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

SHARON G. LEE, J., concurring.

I concur fully in the majority opinion. I write separately to highlight the flawed and impractical analysis in the concurring in judgment opinion, authored by Justice Campbell and joined by Justice Kirby.

Plaintiff's health care liability claim against Dr. Michael Seeber is based on vicarious liability for the acts and omissions of Nurse Jennifer Mercer. Dr. Seeber gave over 150 pages of deposition testimony as a fact witness, describing his background, experience, and medical practice; the role of a nurse midwife; and the patient's medical records. When Plaintiff's counsel asked Dr. Seeber about matters related to the standard of care applicable to Nurse Mercer and her deviation from that standard, his lawyer did not allow him to answer. The trial court did not compel Dr. Seeber's testimony. At issue here is whether Dr. Seeber had to give expert testimony about Nurse Mercer's standard of care and any deviation from it.

The Court correctly holds that a health care provider cannot be compelled to provide expert testimony about another defendant provider's standard of care or any deviation from that standard. The Court relies on Tennessee Rule of Evidence 706 and *Lewis v. Brooks*, 66 S.W.3d 883 (Tenn. Ct. App. 2001) and its progeny. The Court explained how its ruling was good policy, but that was not the basis for its ruling.

The concurring in judgment opinion confuses fact testimony with expert testimony and would allow a party to subpoena *any* health care provider to appear and give expert testimony in a health care liability case about another provider's standard of care and deviation from that standard. This analysis would seemingly permit the virtual indentured

servitude of unretained experts who are complete strangers to a civil lawsuit between private parties.

Setting these practical issues aside, the problem with forced expert testimony is that it conflicts with Tennessee Rule of Evidence 706. Under Rule 706(a), a trial court may not compel an expert witness to testify but may only appoint the witness if he "consents to act."[1] This language implies a broader privilege for expert witnesses to "refuse to be a witness" than is allowed for fact witnesses under Tennessee Rule of Evidence 501.[2] If the trial court had required Dr. Seeber to give expert testimony, this would have been the same as appointing him an expert witness without his consent. If a court cannot force a witness to provide expert testimony, then it makes sense that a party also cannot force a person to become a witness and give expert testimony. *See Carney-Hayes v. Nw. Wis. Home Care, Inc.*, 699 N.W.2d 524, 533 (Wis. 2005) (quoting *Burnett v. Alt*, 589 N.W.2d 21, 26 (Wis. 1999)) (allowing, under a similar rule of evidence, the court to appoint an expert only if the expert consents and noting that "[i]f a court cannot compel an expert witness to testify, it logically follows that a litigant should not be able to so compel an expert" because "[i]t makes little if any sense to conclude that a litigant has greater rights than a court with respect to obtaining testimony from experts"); *see also* Neil P. Cohen et al., Tennessee Law of Evidence, § 7.06[3][g] (6th ed. 2011) ("[Rule 706] guards against a form of involuntary servitude, compelling an expert to sell his or her services to a public entity. A non-consensual appointment deprives the expert of the freedom to choose for whom he or she works, when and where to work, and what issues to work on.").

The concurring in judgment opinion claims that the Court's ruling "circumvents procedures that are designed to ensure deliberate, informed decisionmaking." Rule 706 was adopted in 1990 under the Court's authority to prescribe "general rules . . . [regarding] the

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[1] The court may not appoint expert witnesses of its own selection on issues to be tried by a jury except as provided otherwise by law. . . . The court ordinarily should appoint expert witnesses agreed upon by the parties, but in appropriate cases, for reasons stated on the record, the court may appoint expert witnesses of its own selection. *An expert witness shall not be appointed by the court unless the witness consents to act*.

Tenn. R. Evid. 706(a) (emphasis added).

[2] 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) Refuse to be a witness;
(2) Refuse to disclose any matter;
. . . .

Tenn. R. Evid. 501.

practice and procedure in all courts of this state." Tenn. Code Ann. § 16-3-402 (2022). As required, the General Assembly considered and approved Rule 706 before its adoption. *Id.* § -404. Thus, the "deliberate, informed decisionmaking" about Rule 706 occurred over thirty years ago. This Court did its job by interpreting and applying Rule 706.

After a long discussion about evidentiary privilege, the concurring in judgment opinion effectively says, "never mind." The opinion concludes that if the trial court erred by not compelling Dr. Seeber's testimony, the error was harmless, suggesting that Plaintiff cannot show that the exclusion of Dr. Seeber's testimony more probably than not influenced the jury's verdict. The jury observed a "battle of experts"—different retained experts gave conflicting opinions. The Plaintiff's retained expert witness testified that Nurse Mercer failed to meet the standard of care. And as you might expect, the Defendants' retained expert testified Nurse Mercer complied with the standard of care. The concurring in judgment opinion assumes that if Dr. Seeber had testified that Nurse Mercer deviated from the standard of care, his testimony would have been similar to the Plaintiff's expert's testimony and merely cumulative and unlikely to change the jury's verdict. To its credit, the opinion concedes that "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."

Respectfully, it's much more than conceivable. It is almost a certainty that a jury would have been more strongly influenced by the expert testimony of Dr. Seeber than a retained expert with no stake in the outcome. 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.

Common sense tells us that if Dr. Seeber believed Nurse Mercer had complied with the standard of care, he would have freely shared that opinion. Dr. Seeber's lawyer would have encouraged, not prevented, his testimony. But that's not what happened here.

In sum, I concur in the Court's majority opinion. It is based on Tennessee Rule of Evidence 706, established precedent, and common sense.

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SHARON G. LEE, JUSTICE