the Journal

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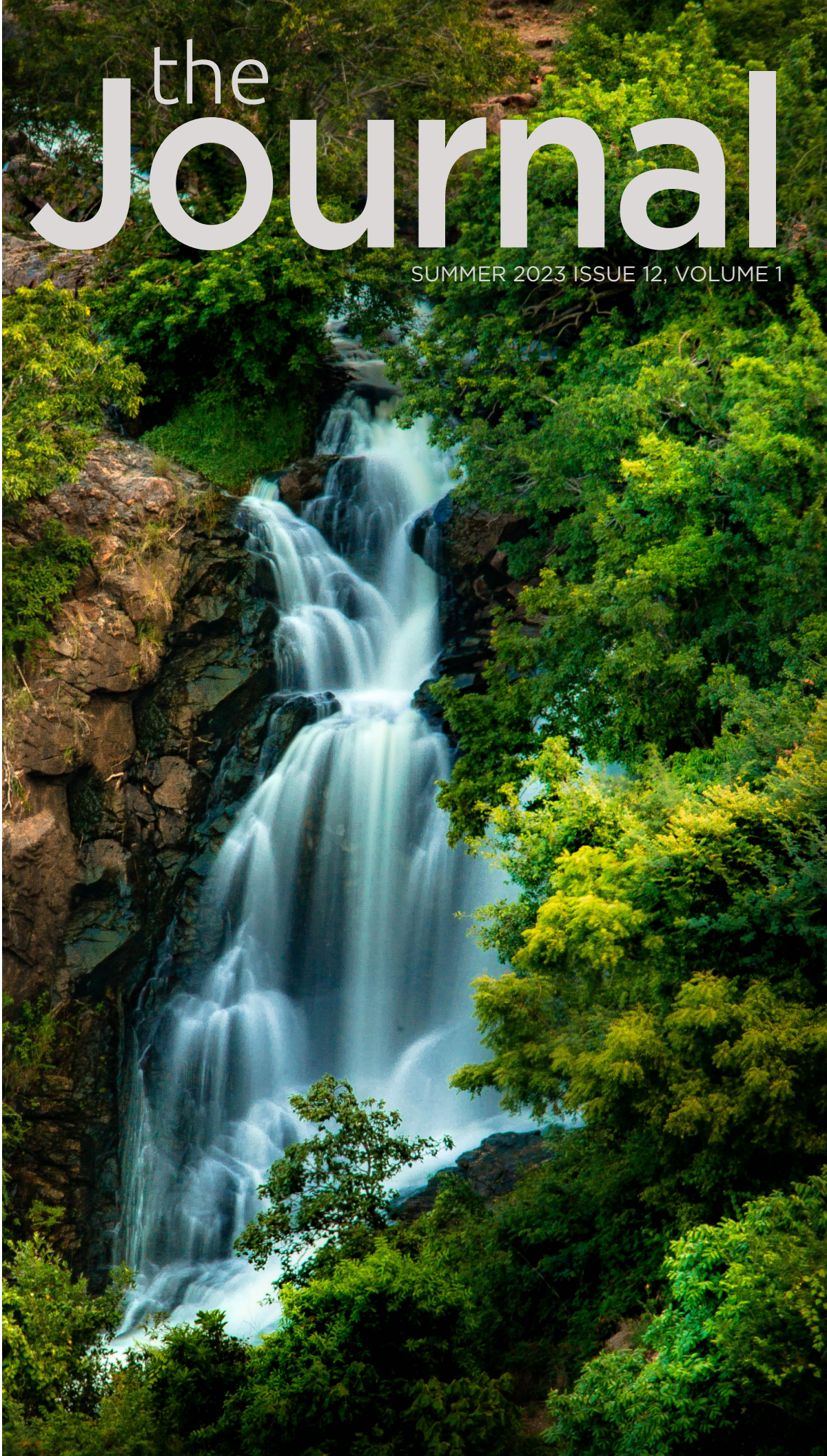

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TABLE OF CONTENTS

4

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6

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President's Update

HANNAH LOWE has practiced insurance defense litigation since 2011 and currently works for Farmers Insurance Exchange Claims Litigation Department, Tennessee Branch Legal Office. Hannah is originally from England, but has lived in the United States since 2003. She graduated from the University of Tennessee College of Law in 2010. She may be reached at h.lowe@farmersinsurance.com

Our year started out with another successful TDLA Trial School in January in Nashville. We were grateful to have Judge Don Ash and Chancellor (and former TDLA President) Michael Mansfield as judges this year, and 8 talented young lawyers who participated. We appreciate all of the volunteers who came out to help as jurors and witnesses, including our sponsors from ESi, Elliot Davis, Tri-Star Court Reporting, and Principle Forensics.

In April 2023, TDLA Leadership, including myself, President Elect Nathan Shelby, Secretary Treasurer Michael Haynie, DRI Rep Lynn Lawyer, and our Executive Director Mary Gadd, represented TDLA at the DRI Super-Regional Conference in New Orleans, LA. TDLA Past President Cate Dugan is currently serving as the DRI Regional Director for the Southern Region, and she, along with the other conference chairs, put on a great meeting. It was wonderful to network and share ideas and experiences with other SLDO leaders from across the United States.

In February 2023, we began our Next Gen Webinar Series, our new CLE program series aimed at young lawyers, with each webinar focusing on a different aspect of the defense of a civil case. The program will continue through the rest of the year, with young lawyers continuing to learn from our more experienced membership. The program has been well-attended and well-received, and we appreciate our members who have given their time to this project, as well as those who have attended, asked questions, and shared ideas and experiences.

In June 2023, we partnered again with our friends at the Alabama Defense Lawyers Association for the annual summer meeting at Sandestin Resort in Florida. Mickayla Lewis with Leitner Williams Dooley & Napolitan in Chattanooga was our TDLA Chair this year, and she did a great job getting the CLE

programming organized. It is always great to spend time with our ADLA friends and colleagues for education and fellowship at the beach.

We also had another round of successful in-person happy hours in cities across the state on June 29, 2023. These happy hours are hosted by our young lawyer section co-chairs, and this year we added a happy hour in the Tri-Cities area in Johnson City. We are grateful to our young lawyers for helping to host those events.

We are in the planning stages now for our annual meeting at Fall Creek Falls State Park in Spencer, TN on September 13-15, 2023. This year, we plan to include time for a "Past, Present, and Future Leadership Conference and Board Retreat," where past, present, and future TDLA leadership can meet to brainstorm, share ideas, and conduct strategic planning for the future of our organization. We invite anyone who wishes to be involved in the Leadership Conference, whether you are a Past TDLA President and/or have been active in TDLA in the past, are currently an active TDLA Board or Committee member, or wish to participate in TDLA leadership in the future. As Part of this Leadership Conference, we will be launching an Emerging Leaders Program, whereby young lawyers who participate in our organization can have the opportunity to learn leadership skills and be recognized for their participation in various TDLA activities. Look for more information to come on that program before September's meeting. We will of course also be offering our usual 6 hours of CLE programming for regular members, plus 3 hours of CLE programming for young lawyers in the annual Young Lawyers Boot Camp. We are also looking forward to spending some time outside together in the beautiful State Park, including a BBQ and Bluegrass Past Presidents Reception. We also have plans for a service project at the State Park. We hope you will join us.

In addition to our in-person CLE programming and Next Gen Webinar Series, we have continued to offer CLE webinars on topics of interest to our members this year, many of which are made possible by our generous sponsors. Please thank our sponsors for helping us to offer this programming for our membership. TDLA has also continued to offer amicus brief assistance on appellate cases addressing issues of interest to our membership.

I hope you will plan to join us for an in-person meeting or webinar soon. I encourage you to attend our annual meeting in September for the opportunity to share ideas for the future of our organization at the Leadership Conference. Together, we can continue to be a voice and support for the defense bar in Tennessee.

Hannah Lowe

DRI Update

Since October 2020, Lynn Lawyer has represented Tennessee Defense Lawyers Association as the DRI State Representative. She is a past president with TDLA and managing counsel with Travelers Insurance Company. She may be reached at llawyer@travelers.com

My term as DRI state representative is coming to an end. I am so excited for Hannah Lowe to step into this position as I know ya'll are in good hands. DRI remains the largest association of civil defense attorneys and in-house counsel. TDLA's partnership with DRI has truly allowed us to grow and evolve as an organization. Your membership in the two organizations really allows you to maximize the professional benefits both have to offer, which will unequivocally enhance your career and overall development as a lawyer.

Through DRI, I have had the opportunity to attend two different events that continue to impact my career. I want to encourage you to take the time and consider attending both! The third annual Southeastern Women Litigators (SEWL) conference has just been set to take place in our very own Nashville, Tennessee on February 29-March 1, 2024. The conference is going to be held at the Graduate Hotel. I cannot imagine celebrating strong, professional women in a better place than the Dolly inspired hotel. Women litigators (and their male supporters) from Alabama, Georgia, Florida, North Carolina, South Carolina and Tennessee are joining up for a dynamic conference that supports, educates and advances women civil defense litigators. Be on the lookout for more details to follow.

The DRI annual meeting is in San Antonio this year from October 25-27, 2023. Everything is bigger and better in Texas and, rest assured, this conference will be no different. You really do not want to miss this flagship DRI event. I come back from every DRI annual meeting energized and excited about the practice of law. I know that sounds silly, but it is absolutely true. The annual conference offers an unparalleled opportunity to network with amazing colleagues, attend riveting CLE sessions, and grow your book of business. You can sign up now through September 25th to take advantage of the early registration discount.

Please reach out if you want any information regarding how to get involved in DRI and, especially, any additional information about how to register for these upcoming conferences.

Lynn Lawyer

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Borngne Opinion Holds That a Defendant Health Care Provider Cannot Be Compelled to Provide Expert Opinion Testimony About Another Defendant Health Care Provider's Standard of Care or Deviation Therefrom

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In *Borngne v. Chattanooga-Hamilton County Hosp. Auth.,* --- S.W.3d ----, 2023 WL 3593617 (Tenn. 2023), the Tennessee Supreme Court addressed the compulsion of a physician's deposition testimony and held that a defendant health care provider cannot be compelled to provide expert opinion testimony about another defendant health care provider's standard of care or deviation from that standard. *Id.* at *1.

The plaintiff in *Borngne,* who suffered permanent brain damage and other severe injuries, sued the physician who delivered her and the certified nurse midwife who was initially in charge of the birthing process. *Id.* The trial court dismissed all claims of negligence against the physician but allowed the plaintiff to proceed against him on a vicarious liability theory based on his role as the midwife's supervising physician. *Id.* During his deposition, the doctor was asked to opine on the midwife's performance outside of his presence; he refused, and the trial court declined to compel him to offer such opinion testimony. *Id.* After trial, the jury found in favor of the defendants, and the plaintiff appealed. *Id.*

On appeal, the Court of Appeals partially reversed the judgment, holding that the trial court committed reversible error in declining to compel the physician to answer questions about the standard of care applicable to the midwife. *Id.* The questions at issue included questions about what the physician would expect from the midwife under certain circumstances and what his expectations would be in his supervisory role, which would require the physician to express an opinion regarding the standard of care applicable to the midwife, as well as whether she complied with this standard. *Id.* at *2. Following the Court of Appeals' judgment, the defendants filed applications for permission to appeal, which the Supreme Court granted. *Id.* at *3.

The Supreme Court first noted that *Lewis v. Brooks,* 66 S.W.3d 883 (Tenn. Ct. App. 2001), was the most relevant law on the issue of compelled opinion testimony, but it did not directly address the issue raised in *Borngne. Id.* at *4. The Supreme Court further noted that the Court of Appeals attempted to distinguish *Lewis* by finding that the midwife

was not a defendant health care provider on equal footing with the physician but rather a health care provider in a "subordinate role." *Id.* Finally, the Supreme Court noted, the Court of Appeals relied upon *Waterman v. Damp,* No. M2005-01265-COA-R3-CV, 2006 WL 2872431 (Tenn. Ct. App. 2006)—a case holding that medical experts alleged to have injured a patient may be compelled to answer questions as to whether their conduct complied with the applicable standard of care—as the rationale for compelling the physician to testify as to the standard of care applicable to the midwife, finding that such compulsion would be akin to compelling the physician to testify as to his own conduct. *Id.* The parties' arguments at the Supreme Court level, then, essentially boiled down to whether to extend the holding of *Waterman or Lewis. Id.* at *5.

Ultimately, the Supreme Court was persuaded that the *Lewis* holding is sound and that the evidentiary privilege articulated therein has a legitimate source within the evidentiary rules of Tennessee. *Id.* at *6. Accordingly, the Supreme Court held that an expert cannot be compelled to give his or her expert opinion—even where the expert is a party defendant—because a private litigant is simply not entitled to a health care professional's expert views. *Id.* More specifically, the *Borngne* Court held that a defendant health care provider "cannot be compelled to provide expert opinion testimony about another defendant provider's standard of care or deviation from that standard." *Id.* at *8.

Based on the *Borngne* opinion, health care providers and defense counsel alike will be able to rest more easily knowing that a health care provider defendant cannot be compelled to offer testimony regarding another health care provider's alleged deviation from the standard of care. The holding is especially significant given the proliferation of advanced practice providers and the importance of supervisory relationships to the health care profession.

Drew H. Reynolds

You Can't Touch This: An Insurance Claim File is Protected Work Product

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An insurance company's investigation of a claim often begins the day an incident occurs, but the company does not typically hire counsel to represent their insured until a year or more later when suit is filed. The insurance claim file may include statements from witnesses, photographs, or other documentation of the property or damages at issue, as well as notes about the claims representative's assessment of the claim. Despite the fact that these documents are created before defense counsel is hired, much of the insurance company's pre-suit investigation is still protected from discovery by the opposing party as work product in Tennessee. When these documents are inevitably requested by the plaintiff in written discovery, most of the claim file should be withheld as protected work product. Tennessee Courts use a three-step burden-shifting approach to determine which documents from the claim file must be produced by the insured defendant.[1]

First, the plaintiff must establish that the requested documents are discoverable by showing "(1) that the material being sought is relevant to the subject matter involved in the pending action, (2) that the material being sought is not otherwise privileged, and (3) that the material being sought consists of documents or other tangible things."[2]

Second, after the plaintiff has made a *prima facie* showing of discoverability, the burden shifts to the defendant to establish the applicability of the work product doctrine.[3] Work product is essentially any document prepared in anticipation of litigation by the party or a party's representative. Under Rule 26.02 of the Tennessee Rules of Civil Procedure:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship

1. State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Grp. Tr., 209 S.W.3d 602, 617-18 (Tenn. Ct. App. 2006).

2. Id. at 617.

3. Id.

> to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.
>
> A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order.[4]

In other words, the work product doctrine applies broadly to the work of insurance agents and adjusters as the "party's representative," as long as the work is done in anticipation of litigation.[5] Given the nature of the work being done, arguably every document in the claim file is created in anticipation of litigation. Though certainly, any document created after a plaintiff hires counsel would be protected work product. This approach is fair. A defendant's representative – attorney or otherwise – should be permitted to gather pertinent information, evaluate the claim, and strategize a defense without fear that their work and mental impressions may someday be divulged to an opposing party.[6]

Some states exempt insurance claim files from work product protection. Courts in these other jurisdictions reason that because the purpose of a liability insurance company is to investigate claims by or against an insured, the investigations are just normal business activity, which should be distinguished from trial preparation activity. However, the same could be said of a law firm hired to represent a defendant – the business of the firm is to investigate and defend claims, so every memoranda and report is just a normal business record. Tennessee's approach makes more sense. Rule 26.02(3) does not differentiate between attorney and insurer for purposes of the work product doctrine. No Tennessee court has held that an insurance company's normal business records, including the claim file, cannot also be work product.

In fact, Tennessee has historically leaned towards protection of pre-suit investigation of any representative as work product. In *Medic Ambulance Service, Inc. v. McAdams*, the Tennessee Supreme Court found that when a claim agent of the defendant company was notified of a motor vehicle accident and went to the scene to take pictures and witness statements, those documents were protected work product.[7] The Tennessee Supreme Court held that "[w]ritten statements secured from witnesses are the work product of the parties obtaining them, and a party should not be required prior to trial to turn them over to his opponent."[8] The Court reasoned that information contained within the protected documents were equally available to the plaintiff,[9] who should not benefit from the diligence of his adversary.[10] Much of the information in an insurance claim file is protected under this rationale.

Third, once the defendant has established the requested document is work product, the burden shifts back to the plaintiff to show they are nevertheless entitled to the information.[11] The nature and extent of the plaintiff's burden depends on whether the work product is "ordinary/fact" work product or "opinion" work product.[12] Opinion work product contains "the mental impressions, conclusions, opinions, or legal theories" of the insurance claims representative, where ordinary work product does not.[13] For example, in the insurance claim file, photographs from the property damage appraisal would be ordinary work product, and the claims representative's notes regarding liability or causation issues or value of a claim would be opinion work product.

4. Tenn. R. Civ. P. 26.02(3).

5. Most states extend the work product doctrine to any party in anticipation of litigation, but some limit the protection to documents produced by or for an attorney. In Montana, for example, nearly every page of the insurance claim file would be discoverable. See Cantrell v. Henderson, 718 P.2d 318, 322 (Mont. 1986). Unless, however, the insurance company used only attorneys as claims representatives, which some companies have done to protect their investigations as work product in those states.

6. See Flowers, 209 S.W.3d at 616-617.

7. 392 S.W.2d 103, 106 (Tenn. 1965).

8. Id. at 110. The exception to this rule is, of course, the party's own recorded statement, which must be produced upon request. Tenn. R. Civ. P. 26.02(3); Se. Fleet Leasing, Inc. v. Gentry, 57 Tenn. App. 162, 172, 416 S.W.2d 773, 778 (1966).

9. Id.

10. Vythoulkas v. Vanderbilt Univ. Hosp., 693 S.W.2d 350, 357 (Tenn. Ct. App. 1985) ("The rationale for the protection of an attorney's work-product has been stated in different ways. Most frequently, courts have found that one of the primary purposes of the protection is to protect the work of a diligent lawyer from unwarranted invasion by a less diligent adversary." Hickman v. Taylor, 329 U.S. 495, 516 (1947) (Jackson, J., concurring); Jordan v. State ex rel. Williams, 397 S.W.2d 383, 393 (Tenn. 1965); Medic Ambulance Service, Inc., 392 S.W.2d at 110; and State ex rel. Pack v. West Tennessee Distributing Co., 430 S.W.2d 355, 358 (Tenn. 1968). "Others have stated that it promotes the adversarial system of justice." See F. James, Civil Procedure § 6.9, at 205 (1965). "Still others have noted that it is designed to encourage thorough pre-trial preparation." Lutz v. John Bouchard and Sons Co., 575 S.W.2d 7, 13 (Tenn. Ct. App. 1974). See also S. Cohn, The Work-Product Doctrine: Protection, Not Privilege, 71 Geo.L.J. 917, 920 (1983), and Wright & Miller § 2032.).

11. Flowers, 209 S.W.3d at 617.

12. Boyd v. Comdata Network, 88 S.W.3d 203, 221 (Tenn. Ct. App. 2002).

13. Id.

continued on next page

To obtain ordinary work product, the plaintiff must articulate with specificity (1) a "substantial need" of the documents to prepare their case and (2) inability to obtain substantial equivalent by other means without undue hardship.[14] Opinion work product, on the other hand, is not likely to be discoverable. Rule 26.02(3) explicitly states that the court "shall protect" this type of work product from disclosure, but other jurisdictions have found rare, extraordinary circumstances where it should be produced to an opposing party.[15]

In Tennessee, the work product protection is quite broad. Tennessee Courts recognize the unfairness of an opposing party benefiting from the diligence of his adversary.[16] Don't do the plaintiff's job for them by producing the defendant's protected work product. As a defense attorney, you should withhold every page of the insurance claim file, aside from the plaintiff's own statement. The work product doctrine is waived if the document is produced.[17] If the plaintiff wishes to challenge whether the documents you've withheld should be protected, they can file a motion to begin the burden-shifting outlined above, which will likely lead to the same result.

Jordan K. Gibson

14. Tenn. R. Civ. P. 26.02(3); id.

15. Boyd, 88 S.W.3d at 222 (citing Hickman, 329 U.S. at 513; Gundacker v. Unisys Corp., 151 F.3d 842, 848 (8th Cir. 1998); In re Sealed Case, 856 F.2d 268, 273 (D.C. Cir. 1988); Restatement (Third) of the Law Governing Lawyers § 89).

16. Vythoulkas, 693 S.W.2d at 357.

17. Of note, if work product is inadvertently disclosed, the protection is not waived if the holder of the work product protection took reasonable steps to prevent the disclosure and to rectify the error. Tenn. R. Evid. 502.

TDLA Young Lawyer Update

CHRISTINA HADAWAY is an associate with Hickman, Goza and Spragins in Memphis, TN. Her practice focuses on both personal injury and insurance defense. She may be reached at chadaway@hickmanlaw.com

The Young Lawyers recently held Happy Hour on June 29 across the State. This is a yearly free event. Each year, Happy Hour is hosted by the Young Lawyer Section Co-Chairs: Christina Hadaway (Memphis), AJ Parker (Nashville), Chancey Miller (Chattanooga), Stefanie Bowen (Knoxville), and Sydney Gilbert (Tri-Cities). This is a great opportunity to meet and make connections with other young lawyers in their region.

Another exciting opportunity to make connections is the Southeastern Women Litigators Conference (SEWL). SEWL is comprised of women civil defense litigators from Alabama, Georgia, Florida, North Carolina, South Carolina and Tennessee. I attended the inaugural SEWL Conference, held at the Atlanta Zoo in March 2022, and I was blown away. The location was fun. (There were elephants and giraffes walking past the windows of the conference room.) And the speakers were inspiring and informational. I truly enjoyed being part of such a large group of women litigators in a profession that is and has always been predominately male. The topics range from mentorship to managing stress to work-life balance and everything in between.

In addition to attending the 2023 SEWL Conference in Hilton Head, SC, I acted as co-chair for Tennessee and was involved in the planning process. Once again, the Conference was held in a fun location with a range of topics geared to provide support and information for the women litigators in attendance. The third annual SEWL Conference will be held in Nashville, TN. Keep an eye on your inboxes for additional details. This is one you do not want to miss!

Another young lawyer, Mickala Lewis, chaired the TDLA/ADLA Joint Summer Meeting in Destin, FL. Each year, Tennessee and Alabama join up for a two-day conference (usually beachside). This event is family friendly with activities geared toward attending lawyers' and their family/kids, along with other events and opportunities to relax and make connections with lawyers from across Tennessee and Alabama.

Mark your calendars for September 13-25, 2023, for the TDLA Annual Meeting and Young Lawyers Bootcamp. This year's event will take place at Falls Creek Falls State Park in Spencer, TN. This is another great opportunity to network with civil defense lawyers from all over the State. This year's annual meeting is in a fun new location. I hope you will all join us!

Christina Hadaway

Workers' Compensation Legislative Update

New laws impact penalties, attorney's fees, and death benefits

MICHAEL L. HAYNIE is a principal with Manier & Herod out of Nashville. For over 20 years, he has specialized in representing employers and insurers in workers' compensation claims. Mr. Haynie is frequently called upon to draft and advise on workers' compensation legislation in the Tennessee General Assembly and has authored amicus briefs filed in the Tennessee Supreme Court on behalf of the business community. He currently serves as Secretary/ Treasurer on the TDLA Board of Directors. He may be reached at mhaynie@manierherod.com

Unlike last year, the General Assembly was relatively active in amending workers' compensation laws. This year, there were significant changes to the 25% penalty for failure to pay medical expenses, the attorney's fee statute, and death benefits.

PUBLIC CHAPTER 145: AMENDS THE STANDARD FOR IMPOSING THE 25% PENALTY AND ATTORNEY'S FEES AND CREATES A PHYSICIAN EDUCATION PROGRAM.

The Tennessee General Assembly significantly revised Tennessee Code Annotated section 50-6-118(d), which historically has provided for a 25% penalty for failing to pay certain medical expenses in bad faith. Specifically, a 25% penalty could be imposed if an employee receives a final judgment that includes the payment of medical expenses and the employer wrongfully fails to reimburse the employee for any medical expenses actually paid by the employee within sixty (60) days of the final judgment, or fails to provide reasonable and necessary medical treatment, in bad faith after receiving reasonable notice of the obligation.

Pursuant to the revised statute, "bad faith" is no longer the standard for imposing the 25% penalty. Instead, the 25% penalty may be imposed if the employer "unreasonably" fails to pay the medical expenses or provide reasonable and necessary treatment. However, a safe harbor was created. The employer will not be subject to the penalty if "payment of the subject medical expense is issued, or reasonable and necessary medical treatment is authorized, within sixty (60) days of the employer's or workers' compensation carrier's receipt of information and documentation reasonably necessary to issue payment of the subject medical expense or to determine liability for reasonable and necessary medical treatment." The new standard is effective July 1, 2023.

Additionally, the General Assembly amended Tennessee Code Annotated section 50-6-226(d)(1)(B), which currently provides that the employer may be liable for the employee's attorney's fees if the employer "wrongfully" denies the claim or "wrongfully" fails to initiate medical or disability benefits timely. Under the revised statute, the "wrongfully" standard has been replaced with "unreasonably." Unlike "wrongfully," "unreasonably" is not defined in the statute. The new standard is effective on April 13, 2023.

In the same bill, the General Assembly

also authorized the establishment of a voluntary physician education program. Participating physicians are eligible for an additional reimbursement under the medical fee schedule. The expressed intent is to improve the quality of medical care delivered to injured employees and the accuracy of impairment ratings.

PUBLIC CHAPTER 158: AMENDS THE DEATH BENEFITS STATUTE REGARDING SURVIVING SPOUSES AND DEPENDENT MINOR CHILDREN.

The General Assembly modified the death benefits statute through what has been titled the "Garrison-Jordan Survivor Benefits Act." The new provisions modify the impact remarriage has on a surviving spouse's benefits, increase the scope of educational programs that extend dependency status for minors, and provide a mechanism for ongoing verification of dependency status.

The Tennessee Workers' Compensation Law has long provided that a surviving spouse was no longer entitled to death benefits upon remarriage. Per the revised statute, a surviving spouse who remarries will still cease to receive periodic death benefits upon remarriage.However, the spouse will be entitled to a single lump sum payment equal to 100 weeks times 25% of the deceased employee's average weekly wages. Upon payment of that final lump sum benefit, the surviving spouse will not be eligible for any additional death benefits.

The General Assembly also expanded the scope of educational programs that may extend the eligibility of dependent minors. Under the new law, a dependent minor will continue to be eligible for benefits until age 22 if enrolled in a recognized institution that provides technical education.

Finally, the new law provides a mechanism through which employers and insurers may periodically verify whether a dependent continues to meet eligibility requirements for death benefits. Though employers and insurers currently may inquire about eligibility, the new law requires the dependent to cooperate and establishes sanctions for noncompliance.

Specifically, the dependent must respond to a request for information within 15 days of the date of the request. If the dependent fails to respond timely, then the employer may suspend benefits. When doing so, a notice of change or termination of benefits must be filed with the Bureau within 15 days of the first omitted payment. If the dependent eventually provides the information establishing dependency, then the employer must resume payments beginning on the date of the original suspension of benefits.

If the dependent provides information indicating the dependent no longer qualifies as a dependent, then the employer may terminate benefits. In that case, the employer must file a notice of change or termination of benefits within 15 days of the first omitted payment. Whenever benefits are suspended or terminated, the dependent may file a PBD.

Significantly, the new statute clearly provides that a dependent who provides false or misleading information in response to a request for information relevant to dependency commits a fraudulent insurance act, which is punishable as theft.

These new provisions take effect on July 1, 2023.

Michael L. Haynie

Navigating Daubert: Keys to Successful Challenges and Defenses

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The U.S. Supreme Court's landmark ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* in 1993 established a standard for the admissibility of expert testimony in federal courts. As a result of the *Daubert* decision, financial expert testimony in federal courts – and many state courts – is now subject to greater scrutiny. Financial experts are required to provide a more rigorous and reliable basis for their opinions, and their methodologies and techniques must be supported by established scientific principles, empirical data, and peer-reviewed literature. This has raised the bar for financial expert testimony and has led to more challenges to the admissibility of such testimony in court.

HISTORY OF EXPERT ADMISSIBILITY IN THE U.S.

Prior to *Daubert*, courts had addressed the question of admitting expert testimony at trial for roughly 70 years. The decision in *Frye v. United States* in 1923 marked the first major attempt of a U.S. court to address the question of admitting expert testimony at trial. In *Frye*, both the trial court and circuit court of appeals ruled to exclude testimony from an expert for the defense regarding an early form of the polygraph test. *Frye* established the "general acceptance" rule: expert testimony would not be allowed unless the subject matter had achieved general acceptance within a scientific community.

In 1975, the Federal Rules of Evidence extended and liberalized the standards established in *Frye* and established inclusive rules for admitting expert testimony. Rules 402, 702, 703, and 705, in particular, place the responsibility on the judge to ensure that admitted expert testimony is reliable and relevant.

From 1975 to 1993, debate raged in courtrooms across the country regarding expert witness testimony – especially medical expert testimony and so-called "junk science." *Daubert v. Merrell Dow Pharmaceuticals, Inc.* was the seminal case involving the admission of scientific expert testimony. The *Daubert*s were the parents of a child born with deformities who claimed that the mother's ingestion of the drug Bendectin caused the child's birth defects. The Plaintiff offered testimony from multiple medical experts citing evidence that Bendectin was a teratogen – or known to cause birth defects. The trial court and circuit court of appeals held that the Plaintiff's medical expert's evidence, which relied on animal testing, did not meet the standard for admission of scientific evidence. The U.S. Supreme Court found that the Federal Rules of Evidence superseded *Frye* and that the task of trial judges was to ensure "the testimony's underlying reasoning or methodology is scientifically valid."

The Supreme Court's opinion in *Daubert* laid out several factors to be considered in determining the validity and admissibility of an expert's

methodology. In 2000, Congress amended Federal Rule of Evidence 702 to codify the *Daubert* standard and factors. Since the Supreme Court's decision, the *Daubert* standard has been widely adopted by federal courts and state courts and continues to evolve today. The *Daubert* decision, along with the decisions in *General Electric Co. v. Joiner* (1997) and *Kumho Tire Co. v. Carmichael* (1999), has established the legal framework for challenging expert admissibility.

DAUBERT STATISTICS AND TRENDS

A 2022 study conducted by PwC analyzes post-*Kumho* Tire challenges to financial expert witnesses under the *Daubert* standard. The study found 13,110 cases citing *Kumho* Tire from 2000 through 2021, including 3,342 financial expert challenges and 16,112 non-financial expert challenges.

The study found that financial experts are excluded for two primary reasons: lack of reliability or lack of relevancy. For financial experts excluded for lack of reliability, courts most frequently cite a lack of sufficient data or the use of methods that are not generally accepted as reasons for exclusion. For financial experts excluded for lack of relevancy, courts frequently cite to testimony beyond the scope of the expert's role (for example, testimony related to legal matters) or testimony that will not aid the trier of fact (for example, the opinion is not tied to the specific facts of the case).

The study analyzes trends in challenges to financial expert witnesses, including challenges and exclusion rates by case type, federal circuit, type of financial expert, and whether the expert was retained on behalf of the Plaintiff or Defendant. The study provides valuable insight that can assist counsel in developing legal strategies and framing expectations with regard to financial expert testimony.

RAISING A DAUBERT CHALLENGE

In order to raise a successful *Daubert* challenge of an opposing financial expert witness, counsel should communicate with its own financial expert regarding areas of vulnerability of the opposing expert. Plan to attack the reliability and relevancy of the expert's testimony.

Regarding the reliability of the testimony, address the following questions:

- Which economic/financial concepts of the testimony are verifiable?
- Does the opposing expert utilize unrealistic assumptions or pre-conditions?
- Have the concepts and methodologies employed by the expert been utilized historically and tested by others in the community?

Regarding the relevancy of the testimony, address the following questions:

- Does the evidence assist the trier of fact?
- Is there a valid connection of the discipline to the issue being litigated?
- Does the expert have sufficient skills, knowledge, education, experience, and training in the discipline s/he is offering an opinion?
- Are the analyses conducted reasonable in light of the facts of the case?

DEFENDING A DAUBERT CHALLENGE

In order to successfully defend a *Daubert* challenge of a financial expert witness, work closely with your witness to discuss all aspects of the motion to exclude, both big and small, and address each in your defense. Keep the following best practices in mind with regard to your financial expert witness:

- Gain an understanding of your expert's qualifications and standards by which they abide. For example, a CPA has certain standards under the AICPA by which they must abide in all matters.
- Engage your financial expert as early as possible in the case to allow for appropriate and sufficient documents to be requested and interviews to take place. The expert can also help with deposition questions needed to lend additional support to opinions.
- Review your expert's report in detail, understand your expert's methodology, and discuss any key assumptions, especially assumptions that rely on the facts of the case.
- Keep your expert's testimony in the "expert" lane, and do not veer into the "fact witness" lane.
- Ensure your expert's testimony remains within the scope of their discipline and their skills, knowledge, education, experience, and training.

WE CAN HELP!

Daubert challenges to financial expert witness testimony are on the rise and are likely to continue to rise in the future. Carefully selecting the right financial expert witness can mean the difference between having the witness testify at trial or having that witness excluded from doing so. Elliott Davis is ready with a team of experienced professionals to serve your financial expert witness needs. For more information, contact Nick Pacitti at (615) 786-7971 or nick.pacitti@elliottdavis.com.

continued on next page

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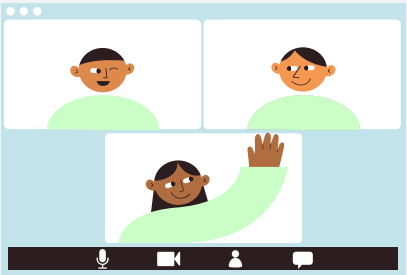

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