EXAMPLES OF MOTIONS IN LIMINE THAT PLAINTIFFS MAY WANT TO CONSIDER FILING ON EVIDENTIARY ISSUES

I. PLAINTIFF'S MOTION IN LIMINE TO PREVENT TESTIMONY AT TRIAL REGARDING NEW MEMORIES/RECOLLECTIONS FROM PREVIOUSLY DEPOSED EMPLOYEES (CURRENT OR FORMER) OF DEFENDANT FACILITY

Pursuant to the recently released Tennessee Court of Appeals case of Collier v. Roussis, 2017 Tenn.App.LEXIS 533; No. E2016-01591-COA-R3-CV (Tenn. Ct. App. Aug. 7, 2017) (attached as **Exhibit A**), Plaintiff files this Motion in Limine to prevent any of the previously deposed former or current employees of the Defendant facility from testifying to new found memories or recollections that he or she may have recalled since his or her deposition.

In Collier, the Tennessee Court of Appeals reversed a defense verdict in a medical malpractice case and found the trial court judge erroneously allowed a nurse employed by the Defendant Hospital to testify to new memories that she claimed that she developed well after her initial deposition testimony. The nurse claimed that seeing a picture of a piece of medical equipment months after her deposition rekindled new memories that convinced her that the patient's blood pressure must not have been low otherwise the machine would have told her. The Collier Court indicated that the patient's blood pressure readings (or lack thereof) were an important component of the case as the allegations against the Defendant Hospital centered on a failure to properly monitor the patient's blood pressure. The nurse testified that she began to remember new facts after being shown a photograph during a pre-trial preparation meeting with counsel for the Defendant Hospital.

Defense counsel in Collier argued that it was under a duty to supplement newly discovered testimony only with respect to a company representative. The Collier Court specifically disagreed and found that:

> The Hospital asserts that it would have a duty to supplement pursuant to Rule 26.05 only with regard to testimony of its corporate representatives. The Hospital's position is understandable as "corporate representatives" of a hospital rarely are

> involved in the actual care and treatment of patients. If the Hospital is found liable in this case, it will be because of the actions or inactions of its employee nurses, not those of its corporate representatives. Furthermore, we note that the nurses were shown the photographs at issue during a meeting with the Hospital's attorney in preparation for trial. Construing Rule 26.05 to mean that a corporate entity would be required to supplement only with regard to its corporate representatives and not its employees actually involved would give an unjust advantage to corporations over individuals. Such a construction would be contrary to the Tennessee Rules of Civil Procedure which specifically **[*15]** state: "These rules shall be construed to secure the just, speedy, and inexpensive determination of every action." Tenn. R. Civ. P. 1. **There would be nothing "just" about allowing a corporation, such as the Hospital, to know that the testimony of its employees whose conduct the corporation may be liable for has totally changed from their deposition testimony and not requiring the corporation to supplement its employees' responses**. **Such a construction not only would permit corporations to engage in court sanctioned trial by ambush, but would encourage it.** To adopt the Hospital's construction would mean that the Tennessee Supreme Court in adopting Tenn. R. Civ. P. 26.05(2) and 37.03 intended to give corporations an unjust advantage over individuals. Instead of adopting such a construction, we will comply with the explicit direction of Tenn. R. Civ. P. 1 and construe the rule "to secure the just . . . determination of every action." Tenn. R. Civ. P. 1.
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> Id. at *14-15.
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> Although the nurses were not named individually as defendants, the Hospital had a duty to supplement pursuant to Rule 26.05 when it learned that its employee nurses had not only new but different testimony to offer. The nurses were not some third party witnesses with no connection to the Hospital. Instead, the nurses are the Hospital's employees whose conduct is attributed to and gives rise to the Hospital's liability, if any, in this health care liability action.
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> Id. at *15-16.

Importantly, the Supreme Court specifically struck down another defense raised by the Hospital defense counsel which is that if the Plaintiff had done a better job in the deposition by showing photographs to the nurses, perhaps the testimony could have been elicited. The Collier Court stated that this was "meaningless misdirection" and concluded that the hospital lawyers this shown the photographs to the nurses in doing so "jog the nurse's memories causing the nurses to change their testimony. Once the Hospital had that information, it was under a duty to supplement, no matter what plaintiff could have done previously:

> The Hospital also asserts **[*17]** that the allegedly new testimony given by the nurses actually was not new because the Hospital had asserted from the beginning that the Patient's blood pressures were monitored. This argument is disengenuous. Although the Hospital's theory of the case may have been that the Patient's blood pressure readings were monitored, the nurses during their depositions stated that they could recall nothing about the monitoring of the Patient's blood pressure beyond what was stated in the medical chart. The medical chart was devoid of any mention of the Patient's blood pressure readings being monitored by a Dinamap machine. Nothing within the medical chart suggests that a Dinamap was utilized while the Patient was having the reaction to the Ampicillin. As such, the new testimony offered by the nurses that they recalled using a Dinamap and viewing the Patient's blood pressure readings on the Dinamap during the relevant time period was indeed new, different, and previously undisclosed testimony.
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> **The Hospital also asserts that Plaintiff provided the photographs and that Plaintiff's counsel could have shown the photographs to the nurses during their depositions. This could have/should have/would have [*18] assertion is meaningless misdirection.** While it is true that Plaintiff's counsel could have shown the nurses the photographs, this assertion is immaterial to an analysis of this issue. The Hospital's counsel did show the nurses the photographs after their depositions were taken and knew that seeing the photographs jogged the nurses's memories causing the nurses to change their testimony. Once the Hospital had that information, it was under a duty to supplement, no matter what Plaintiff could have done previously.
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> The Hospital failed to supplement pursuant to Tenn. R. Civ. P. 26.05. As such, pursuant to Tenn. R. Civ. P. 37.03, the previously undisclosed and contradictory testimony of the nurses should have been excluded. We hold that it was error to allow the previously undisclosed testimony of the nurses, and such error cannot be considered harmless in this case because it was relevant to a central issue of whether the Patient's blood pressure was monitored or not. As such, we vacate the Trial Court's judgment and remand this case for a new trial.
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> Id. at *16-18.

Plaintiff simply wants to make sure that this Court prevents a knowing ambush—if Defense counsel meets with a previously-deposed witness before trial and she/he suddenly has developed new memories not previously disclosed, then Plaintiff's counsel is asking that this Court strike such testimony and prevent Defense counsel from knowingly eliciting testimony that has changed and was not previously supplemented/disclosed. The Collier opinion attempts to prevent an ambush at trial—especially on crucial factual issues where opposing counsel may have advance notice that new or improved testimony is coming.

Collier stands for the proposition that a corporate Defendant is required to supplement when its employees (former or current) develop new memories or change their testimony and counsel for the corporate Defendant is aware of such a development in order to prevent an ambush at trial. Plaintiff is only seeking the same result here in the case at bar.

II. PLAINTIFF'S MOTION IN LIMINE TO PREVENT TESTIMONY AT TRIAL ON ISSUES PERTAINING TO MEDICAL CAUSATION FROM NURSE WITNESSES (EXPERT OR FACT) TESTIFYING FOR THE DEFENSE

It Is Well Settled In Tennessee—Nurses Cannot Testify On Issues Of Medical Causation.

As recently as October 11, 2017, in Estate of Sample v. Life Care Centers of America, Inc., No. e2017-00687-COA-R3-CV (Eastern Section Tenn. Crt. App. Oct.11, 2017) the Tennessee Court of Appeals, citing to a previous published opinion also on point on the same issue, has once again held that nurses are prevented from testifying on issues pertaining to medical causation:

> In its order granting summary judgment to Life Care, the Trial Court correctly found that Nurse Huff was not competent to testify as to the issue of causation. The Trial Court relied upon *Richberger v. The West Clinic, P.C.*, wherein this Court held that in a health care liability action a registered nurse is prohibited from testifying as an expert with regard to causation pursuant to Tenn. Code Ann. § 29-26-115(a)(3) because a registered nurse is prohibited from making a medical diagnosis pursuant to Tenn. Code Ann. § 63-7-103(b). *Richberger v. The West Clinic, P.C.*,152 S.W.3d 505 (Tenn. Ct. App. 2004).
> Id. at * __.

In Richberger v. The West Clinic, P.C., 152 S.W.3d 505 (Tenn. Ct. App. 2004) *perm. app. denied* Tenn. Oct 4, 2004, the Court of Appeals upheld summary judgment for the defendant health care provider where the Plaintiff provided expert proof from a nurse on the issue of medical causation in a medical malpractice lawsuit. The Richberger court concluded that "we find that the trial court did not err in ruling that [nurse expert] was prohibited from testifying as

an expert regarding the issue of causation." Id. at 511. Additionally, the Richberger court examined the plethora of cases that stood for this same proposition considered by earlier appellate courts all over Tennessee with the same conclusion.

Defendant's Nurse Witnesses Should Not Be Allowed To Provide Medical Causation Testimony.

Employing the logic from the Estate of Sample and Richberger opinions, Plaintiff moves this Court to prevent the Defendants from soliciting any medical causation opinions from either a nurse fact witness or any disclosed nurse expert witness.

Tennessee's appellate courts have repeatedly concluded that medical causation testimony from a nurse is inappropriate in the context of a medical malpractice claim. Lastly, to allow such testimony will likely create reversible error on appeal. Accordingly, such testimony should be prohibited by the Defendants.

III. PLAINTIFF'S MOTION IN LIMINE TO PREVENT DEFENDANT HEALTH CARE PROVIDER FROM ASSERTING A COMPARATIVE FAULT DEFENSE AGAINST UN-NAMED PARTIES

A defendant in a negligence case who wishes to introduce evidence that a person other than a named defendant caused plaintiff's injury must affirmatively plead comparative fault as a defense. George v. Alexander, 931 S.W.2d 517 (Tenn. 1996). In the George case, the Tennessee Supreme Court awarded a plaintiff a new trial in the context of a medical malpractice claim and held that the trial court mistakenly allowed the defendant to introduce evidence from an expert witness that a non-party to the lawsuit (a surgeon) failed to properly position the Plaintiff during the surgery and that this action by the un-named surgeon was the true cause of the Plaintiff's injury:

> Consequently, where the defendant does not plead comparative fault, it will be held liable for 100% of the plaintiff's damages unless it is absolved of all

> liability. In other words, where a sole defendant does not plead comparative fault, there will be no apportioning of liability for damages even though the defendant may have been only partially at fault. **Evidence which tends to establish the plaintiff or a nonparty as a tortfeasor responsible for the damages alleged is not admissible unless the defendant has played comparative fault as an affirmative defense**.
> Id. at 527. (Emphasis added.)

The Tennessee Supreme Court over twenty years ago made very clear that they would not tolerate defendants attempting to circumvent the comparative fault process through expert testimony that asserts fault or suggests fault to a non-party. In this case, it is undisputed that the NAMED DEFENDANT never asserted fault as to UN-NAMED DEFENDANT. Any testimony from the NAMED DEFENDANT'S designated expert witness _____ that insinuates fault or mistake to UN-NAMED DEFENDANT is a clear violation of the Tennessee Supreme Court's directive in George v Alexander, 931 S.W.2d 517 (Tenn. 1996.)

Companion/Similar Motion In Limine:

The policies and purposes of Rule 8.03's comparative fault pleading requirements are to give fair notice to plaintiffs in advance of trial, and to prevent trial-by-ambush and empty-chair defenses when the pleading requirements have not been met. *See, e.g., George v. Alexander*, 931 S.W.2d 517, 521 (Tenn. 1996).

In the George case, the Tennessee Supreme Court awarded a plaintiff a new trial in the context of a medical malpractice claim and held that the trial court mistakenly allowed the defendant to introduce evidence from an expert witness that a non-party to the lawsuit (a surgeon) failed to properly position the Plaintiff during the surgery and that this action by the un-named surgeon was the true cause of the Plaintiff's injury:

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> fault, there will be no apportioning of liability for damages even though the defendant may have been only partially at fault. **Evidence which tends to establish the plaintiff or a nonparty as a tortfeasor responsible for the damages alleged is not admissible unless the defendant has played comparative fault as an affirmative defense**.
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> Id. at 527. (Emphasis added.)

Sixteen years later, the Court of Appeals again observed that "the Supreme Court clearly established that 'Rule 8.03 is a prophylactic rule of procedure that must be strictly adhered to if it is to achieve its purposes.'" *Dickson v. Kriger*, 374 S.W.3d 405, 412-13 (Tenn. Ct. App. 2012) (quoting *George*, 931 S.W.2d at 522).

The Eastern Section of the Tennessee Court of Appeals, citing to the George opinion, recently released an important opinion on the attempted use of "back door" comparative fault and here is the punch line from that opinion:

> However, if a defendant states that he is not trying to blame anybody, but then proceeds to blame somebody, the disclaimer that he is not trying to blame anybody rings hollow.
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> Kanipe v. Patel, 623 S.W.3d 298, 309 (Tenn. Ct. App. 2020)

The George and Kanipe opinions stand for the distinct proposition that Tennessee's appellate courts don't believe in allowing defendants to surreptitiously assert comparative fault defenses as to non-parties when no formal affirmative defense has been raised against such non-parties . Express and indeed implicit blame shifting is strictly prohibited when a defendant has never formally asserted a comparative fault affirmative defense towards that non-party.

Similar Motion:

Argument supporting Plaintiff's Motion in Limine To Prevent Blame From Being Asserted Against A Non-Party

In Kanipe v. Patel, 623 S.W.3d 298 (Tenn. Ct. App. 2020) the Court of Appeals for the Eastern Section recently affirmed a trial court's decision to grant a new trial to a plaintiff in a medical malpractice case where during the first trial the defendant, the treating cardiologist, attempted to cast blame upon a non- party, namely, the hospital nursing staff, for failing to notify the cardiologist of the patient's continued chest pain.

The issue in the case centered on whether or not hospital nurse had timely informed the treating cardiologist of continued chest pain which would have required the cardiologist to re-evaluate the patient, which never happened. The patient ultimately died and the Plaintiff's proof at trial reflected that time was of the essence and that earlier, standard testing would have likely uncovered the true issue with an 80% chance of survival if timely caught.

The Court of Appeals noted that testimony of defendant Dr. Patel certainly insinuated that he was not told of the patient's continued chest pains by the hospital nursing staff. Plaintiffs were allowed to call the hospital nurse on duty in rebuttal and the hospital nurse (whose testimony appears in detail on Pages 7-8 in the opinion) adamantly testified that she made the cardiologist aware of the patient's continued chest pains.

At the first trial a verdict was rendered in favor of the defendant cardiologist. The trial court granted a new trial finding that although the hospital (via their nursing staff) was never named as a comparative fault tortfeasor by the defendant Dr. Patel, the cardiologist's testimony certainly insinuated that the hospital nursing staff was to blame. The Court of Appeals concluded:

> We note first that when Dr. Patel's [Defendant] attorney pursued on Dr. Barksdale's [Plaintiff's expert witness] cross- examination the issue of whether Dr. Patel was notified, Mr. Kanipe's [Plaintiff] attorney timely objected on grounds that comparative fault had not been pled. The objection was overruled; she did not have to object continually to preserve her objection. With respect to Dr. Barksdale's testimony about notification, this did not tend to blame the nurses for Ms. Kanipe's death. If anything, Dr. Barksdale faulted Dr. Patel for not ensuring there was stronger language in the order about calling him if Ms. Kanipe continued to experience chest pain. **Mr. Kanipe [Plaintiff] did not introduce the issue of the nurses' potential fault. Dr. Patel did when he testified point-blank that he never was notified of Ms. Kanipe's pain and would have re-evaluated her had he known of it.** In keeping with our Supreme Court's holding in George v. Alexander, we discern no abuse of discretion in the Trial Court's decision to grant Mr. Kanipe's motion for a new trial.
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> Id. at *15 (emphasis added.)

The Court of Appeals upheld the trial court's decision to award a new trial to the Plaintiffs and cited the well-known Tennessee Supreme Court decision in George v. Alexander, 931 S.W.2d 517, 520-521 (Tenn. 1996):

> While the defendants' position seems plausible at first blush, its assumption that proof of proximate cause is necessary to "shift the blame" to another is unfounded. Since proximate cause is actually just a policy decision of the judiciary to "deny liability for otherwise actionable causes of harm," see Kilpatrick v. Bryant, 868 S.W.2d 594, 598 (Tenn. 1993); Joseph H. King, Jr., Causation, Valuation and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences, 90 Yale L.J. 1353, 1355, n. 7 (1981), the defendants' position ignores the fact that "blame-shifting" in a negligence context actually has to do with the element of causation in fact. Once the defendant introduces evidence that another person's conduct fits this element, it has effectively shifted the blame to that person. Therefore, if the defendants' position were to be accepted, any defendant wishing to transfer blame to another person at trial could always maintain that it is not trying to show that the other's conduct satisfies the legal definition of negligence, but that it is merely trying to establish that the other person's conduct actually caused the injury. In the latter situation, however, the defendant has fully accomplished what Rule 8.03 was intended to prevent: it has effectively shifted the blame to another person without giving the plaintiff notice of its intent to do so. Therefore, the purpose of Rule 8.03 would be undermined to a substantial degree if the defendants' overly technical argument were to prevail. George v. Alexander, 931 S.W.2d 517, 520-21 (Tenn. 1996) (footnote omitted, emphases in original). This Court later observed that "the Supreme Court clearly established that 'Rule 8.03 is a prophylactic rule of procedure that must be strictly adhered to if it is to achieve its purposes.'" Dickson v. Kriger, 374 S.W.3d 405, 412-13 (Tenn. Ct. App. 2012) (quoting George, 931 S.W.2d at 522).
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> Id. at *13-14.

Notably, the Kanipe Court further alluded that attempts to cast blame rather than technical deviations in the standard of care are where the focus should lie:

> In keeping with George, our inquiry is with respect to causation in fact. Therefore, whether the nurses adhered to the nursing standard of care is not before us. The issue is whether Dr. Patel cast blame on non-party nurses for causing Ms. Kanipe's death. Dr. Patel testified that he was not trying to blame anybody. **However, if a defendant states that he is not trying to blame anybody, but then proceeds to blame somebody, the disclaimer that he is not trying to blame anybody rings hollow.**

The Kanipe court concluded:

> Dr. Patel's argument notwithstanding, we are unpersuaded that the matter

> of whether he ever was notified about Ms. Kanipe's ongoing chest pain somehow was immaterial to a determination of the cause in fact of her death. The jury in the first trial could well have concluded that non-party nurses were to blame for Ms. Kanipe's death rather than Dr. Patel. Under George, it was incumbent upon Dr. Patel to plead the comparative fault of the nurses in his answer if he intended to assert that they never notified him of Ms. Kanipe's ongoing pain, but he failed to do so.
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> Id. at *15.

IV. MOTION TO STRIKE EXPERTS TESTIFYING FOR THE DEFENSE WHO SEEK TO BLAME NON-PARTIES NEVER IDENTIFIED AS COMPARATIVE FAULT TORTFEASORS

As Plaintiff has pointed out in the companion Motion in Limine, the Eastern Section Court of Appeals in Kanipe v. Patel, 623 S.W.3d 298 (Tenn. Ct. App. 2020) expressly disavowed such implied blame shifting. Additionally, the Tennessee Supreme Court in George v Alexander, 931 S.W.2d 517, 521 (Tenn. 1996) likewise has expressly mandated that a Defendant must formally amend its answer and properly cast blame which has never happened as to non-parties X and Y and their respective staff and physicians.

Additionally, Tennessee's appellate courts have on a number of occasions held that "Defendants are not authorized to sit on their hands and not asset affirmative defenses as to hold otherwise would be to invite parties to lie in wait." Estate of Bradley v. Hamilton Cty., No. E2014-02215-COA-R3-CV, 2015 Tenn. App. LEXIS 669 (Ct. App. Aug. 21, 2015) *citing* Pratcher v. Methodist Healthcare Memphis Hosps., 407 S.W.3d 727, 735 (Tenn. 2013).

Here, Defendant waited until the window to conduct discovery was closed and then produced two separate experts who are attempting to shift blame onto non-parties never properly identified as comparative fault tortfeasors.

V. MOTION IN LIMINE TO PREVENT DEFENDANT'S EMPLOYEES FROM PROVIDING CORPORATE CHARACTER EVIDENCE ABOUT DEFENDANT _____ CORPORATION

The deposition testimony of Defendant XYZ'S EMPLOYEE _____ confirmed that she had no personal knowledge of the care provided to PLAINTIFF while PLAINTIFF was a resident at _____, did not personally remember PLAINTIFF and did not believe that she provided direct care to Plaintiff.

Nevertheless, DEFNDANT XYZ COMPANY EMPLOYEE repeatedly extolled the general virtues of the defendant facility and even discussed her opinion of what she thinks the reputation of the defendant facility was in the community and the defendant facility's performance on internal metrics (not available for examination) to suggest that the Defendant XYZ could not have deviated from the standard of care in the case at bar.

Tennessee courts have clearly established that character evidence is simply not admissible in civil matters to prove conformity therewith.

> In criminal cases, the accused is permitted to prove not only his good reputation, but also his good character in defense of the accusation of crime against him. **In civil cases, however, the character or reputation of a party to an action is generally regarded as irrelevant, and evidence concerning it is not admissible. Evidence of the character of a party is not admissible to prove or disprove the act with which he is charged. In civil cases each transaction must be ascertained by its own circumstances, and not by the character or reputation of the parties.** The only instances where proof of character or reputation is permitted is where the action involves or directly affects the character or reputation of a party, or, in other words where [*12] the nature of the proceeding is such as to put the character of a party directly in issue. Evidence of character and reputation is generally regarded as inadmissible, even though the cause of action is one for which a criminal prosecution might be brought. Generally in actions for recovery of penalties, evidence of general reputation or character is not admissible.'
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> Decisions of Tennessee courts have modified the principles announced in the above quotation to a certain extent, among others, by admitting character evidence in a tort action for malicious prosecution, *Scott v. Fletcher,* 1 Tenn. 488, and by admitting character evidence in a civil action where a party is charged with a crime, *Livingston v. U.S. Fire Ins. Co.,* 7 Tenn.App. 230. In *Hill v. State,* 159 Tenn. 297, 17 S.W.2d 913, it was held that the admission of character evidence to support the testimony of one of the prosecuting witnesses was within the sound discretion of the court, and in *Smith v. Tune,* 2 Tenn.Civ.App. 503, 511, it was held that the admission or exclusion of character evidence with reference to one of the parties to the suit was within the sound discretion of the trial judge. *HN4* **But no [*13] case has been pointed out to us, nor have we found any, wherein the lower court was reversed for excluding character evidence in**

> **a civil suit wherein the character or reputation of the party in whose behalf such testimony was offered, was not directly in issue.** In *Warfield v. Louisville & N.R. Co.,* 104 Tenn. 74, 79 55 S.W. 304; *LaFollette Coal, Iron & Ry. Co. v. Minton,* 117 Tenn. 415, 428, 101 S.W. 178, 11 L.R.A., N.S., 478; and *Lackey v. Metropolitan Life Ins. Co.,* 26 Tenn.App. 564, 585, 174 S.W.2d 575, where the trial judge had exercised his discretion to admit such testimony, his action was approved on appeal." *Id.* 59.
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> JOHNSON v. AETNA Cas. & Sur. Co., 1985 Tenn. App. LEXIS 3017, at *11-13 (Ct. App. July 16, 1985) (Emphasis added.)

This well-known principle of law dates back to reported opinions from the 1930s:

> **It is the universal, general rule that when the character of a party to a civil action is not a relevant fact apart from any inference of conduct arising therefrom, it is not a proper subject of inquiry, for while it is recognized that ground for an inference of some logically probative force as to whether or not a person did a certain act may be furnished by the fact that his character is such as might reasonably be expected to predispose him toward or against such an act, this consideration is outweighed by the practical objections to opening the door to this class of evidence.** 22 C. J., 470; 1 Wigmore on Evidence, sec. 64; 10 R. C. L., 947.
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> An exception applies [***12] where the nature of the action involves the general character of the party, or goes directly to affect it--where damages claimed embrace injury to feelings, as in actions involving chastity, malicious prosecution, false imprisonment, or libel or slander. 22 C. J., 472; Spears v. International Insurance Company, 60 Tenn. 370, 1 Baxt. 370. In the text of 40 Cyc., p. 1162, a rule is declared as follows:
> "As circumstances tending in some slight degree to furnish ground for an inference of fraud or undue influence, it is proper to consider the character of the proponents and beneficiaries, any interest or motive on their part to influence unduly the testator, and facts and surroundings giving them an opportunity to exercise such an influence," citing cases.
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> Hager v. Hager, 17 Tenn. App. 143, 151, 66 S.W.2d 250, 255 (1933) (Emphasis added.)

CONCLUSION

In the case bar, the Defendant's EMPLOYEE should be prevented from testifying to claims and alleged facts/opinions which are classic character-evidence such as: "We are considered the best"; or "Everyone agrees that we have a wonderful ____."

The issue in this case is whether the Defendant's employees breached the pertinent nursing standard of care. This type of puffery testimony is neither substantive nor relevant to the inquiry at hand.

VI. PLAINTIFF'S MOTION IN LIMINE TO PREVENT DEFENSE COUNSEL FROM ATTEMPTING TO ELICIT INADMISSIBLE HERASAY TESTIMONY FROM SON OF DECEASED PLAINTIFF ABOUT WHAT HEALTH CARE PROVIDERS TOLD SON ABOUT CONDITION OF HIS FATHER

Plaintiff files this Motion in Limine to prevent defense counsel at trial from questioning X, the son of PLAINTIFF ____, as to what health care providers told X about his father's condition.

It is undisputed that X is not a qualified health care provider and that X will not be providing any opinions as to deviations in the nursing standard of care nor any opinions about medical causation in this case.

Accordingly, any questions posed to X by defense counsel about what treating physicians told X about his father's diagnosis of Alzheimer's Disease, his father's life expectancy, his father's nutritional state, or any other diagnosis would only lead to the introduction to the jury of otherwise inadmissible hearsay testimony. Nothing prevents defense counsel from directly deposing treating physicians. Additionally, Defendant has its own expert witnesses who can testify regarding diagnoses or conditions attributed to Plaintiff.

Tennessee Rules of Evidence 802 declares that hearsay is not admissible. Asking the son of the Plaintiff on cross examination to confirm what he was told by health care providers or to confirm that he was told certain information by health care providers regarding his father's health issues attempts to subvert the Tennessee Rules of Evidence and should be prevented.

OTHER STRATEGIC ISSUES TO CONSIDER

POST BIDWELL, THE PLAINTIFF ARGUABLY MUST SMOKE OUT COMPARATIVE FAULT DEFENSES

After the Tennessee Supreme Court's decision in January, 2021 in Bidwell ex rel. Bidwell v. Strait, 618 S.W.3d 309 (Tenn. 2021), arguably a duty exists upon the Plaintiff to employ the discovery process to "smoke out" latent or implied comparative fault assertions against un-named parties.

The Plaintiff should consider *aggressively using the discovery process* to force the Defendant's hand. Expect a clever Defendant to slow walk answering the discovery and then to argue that by the time the Plaintiff has finally discovered the identity of the un-named tort feasor, the 90-day window pursuant to TCA 20-1-119 to bring the un-named party in (without asking permission from the Court (see Tenn. R. Civ.P. 15.01) has expired.

Specifically, expect the Defendant to argue that the 90-day window began to run from the date that the general comparative fault assertion was first raised rather than when the Plaintiff actually was able to clearly identify the true identity of an un-named party. The Bidwell arguably case stands for the proposition that the 90 day window begins to run based on innuendo, implication or the classic passive-aggressive "I'm not saying anyone else did anything wrong, but….." or "I'm not blaming then, but someone else was responsible for doing _____."

Accordingly, the Plaintiff must hold the Defendant to their 30 days, explain that time is of the essence, and move the Court to compel an answer because the 90 day window pursuant to T.C.A. 20-1-119 may be running from the date of the initial innocuous filing of a "general" comparative fault defense although no specific identities are actually pled.

Kanipe v Patel-The Appellate Case That Keeps On Giving—Original Source Evidentiary Rule

There is an excellent discussion of the use of the Original Source exception to cross-examine a defendant physician who made the difficult decision to serve as his own expert at trial:

> We next address whether the Trial Court erred in admitting evidence of Dr. Patel's **voluntary surrender of his privileges to practice medicine at Morristown-Hamblen Hospital** in the second trial. Dr. Patel argues that admission of this evidence violated peer review privilege and lacked any probative value. In response, Mr. Kanipe argues, among other things, that the information falls under the "original source exception."
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> Regarding evidentiary decisions, "trial courts are accorded a wide degree of latitude in their determination of whether to admit or exclude evidence, even if such evidence would be relevant." Dickey v. McCord, 63 S.W.3d 714, 723 (Tenn. Ct. App. 2001). This Court has discussed the original source exception as follows:

To further protect those who participate in a QIC [quality improvement committee] or provide information or testimony to a QIC, the General Assembly mandated that all records of a QIC, including testimony or statements by persons relating to activities of the QIC, are not only confidential and privileged, they are protected from discovery or admission into evidence. Tenn. Code Ann. § 68-11-272(c)(1)....

***

Nevertheless, the HCQIA provides an exception to the above, known as the "original source" exception. See Tenn. Code Ann. § 68-11-272(c)(2). Pursuant to this exception, any information, documents or records that were not produced for use by a QIC, or which were not produced by persons acting on behalf of a QIC, and **are available from original sources,** are **not immune from discovery or admission into evidence even if the information was presented during a QIC proceeding.** Tenn. Code Ann. § 68-11-272(c)(2). Furthermore, persons who provided testimony or information to or as part of a QIC are not exempt from discovery and are not prohibited from testifying as to their knowledge of facts or their opinions. Id.; see Powell v. Community Health Systems, Inc., 312 S.W.3d 496, 510 (Tenn. 2010); see also Stratienko v. Chattanooga-Hamilton County Hosp. Auth., 226 S.W.3d 280, 287 (Tenn. 2007) (Holding that, under the TPRL, information that had been furnished to a peer review committee by original sources "outside the committee" could be obtained directly from the original sources, unless otherwise privileged).

We find it significant that the original source exception to the HCQIA privilege parallels the work product doctrine in many respects. See Tenn. R. Civ. P. 26.02(3); see also Robert Banks, Jr. & June F. Entman, Tennessee Civil Procedure § 8-1[i] at 8-25 (3d ed. 2009). Like the original source exception, the work product doctrine does not prevent the discovery of facts from the original source of the information. Id. § 8-1[i] at 8-26. Thus, while the work product doctrine prohibits a litigant from obtaining from the adverse party its work product, the litigant may obtain substantially the sameinformation directly from the original sources. See id. § 8-1[i] at 8-28. Although the HCQIA privilege is problematic, it does not prohibit Dr. Pinkard from obtaining evidence that goes to the heart of the case from the original sources.

Pinkard v. HCA Health Servs. of Tennessee, Inc., 545 S.W.3d 443, 452-53 (Tenn. Ct. App. 2017) (footnotes omitted).

Dr. Patel points out correctly that the purpose of peer review privilege is to foster the improvement of healthcare services by protecting the records of QICs from discovery and thereby encouraging frankness in their deliberations. However, the fact of Dr. Patel's surrender of privileges in

lieu of an investigation at Morristown-Hamblen Hospital is not, in our judgment, the sort of material the disclosure of which would tend to chill the work of QICs as envisioned by peer review privilege. **Mr. Kanipe's attorney found this information on the Tennessee Department of Health website under Dr. Patel's publicly available Practitioner Profile**. In addition, the Trial Court instructed the jury that it had to confine its consideration of this evidence to questions of Dr. Patel's **competence as an expert witness** and his credibility in resolving the factual dispute over the content of the 3:30 p.m. phone call with Nurse Crespo. Evidence of Dr. Patel's surrender of privileges thus was relevant for impeachment purposes. Dr. Patel's later surrender of his privileges at Morristown-Hamblen Hospital was not offered for the purpose of showing that Dr. Patel was negligent in his treatment of Ms. Kanipe. We do not presume without evidence that the jury ignored the Trial Court's limiting instruction. Given this narrowing of what the jury could use the information for, and in view of the original source exception, we find no abuse of discretion in the Trial Court's admission into evidence of Dr. Patel's voluntary surrender of privileges at Morristown-Hamblen Hospital.