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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

HOLLY KIRBY, J., concurring.

I am pleased to concur in Justice Campbell's separate concurring opinion, concurring in the result of the majority opinion but not the reasoning. I write separately on particular problems with the majority's reasoning, as well as far-reaching unintended consequences of this ill-defined new common-law privilege.

The privilege fashioned by the majority as "good public policy" is based on purported "compelling" reasons that do not hold water. The first is "the unfairness of compelling a person to testify just because he or she 'is accomplished in a particular science, [art], or profession,'" citing *Carney-Hayes v. Northwest Wisconsin Home Care, Inc.*, 699 N.W.2d 524, 536 (Wis. 2005) (alteration in original) (quoting *Ex parte Roelker*, 20 F. Cas. 1092, 1092 (D. Mass. 1854)). This could be a consideration in an unusual case where opinion testimony is sought from an expert witness not hired by any party, not appointed by the court, with no knowledge of the facts and no connection to the lawsuit. In that circumstance, of course, trial courts already have full discretion to prohibit discovery under Tennessee Rule of Civil Procedure 26.03, which gives trial courts discretion to limit discovery when necessary "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

That situation bears little resemblance to this case. Here, Dr. Seeber treated the patient right after Nurse Mercer did; the pivotal issue is whether Nurse Mercer waited too long to ask Dr. Seeber to take over the patient's care; Dr. Seeber is a party defendant; and *the parties stipulated that Dr. Seeber was Nurse Mercer's supervising physician*.[1] Inherent

[1] Dr. Seeber's overlapping roles as fact witness, supervisor, and co-defendant are perhaps best described in Justice Lee's separate opinion supporting the majority's creation of a privilege:

in any level of work supervision is assessment of the person's performance.[2] Inherent in Dr. Seeber's supervision of Nurse Mercer was assessing whether she should have called him in sooner. What if Nurse Mercer had called Dr. Seeber too late on 5 occasions? On 10 occasions? 50 occasions? If Dr. Seeber believed she had, the hospital and/or Caring Choice would expect him to bring that assessment to their attention. There is nothing "unfair" about permitting discovery from Dr. Seeber on that same assessment.

As further reason for its policy, the majority offers speculation that "relationships among local health care providers *may* affect the objectivity of their testimony," that "[s]ome witnesses *may* have a financial stake in the outcome of malpractice litigation" and some may "shade their testimony to advance their own interests, guard their own reputations, or protect their co-workers." *Carney-Hayes*, 699 N.W.2d at 536 (emphasis added). Possibilities such as these are classic fodder for cross-examination by any average attorney. In no way, however, do they support the Court's decision to automatically discredit all such opinion testimony, regardless of the circumstances.

The last "compelling" reason is perhaps the most flimsy. The majority quotes and adopts the *Carney-Hayes* court's explanation that "People . . . are often . . . sensitive to a colleague's critical opinion. The resulting tension can destroy friendships, working relationships, and economic relationships." *Id*. It agrees with the *Carney-Hayes* court that it is best "to avoid these familiar human problems" altogether by forbidding any testimony that might cause them. *Id*.

This is hardly "compelling." Potential discomfort between work colleagues in no way justifies an across-the-board exclusion of relevant testimony.

For comparison, it is useful to look at *University of Pennsylvania v. E.E.O.C.*, in which the United States Supreme Court rejected a request to create a common-law privilege against disclosure of confidential peer review materials used in tenure decisions. 493 U.S. 182, 189 (1990). There, a university faculty member alleged that a tenure decision was discriminatory, and the petitioner university argued that creation of a privilege was necessary to protect the integrity of the peer review process. *Id*. at 185, 189.

Dr. Seeber and Nurse Mercer were both defendants; they both worked for the same entity (also a defendant); Dr. Seeber was Nurse Mercer's supervising physician; and the sole claim against Dr. Seeber was vicarious liability based on Nurse Mercer's care of the Plaintiff. Dr. Seeber had every incentive to testify favorably about Nurse Mercer's care—yet he did not.

[2] "Superintend the execution or performance of (a task, operation, etc); oversee the actions or work of (a person)." *Supervise*, *Shorter Oxford English Dictionary* (6th ed. 2007).

The Court in *University of Pennsylvania* first observed that Congress had legislated extensively in the area of discrimination in higher education. *Id*. at 189–90. Congress did not, however, "see fit to create a privilege for peer review documents." *Id*. at 189. The Court said it was "especially reluctant to recognize a privilege" where Congress had enacted extensive legislation but did not provide for such a privilege, noting that "[t]he balancing of conflicting interests of this type is particularly a legislative function." *Id*.

Similarly, Tennessee's legislature has legislated *extensively* in the area of healthcare liability. *See* Tennessee Health Care Liability Act, Tenn. Code Ann. § 29–26–101 *et seq*. Despite having done so, the legislature did not see fit to create any privilege for opinion testimony among healthcare providers. Like the Court in *University of Pennsylvania*, this should make us "especially reluctant" to create such a privilege under the common law.

The petitioner university in *University of Pennsylvania* also alleged that compelling disclosure of opinion peer review material would have a "chilling effect" on candid evaluations and would "result in divisiveness and tension, placing strain on faculty relations," requiring the creation of a privilege. 493 U.S. at 197. In evaluating this argument, the Court emphasized, "We do not create and apply an evidentiary privilege unless it 'promotes sufficiently important interests to outweigh the need for probative evidence.'" *Id*. at 189 (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)). The Court characterized the university's concerns as "speculative." *Univ. of Pennsylvania*, 493 U.S. at 200. Still, even assuming them to be true, it said that they "constitute only one side of the balance." *Id*. at 193. It pointed out that uncovering discrimination "is a great, if not compelling, governmental interest." *Id*. The Court declined to create a privilege to prevent the discovery of relevant evidence. *Id*. at 189. Thus, the Court in *University of Pennsylvania* determined that "strain" and "tension" in faculty relations did not outweigh the need for probative evidence of discrimination. *Id.* at 197.

Here, the majority opinion gives great weight to similarly "speculative" concerns about "tension" among work colleagues. It then gives short shrift to the need for probative evidence on medical malpractice. Tennessee's Healthcare Liability Act protects plaintiffs' right to engage in fulsome discovery and seek accountability for healthcare providers who provide substandard care to the detriment of patients. The Act shows our legislature views accountability for medical malpractice as "a great, if not compelling, governmental interest." *Id*. at 193. The majority accords this interest little weight and effectively considers only "one side of the balance." *Id*.

Testimonial exclusionary rules and privileges are acceptable only where "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 truth." *Trammel*, 445 U.S. at 50 (citation omitted). Thus, courts normally exclude relevant evidence only for reasons that are profound. For example, to protect a fundamental

constitutional right. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (evidence from interrogation excluded to protect rights under federal constitution). Or to protect important relationships that cannot exist without strict confidentiality. *See, e.g.*, *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) ("Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is 'rooted in the imperative need for confidence and trust.'"); *McMannus v. State*, 39 Tenn. 213, 216 (1858) ("[T]he professional intercourse between attorney and client should be protected by profound secrecy."). Respectfully, "sensitiv[ity] to a colleague's critical opinion" does not rise to this level.

"The essential aim of our legal system is to seek truth in the pursuit of justice." *Harris v. Bd. of Pro. Resp. of Supreme Ct. of Tenn.*, 645 S.W.3d 125, 139 (Tenn. 2022) (quoting *In re Dixon*, 435 P.3d 80, 88 (N.M. 2019)). This is no job for the faint-hearted. Our adversarial system regularly compels testimony in situations that may be excruciating for witnesses or parties. Witnesses may be compelled to give testimony even when they fear for the safety of their family. *See, e.g.*, *State v. Lagrone*, No. E2014-02402-CCA-R3-CD, 2016 WL 5667514, at *7 (Tenn. Crim. App. Sept. 30, 2016) (trial court advised witness who feared for safety of her children that it was not "a legal ground for refusing to testify" and instructed her to testify). Family members may be compelled to testify against other family members. *State v. Mangrum*, 403 S.W.3d 152, 154 (Tenn. 2013) (grand jury testimony). Parents may be compelled to testify against their own children, even children who are minors. Hillary B. Farber, *Do You Swear to Tell the Truth, the Whole Truth, and Nothing but the Truth Against Your Child?*, 43 Loy. L.A. L. Rev. 551, 587 (2010) ("[C]onversations between parents and children in the police-dominated pre-interrogation atmosphere are not protected"). All such witnesses are asked, even compelled, to testify at great personal cost.

What does it mean to have a justice system that compels some witnesses to testify against family members or when they fear for their safety, but shields others from having to opine about a work colleague so as to avoid "tension" in work relationships and "sensitiv[ity] to a colleague's critical opinion"? Such a ruling trivializes the essential truth-seeking mission of our justice system.

The privilege adopted by the majority is like the privilege sought in *University of Pennsylvania* in another important respect: the lack of any limiting principle. In *University of Pennsylvania*, the Court observed that, while the university sought a peer-review privilege only in academia, creation of that privilege would "lead to a wave of similar privilege claims by other employers." 493 U.S. at 194. It went on: "What of writers, publishers, musicians, lawyers? It surely is not unreasonable to believe, for example, that confidential peer reviews play an important part in partnership determinations at some law firms. We perceive no limiting principle in petitioner's argument." *Id.*

The same is true here. The majority's creation of a new opinion-testimony privilege all but ensures this case will not be the end of it.[3] While this appeal involves a healthcare setting and healthcare standards, the purported policy reasons for the common-law privilege translate to countless settings in which people work in collaborative environments with standards or protocols. Indeed, in the wake of *Carney-Hayes*, appellate courts in Wisconsin have *already* extended the same expert privilege our Court adopts today beyond medical malpractice cases. *See Savage v. Am. Transmission Co.*, 828 N.W.2d 244, 250 (Wis. Ct. App. 2013) (affording expert privilege to real estate appraiser in condemnation case). As the Wisconsin appellate court in *Savage* observed: "Although the expert privilege has been applied in medical malpractice cases, nothing in those cases limits its application as such." *Id.*

That's what we're in for. There's no principled reason why the "compelling" policy reason of avoiding "sensitive[ity] to a colleague's critical opinion" would not apply in many different work settings. And the likelihood of "a wave of similar privilege claims" is increased tenfold by the majority's stunning holding that their new privilege applies "*regardless of any supervisory relationship*," so that even a direct supervisor, with sole authority to hire and fire, may decline to testify about whether an employee under his direct supervision engaged in conduct that transgressed applicable standards.

Thus, a police chief may decline to testify about whether an officer's conduct violated training and protocols. A construction contractor may decline to testify about whether his employee's work was substandard. A lawyer may decline to testify about whether his associate's work was deficient. And so on. The Court today "ignores th[e] traditional judicial preference for the truth, and ends up creating a privilege that is new, vast, and ill defined." *Jaffee*, 518 U.S. at 19–20 (1996) (Scalia, J., dissenting).

Commentators on the Wisconsin *Carney-Hayes* privilege the majority replicates have flayed the Wisconsin high court's decision to create a new, undefined privilege, citing many of the problems outlined in this opinion as well as Justice Campbell's concurrence:

> Wisconsin has created a privilege of sorts for expert witnesses who are unwilling to provide their opinion testimony either at trial or during discovery. The rule is at once controversial and uncertain in its scope. Although the published cases involve physicians, the rule's logic extends to any field of specialized knowledge. Moreover, the rule's evolution in the case law illustrates the problem of creating and defining evidentiary privileges on a case-by-case basis where it is more difficult to identify and

[3] The majority's handwave in a footnote at the possibility of an "exception in compelling circumstances" is not a limiting principle. Indeed, it implicitly acknowledges the overbreadth of the privilege the majority adopts.

> weigh competing public policy concerns than is possible through the supreme court's rule-making process.

The expert privilege, 7 *Wis. Prac., Wis. Evidence* § 702.8 (4th ed.) (describing the "confusion and controversy" generated by the serial Wisconsin cases attempting to explain and define the privilege). *See also Wisconsin's "expert opinion privilege*,*"* 3B *Wis. Prac., Civil Rules Handbook* § 907.02:7 (2022 ed.) ("Wisconsin has created a privilege (of sorts) for expert witnesses who are unwilling to provide their opinion testimony either at trial or during discovery.").

As cogently set out in Justice Campbell's concurrence, the majority's ruling today is an extreme minority position; the great majority of jurisdictions have wisely declined to adopt any such privilege. The better route would be for this Court to reject the "privilege" in *Lewis v. Brooks* and take the path set out in Justice Campbell's concurrence, i.e., outline considerations for trial courts under existing rules, such as Tennessee Rule of Civil Procedure 26.03, or ask our Rules Commission to consider whether a rule is appropriate. Both options are now foreclosed by the majority's ruling.

Consequently, I concur in the result in the majority opinion for the reasons outlined in Justice Campbell's separate opinion and in this separate opinion.

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HOLLY KIRBY, JUSTICE