A)(i).

However, as this Court has previously held when faced with the question of whether the rule allows for discovery of additional expert witness materials:

> We likewise conclude that the last sentence of Tennessee Rule of Civil Procedure 26.02(4)(A)(i) was intended to clarify that certain information about an expert must be provided if requested by an interrogatory, in order to "minimize the cost of learning additional information." Tenn. R. Civ. P. 26.02, Adv. Comm'n Cmt to 2011 Amendment. However, it was not intended to establish an outer limit for what can be discovered about an expert. There is no indication on the face of the rule to suggest that a party is absolutely prohibited from seeking

> additional information about an opponent's expert witnesses, and we decline to interpret the rule in such a manner.

Laseter v. Regan, 481 S.W.3d 613, 638 (Tenn. Ct. App. 2014) (emphasis added) (rejecting the plaintiff's argument that Rule 26.02(4)(A)(i) prohibited the discovery of an expert's financial information because such was not specifically stated in the rule). Therefore, Rule 26.02(4)(A)(i) does not prohibit discovery of the expert witness materials requested by Defendants in this action.[2]

We do not determine, as Defendants suggest, that subdivision (4)(A)(i) expressly requires discovery of expert witnesses' notes, draft reports, and communications with counsel because none of these items are specifically mentioned in the subsection. However, the introduction of subdivision (4) does provide for "[d]iscovery of facts known and opinions held by experts" to be obtained under subdivision (A)(i) through interrogatories and under subdivision (ii) through deposition. In contrast, with the exception of examining physicians' reports, subdivision (4)(B) protects from discovery "the identity of, facts known by, or opinions held by an expert" who is a consulting witness only and will not be testifying absent "a showing that the party seeking discovery cannot obtain facts or opinions on the same subject by other means." We therefore determine that the testifying expert witnesses' notes, draft reports, and communications requested by Defendants are discoverable under Rule 26.02(4)(A), provided that another privilege does not apply.[3]

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[2] In making a public policy argument for excluding an expert witness's draft reports and communications with counsel from discovery, Ms. Starnes relies on a 2010 amendment to Federal Rule of Civil Procedure 26(b)(4) that protects draft reports and communications of expert witnesses from discovery. As Ms. Starnes acknowledges, Tennessee has not adopted this amendment. We are therefore unpersuaded by her argument based on the amendment to the federal rule.

[3] In support of her position that an expert witness's materials are protected by the work product doctrine, Ms. Starnes cites this Court's decision in *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 784 (Tenn. Ct. App. 1999), wherein this Court stated that "Tennessee Courts have consistently held that reports prepared by experts for an attorney in preparation for trial are included as part of that attorney's work product." However, as the State notes, *Arnold* involved reports produced by consulting experts rather than by a retained, testifying expert. *See Arnold*, 19 S.W.3d at 788 (determining in the context of a Public Records Act petition that the respondent city had waived work product protection when the consulting experts' reports were referenced at public meetings). Similarly, Ms. Starnes's reliance on *Lutz v. John Bouchard & Sons Co., Inc.*, 575 S.W.2d 7, 12 (Tenn. Ct. App. 1974), for the proposition that an expert's "mental processes" should be protected when the expert is engaged as both a witness and an advisor is misplaced because *Lutz* predated Tennessee's 1987 adoption of Tennessee Rule of Civil Procedure 26.02(4)(B) specifically protecting discovery of consulting experts and their materials as opposed to testifying experts. *See* Tenn. R. Civ. P. 26.02, Adv. Comm'n Cmt to 1987 Amendment.

At this point, we turn to Rule 26.02(3), which, as noted above, provides that a party may obtain discovery of materials relevant to the subject matter of the case and "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Subdivision (3) sets forth the work product doctrine, which operates to protect the work produced by attorneys, "embod[ying] the policy that attorneys, doing the sort of work that attorneys do to prepare a case for trial, should not be hampered by the prospect that they might be called upon at any time to hand over the results of their work to their adversaries." *Boyd*, 88 S.W.3d at 219.

In opposing Defendants' motions to compel, Ms. Starnes has relied on the work product doctrine to argue that not only her counsel's work preparing for trial should be protected but also her testifying experts' work. However, upon careful review of the procedural history in this matter, we determine that Ms. Starnes has waived her objections to producing her testifying experts' notes, draft reports, and communications with counsel by failing to timely object to the State's 2018 interrogatories regarding and requests for production of those materials.

The version of Tennessee Rule of Civil Procedure 33.01 in effect when the State proffered its interrogatories provided the following procedure to be followed when a party objected to an interrogatory:

> Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37.01 with respect to any objection to or other failure to answer an interrogatory.

Similarly, with respect to production requests for documents, Tennessee Rule of Civil Procedure 34.02 provides the same timeline for responses.[4]

[4] Effective July 1, 2020, Tennessee Rule of Civil Procedure 33.01 has been amended to further require that an objection to an interrogatory be "stated with specificity" and "clearly indicate whether responsive information is being withheld on the basis of that objection." Also effective July 1, 2020, Tennessee Rule

Additionally, regarding the withholding of otherwise discoverable materials, Rule 26.02(5) provides in relevant part:

> When a party withholds information otherwise discoverable under the rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege protection.

In responding to the State's 2018 discovery requests regarding testifying experts, Ms. Starnes stated that her expert witnesses had not yet been identified. She did not object to the scope of the requests at that time. Approximately three years later, Ms. Starnes served her expert disclosures on counsel for both Defendants. For each expert identified, she included a curriculum vitae and the basic information she was required to provide, in response to an interrogatory, pursuant to Rule 26.02(4)(A)(i), which included "the subject matter on which the expert is expected to testify," "the substance of the facts and opinions to which the expert is expected to testify[,] and a summary of the grounds for each opinion." *See* Tenn. R. Civ. P. 26.02(4)(A)(i). In her disclosures, Ms. Starnes again did not object to the additional expert witness information previously requested by the State's interrogatories and requests for production, and she did not state that she was withholding any materials.

When Dr. Akinlaja served the notice of deposition for Dr. Anderson two weeks prior to the scheduled deposition, she included the exhaustive list of requested materials to be produced, noted previously as "Exhibit A." Although the exact descriptions were somewhat different, we discern that the specific materials ultimately sought by Defendants in their motions to compel—communications between Ms. Starnes's counsel and her expert witnesses, draft reports, and the experts' notes—were included in this request as to Dr. Anderson as they had been in the State's initial interrogatories and requests for production.

On appeal, Ms. Starnes argues in part that the State's request for production of documents accompanying the deposition notice was improper, pursuant to Tennessee Rules of Civil Procedure 30.02 (governing depositions) and 34 (governing requests for production of documents), because Dr. Anderson was not a party deponent as provided in Rule 30.02 and because the request was not served thirty days in advance as required by

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of Civil Procedure 34.02 has been amended to require specificity in objections and to require that an objection "state whether any responsive materials are being withheld on the basis of that objection."

Rule 34. However, Ms. Starnes's argument in this regard fails to take into account that the materials at issue here for testifying experts had been previously requested by the State in 2018. In response to the notice of deposition, Ms. Starnes provided Dr. Anderson's pre-engagement email and two invoices. The record contains no indication that Ms. Starnes objected to Defendants' requests for production of other expert witness materials or gave notice of any withheld materials prior to the deposition.

When Dr. Anderson testified during the deposition that he had made handwritten notes and that he had communicated to Ms. Starnes's counsel what could be termed a draft report, a set of bulleted points concerning the case, Defendants' counsel raised an issue regarding the withholding of these materials. It was at this point that Ms. Starnes's counsel objected for the first time to producing Dr. Anderson's notes and communications with counsel. We therefore determine that Ms. Starnes waived her objections to discovery of her expert witnesses' notes, draft reports, and communications with her counsel through failure to timely and expressly object to these materials as requested in interrogatories and requests for production of documents pursuant to Tennessee Rules of Civil Procedure 33.01, 34.02, and 26.02(5).[5]

In granting Defendants' motions to compel, the trial court stated in its order in pertinent part:

> Based upon the filings and argument of the parties, the Court finds the motions well taken and they are GRANTED. None of the materials sought by Defendants—including but not limited to communications between [Ms. Starnes's] counsel and [Ms. Starnes's] expert witnesses, draft reports, notes made by the experts—are privileged or protected under Rule 26.02 of the Tennessee Rules of Civil Procedure. If [Ms. Starnes] believes that any of the material to be produced contains mental impressions of [Ms. Starnes's] counsel, [Ms. Starnes] may raise any such issue separately by way of a privilege log and/or presentation to the Court for in camera review. Otherwise, all materials sought by Defendants in the motions to compel are discoverable and shall be produced by [Ms. Starnes].
>
> It is so ORDERED.

[5] Citing identical language in Tennessee Rule of Civil Procedure 26.02(5) and the corresponding subdivision of the federal rule, as well as several federal decisions determining objections to discovery requests to be waived absent a privilege log, Defendants urge this Court to adopt a blanket rule that a party's claim of privilege or protection must be waived when the party fails to provide a privilege log. We decline to adopt such a blanket rule. *See Summers Hardware & Supply Co., Inc. v. Steele*, 794 S.W.2d 358, 362 (Tenn. Ct. App. 1990). ("Cases from other jurisdictions, including federal cases, are always instructive, sometimes persuasive, but never controlling in our decisions.").

The trial court did not further explain its determination that Ms. Starnes' expert witnesses' notes, draft reports, and communications with counsel were not "privileged or protected under Rule 26.02." Having determined that Ms. Starnes waived her objections to producing these materials, we further determine that the trial court did not abuse its discretion in finding these materials unprotected and granting the motions to compel specifically as to these materials. *See Lee Med.*, 312 S.W.3d at 524 (explaining that a trial court abuses its discretion if its decision "causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence"). Furthermore, Defendants have not challenged the trial court's inclusion in its order of a proviso that Ms. Starnes may still raise an issue regarding specific materials that she believes contain her counsel's "mental impressions," or attorney work product under Rule 26.02(3), "by way of a privilege log and/or presentation to the Court for in camera review," and we find no abuse of discretion in the inclusion of this proviso. *See Boyd*, 88 S.W.3d at 222 (distinguishing between fact and opinion work product and explaining that opinion work product, or that "revealing an attorney's mental processes," is "'deserving of special protection'" (quoting *Upjohn Co. v. United States*, 101 S. Ct. 677, 688 (1981))).

However, we do agree with Ms. Starnes's assertion that the trial court's order is overly broad in its implications. Specifically, the language, "None of the materials sought by Defendants—including but not limited to," the materials noted above runs afoul of the provisions for requesting specific information as to expert witnesses in Rule 26.02(4)(A)(i). In particular, we note that the State in its motion to compel requested "any similar materials," and although this language is not in the trial court's order, the statement that "[n]one of the materials sought" are protected would, by implication, afford discovery carte blanche to Defendants. We therefore affirm the trial court's grant of the motions to compel with the following modification to more closely track the language of Rule 26.02(4)(A)(i) and the specific materials requested by Defendants for which we have determined Ms. Starnes's objections to have been waived.

We modify the order to replace the language quoted above with the following:

> Based upon the filings and argument of the parties, the Court finds the motions well taken and they are GRANTED. Defendants are entitled to discovery of expert witness materials as provided in Tennessee Rule of Civil Procedure 26.02(4)(A)(i) and specific expert witness materials requested in their motions to compel and previously requested through their interrogatories and requests for production presented to Ms. Starnes. As provided in Rule 26.02(4)(A)(i), Ms. Starnes must produce any materials

not previously produced concerning the identity of each expert who is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; the opinions to which the expert is expected to testify; a summary of the grounds for each opinion; each witness's qualifications (including a list of all publications authored in the previous ten years); a list of all other cases in which, during the previous four years, the witness testified as an expert; and a statement of the compensation to be paid for the study and testimony in the case. Additionally, as specifically requested in Defendants' motions to compel and previously in interrogatories and requests for production, Ms. Starnes must produce copies of testifying experts' communications with counsel, draft reports, and notes made by the experts. If Ms. Starnes believes that any of the material to be produced contains mental impressions of her counsel, Ms. Starnes may raise any such issue separately by way of a privilege log and/or presentation to the trial court for *in camera* review.

It is so ORDERED.

V. Conclusion

For the foregoing reasons, we affirm the trial court's grant of Defendants' motions to compel with modification of the order to more closely track the language of Rule 26.02(4)(A)(i) and the specific materials requested by Defendants. Accordingly, the language of the trial court's order beginning with the second sentence up to the entry date is replaced by the language set forth above. This case is remanded to the trial court, pursuant to applicable law, for enforcement of the modified order granting Defendants' motions to compel and further proceedings consistent with this Opinion. Costs on appeal are taxed one-half to the appellant, Shay Lynn Jeanette Starnes, and one-half to the appellees, Olukayode Akinlaja, M.D., and the State of Tennessee.

s/ Thomas R. Frierson, II_____
THOMAS R. FRIERSON, II, JUDGE