IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE
May 3, 2022 Session

BRITTANY BORNGNE EX REL MIYONA HYTER v. CHATTANOOGA-HAMILTON COUNTY HOSPITAL AUTHORITY ET AL.

Appeal by Permission from the Court of Appeals
Circuit Court for Hamilton County
No. 15C814 J.B. Bennett, Judge

No. E2020-00158-SC-R11-CV

SARAH K. CAMPBELL, J., with whom HOLLY KIRBY, J., joins, concurring in the judgment.

I agree with the Court's decision to reverse the judgment of the Court of Appeals. But my agreement with the majority ends there. I would not adopt a new evidentiary privilege for expert witnesses because that privilege is not grounded in the Constitution, Tennessee's statutes, the common law, or this Court's Rules—the only permissible sources of a privilege under Tennessee Rule of Evidence 501. Although the trial court erred by excluding the expert opinions at issue in this case, that error was harmless and did not warrant reversal of the judgment below or a new trial. For that reason, I join in the Court's judgment.

I.

The majority holds as a matter of first impression that "an expert, even a party defendant, may not be compelled to give his or her expert opinion because a private litigant is simply not entitled to [that] expert['s] views." I disagree with the majority's adoption of this privilege for two reasons. First, it contravenes Tennessee Rule of Evidence 501, which circumscribes our ability to adopt new evidentiary privileges. Second, it amounts to an exercise of policymaking authority that more appropriately belongs to the legislature, the branch of government best suited to weigh competing interests and determine policy for our State.

A.

Evidentiary privileges are "disfavor[ed]" because they "present obstacles to the search for the truth" and stand "in derogation of the public's 'right to every man's

evidence.'" *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 525 (Tenn. 2010) (quoting Edward J. Imwinkelried, *The New Wigmore: Evidentiary Privileges* § 3.2.2, at 129–30, § 4.3.3, at 248 (2002)). Privileges therefore ought not be "lightly created []or expansively construed." *Id.* (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)). Tennessee Rule of Evidence 501 reflects these principles. It reads: "Except as otherwise provided by constitution, statute, common law, or by these or other rules promulgated by the Tennessee Supreme Court, no person has a privilege to: (1) [r]efuse to be a witness; (2) [r]efuse to disclose any matter; (3) [r]efuse to produce any object or writing; or (4) [p]revent another from being a witness or disclosing any matter or producing any object or writing." Tenn. R. Evid. 501. It follows that an expert may not refuse to testify or otherwise disclose relevant information unless the Constitution, a statute, the common law, or one of this Court's Rules says so. *See id.*

The majority attempts to ground its new privilege in our Rules by claiming that Tennessee Rule of Evidence 706(b), which allows a court to appoint an expert witness if the expert consents and is reasonably compensated, "necessarily implies a broader privilege" for experts. I begin by explaining why the majority is wrong on that score. I then consider the other possible sources of a broad privilege for experts and conclude that none justifies the unqualified privilege the majority creates.

i.

The majority asserts that Tennessee Rule of Evidence 706(a) provides a "legitimate source" for its new privilege, but the majority reads far too much into that provision.

Rule 706 allows a court to "appoint expert witnesses of its own selection" provided the "witness consents to act" and is reasonably compensated. Tenn. R. Evid. 706(a)–(b). In *Carney-Hayes v. Northwest Wisconsin Home Care, Inc.*, the Wisconsin Supreme Court held that a privilege for expert witnesses was "inherent" in a Wisconsin statute that is nearly identical to Rule 706. 699 N.W.2d 524, 533 (Wis. 2005) (first citing *Imposition of Sanctions in Alt v. Cline*, 589 N.W.2d 21, 26 (Wis. 1999); then citing Wis. Stat. § 907.06). The court reasoned that if "a court cannot compel an expert witness to testify, . . . a litigant should not be able to so compel an expert" either. *Id.* The majority is "persuaded by the Wisconsin court's reasoning . . . that a consent requirement for court-appointed experts necessarily implies a broader privilege."

But this reasoning suffers from an important flaw: it overlooks a significant distinction between a court-appointed expert and an unretained expert that a party calls as a witness. As Judge Friendly explained in *Kaufman v. Edelstein*, a court-appointed expert "is expected to delve deeply into the problem and arrive at an informed and unbiased opinion," while an expert called by a party simply "state[s] what facts he may know and what opinion he may have formed without being asked to make any further investigation." 539 F.2d 811, 818 (2d Cir. 1976). The fact that a statute or rule requires consent and

compensation for a court-appointed expert therefore does not fairly imply that an expert must consent to only disclosing his previously formed opinions. *See id.*; *see also* Marjorie Press Lindblom, *Compelling Experts to Testify: A Proposal*, 44 U. Chi. L. Rev. 851, 853 n.8 (1977) (noting that "[c]onsent apparently is required" for court-appointed experts because they "may have to do out-of-court work in addition to testifying"). The majority posits that "[t]here is no universal set of circumstances that differentiates the effort required of one type of expert over the other" and speculates that "a court-appointed expert" may "already ha[ve] opinions on the relevant issue." But in considering whether the existence of Rule 706 necessarily implies a broader expert privilege, we ought to consider the usual application of that Rule, not remote possibilities.

The only other Rule that addresses a party's ability to obtain expert testimony is Tennessee Rule of Civil Procedure 26.02(4)(B). That Rule prohibits a party from "discover[ing] the identity of, facts known by, or opinions held by an expert who has been consulted by another party in anticipation of litigation or preparation for trial and who is not to be called as a witness at trial" unless the party shows that it "cannot obtain facts or opinions on the same subject by other means." Tenn. R. Civ. P. 26.02(4)(B).[1] If a party obtains discovery from a consulting expert, the party must "pay the expert a reasonable fee." *Id.* 26.02(4)(C).

The majority does not rely on this Rule in adopting its broader privilege for defendant treating physicians, and for good reason. Rule 26.02(4)(B) is narrow; it addresses only the discovery of a consulting expert's opinions. It provides no protection for the expert opinions of unretained experts, whether strangers to the litigation or those like Dr. Seeber who participated in the events giving rise to the litigation.

If anything, the fact that the Rules expressly address the situation of consulting experts and court-appointed experts and say nothing about a party's ability to obtain or compel testimony from other experts cuts against recognition of a broader privilege, not for it. *See Kaufman*, 539 F.2d at 818 (reasoning that, "[i]f any inference is to be drawn" from statutes or rules concerning court-appointed experts, it is "against the claim of privilege by an expert, not for it"). The contention that "experts enjoy some kind of privilege" is hardly new. *See id.* Had the Rules intended to confer a broad expert privilege, they almost certainly would have done so expressly.

Our Rules of course give trial courts wide discretion to limit or prohibit discovery when necessary "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," Tenn. R. Civ. P. 26.03, and to exclude evidence that presents a danger of prejudice or confusion, Tenn. R. Evid. 403. There may be situations in which requiring disclosure of a treating physician's expert opinions would be sufficiently burdensome to warrant an exercise of that discretion. *Cf. Kaufman*, 539 F.3d at 822

[1] Rule 26.02(4)(B) also has a second exception that is not relevant here.

(identifying factors that would be appropriate to consider in exercising discretion to excuse an expert from "testifying in the particular case," including "the degree to which the witness is able to show that he has been oppressed by having continually to testify"). But that discretion must be exercised on a case-by-case basis. The majority's blanket rule all but eliminates that discretion.[2] This Court's Rules therefore provide no basis for the majority's holding.

ii.

The other permissible sources of a privilege under Rule 501—the Constitution, statutory law, and the common law—do not grant expert witnesses an unqualified privilege either. Start with the Constitution. Although the majority does not expressly discuss a potential constitutional basis for its privilege, it "agree[s] with [the] reasoning employed by our Court of Appeals" in *Chambers v. Wilson* (Tenn. Ct. App. May 23, 1984), *Lewis v. Brooks*, 66 S.W.3d 883 (Tenn. Ct. App. 2001), and *Burchfield v. Renfree*, No. E2012-01582-COA-R3-CV, 2013 WL 5676268 (Tenn. Ct. App. Oct. 18, 2013). Those cases relied on the notion that a private litigant may not compel an expert to "give up the product of his brain." *Lewis*, 66 S.W.3d at 887 (quoting *Chambers*, which in turn quotes *Pa. Co. v. City of Phila.*, 105 A. 630, 630 (Pa. 1918)); *see also Burchfield*, 2013 WL 5676268, at *25.

The Pennsylvania case that *Chambers* quoted—*Pennsylvania Company*, 105 A. 630—articulated this property-based rationale for the expert privilege. There, the defendant in an eminent-domain case called as expert witnesses "two real estate men" who "had been previously employed by [the] plaintiff" in the same case. *Id.* at 630. Without citing any authority, the Pennsylvania Supreme Court held that the witnesses could not be compelled to offer their expert opinions regarding the amount of damages sustained by the defendant. *Id.* The court reasoned, again without citing any authority, that although the government "may call upon her citizens to testify as experts in matters affecting the common weal . . . because of the duty which the citizen owes to his government," the "private litigant has no more right to compel a citizen to give up the product of his brain than he has to compel the giving up of material things." *Id.* The court explained that, for private litigants, securing expert testimony "is a matter of bargain" that "takes two to make." *Id.*

The Pennsylvania Supreme Court did not expressly ground its rationale in any body of law, nor does the majority in approving of that rationale. The most obvious candidates would seem to be the Takings Clause of the Fifth Amendment to the United States Constitution and Article I, section 21 of the Tennessee Constitution, which prohibit the government from taking private property without providing just compensation. *See* U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just

[2] In a footnote, the majority suggests that "an exception might exist in compelling circumstances" but does not elaborate on what those circumstances might be. Absent further guidance, trial courts understandably will be reluctant to deviate from the majority's otherwise clear instruction.

compensation."); Tenn. Const. art. I, § 21 ("[N]o man's particular services shall be demanded, or property taken, or applied to public use . . . without just compensation being made therefor.").

At least one court has held that compelling the disclosure of expert opinions in a judicial proceeding without compensation is an unconstitutional taking. *See Buchman v. State*, 59 Ind. 1, 11, 13–14 (1877) (holding that compelled disclosure of a physician's expert opinions would violate the Takings Clause of the Indiana Constitution, which provides that "[n]o man's particular services shall be demanded without just compensation" (quoting Ind. Const. art. I, § 21)). The Federal Rules of Civil Procedure, which provide expert witnesses with some protection from compelled disclosure of their opinions, also reflect this rationale. Rule 45(d)(3)(B)(ii), for example, provides that a federal court may quash or modify a subpoena if it requires "disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party." Fed. R. Civ. P. 45(d)(3)(B)(ii). The Advisory Committee Note to that Rule explains that the "compulsion to give evidence may threaten the intellectual property of experts denied the opportunity to bargain for the value of their services" and "[a]rguably . . . can be regarded as a 'taking' of intellectual property." Fed. R. Civ. P. 45(d)(3)(B)(ii) advisory committee's note to 1991 amendment. Rule 45(d)(3)(B)(ii) was intended to "provide[] appropriate protection" for that intellectual property. *Id.*

Even assuming the compelled disclosure of expert opinions would constitute a "taking" within the meaning of the federal or state constitutions, that does not mean the majority's holding is constitutionally required. The Takings Clause prohibits the government from taking private property for public use *without just compensation*; it does not prohibit the taking of that property altogether. *See, e.g.*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536–37 (2005). So while the Takings Clause arguably could require certain expert witnesses to be reasonably compensated when their testimony is needed in a civil proceeding, it does not require this Court to grant experts an unqualified privilege to withhold their opinions.

iii.

The majority considers only one potential statutory source for a privilege: Tennessee's Quality Improvement Committee privilege. *See* Tenn. Code Ann. §§ 63-1-150(d)(1) (Supp. 2012), 68-11-272(c)(1)–(2) (2011). But it holds that this statutory privilege is inapplicable.[3] I am aware of no other statute that arguably prohibits a court

[3] I tend to agree with the majority that the statutory Quality Improvement Committee privilege does not apply in this situation, but I would allow the Court of Appeals to consider that question in the first instance.

from compelling the sort of expert testimony at issue in this case, and the parties point to none. The majority's holding is thus not required by Tennessee's statutory law either.

iv.

The only other possible source of authority for the majority's holding is the common law. Our Constitution provided at the time of its adoption that "[a]ll laws and ordinances now in force and use in this State . . . shall continue in force and use until they shall expire, be altered or repealed by the Legislature." Tenn. Const. art. XI, § 1. We have explained that the term "laws" in this provision includes "the common law of England, as it stood at and before the separation of the colonies." *Quarles v. Sutherland*, 389 S.W.2d 249, 250 (Tenn. 1965). That is because Tennessee adopted the laws of North Carolina when our State was formed, and North Carolina had previously adopted the common law of England. *See id.*

No expert-witness privilege existed at common law, either in England before the separation of the colonies or in North Carolina at the time Tennessee was created. *See* 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2203, 140 n.1 (John T. McNaughton rev., 1961); *see also* 23A Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5431 (1st ed.), Westlaw (database updated Apr. 2022) ("At common law there was no privilege for expert witnesses, although there are arguments that might support at least a qualified privilege."); *cf. Kaufman*, 539 F.2d at 820 ("[W]e perceive no sufficient basis in principle or precedent for holding that the common law recognizes any general privilege to withhold . . . expert knowledge.").

The earliest English case on the subject—*Webb v. Page* (1843) 174 Eng. Rep. 695; 1 Car. & K. 23—came decades after colonial separation and thus is of limited relevance. It also provides little support for the majority's holding. In *Webb*, the plaintiff in an action for "negligence in carrying goods" called a witness "to speak to the nature of the damage sustained by the goods . . . and the expense that would be necessary to restore or replace the injured articles." *Id.* at 695, 1 Car. & K. at 23. The witness "applied for compensation for his loss of time" and eventually was paid by the plaintiff's attorney before being examined. *Id.* In holding that the witness was entitled to compensation, the Court reasoned that, unlike a fact witness, who "is bound, as a matter of public duty, to speak to a fact which happens to have fallen within his knowledge," an expert "is under no such obligation" because "[t]here is no such necessity for his evidence." *Id.* at 695, 1 Car. & K. at 23–24. While this case provides some support for a rule entitling experts to reasonable compensation, it does not establish a general privilege for expert testimony. Only a handful of American cases decided during the same time period established a similar rule providing that expert witnesses are entitled to reasonable compensation. *See, e.g.*, *United States v. Cooper*, 21 D.C. (Tuck. & Cl.) 491, 493 (D.C. 1893); *In re Roelker*, 20 F. Cas. 1092, 1092–93 (D. Mass. 1854) (No. 11,995); *Buchman*, 59 Ind. at 11–14.

In the years that followed, several state high courts held that experts may not be compelled to disclose their previously formed opinions, at least without a showing of necessity and reasonable compensation. *See, e.g.*, *Box Pond Ass'n v. Energy Facilities Siting Bd.*, 758 N.E.2d 604, 612 (Mass. 2001) ("The general rule is that an expert witness . . . who has not been retained by the party seeking his testimony[] cannot be required to give an opinion already formed unless 'necessary for the purposes of justice.'" (quoting *Ramacorti v. Boston Redevelopment Auth.*, 170 N.E.2d 323, 235 (Mass. 1960))); *Ondis v. Pion*, 497 A.2d 13, 18 (R.I. 1985) ("We believe that compelling expert testimony would in essence involve a form of involuntary servitude . . . ."); *Klabunde v. Stanley*, 181 N.W.2d 918, 921 (Mich. 1970) (concluding that an expert "has a property right in his opinion and cannot be made to divulge it in answer to a subpoena"); *Agnew v. Parks*, 343 P.2d 118, 123 (Cal. 1959) (holding that physician lacking a relationship with patient may not be compelled to give expert opinion concerning standard of care or treatment provided by another); *People ex rel. Kraushaar Bros. & Co. v. Thorpe*, 72 N.E.2d 165, 166 (N.Y. 1947) (holding that "the better rule is not to compel a witness to give his opinion as an expert against his will"); *Stanton v. Rushmore*, 169 A. 721, 722 (N.J. 1934) ("[A]n expert witness cannot as such be compelled to give testimony in response to subpoena, and, if such expert testimony is called for and given, it is the right of such person to contract for and receive proper and adequate compensation therefor.").

But the majority of state high courts declined to adopt a privilege for expert witnesses and instead allowed trial courts to compel witnesses to disclose their previously formed opinions. *See Fenlon v. Thayer*, 506 A.2d 319, 322 (N.H. 1986) (holding "[a]s a general rule" that "a party may assert the right of testamentary compulsion of experts" but noting that the right is "subject to the traditional limitations excluding prejudicial, misleading, or cumulative evidence"); *State*, *Dep't of Transp. & Dev. v. Stumpf*, 458 So. 2d 448, 454 (La. 1984) (allowing a party to depose experts retained but not called by the other party "on their opinions" and to "subpoena the experts to appear as their own witnesses at trial"); *Cornfeldt v. Tongen*, 262 N.W.2d 684, 696 (Minn. 1977) ("[N]o cogent reason appears sustaining the restriction of the testimony of a defendant who has sufficient expertise to render an opinion against a codefendant."); *Urban Renewal & Cmty. Dev. Agency of Louisville v. Fledderman*, 419 S.W.2d 741, 743 (Ky. 1967) (allowing a party to subpoena as an expert witness "the other party's paid expert"); *Cooper v. Norfolk Redevelopment & Hous. Auth.*, 90 S.E.2d 788, 791 (Va. 1956) (allowing plaintiff in condemnation proceeding to compel expert testimony from witness who offered opinion about value of property to condemning authority); *Swope v. State*, 67 P.2d 416, 419 (Kan. 1937) ("[W]e are not disposed to hold that a witness claiming to be an expert called upon to give expert testimony may refuse to testify unless his demands have been met."); *Brown Cnty. v. Hall*, 249 N.W. 253, 253 (S.D. 1933) (holding that an expert witness "may be required to testify to such matters as are within his knowledge, though he may have gained a special knowledge thereof by reason of professional learning, experience, or skill, and is not entitled to demand extra compensation for testifying thereto"); *In re Hayes*, 156 S.E. 791, 793 (N.C. 1931) (concluding that the "better opinion . . . is that an expert summoned

to testify who refuses to answer questions without compensation other than his witness fees is in contempt"); *State ex rel. Berge v. Superior Ct.*, 281 P. 335, 335 (Wash. 1929) ("[A]n expert witness is not entitled to demand additional compensation other than the ordinary witness fees, unless special services other than attendance to give testimony on the trial are required in order to enable the witness to testify."); *State v. Bell*, 111 S.W. 24, 28 (Mo. 1908) (holding that physician was not entitled to compensation for disclosing his expert opinion and endorsing view that an expert has a duty to "give the court the benefit of the knowledge he has in store at the time he is called upon" (quoting *Burnett v. Freeman*, 103 S.W. 121, 123 (Mo. Ct. App. 1907)));. *Dixon v. People*, 48 N.E. 108, 110–13 (Ill. 1897) (holding that physician could be held in contempt for refusing to disclose expert opinions without additional compensation); *Flinn v. Prairie Cnty.*, 29 S.W. 459, 460 (Ark. 1895) (holding that a witness may be compelled to disclose "such information as he already possesses . . . whether such information is peculiar to his trade or profession, or not"); *Ex parte Dement*, 53 Ala. 389, 395–97 (1875) (holding that a physician could be held in contempt for refusing to testify as an expert without payment); *see also Logan v. Chatham Cnty.*, 148 S.E.2d 471, 473 (Ga. Ct. App. 1966) ("An expert testifying as a witness, has no greater privilege than any other witness." (quoting *Dixon v. State*, 76 S.E. 794, 794 (Ga. Ct. App. 1912))); *Summers v. State*, 5 Tex. App. 365, 378 (1879) (holding that "[a] medical expert could not be compelled to make a *post-mortem* examination unless paid for it; but, an examination having already been made by him, he could be compelled to disclose the result of that examination"); *Bd. of Comm'rs of Larimer Cnty. v. Lee*, 32 P. 841, 842 (Colo. App. 1893) (recognizing the "general rule" that "the professional witness" may be compelled "to testify as to what he may know, whether it be observed facts, or accumulated knowledge acquired by study and experience").[4]

Only two courts have extended a privilege in the specific circumstances presented here—where the expert is not a stranger to the case but instead a participant in the events underlying the litigation. *See Carney-Hayes*, 699 N.W.2d at 541–42; *Ransom v. Radiology Specialists of Nw.*, 425 P.3d 412, 421 (Or. 2018) ("A party cannot turn a participating expert into a nonparticipating expert and ask a participating expert about matters in which the participating expert was not directly involved."). By joining these courts, the majority makes Tennessee an outlier. And it does so without even acknowledging contrary precedent.

Because there was no privilege for experts at common law, the majority cannot rely on the common law to deviate from Rule 501's limits on privileges. This Court's decision in *Quarles v. Sutherland*, 389 S.W.2d 249, is instructive. There, we declined to adopt a doctor-patient privilege because it was "axiomatic that at common law neither the patient

[4] One court adopted a middle-ground approach that gives trial courts "wide discretion to quash subpoenas or issue protective orders whenever a litigant's demand for a particular expert constitutes an unnecessary or unwarranted intrusion" as well as "the power to compel an unwilling expert to provide pre-formulated opinion testimony whenever a litigant establishes a compelling need for the testimony." *Mason v. Robinson*, 340 N.W.2d 236, 243 (Iowa 1983).

nor the physician had a privilege to refuse to disclose in court a communication of one to the other" or a "privilege that the communication not be disclosed to a third person." *Id.* at 251. Because the legislature had not enacted any statute "which would alter the common law rule," we simply applied that rule. *Id.* Although we noted that "the arguments for and against making doctor-patient communications privileged are many," we did not wade into that debate given that the legislature "ha[d] not seen fit to act on the matter." *Id.*

* * *

Neither this Court's Rules, the Constitution, the Tennessee Code, nor the common law provides that an unretained expert witness—whether a stranger to the litigation or a party defendant like Dr. Seeber—may refuse to disclose relevant expert opinions at trial or in discovery. Tennessee Rule of Evidence 501's general rule therefore controls and forecloses the adoption of a new privilege.

B.

Although the majority relies in part on Rule 702 for its holding, it also claims that the new privilege it adopts is "good public policy." The majority apparently thinks that our status as a common-law court gives us freewheeling policymaking authority. I respectfully disagree.

I do not dispute the proposition that a common-law court has authority to apply existing common-law rules to new situations and to consider whether changed conditions call for the abrogation or extension of existing rules. While "the fundamental principles of the common law are unchangeable," it is of course sometimes necessary to apply "old rules to new cases." *Powell v. Hartford Accident & Indem. Co.*, 398 S.W.2d 727, 730 (Tenn. 1966); *see also id.* at 731 (explaining that "[f]lexibility has been necessary since the courts applied the same rule of negligence to one who drove an oxcart, to one who drove a buggy or a wagon, to another who drove an automobile, and to one who pilots an airplane"). Common-law rules are thus "gradually, almost imperceptibly, enlarged or contracted by the courts, by construction, in the course of their application to new states of fact." *Northcut v. Church*, 188 S.W. 220, 223 (Tenn. 1916). "[N]ew principles may be developed, and old ones extended, by analogy, so as to embrace newly-created relations and changes produced by time and circumstances." *Dodson by Dodson v. Shrader*, 824 S.W.2d 545, 549 (Tenn. 1992) (quoting *Jacob v. State*, 22 Tenn. (3 Hum.) 372, 388 (1842)). But any new rules must be "so fashioned that the new truly grows out of the old." *Cardwell v. Bechtol*, 724 S.W.2d 739, 744 (Tenn. 1987) (quoting *Powell*, 398 S.W.2d at 732).

We have made clear, however, that the flexibility inherent in the common law is not a license to engage in unbridled policymaking. *See, e.g.*, *Northcut*, 188 S.W. at 223 (cautioning that "it is not allowable to change" common-law rules "per saltum" because "[t]his can be done only by legislation"); *Taylor v. Beard*, 104 S.W.3d 507, 511 (Tenn.

2003) (explaining that the Court "has a limited role in declaring public policy"); *Smith v. Gore*, 728 S.W.2d 738, 746 (Tenn. 1987) (warning that Tennessee law forbids the Court from establishing "what its members believe to be the best policy for the State"). This is particularly true in areas that are now governed primarily by statute rather than common-law rules. *See, e.g.*, *Hodge v. Craig*, 382 S.W.3d 325, 338 (Tenn. 2012) ("In areas of the law where the General Assembly has enacted statutes that clearly and definitively set boundaries on rights, obligations, or procedures, we have recognized that 'it should be left to the legislature to change those boundaries, if any are to be changed, and to define new ones.'" (quoting *Taylor*, 104 S.W.3d at 511)); *Taylor*, 104 S.W.3d at 511 (declining to create a new common-law cause of action for loss of parental consortium because the issue was one of "public policy and interest balancing in which the legislature ha[d] involved itself before").

To the extent the Court has relied on policy considerations when considering whether to alter the common law, it has typically looked to Tennessee's policy as expressed by the legislature, not its own views of the "best" policy. For example, the Court has abolished common-law doctrines that had become inconsistent with the State's public policy as expressed in later-enacted positive law. *See, e.g.*, *State v. Al Mutory*, 581 S.W.3d 741, 748–50 (Tenn. 2019) (abolishing common-law doctrine of abatement ab initio because it was inconsistent with constitutional and statutory provisions granting greater protections to victim rights). We also have "inquire[d] whether public policy prevents the continuing development of the common law" by looking to "the public policy of this state, reflected in the Constitution of Tennessee and the statutes enacted by the General Assembly." *Hodge*, 382 S.W.3d at 341. But the Court consistently has declined to create new common-law rules when doing so would amount to "positively declaring the public policy of the State" or would require the Court to balance competing policy interests. *Smith*, 728 S.W.2d at 747.

In my view, the Court overstepped the appropriate boundaries of a common-law court by adopting a new privilege based on its own assessment and weighing of the relevant policy interests. The majority's holding cannot be said to "grow out of" or constitute a reasonable extension of any traditional common-law privileges such as the attorney-client privilege or spousal privilege. *See, e.g.*, 1 Kenneth S. Broun et al., *McCormick on Evidence* § 75 (8th ed. 2020), Westlaw (database updated July 2022) (noting that "both the husband-wife and attorney-client privileges" are "traceable to the received common law"). Those privileges are designed to protect certain *relationships* that society deems valuable. *See, e.g.*, *State v. Jackson*, 444 S.W.3d 554, 599 (Tenn. 2014) (explaining that the common-law and statutory attorney-client privilege, "the oldest privilege in this State," "encourage[s] full and frank communication between attorneys and their clients" and is "integral to a [criminal] defendant's constitutional rights against compulsory self-incrimination and to the effective assistance of counsel" (internal quotation marks omitted)). The policy reasons for protecting an expert's opinions are distinct. If this Court did not consider the doctor-patient privilege sufficiently analogous to these traditional privileges to warrant extending

the common law, *see Quarles*, 389 S.W.2d at 251, then an extension here would not be reasonable either.

Indeed, it is hard to see how any new privilege could truly "grow out of" an existing one. Privileges are accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Lee Med.*, 312 S.W.3d at 525 (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)). Even a slight change to the nature of the underlying interests a privilege is designed to protect could easily change the balance.

Perhaps that is why "the source of newly created privileges shifted decisively from the courts to the legislatures" during the nineteenth century and "the vast majority of new privileges created since that time have been of legislative origin." *McCormick on Evidence*, *supra*, § 75. The development of privileges in Tennessee has followed that pattern. Nearly all privileges today are statutory, including privileges that originated in the common law. *See, e.g.*, Tenn. R. Evid. 501, Advisory Commission Comments (listing nearly twenty statutory privileges, including the attorney-client and spousal privileges, that existed at common law); *Willeford v. Klepper*, 597 S.W.3d 454, 468 (Tenn. 2020) ("The creation of a privilege is substantive law which, at least in large part, is within the province of the legislature.").

That the creation of evidentiary privileges is now predominately a legislative function provides an especially strong reason for this Court to stay its hand. The legislature is far better suited than the Court to weigh competing policy interests and determine which course is best for Tennessee. *See, e.g.*, *Hodge*, 382 S.W.3d at 338 (explaining that our "deference to the General Assembly's prerogative to establish Tennessee's public policy rests on fundamental differences between the judicial and legislative process"); *Smith*, 728 S.W.2d at 747 (noting that the Court "simply does not function as a forum for" determining "which of several competing public policies represents the most compelling and controlling public policy for this State"). "Unlike legislative proceedings, judicial proceedings do not provide an open forum for the discussion and resolution of broad public policy issues." *Hodge*, 382 S.W.3d at 338.

Even if the majority's holding could be viewed as a rule of procedure rather than a substantive evidentiary privilege, there still was a better way to go about adopting that rule. The legislature established an "advisory commission" to "advise [the Court] from time to time respecting the rules of practice and procedure." Tenn. Code Ann. § 16-3-601(a) (1980). Although this Court "has the inherent power to promulgate rules governing the practice and procedure of the courts of this state," *State v. Mallard*, 40 S.W.3d 473, 481 (Tenn. 2001), we previously have expressed a preference for adopting rule changes through the "normal rule-making process" rather than "by judicial fiat in the limited context of a single case," *Webb v. Nashville Area Habitat for Human., Inc.*, 346 S.W.3d 422, 436 (Tenn.

2011). The normal rulemaking process is superior because it "provides for a broader discussion and examination of the policies at issue and allows for input from the advisory commission . . . and members of the bench, bar, and general public." *Id.* Rules adopted through this process also are subject to approval by the General Assembly. *See* Tenn. Code Ann. § 16-3-404 (1980). The majority's choice to decide this issue by "judicial fiat" rather than the ordinary rulemaking process deprives the Court of meaningful input from all relevant stakeholders.

In a footnote, the majority rejects the invitation of amicus curiae, the Tennessee Trial Lawyers Association, to adopt a rule similar to Federal Rule of Civil Procedure 45 that "would allow the trial courts to consider relevant factors in determining whether it is appropriate to excuse an expert from being compelled to testify" and encourages the Association to petition the Advisory Commission for that change instead.[5] That encouragement might be well-placed if the majority had not already held that "a defendant healthcare provider cannot be compelled to provide expert opinion testimony about another defendant provider's standard of care or deviation from that standard." Having so held, however, the Court at least arguably has foreclosed the possibility that a different, more flexible rule, can be adopted through the ordinary rulemaking process. We have described evidentiary privileges as "substantive law," *Willeford*, 597 S.W.3d at 468, and this Court's Rules may not "abridge, enlarge[,] or modify any substantive right," Tenn. Code Ann. § 16-3-403 (1980).

The majority takes pains to downplay the significance of its holding. But the reality is this: in its "role as a law development court" and in reliance on "public policy," the majority creates a seemingly unqualified substantive evidentiary privilege that has no basis in the Constitution, Tennessee's statutory law, the common law, or this Court's Rules. I cannot join that holding because it exercises authority that properly belongs to the legislature and circumvents procedures that are designed to ensure deliberate, informed decisionmaking.

[5] At least twenty-one States and the District of Columbia have adopted statutes or rules similar to Federal Rule of Civil Procedure 45(d)(3)(B)(ii)–(C)(ii). *See* Ala. R. Civ. P. 45(c)(3)(B)(ii); Ariz. R. Civ. P. 45(e)(2)(B)(ii)–(C)(ii); C.R.C.P. 45(c)(3)(B)(ii)–(C)(ii); Del. Super. Ct. Civ. R. 45(c)(3)(B)(ii); D.C. Super. Ct. R. Civ. P. 45(c)(3)(B)(ii), 45(c)(3)(C)(i)-(ii); Iowa R. Civ. P. 1.1701(4)(d)(2)(2), 1.1701(4)(d)(3)(1)–(2); Kan. Stat. Ann. § 60-245(c)(3)(B)(ii)–(C)(ii); Me. R. Civ. P. 45(c)(3)(B)(ii); Minn. R. Civ. P. 45.03(c)(2)(B)–(C); Miss. R. Civ. P. 45(d)(1)(B)(ii), 45(d)(2)(C); Mont. R. Civ. P. 45(d)(3)(B)(ii), 45(d)(3)(C)(i)–(ii); Nev. R. Civ. P. 45(c)(3)(B)(ii)–(C)(ii); NMRA, Rule 1-045(C)(3)(b)(ii)–(iii); N.D. R. Civ. P. 45(c)(4)(B)(ii)–(C)(ii); 12 Okl. Stat. Ann. § 2004.1(C)(3)(b)(2) (West); R.I. Super. Ct. R. 45(c)(3)(B)(ii); S.C. R. Civ. P. 45(c)(3)(B)(ii)–(iii); Utah R. Civ. P. 45(e)(3)(I), (e)(5); Vt. R. Civ. P. 45(c)(3)(B)(ii)–(iii); Wash. Super. Ct. Civ. R. 45(c)(3)(B)(ii); W. Va. R. Civ. P. 45(d)(3)(B)(ii); Wyo. R. Civ. P. 45(c)(3)(B)(ii).

II.

Although I disagree with the majority's holding that Dr. Seeber could not be compelled to disclose his expert opinions, I concur in the judgment reversing the Court of Appeals because any error related to Dr. Seeber's testimony was harmless and therefore did not require reversal or a new trial.

The Court of Appeals reversed the trial court's judgment and remanded for a new trial without considering whether the trial court's evidentiary error was harmless. But evidentiary errors do not "necessarily require reversal." *Blackburn v. Murphy*, 737 S.W.2d 529, 533 (Tenn. 1987). To the contrary, Tennessee Rule of Appellate Procedure 36(b) provides that "[a] final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." Tenn. R. App. P. 36(b). When a case is tried before a jury, we must "carefully examine the entire record to determine whether exclusion of the evidence, more probably than not, influenced the jury's verdict." *White v. Beeks*, 469 S.W.3d 517, 529 (Tenn. 2015) (cleaned up). In evaluating the "weight a juror probably would have placed on the" wrongly excluded evidence, we must consider "the substance of the evidence, its relation to other evidence, and the peculiar facts and circumstances of the case." *In re Estate of Smallman*, 398 S.W.3d 134, 152–53 (Tenn. 2013) (quoting *Keith v. Murfreesboro Livestock Mkt., Inc.*, 780 S.W.2d 751, 758 (Tenn. Ct. App. 1989)). We should also "take into account whether the facts present a close case." *Id.* at 153.

Here, even if we assume that Dr. Seeber's opinion testimony would have been admissible and that he would have testified that Nurse Mercer's conduct violated the standard of care, the exclusion of that testimony was harmless because plaintiff cannot establish that it more probably than not affected the jury's verdict.

One of defendant's expert witnesses, Dr. Craig Towers—a maternal fetal medicine specialist—testified that Nurse Mercer complied with the standard of care when reading and interpreting plaintiff's fetal heart rate tracing and "in [her] management of [plaintiff's] labor and delivery, specifically during the period when [plaintiff] began to push until the time Dr. Seeber was called."

Plaintiff's expert witness, Dr. Thomas McCaffrey—an obstetrician and gynecologist—disagreed. In response to questions similar to those posed to Dr. Seeber during his deposition, Dr. McCaffrey testified at trial that Nurse Mercer failed to meet the standard of care. For example, Dr. Seeber was asked "when [he] would have expected [the minimal variability and late decelerations in the fetal heart tones] to become concerning," and did not answer. At trial, after discussing the circumstances of the labor, Dr. McCaffrey was asked "[d]o you have an opinion, to a reasonable degree of medical certainty, when

pushing should have stopped, a discussion had with [plaintiff] and a change of course should have occurred?" Dr. McCaffrey answered:

> A: Well, I would say about 10 o'clock, I mean, when you have this fairly quick onset of the late decelerations and the process was not improving, I think it should have been stopped, Dr. Seeber should have been notified, and the patient given the choice of continuing to push or cesarean section or operative delivery, if it was feasible at that time.

Again, Dr. McCaffrey testified about when he thought action was required during plaintiff's labor, saying:

> Q: What time is it that you believe that the discussion should have been had with [plaintiff] and an evaluation done?
>
> . . .
>
> A: . . . At about 10:00 p.m.
>
> Q: Okay. How much longer did the pushing go on after 10:00 p.m.?
>
> A: One hour and 14 minutes.

In his deposition, Dr. Seeber was also asked what his "expectation of Mercer [would] be if [he] had a patient . . . with minimal variability [who was] late for an hour." Dr. Seeber refused to opine, other than to say that it would depend on whether Mercer was aware of these circumstances. At trial, Dr. McCaffrey testified that the standard of care would have required a conversation with plaintiff about other options in this case:

> Q: Doctor, according to the standard of care . . . at what point would you have to say to [plaintiff] what's going on?
>
> A: Well if you couldn't fix the problem in a very short period of time . . . or problem's progressing, getting more deterioration, I definitely would have told her about it. . . . [I]f it's a persistent problem and you're having a persistent deterioration, I think you would need to let [her] know.
>
> Q: And that would be in accordance with the standard of care?
>
> A: Yes.

Given Dr. McCaffrey's testimony, plaintiff has not established that excluding Dr. Seeber's testimony "more probably than not affected the judgment" with respect to breach.

White, 469 S.W.3d at 529. Dr. McCaffrey testified that Nurse Mercer failed to meet the standard of care by allowing plaintiff to keep pushing after the fetal heart tones became concerning and by not adequately informing plaintiff of changes in status. Despite this testimony, the jury found that Nurse Mercer met the standard of care. Any similar testimony by Dr. Seeber would have been cumulative and unlikely to change the jury's verdict.

Plaintiff argues Dr. Seeber's potential testimony would not have been cumulative of Dr. McCaffrey's testimony because (1) the jury would not view an admission from a party defendant as equivalent to a statement by a paid expert and (2) defendant's counsel argued to the jury that Dr. McCaffrey's opinions were flawed because he did not have enough experience working with midwives. I disagree.

While it is conceivable that the jury would place more weight on Dr. Seeber's testimony because it would be against his interest to testify that Nurse Mercer violated the standard of care, Dr. Seeber's opinions would have been subject to the same criticisms as Dr. McCaffrey's. Dr. Seeber testified during his deposition that he had no written guidelines for his midwives, had a book about the practice of midwives but had never read it, and struggled to answer questions about limits on the practice of midwives. Moreover, as Judge Davis noted in her opinion, "[i]t is not apparent that Dr. Seeber has any more knowledge or insight than any other medical expert who might be called upon to review the documents in Plaintiff's chart and provide an opinion as to whether Nurse Mercer complied with the standard of care." *Borngne ex rel. Hyter v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, No. E2020-00158-COA-R3-CV, 2021 WL 2769182, at *15 (Tenn. Ct. App. July 1, 2021) (Davis, J., concurring in part and dissenting in part).

* * *

In sum, I disagree with the majority's adoption of a new privilege. But because the error in excluding Dr. Seeber's expert opinion testimony was harmless, I concur in the judgment reversing the Court of Appeals' decision.

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SARAH K. CAMPBELL, JUSTICE