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

This appeal primarily concerns the compulsion of a physician's deposition testimony in a health care liability action. In 2014, a child was born via cesarean section and suffered permanent brain damage and severely debilitating injuries. By and through her next friend and mother Brittany Borngne ("Plaintiff"), the child sued the doctor who delivered her and the certified nurse midwife who was initially in charge of the birthing process, among other defendants. The trial court dismissed all claims of direct negligence against the defendant physician but allowed the plaintiff to proceed against the physician on a vicarious liability theory as the midwife's supervising physician. However, during his deposition prior to trial, the physician refused to opine on the midwife's performance outside of his presence. The trial court declined to require the physician to do so, and after a trial, the jury found in favor of the defendants. The Court of Appeals, in a divided opinion, partially reversed the judgment. The intermediate court concluded, among other things, that the trial court committed reversible error in declining to order the physician to answer the questions at issue in his deposition and remanded for a new trial. After review, we hold 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. We therefore conclude that the trial court here properly declined to compel the defendant physician's testimony. Accordingly, we reverse the decision of the Court of Appeals and affirm the trial court's judgment.

Tenn. R. App. P. 11 Appeal by Permission; Judgment of the Court of Appeals Reversed; Judgment of the Trial Court Affirmed

ROGER A. PAGE, C.J., delivered the opinion of the Court, in which SHARON G. LEE and JEFFREY S. BIVINS, JJ., joined. SHARON G. LEE, J., filed a separate concurring opinion.

SARAH K. CAMPBELL, J., filed a separate opinion concurring in the judgment, in which HOLLY KIRBY, J., joined. HOLLY KIRBY, J., filed a separate concurring opinion.

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Dixie Cooper and Matthew H. Cline, Brentwood, Tennessee, for the appellants, Michael John Seeber, Jennifer Mercer, and Caring Choice Women's Center, P.C.

Timothy R. Holton, Memphis, Tennessee, for the appellee, Brittany Borngne ex rel. Miyona Hyter.

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OPINION

I. FACTUAL & PROCEDURAL BACKGROUND

This appeal arises from a healthcare liability action brought by Miyona Hyter, a minor, by and through her mother Brittany Borngne. Specifically, Plaintiff brought suit against certified nurse midwife Jennifer Mercer, Dr. Michael Seeber, their employer Caring Choice Women's Center, P.C. ("Caring Choice"), and Chattanooga-Hamilton County Hospital Authority d/b/a Erlanger Health System ("Erlanger") based on the following events.

On March 3, 2014, Plaintiff, then approximately thirty-seven weeks pregnant, was admitted to the hospital with complaints of abdominal pains and cramping, back pain, headache, visual disturbances, and leg swelling. The following day, Plaintiff was admitted to labor and delivery at the direction of Nurse Mercer for medical induction of labor for pre-eclampsia. According to the record on appeal, Dr. Seeber was notified when Plaintiff was admitted to the hospital and when she began pushing.

On the evening of March 5, Plaintiff began attempting to push at approximately 9:30 p.m. After about an hour and forty-eight minutes of pushing, the baby had made no progress from the onset of labor. The fetal heart monitoring apparatus showed concerning signs for

the health of the child in the form of late decelerations in relation to the mother's contractions that were recognized by Nurse Mercer and the other medical professionals working with her. Nurse Mercer called Dr. Seeber at about 11:18 p.m. He arrived at the hospital roughly forty-five minutes later. Upon reviewing Plaintiff's chart, Dr. Seeber promptly ordered a cesarean section ("C-section"). The child was not breathing when she was delivered on March 6, 2014. She was subsequently diagnosed with hypoxic ischemic encephalopathy ("HIE"), which is a type of brain damage that occurs when the brain does not receive sufficient blood flow and oxygen.

Plaintiff sued the defendants, alleging negligence on the parts of Nurse Mercer and Dr. Seeber. Concerning Erlanger specifically, Plaintiff alleged the hospital was vicariously liable for the allegedly negligent acts of one of its nurses, Sylvia Stephenson. Later, the trial court granted partial summary judgment on all claims of direct negligence against Dr. Seeber. However, Dr. Seeber remained in the case based upon Plaintiff's theory that he was vicariously liable for Nurse Mercer's actions as her supervising physician.

During Dr. Seeber's deposition, Plaintiff asked Dr. Seeber to give his opinion on Plaintiff's condition and Nurse Mercer's performance during the period of time she cared for Plaintiff and the child prior to Dr. Seeber's arrival. Dr. Seeber refused to opine on Nurse Mercer's performance prior to his arrival after defense counsel instructed him not to answer, referencing the Court of Appeals' opinion in *Lewis v. Brooks*, 66 S.W.3d 883 (Tenn. Ct. App. 2001), *perm. app. denied* (Tenn. Dec. 27, 2001). A pertinent portion of the dialogue during Dr. Seeber's deposition included the following:

> Q: What would your expectation of Mercer be if you had a patient of your group with minimal variability and late for an hour? What would you expect?
> A: It depends . . . if Jennifer Mercer is aware of this, that's one thing. And if Jennifer Mercer is unaware of this is another thing. And I don't know whether she's aware or not so I can't really—I can't really say.
> Q: Let's take it—assume she was aware of it. What would your expectation be? Late . . . and minimal variability for an hour?
> [Defense counsel:] I'm going to object to this and instruct him not to answer. You're asking for an opinion.
> Q: What would your expectation of your employee, the one you're supervising, be in this scenario?
> [Defense counsel:] Same objection. Instruct him not to answer.
> . . .
> Q: . . . [T]he concern about the fetal heart tones is its minimal variability and late decelerations; right?
> A: Correct.
> [Defense counsel:] Object to the form.
> Q: And that status had been persisting for more than an hour, had it not?

A: About an hour.
Q: When did it become concerning?
[Defense counsel:] Object to the form. Do not speculate on this. He's asking you about something –
A: I cannot tell you when – when it became concerning to those individuals, because I'm not there.
Q: Well, when would you have expected it to be concerning?
[Defense counsel:] Don't answer that question.
[Defense counsel:] Same objection.
[Defense counsel:] *Lewis v. Brooks*. Don't answer.

Plaintiff filed a motion to compel Dr. Seeber to testify concerning Nurse Mercer's performance prior to his arrival, which was argued and eventually denied by the trial court. In denying the motion to compel, the trial court explained:

> [T]he question calls for an opinion by Dr. Seeber that asks him to comment on the actions of other healthcare providers and does not involve his own actions, as required by *Lewis v. Brooks*. The question is governed by *Lewis v. Brooks* and is an impermissible question and Dr. Seeber is not required to answer it.
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> The Court further finds that hypothetical questions posed to Dr. Seeber about actions of other individuals or circumstances involving patient care while he was not involved in the patient's care, are not permissible under *Lewis v. Brooks* . . . .

Concerning the issue of damages, Plaintiff's prayer for relief included, among other things, compensation for "[l]arge medical expenses past, present, and future," and the "[l]oss of future earning capacity" of the child. The defendants filed a joint motion for partial summary judgment relating to the claim for pre-majority medical expenses. The trial court heard oral argument on May 24, 2019, and later granted the defendants' joint motion for partial summary judgment regarding pre-majority medical expenses.

The case proceeded to a jury trial conducted in late May and early June of 2019. The jury found that neither Nurse Mercer nor Nurse Stephenson deviated from the recognized standard of care; thus, the jury found they were not negligent. The trial court, therefore, did not reach the issues of Dr. Seeber's vicarious liability or damages. Plaintiff moved for a new trial based on several different grounds, but the trial court denied the motion. Plaintiff then filed a notice of appeal.

Relevant to the issues raised on appeal before this Court, the Plaintiff argued to the Court of Appeals that (1) the trial court erred in limiting Plaintiff's examination of Dr.

Seeber during his deposition and at trial under *Lewis v. Brooks*; and (2) the trial court erred in excluding proof of the child's pre-majority medical expenses. *Borngne ex rel. Hyter v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, No. E2020-00158-COA-R3-CV, 2021 WL 2769182 at *3 (Tenn. Ct. App. July 1, 2021). As to the first issue, the Court of Appeals reversed the trial court, concluding that the trial court erred by refusing to order Dr. Seeber to answer the questions at issue in his deposition. *Id.* at *13. In a split opinion, the Court of Appeals distinguished the facts of this case from the facts of *Lewis v. Brooks* by primarily highlighting the supervisory relationship between Dr. Seeber and Nurse Mercer. *Id*. The intermediate court remanded the case for a new trial and further concluded that, on remand, Plaintiff should be permitted to put on proof of her pre-majority medical expenses. *Id.* at *14. Judge Kristi M. Davis filed a separate opinion concurring in part but dissenting as to the compulsion of Dr. Seeber's deposition testimony. *Id.* at *15–*16 (Davis, J., dissenting).

We granted the defendants' ensuing applications for permission to appeal.

II. ANALYSIS

The first application for permission to appeal to this Court, filed by Dr. Seeber, Nurse Mercer, and Caring Choice, asked this Court to consider whether the Court of Appeals erred in its decision concerning the compulsion of Dr. Seeber's testimony and in its decision concerning exclusion of proof of Plaintiff's pre-majority medical expenses. Erlanger filed a separate application asking to this Court to consider whether the Court of Appeals erred in remanding the case for a new trial as to all named defendants when the reversible errors on appeal were only attributable to the Caring Choice defendants. As we see it, however, the dispositive issue before us is whether the trial court appropriately declined to order Dr. Seeber to answer the subject deposition questions concerning his expert opinion of the nurse-midwife's care of the Plaintiff. This is an issue of first impression for this Court.

Of course, in considering this question, we must begin with our standard of review. The lens through which we view the issue before us is no small matter. The parties have operated under the assumption that this Court will review the trial court's decision for an abuse of discretion. We certainly agree that "[i]t is well settled that decisions with regard to pre-trial discovery matters rest within the sound discretion of the trial court." *Benton v. Snyder*, 825 S.W.2d 409, 416 (Tenn. 1992). However, the defendants here are asking *this Court* to recognize for the first time that a defendant physician may refuse to give his or her expert opinion as to certain matters in a healthcare liability action. This is a question of law that we review de novo. *Moore v. Lee*, 644 S.W.3d 59, 63 (Tenn. 2022) (quoting *Fisher v. Hargett*, 604 S.W.3d 381, 395 (Tenn. 2020)); *see also Carney-Hayes v. Nw. Wis. Home Care, Inc.*, 699 N.W.2d 524, 532 (Wis. 2005). Therefore, the trial court's conclusion on this issue is not entitled to a presumption of correctness.

Tennessee Code Annotated section 29-26-115(a) sets out the elements that a plaintiff in a healthcare liability action must prove to prevail at trial:

> (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;
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> (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and
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> (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

In addition, the statute makes clear that "expert testimony must be provided by a plaintiff to establish the elements of his or her medical negligence case." *Shipley v. Williams*, 350 S.W.3d 527, 537 (Tenn. 2011) (citing *Williams v. Baptist Mem'l Hosp.*, 193 S.W.3d 545, 553 (Tenn. 2006); *Stovall v. Clarke*, 113 S.W.3d 715, 723 (Tenn. 2003); *Robinson v. LeCorps*, 83 S.W.3d 718, 724 (Tenn. 2002)); *see also* Tenn. Code Ann. § 29-26-115(b).

In the case before us, Plaintiff attempted to directly question a party defendant (who was not an independent expert) to prove the applicable standard of care and whether Nurse Mercer's conduct was compliant with that standard. As noted above, the trial court declined to compel Dr. Seeber to testify as to his opinion of the medical care rendered by Nurse Mercer at times when Dr. Seeber was not present or directly involved with the plaintiff's medical treatment. The trial court stated that Dr. Seeber could not be required to answer a question that "calls for an opinion . . . on the actions of other healthcare providers and does not involve his own actions, as required by *Lewis v. Brooks*."

Indeed, the most relevant Tennessee case on this particular issue is a twenty-two-year-old Court of Appeals opinion, *Lewis*, 66 S.W.3d 883. In *Lewis*, the plaintiff sued three doctors: Drs. Moore, Lawrence, and Brooks. *Id.* at 884. She sued Drs. Moore and Lawrence for negligence with respect to their prenatal care of her and for negligence in their selection of Dr. Brooks to cover for them. *Id.* The plaintiff sued Dr. Brooks for negligence that occurred during his delivery of her child. *Id.* at 884–85. Drs. Moore and Lawrence refused to answer questions in their depositions regarding their opinions as to the plaintiff's treatment by any other health care providers, including Dr. Brooks and the nurses. *Id.* at 887. The plaintiff filed a motion to compel, which the trial court denied, limiting the testimony of Drs. Moore and Lawrence to opinions they were expected to offer at trial and opinions related to their own actions. *Id.* The Court of Appeals affirmed, explaining:

> Counsel have not cited, nor have we been able to find, any Tennessee cases specifically dealing with this point. However, an unpublished opinion from this court is instructive. In *Chambers v. Wilson*, (Tenn. Ct. App. May 23, 1984) (Crawford, J.), the issue was whether an expert specifically hired for litigation could be compelled to testify against his will. In holding that an expert could not be compelled to testify against his will, we stated that "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. In each case it is a matter of bargain, which, as ever, it takes two to make, and to make unconstrained." *Id.* at 6 (quoting *Pennsylvania Co. v. City of Philadelphia*, 262 Pa. 439, 105 A. 630 (1918)).
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> . . . [W]e note that Dr. Moore and Dr. Lawrence were not listed as expert witnesses by either party. They were simply party defendants who are "experts" by nature of their chosen field. Under the facts of the instant case, we do not find that their expertise is subject to compulsion. As a result, we find that the trial court did not err when it refused to compel Dr. Moore and Dr. Lawrence to answer questions outside the realm of their own actions and opinions that they expected to render at trial.

Id. at 887–88.

Here, a majority of the Court of Appeals disagreed with the trial court's assessment that the *Lewis* decision was determinative of the present case. *See Borngne*, 2021 WL 2769182 at *13. Notably, the intermediate court stated that "[t]his is not a scenario featuring co-defendant healthcare providers on an equal footing and at arm's length from one another." *Id.* Rather, the majority of the Court of Appeals described Nurse Mercer as a provider in a "subordinate role." *Id.*

In determining that Dr. Seeber could be compelled to testify, the intermediate court drew from the 2006 Court of Appeals decision *Waterman v. Damp*, No. M2005-01265-COA-R3-CV, 2006 WL 2872432 (Tenn. Ct. App. 2006), *perm. app. denied* (Tenn. Feb. 26, 2007), in which the intermediate court purported to "place[] Tennessee among those jurisdictions recognizing that medical experts alleged to have injured a patient by their own direct causal negligence may be compelled to answer questions as to whether their conduct conformed to the applicable standard of care." *Borngne*, 2021 WL 2769182 at *11. According to the majority opinion, "[c]ompelling Dr. Seeber to testify regarding the conduct of his supervisee . . . would be more akin to compelling him to testify as to his own conduct, in accordance with *Waterman v. Damp*, as it is Nurse Mercer's conduct as Dr. Seeber's supervisee that gives rise to his liability, if any." *Id.* at *13.

By contrast, in her dissent, Judge Davis determined that the trial court correctly refused to compel Dr. Seeber's testimony based on *Lewis*. *Id.* at *15 (Davis, J., dissenting). She explained:

> The essence of Plaintiff's action is her allegation that Nurse Mercer too slowly recognized concerning signs and indicators suggesting dangerous complications in her delivery and that she called Dr. Seeber too late. Defendants denied this and put on proof to the contrary, including the testimony of Nurse Mercer, Nurse Stephenson, and Dr. Seeber. Dr. Seeber was not at the hospital during the critical time that Nurse Mercer was providing care to Plaintiff, before she called him. Thus, it is apparent that Dr. Seeber was not providing treatment to Plaintiff during this time. It 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.
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> The underpinning of *Lewis* . . . is the recognition that a practitioner who has not been named as an expert witness cannot be forced to provide expert testimony against another practitioner simply because of their knowledge, skill, experience, training, or education.

Id.

As we see it, the parties' arguments on appeal boil down to this: Plaintiff argues for an extension of the *Waterman* holding, while the defendants argue for an extension of *Lewis*. Admittedly, the factual scenario presented here falls somewhere in the middle. Dr. Seeber was not being questioned about the standard of care provided by another entirely independent physician and co-defendant, which under *Lewis* he could not be compelled to answer. Nor was he being questioned about whether his own actions deviated from the accepted standard of care, which he could be compelled to answer under *Waterman*. Rather, this case involves the potential testimony of a physician against whom the plaintiff asserts a vicarious liability claim based on the physician's supervision of another healthcare provider.

However, the parties on both sides of this appeal have failed to recognize or adequately address that this Court is not bound by the *Lewis v. Brooks* holding. Although the *Lewis* court did not frame it as such, the holding therein effectively articulated an evidentiary privilege.[1] In our role as a law development court, we are today deciding for

[1] The record on appeal indicates a bit of confusion on the part of the parties and the trial court as to whether *Lewis* articulated a privilege. In response to Plaintiff's motion to compel, the defendants relied on

the first time whether there is a sufficient rationale to support such a privilege at all before we get to the question of whether it applies to Dr. Seeber.[2]

Ultimately, we are persuaded that the *Lewis* holding is sound and that the privilege articulated therein has a legitimate source within our evidentiary rules. We agree with reasoning employed by our Court of Appeals first in *Chambers v. Wilson*, then *Lewis*, and later in *Burchfield v. Renfree*, No. E2012-01582-COA-R3-CV, 2013 WL 5676268, at *25 (Tenn. Ct. App. Oct. 18, 2013), 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 a healthcare professional's expert views.[3]

In so deciding, we are particularly persuaded by the Wisconsin Supreme Court opinion in *Carney-Hayes v. Northwest Wisconsin Home Care, Inc.*, 699 N.W.2d 524 (Wis. 2005). In that case, a patient brought a medical malpractice action against a home health agency and its employee/nurse for allegedly providing negligent emergency nursing treatment. *Id.* at 528. Notably, the *Carney-Hayes* case was based on a state statute that

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Lewis in support of their instruction to Dr. Seeber not to answer questions regarding care rendered by Nurse Mercer, but the defendants did not ever indicate that *Lewis* articulated a privilege. The trial court ultimately indicated a lack of clarity on whether *Lewis* articulated a privilege, but determined that its characterization was immaterial for the resolution of the issue presented. Changing course, the defendants admit in their brief on appeal to the intermediate court that *Lewis* "can probably be construed most closely to a privilege at common law." Despite the confusion, on its face, the use of *Lewis* to permit a witness to refuse to answer questions in a deposition or at trial leads us to the conclusion that it effectively articulates a privilege, which under our rules of evidence requires a source. *See* Tenn. R. Evid. 501 ("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 . . . [r]efuse to be a witness[, or] . . . to disclose any matter[.]") (emphasis added).

[2] As the Court of Appeals recognized, the holding articulated in *Waterman*—that a defendant physician may be compelled to testify as to whether his or her own conduct complied with the standard of care—is now the generally accepted rule in the majority of jurisdictions. *Borngne*, 2021 WL 2769182, at *11 (citing *Anderson v. Florence*, 181 N.W.2d 873, 875 (Minn. 1970)). We need not address the soundness of that generally-accepted principle today.

[3] Amicus curiae Tennessee Trial Lawyers Association ("TTLA") urges the Court to abrogate *Lewis v. Brooks* and its progeny and adopt the holding of federal courts such as that of the Second Circuit in *Kaufman v. Edelstein*, 539 F.3d 811 (2d Cir. 1976), which rejected any claim of privilege by experts on the ground of a protected property interest in the products of their brains. According to the TTLA, *Kaufman* is the prevailing federal view and has been incorporated into Federal Rule of Civil Procedure ("FRCP") 45 with respect to "pure" experts—those experts who were not involved in the events of the case or named as parties. The TTLA advocates for a similar rule in Tennessee 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. However, this argument was not raised by the parties below, and it was not addressed by either the trial court or the Court of Appeals. Such a change in Tennessee law would certainly warrant an opportunity for the parties to fully brief the issue. If the TTLA prefers a rule similar to FRCP 45, we encourage it to petition the Court's Advisory Commission on the Rules of Practice and Procedure.

allowed a circuit court judge to appoint an expert witness *if* the expert "consents to act." *Id.* at 533 (citing Wis. Stat. § 907.06(1)). The Wisconsin court had previously interpreted an implied "broader privilege inherent in the statute," reasoning "[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." *Id.* (quoting *Burnett v. Alt*, 589 N.W.2d 21, 26 (Wis. 1999)). The court held that "[s]ubject to the compelling need exception . . . a medical witness who is unwilling to testify as an expert cannot be forced to give [his or] her opinion of the standard of care applicable to another person or [his or] her opinion of the treatment provided by another person." *Id.* at 541. *See also Ransom v. Radiology Specialists of Nw.*, 425 P.3d 412, 420–21 (Or. 2018) (explaining that under Oregon's Rules of Civil Procedure, an expert physician "who acquires or develops facts or opinions as a participant in the events at issue may be questioned about those events as an ordinary witness. . . . A party cannot . . . ask a participating expert about matters in which the participating expert was not directly involved.").

The court then applied the privilege to the specific circumstances and witnesses involved in that case. The three witnesses at issue in *Carney-Hayes* were all employed by the agency. *Id.* at 528. The nurse directly involved in the patient's emergency care was "required to answer questions about the standard of care governing her conduct because she [was] accused of negligence and [was] central to the case." *Id.* at 540. The patient's "case manager" was required to testify about her own conduct in preparing the patient's "plan of care" and, if relevant, any direct care she provided to the patient in the past. *Id.* The case manager was not required to testify about the "general standard of care for preparing a similar plan of care" or about "whether she believe[d] [the nurse directly involved in the incident's] conduct conformed to the standard of care." *Id.* The third witness, the "Director of Extended Care Services," was required to testify about her own actions and any training she provided to the nurse involved in the incident, but not about the general standard of care for a nursing supervisor or about whether she "believe[d]" the nurse directly involved in the incident's "conduct conformed to the applicable standard of care." *Id.* at 541.

Tennessee Rule of Evidence 706 is remarkably similar to the Wisconsin statute that formed the basis for the privilege discussed in *Carney-Hayes*. Rule 706(a) provides that "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). Subsection (b) provides that such experts are "entitled to reasonable compensation." Tenn. R. Evid. 706(b). We are persuaded by the Wisconsin court's reasoning under a similar statutory scheme that a consent requirement for court-appointed experts necessarily implies a broader privilege. Indeed, "[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." *Alt*, 589 N.W.2d at 26. Thus, we

find that the privilege articulated in *Lewis* has a legitimate source—it is grounded in Tennessee Rule of Evidence 706.

We are also convinced that recognizing such a privilege is good public policy. The *Carney-Hayes* court cited three compelling reasons for the "ability to refuse to give an expert opinion." *Id.* at 535. First, it acknowledged the unfairness of compelling a person to testify just because he or she "is accomplished in a particular science, [art], or profession." *Id.* at 536 (quoting *Ex parte Roelker*, 20 F. Cas. 1092 (D. Mass. 1854) (alteration in original)). To do so "would subject the same individual to be called upon, in every cause in which any question in his department of knowledge is to be solved." *Id.* (quoting *Roelker*, 20 F. Cas. 1092. Second, the Wisconsin Supreme Court emphasized the understandable reluctance of a health care provider to testify against another health care provider due to the strain unfavorable testimony can place on relationships between colleagues:

> There is a heavy strain on the relationships in a hospital, clinic, or other health care facility when one health care provider is required to make a public assessment under oath about another health care provider's professional performance. People understand a requirement that a witness must divulge facts; they are often more sensitive to a colleague's critical opinion. The resulting tension can destroy friendships, working relationships, and economic relationships. In the absence of necessity, there are practical reasons to avoid these familiar human problems by not requiring non-essential opinion testimony from certain witnesses.

Id. Third, the court noted "relationships among local health care providers may affect the objectivity of their testimony" *Id.* at 536. It noted that "[s]ome witnesses may have a financial stake in the outcome of malpractice litigation . . . [and] shade their testimony to advance their own interests, guard their own reputations, or protect their co-workers." *Id.*

Justice Campbell, in her separate concurring in the judgment opinion, expresses concern about finding an implied broader privilege in Rule 706, emphasizing the differences between a court-appointed expert and an expert called by a party. She states: "The fact that a statute or rule requires consent and compensation for a court-appointed expert [] does not fairly imply that an expert must consent to only disclosing his previously formed opinions." Her criticism seems to stem from her view that a court-appointed expert, as compared to a party co-opted expert, must likely devote more out-of-court time and resources to a case in order to give his or her expert opinion. Conversely, as we see it, there certainly may be instances in which one type of expert or the other may have already formed an opinion or done the work. There is no universal set of circumstances that differentiates the effort required of one type of expert over the other. It could be that a court-appointed expert already has opinions on the relevant issue, particularly if the

question is one regarding his or her expertise in a field and one which would be of general application. On the other hand, a private party may designate an expert who has not previously developed an opinion with respect to the conduct of another party. Regardless, Rule 706 does not differentiate based on the particular circumstances but instead contains a blanket consent requirement for court-appointed experts, and we agree with the Wisconsin court that if a court must obtain consent from an expert witness, then so must a litigant.

With these considerations in mind, we today hold 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 formally adopted the holding in *Lewis*, we return to the crux of the parties' arguments on appeal: whether the supervisory relationship presented here places this case in the realm of *Waterman* or *Lewis*. The Court of Appeals majority opinion expressed the following consternations as to the defendants' position that even a physician in a supervisory role such as Dr. Seeber should be entitled to withhold his expert opinion:

> The ramifications of such an extension [of *Lewis*] would ripple beyond health care liability lawsuits; it could be applied to any field involving expert defendants in a supervisor and supervisee relationship. The results could be absurd and unjust. In this case, adopting Defendants' position with respect to *Lewis* means in practical terms that no one at Caring Choice may be compelled to testify as to whether its employee, Nurse Mercer, complied with the acceptable standard of care. We do not believe *Lewis* stands for this sort of expansive and unjustified expert privilege.

Borngne, 2021 WL 2769182, at *13. Conversely, drawing from Judge Davis's dissent, the defendants make much of the majority's decision to carve out a legally-baseless "exception" to the general rule for supervisor-supervisee relationships when it concluded that compelling Dr. Seeber's testimony as "more akin to compelling him to testify as to his own conduct, in accordance with *Waterman*." *Id.*

It is undisputed and stipulated that Dr. Seeber was Nurse Mercer's supervising physician at the relevant times.[4] Still, the parties on appeal continue to disagree on the scope of that supervision based on the applicable statutes, regulations, guidelines, and

[4] The parties stipulated that "Jennifer Mercer was an employee of Caring Choice Women's Clinic" and that "Dr. Michael Seeber was Jennifer Mercer's supervising physician *at the time she provided care to [Plaintiff] for the labor and delivery on 3/5/14 and 3/6/14.*" (emphasis added). There was no temporal limitation on this stipulated fact.

testimony.[5] The defendants emphasize that the supervisory role of a physician over a certified nurse-midwife is not all-encompassing, *see* Tenn. Code Ann. §§ 63-29-102(10) (2017), 63-29-115(a) (2017); Tenn. Comp. R. & Regs. 1050-05-.02 (2003), and that "subordinate" is not a fair or accurate description of the certified nurse-midwife role in relation to a physician. Indeed, Nurse Mercer was selected by the patient to provide care, and Nurse Mercer, in following the state's regulations, did so independently until Dr. Seeber arrived.

Our review of the arguments of the parties and the amici and the above-cited sources leads us to the conclusion that delving into the particular details of the supervisory relationship is unhelpful. As the defendants and amici emphasize, healthcare as a whole is collaborative in nature and supervisory relationships are ubiquitous in the field. We can certainly envision such a broad, insufficiently-defined exception to the rule as the Court of Appeals' majority purported to create swallowing the well-reasoned *Lewis* holding that a party physician cannot be compelled to provide expert testimony concerning the standard of care of another practitioner. Moreover, as Judge Davis noted in her dissent:

> [T]he majority opines that such testimony [when sought from a supervisor against a supervisee] is acceptable because it is highly pertinent and relevant. Respectfully, if that were the standard, then *Lewis* . . . should be abrogated. One doctor's opinion about whether another doctor complied with the standard of care is inarguably highly pertinent and relevant. The issue is not the relationship between the parties or whether the evidence is relevant. The issue is whether an expert can be compelled to testify regarding whether another practitioner complied with the standard of care, an issue that was properly resolved in *Lewis* . . .

[5] Nurse-midwives are certified through, and regulated by, the State of Tennessee. *See* Tenn. Code Ann. § 63-29-108, 115 (2017); Tenn. Comp. R. & Regs. 1050-05-.02 (2003). The statutory scheme regulating midwifery "recognizes that midwifery is a profession in its own right." Tenn. Code Ann. § 63-29-101 (2017). A certified midwife is "trained to give the necessary care and advice to women during pregnancy, labor, and the post-birth period, to conduct normal deliveries on the midwi[f]e's own responsibility and . . . is able to recognize the warning signs of abnormal conditions requiring referral to and/or collaboration with a physician." *Id.* § -102(9). The practice of midwifery is statutorily defined as "attending low-risk women during pregnancy, labor and the post-birth period with the informed consent of the mother. The scope of midwifery shall include comprehensive care of the pregnant woman during the antepartal phase, intrapartal phase, and postpartal phase, and application of emergency care when necessary." *Id.* § -102(10). *See also* TMA, *Tennessee Midwives Association (TMA) Practice Guidelines*, (adopted Jan., 22, 2001), https://www.tn.gov/content/dam/tn/health/healthprofboards/g5062255.pdf ("Midwifery care is the autonomous practice of giving care to women during pregnancy, labor, birth, and the postpartum period, as well as care to the newborn infant.").

Id. at *15 (Davis, J., dissenting). We agree and ultimately remain unconvinced that one practitioner's supervision of another justifies an exception.[6] We therefore conclude that our holding today stands regardless of any supervisory relationship between the providers.

As for the concerns expressed by the Court of Appeals majority opinion regarding the "ramifications of such an extension [of *Lewis*]," *Borngne*, 2021 WL 2769182, at *13, we can only emphasize that the defendants here merely stipulated that Dr. Seeber was Nurse Mercer's supervisor, not that she was his agent or that Dr. Seeber was vicariously liable for her actions. It goes without saying that, as any other party/witness, defendant healthcare providers like Dr. Seeber may be questioned about the relevant information and observations of which he or she has personal knowledge within the bounds of the evidentiary rules. This may include recounting assessments or opinions made during the normal course of performing his or her duties or even the provider's thought process during a particular incident. However, here, it is apparent from the record that Dr. Seeber was not present at the hospital or actively providing care during the critical time that was the subject of Plaintiff's deposition questions. Rather, Plaintiff sought Dr. Seeber's expert testimony about Nurse Mercer's standard of care and thought process outside of Dr. Seeber's presence and before he became involved in the incident. Plaintiff was free to—and in fact, did—hire an independent expert witness to attempt to assist Plaintiff in establishing the elements of her healthcare liability claims. *See Carney-Hayes*, 699 N.W.2d at 534–36 ("If there are a number of people in a given field of expertise with similar knowledge, each capable of rendering an expert opinion on a particular question, then any one expert's opinion is not unique or 'irreplaceable,' and there is no compelling need for a particular expert's testimony." (citation omitted)). Dr. Seeber's testimony concerning Nurse Mercer's care could have been helpful and/or relevant to Plaintiff's cause of action, but that does not mean she was entitled to it.[7]

[6] While we do not see a need for an exception under these facts, we recognize that an exception might exist in compelling circumstances. *See Carney-Hayes*, 699 N.W.2d 524, 534 (2005) (citing *Glenn v. Plante*, 676 N.W.2d 413 (2004)).

[7] More than one of the amicus curiae briefs brought up the issue of whether Tennessee's Quality Improvement Committee ("QIC") privilege applies to the expert opinion of Dr. Seeber, and if so, whether the original source exception applies. *See* Tenn. Code Ann. §§ 63-1-150(d)(1) (2017 & Supp. 2022), 68-11-272(c)(1)–(2) (2013 & Supp. 2022). The amicus curiae take the position that Dr. Seeber's supervision of Ms. Mercer was a QIC activity within the scope of the statutes, and so any of his statements or opinions regarding Ms. Mercer are privileged. However, this interpretation represents a significant expansion of the generally accepted understanding of the QIC statutes and privilege. Such a position would effectively permit every supervising physician to be deemed engaged in QIC activities at all times while supervising another provider, regardless of whether the supervision is direct. Dr. Seeber's form of active practice supervision does not appear to be what the statutes contemplate.

Therefore, we conclude that the trial court properly declined to compel Dr. Seeber's expert testimony concerning a co-defendant healthcare practitioner's standard of care and/or deviation from that standard. The judgment of the trial court stands. All remaining issues are pretermitted.

III. CONCLUSION

For the foregoing reasons, we conclude that Plaintiff's motion to compel Dr. Seeber's deposition testimony related to the nurse-midwife's care was properly denied. The decision of the Court of Appeals is therefore reversed, and the trial court's judgment is affirmed. The costs of this appeal are taxed to the plaintiff, Brittany Borngne, for which execution may issue if necessary.

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ROGER A. PAGE, CHIEF JUSTICE