IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

HIGHLANDS PHYSICIANS, INC.,	)	**Tennessee Supreme Court No. _____**
Plaintiff-Appellee,	)	**Tennessee Court of Appeals No. E2019-00554-COA-R3-CV**
v.	)	
WELLMONT HEALTH SYSTEM,	)	**On Appeal from the Sullivan County Law Court**
Defendant-Appellant.	)	**Chancellor E. G. Moody**

APPLICATION FOR PERMISSION TO APPEAL OF WELLMONT HEALTH SYSTEM

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IF APPEAL IS GRANTED,
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JUDGMENT OF THE COURT OF APPEALS

Pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure, Defendant Wellmont Health System ("Wellmont") respectfully requests that this Court grant permission to appeal the decision of the Court of Appeals entered on September 25, 2020 ("*Highlands Physicians*"). A copy of the decision of the Court of Appeals is included in the Appendix at Tab 1.

Review is needed because the decision of the Court of Appeals fundamentally undermines the threshold evidentiary standard for proving lost profits in Tennessee and opens the door for plaintiffs to obtain huge awards of lost profits based only on speculative and conclusory proof. In addition, the decision upends established standards governing key duties of the trial court—including (i) the trial court's duty to serve as gatekeeper for expert proof; (ii) its duty to announce its own independent reasoning before adopting lawyer-prepared orders on motions for summary judgment; and (iii) its duty to grant extraordinary injunctive relief only if supported by the baseline findings that are required.

Chancellor E.G. Moody accepted the plaintiff's invitation to ignore all of these basic duties. The result was a judgment against Wellmont for $57.4 million in speculative lost profits and a vague, sweeping and unsupported permanent injunction that jeopardizes Wellmont's ability to conduct ordinary business given the plaintiff's likely attempts to gain leverage through baseless and self-serving claims for contempt.

The Court of Appeals affirmed the judgment and the permanent injunction despite the wealth of authority supporting Wellmont's primary arguments. No petition for rehearing was filed.

INTRODUCTION

This business case has profound implications for several aspects of Tennessee law. Below, the Chancellor allowed the plaintiff to side-step the basic evidentiary standards for proving damages, resulting in a judgment against Wellmont for $57.4 million in speculative lost profits. The Court of Appeals affirmed the judgment based on the vague notion that the "amount" of lost profits may be proven with less certainty than their "existence." *Waggoner Motors, Inc. v. Waverly Church of Christ*, 159 S.W.3d 42, 58 (Tenn. Ct. App. 2004). In so doing, the Court of Appeals concluded that Tennessee plaintiffs may establish millions of dollars in lost profits through nothing more than speculative and conclusory opinion testimony—even though objective facts and data are readily available from which actual losses, if any, can be reasonably ascertained.

The fact that the plaintiff could obtain such an enormous recovery with nothing more than speculative opinion testimony shows that review is urgently needed to settle an important question of law and secure uniformity of decision as to the proper evidentiary standard under Tennessee law for proving lost profits damages. While lost profits were originally considered "too speculative and dependent on changing circumstances to warrant a judgment for their loss," Tennessee courts now allow plaintiffs to recover lost profits if they are proven with "reasonable certainty." *See Waggoner Motors*, 159 S.W.3d at 58 (citing *Chisholm & Moore Mfg. Co. v. U.S. Canopy Co.*, 77 S.W. 1062, 1063 (Tenn. 1903)). But, Tennessee courts have struggled to apply this "reasonable certainty" standard in a fair and consistent way. This Court has not addressed the standard for 65 years. Review is needed to clarify the "reasonable certainty" standard in Tennessee.

Similarly, review is needed to clarify the minimum standards for expert opinions on lost profits. In his role as gatekeeper, Chancellor Moody was tasked with evaluating the qualifications of the plaintiff's purported lost profits expert and

ensuring his opinions were sufficiently reliable to present to the jury. *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 264-65 (Tenn. 1997). Yet, the Chancellor failed to conduct any gatekeeping analysis. On appeal, even though the entire judgment for lost profits hinged on the opinion of this purported expert, the Court of Appeals took no issue with the Chancellor's failure to conduct a reliability analysis; conducted no reliability review of its own; ignored its own prior decisions establishing minimum standards for expert opinions on lost profits; and summarily concluded that the expert's opinions were acceptable based on the notion that the "amount" of lost profits requires less certainty and precision if the plaintiff establishes with reasonable certainty that damages exist.

The Court of Appeals also undermined another critical judicial function: the duty of trial courts to exercise independent judgment. This Court's decision in *Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303 (Tenn. 2014), requires trial courts to announce their independent reasoning ***before*** adopting party-prepared orders on motions for summary judgment. Yet, Chancellor Moody granted summary judgment in favor of the plaintiff without announcing his reasoning—instead soliciting competing orders and simply adopting 113 pages of findings of fact and conclusions of law provided by plaintiff's counsel. In affirming the judgment, the Court of Appeals created a new, unwarranted exception to *Smith*'s "announce-first" requirement and added to the existing muddle of conflicting decisions about whether *Smith* permits trial courts to solicit competing party-drafted orders before announcing a decision and whether and when appellate courts may ignore violations of *Smith*. This Court should exercise its supervisory authority to settle this important question of procedure and secure uniformity of decision as to the trial court's duty to exercise its independent judgment when ruling on motions for summary judgment.

The decision of the Court of Appeals also undermines Tennessee's requirements for permanent injunctions. The Rules of Civil Procedure require

specificity for all restraining orders and injunctions. Tenn. R. Civ. P. 65.02(1). The Rules also explicitly require trial courts to make findings of fact and conclusions of law before granting injunctive relief. Tenn. R. Civ. P. 52.01, 65.04(6). The Rules Advisory Committee Comments highlight the need for uniformity in how trial courts handle restraining orders, temporary injunctions and permanent injunctions.

Below, at the plaintiff's request, Chancellor Moody entered a sweeping permanent injunction against Wellmont without making any specific findings. The Court of Appeals simply deferred to the Chancellor and affirmed the injunction. The appellate court's decision is contrary to the Rules of Civil Procedure and prior case law. In addition, by deferring to the Chancellor's decision to enter a permanent injunction that lacked specificity and was unsupported by any findings, the Court of Appeals has also called into question the appropriate standard of appellate review for injunctions. Again, this Court's supervisory authority is needed to settle important questions of law and secure uniformity of decision regarding both the power of Tennessee trial courts to enter injunctions that lack supporting findings and the proper scope of appellate review of such injunctions.

QUESTIONS PRESENTED FOR REVIEW

1. What is the proper evidentiary standard a plaintiff must satisfy to recover lost profits under Tennessee law, including through expert opinion testimony?

2. May a trial court adopt party-prepared findings of fact and conclusions of law on summary judgment without first announcing the trial court's own decision or reasoning, and may an appellate court ignore a trial court's failure to exercise independent judgment in doing so?

3. May a trial court enter a permanent injunction that lacks both specificity and any findings as to the threshold factors for granting injunctions, and may an appellate court apply the deferential abuse of discretion standard of review to such an injunction?

STANDARD OF REVIEW

The first question presented for review concerns decisions of the trial court (i) to admit expert testimony on lost profits and (ii) to deny a motion for a new trial based on an absence of the proof required to establish lost profits. Questions regarding the qualifications, admissibility, relevancy and competency of expert testimony are reviewed for abuse of discretion. *McDaniel*, 955 S.W.2d at 263-64. The decision to deny a motion for new trial is likewise reviewed for abuse of discretion. *Ali v. Fisher*, 145 S.W.3d 557, 564 (Tenn. 2004).

The second question presented for review concerns the trial court's entry of summary judgment by using party-prepared findings of fact and conclusions of law without first announcing its own decision or reasoning. Review of a trial court's grant or denial of a motion for summary judgment is *de novo*. *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 887 (Tenn. 2019); *see also Beard v. Branson*, 528 S.W.3d 487, 494 n.12 (Tenn. 2017) (denials of summary judgment based on legal grounds remain subject to appellate review).

The third question presented for review concerns the trial court's entry of a permanent injunction. A trial court's decision to grant or deny a permanent injunction is reviewed for abuse of discretion. *See State ex rel. Condon v. Maloney*, 65 S.W. 871, 872 (Tenn. 1901); *Medtronic, Inc. v. NuVasive, Inc.*, 2003 WL 21998480, at *10 (Tenn. Ct. App. Aug. 20, 2003) (no perm. app. filed).

STATEMENT OF THE CASE

I. RELEVANT FACTS

Defendant Wellmont is a nonprofit health system that operates hospitals and other healthcare facilities across northeast Tennessee, southwest Virginia and southeast Kentucky.[1] (Wellmont Tr. Exs. Vol. 2-I, Ex. 1039 at HPI0009667.)[2] Plaintiff Highlands Physicians, Inc. ("HPI") is an independent practice association whose members include more than 2,000 physicians and other healthcare providers in the same region. (*Id.*; TR Vol. 63 at 6254-6302.)

HPI and Wellmont are each 50% shareholders of a physician-hospital organization (the "PHO"), a separate entity they formed together in the 1990s. (*See* Wellmont Tr. Exs. Vol. 2-I, Ex. 1039 at HPI0009667-68.) The PHO served at least two distinct functions: (i) to contract with insurance companies to include Wellmont hospitals and HPI physicians in the insurance companies' provider networks; and (ii) to contract directly with local employers to provide healthcare services through the PHO's own standalone "network" of Wellmont facilities and HPI physicians (the "Direct Employer Contracts"). (*See* HPI Tr. Exs. Vol. II, Ex. 30 at HPI0380046.)

In connection with their establishment of the PHO, the parties signed a Stockholders Agreement that includes a non-competition provision stating that HPI and Wellmont may not "compete with the [PHO]" or "solicit the [PHO's] payors."

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[1] In 2018, Wellmont merged to become a subsidiary of Ballad Health. (TS Vol. 115 at 65:4-8.) The events at issue in this case occurred before that merger.

[2] The record consists of: (i) a paginated technical record of the papers filed in the trial court ("TR"); (ii) a compilation of Transcripts of Proceedings, including the transcripts of the trial and the hearings before the trial court ("TS"); (iii) a compilation of trial exhibits; (iv) a compilation of proffers of excluded evidence; (v) a supplemental record filed on June 2, 2020; and (vi) a supplemental record filed on July 23, 2020. The compilation of trial exhibits consists of: (i) HPI exhibits admitted at trial ("HPI Tr. Exs."); (ii) HPI's proposed exhibits; and (iii) Wellmont exhibits admitted at trial ("Wellmont Tr. Exs.").

(HPI Tr. Exs. Vol. 1, Ex. 2 at HPI0347190-91, § 3.2.1.) However, the non-compete provision includes an express carve-out providing that it "shall not … preclude HPI [or] Wellmont … from entering into contracts to provide services to managed care networks competing with the [PHO]." (*Id*. at § 3.2.2.) Thus, despite their participation in the PHO, both Wellmont and HPI were free to contract directly with insurance companies such as Blue Cross, Cigna and Aetna to provide services in the competing networks offered by those insurance companies. (*See id*.; Wellmont Tr. Exs. Vol. 2-1, Ex. 1039 at HPI0009658-59 (one of numerous HPI private placement memoranda identifying as a "Risk Factor" that "neither Wellmont nor HPI are precluded from entering into contracts to provide services [in competing networks] … [which] could severely damage the viability of the PHO …").)

One of the PHO's largest insurance company contracts was with Cigna. Cigna first agreed to contract through the PHO in the late 1990s, when it was a relatively small player in the Tri-Cities market. (TS Vol. 120 at 590:5-7.) Because Cigna had very little leverage at that time, Cigna's contract with the PHO included physician reimbursement rates that both HPI and Cigna acknowledged, respectively, were "well above market rate" and "much higher" than the rates HPI's physicians charged to Cigna's largest competitor, Blue Cross Blue Shield of Tennessee. (*Id.*; Wellmont Tr. Exs. Vol. 1-I, Ex. 1368 at HPI0183515; June 2, 2020 Supp. R., March Ungs Dep. at 52:16-22.)

In 2009, Cigna's market position improved dramatically when it won a contract to provide health plan coverage to Eastman Chemical, the area's largest employer. (*See* TS Vol. 119 at 437:24-438:6.) The Eastman business propelled Cigna from being a "minor player to being the dominant player" in the market. (*Id*.)

Cigna was determined to use its new market power to make its health plans less expensive and, thus, more competitive in the Tri-Cities market. (HPI Tr. Exs. Vol. III, Ex. 111; June 2, 2020 Supp. R., March Ungs Dep. at 52:12-22.) This meant

negotiating rate reductions with hospitals and physicians. However, Cigna ran into resistance on multiple fronts. When Cigna attempted to reduce rates through the PHO, HPI refused. (*See*, *e.g.*, Wellmont Tr. Exs. Vol. 1-I, Ex. 1603 at WM00514458; Wellmont Tr. Exs. Vol. 3-VI, Ex. 1826 at 2.) Cigna encountered similar resistance from Mountain States Health Alliance ("Mountain States"), Wellmont's main hospital competitor, which was also part of Cigna's network. (HPI Tr. Exs. Vol. III, Ex. 69.)

To break the logjam, Cigna decided to exclude Mountain States from its network. (*See* HPI Tr. Exs. Vol. III, Ex. 73 at WM00403049-53; Wellmont Tr. Exs. Vol. 1-I, Ex. 1544.) Excluding Mountain States would direct a higher volume of Cigna-insured patients to Wellmont hospitals. (*Id.*) The expectation of higher patient volumes freed Wellmont to accept lower hospital rates without a loss of revenue. (HPI Tr. Exs. Vol. III, Ex. 73 at WM00403053.) This arrangement—which made Wellmont the exclusive in-network area hospital system for Cigna in exchange for hospital rate reductions—was memorialized in an October 2011 letter of intent. (Wellmont Tr. Exs. Vol. 1-I, Ex. 1330.)

Because the letter of intent was limited to hospital services, Cigna remained determined to reduce the above-market rates it was paying to HPI physicians under the PHO contract. (June 2, 2020 Supp. R., March Ungs Dep. at 52:5-22.) However, HPI continued to reject Cigna's efforts to lower physician rates through the PHO. (*Id*. at 53:20-54:12.) Accordingly, in 2013, Cigna exercised its undisputed contractual right to terminate the PHO contract—which Cigna was free to do without cause on 120 days' notice. (June 2, 2020 Supp. R., March Ungs Dep. 53:20-54:12; Wellmont Tr. Exs. Vol 1-I, Ex. 57 at HPI0401482 (Section III B), Ex. 1361.) After terminating the PHO contract, Cigna negotiated new contracts directly with individual HPI physician practices, as well as with Wellmont, instead of through the PHO. (*See* TS Vol. 139 at 2643:20-2644:7; HPI Tr. Exs. Vol. IV, Ex. 154, Ex. 155.)

HPI blamed Wellmont for Cigna's termination of the PHO contract. (*See* TR Vol. 1 at 16-17; TR Vol. 22 at 2957.) According to HPI, the termination forced physician practices to accept lower rates from Cigna.

Between 2014 and 2016, changes in the healthcare market also caused the PHO to lose several Direct Employer Contracts. For instance, in late 2014, Cigna added Mountain States back to its network. (TS Vol. 140 at 2728:16-2729:16.) This made Cigna's plans more appealing to employers who were near Mountain States facilities. (TS Vol. 140 at 2728:16-2729:16; 2725:3-2727:2.) In addition, one of the PHO's largest direct employer customers—Bristol Compressors—simply went out of business. (Wellmont Tr. Exs. Vol. 1-II, Ex. 1859; TS Vol. 140 at 2712:16-19.) Yet, HPI blamed Wellmont for all of the lost Direct Employer Contracts. (*See* HPI Tr. Exs. Vol. VI, Ex. 348A at Chart 2B.)

II. SUMMARY OF RELEVANT TRIAL COURT PROCEEDINGS

On February 2, 2016, HPI filed a class action complaint against Wellmont alleging Wellmont was liable for losses caused by Cigna's termination decision and the lost Direct Employer Contracts. (TR Vol. 1 at 1-37.) According to HPI, Wellmont's entry into a direct contract with Cigna, and associated actions by Wellmont executives, breached the Stockholders Agreement, breached fiduciary duties purportedly owed to HPI and HPI's members and amounted to defamation, tortious interference with business advantages and deceit. (*Id.* at 27-34 (¶¶ 85-114).) For damages, HPI sought to recover its lost profits, described as "[t]he amounts that would have been achieved by continuing [under the Cigna PHO contract] ***minus the amounts in fact paid*** to each class member" under their direct contracts with Cigna. (TR Vol. 1 at 29 (¶ 93) (emphasis added).)

Chancellor Moody certified a class of "[a]ll medical practitioners or practice groups who were members of [HPI] for part or all of the period beginning June 22, 2012 through [July 27, 2017]." (TR Vol. 3 at 440.)

A. The Chancellor Rubber-Stamps HPI's Lawyer-Prepared Orders Granting Summary Judgment to HPI *Before* Announcing His Independent Decision or Reasoning.

Before trial, both parties moved for summary judgment on key liability issues, including (i) the meaning of the non-compete provision of the Stockholders Agreement; and (ii) whether HPI's members were third-party beneficiaries of that contract. (*See* TR Vol. 6 at 802-09; TR Vol. 8 at 1099-1101.) Wellmont also moved for a judgment that it did not owe fiduciary duties to HPI's members as a matter of law. (TR Vol. 7 at 1036-37.) On each of these issues, the Chancellor sided with HPI without first—indeed, ever—announcing his own independent reasoning. (*See* TS Vol. 100 at 220:8-221:21; TR Vols. 36-37 at 4339-4418.) Instead, at the end of the April 20, 2018 hearing on the summary judgment motions, the Chancellor took these matters under advisement and ordered the parties to submit proposed findings of fact and conclusions of law. (*See* TS Vol. 100 at 220:8-222:1; TR Vol. 36 at 4344.) On September 4, 2018, he adopted 68 pages of factual findings and legal conclusions drafted by HPI's lawyers. (*Compare* TR Vols. 20-21 at 2754-2832 *with* TR Vols. 36-37 at 4339-4418.)[3]

[3] In this summary judgment order, the Chancellor adopted HPI's position that the Stockholders Agreement ***unambiguously*** barred Wellmont and its physician-group subsidiaries—but no other HPI member—from contracting with insurance companies outside of the PHO. (*See* TR Vol. 36 at 4344-73.) He also adopted HPI's explanation that the "plain language" of § 3.2.2—which expressly allows Wellmont to "enter[] into contracts to provide services in managed care networks competing with [the PHO]"—"allows only competition for and solicitation of persons or entities which do not have networks composed of [PHO] personnel." (TR Vol. 36 at 4344-50 (¶¶ 1-17); TR Vol. 37 at 4377.) The Chancellor then adopted HPI's alternative argument that the contract was ***ambiguous*** and that HPI's reading of the contract was confirmed by the declaration of Douglas Elden, HPI's longtime lawyer and the cousin of HPI's lead litigation counsel. (TR Vol. 36 at 4352 (¶¶ 19-20), 4371-72 (¶¶ 76-84); TS Vol. 116 at 130:17-20.) The Chancellor disregarded Wellmont's conflicting evidence. (*See* TR Vol. 36 at 4368 (¶ 72), 4369 (¶ 74), 4373

Chancellor Moody followed the same procedure when HPI moved for summary judgment on counterclaims asserted by Wellmont. After hearing oral argument on November 16, 2018, the Chancellor advised the parties, "I'm not in a position to make a ruling today, because … I have not looked at the exhibits … [a]nd truthfully, I kind of scanned the briefs." (TS Vol. 113 at 260:7-11.) Ten days later, he adopted 45 pages of findings of fact and conclusions of law supplied by HPI with no material changes and without first stating his reasoning. (*Compare* TR Vol. 59 at 5663-5711 *with* July 23, 2020 Supp. R., HPI's Proposed Findings of Fact and Conclusions of Law.) In his order denying Wellmont's motion for a new trial, the Chancellor explained that his decision to adopt HPI's lawyer-prepared order was driven by time pressures, his workload and a lack of staff resources.[4] (*See* TR Vol. 69 at 6762-63.)

B. HPI Pursues Lost Profits to the Class Through the Year 2029 Based on Speculative Opinion Testimony.

In support of its claim for millions in lost profits, HPI initially hired a Chicago-based economics firm to conduct an economic analysis of class damages.

(¶ 88).) Next, the Chancellor found that HPI's members are third-party beneficiaries of the Stockholders Agreement under ***Tennessee law*** despite the fact that the contract is governed by ***Delaware law***. (TR Vol. 37 at 4375-77.) The Chancellor also adopted HPI's position that Wellmont could owe fiduciary duties to each of HPI's 2,000-plus members despite having no contractual relationship with them. (*Id.* at 4405-09.)

[4] In both of his summary judgment rulings, the Chancellor basically signed his name to the findings of fact and conclusions of law proposed by HPI. His September 4 ruling adopted HPI's proposal without any material change to the ***204 paragraphs*** HPI submitted. (*Compare* TR Vols. 20-21 at 2754-2832 *with* TR Vols. 36-37 at 4339-4418.) In his November 26 ruling on Wellmont's counterclaims, he adopted HPI's proposed order without any material change to the ***290 paragraphs*** HPI submitted. (*Compare* TR Vol. 59 at 5663-5711 *with* July 23, 2020 Supp. R., HPI's Proposed Findings of Fact and Conclusions of Law.)

(*See* TS Vol. 131 at 1859:25-1861:2.) But after doing so, HPI elected not to rely on the firm's work. Instead, HPI designated Brant Kelch, a senior HPI employee, as its only expert witness on damages. (TR Vol. 21 at 2892-95; *see also* TS Vol. 131 at 1861:3-1862:15 (Kelch explaining that the work of the economics firm was "so complicated it was hard for me to explain").) Kelch, whose background was limited to healthcare operations and not finance or economics, had never before prepared any damages model or projection of lost profits. (TS Vol. 131 at 1847:18-1848:13; *see* HPI Tr. Exs. Vol. VI, Ex. 341A.) Therefore, in support of HPI's claim for more than $42.6 million in lost profits resulting from Cigna's contract termination ("Cigna Damages") and more than $33.1 million resulting from lost Direct Employer Contracts ("Direct Employer Damages")—over $75 million in total—Kelch submitted just three pages of charts prepared by HPI's lawyers. (TR Vol. 23 at 3128-30; HPI Tr. Exs. Vol. VI, Ex. 348 at Charts 1, 2B and Addendum to 2B.) Kelch said the charts used so-called "simple arithmetic" to project 15 years of lost profits to the class between 2014 and 2029. (*Id.*; TS Vol. 131 at 1791:15-22, 1833:22-23, 1848:4-6; TS Vol. 132 at 2003:21-2004:6, 2004:17-19.) Kelch's lost profits charts are included in the Appendix at Tab 2.

By the time of trial in late 2018, HPI's members had been operating under Cigna's new rates for nearly five years. In other words, data about the "amounts in fact paid" was available to calculate the difference between those amounts and the amounts that would have been received if the Cigna PHO contract had remained in place. Yet, Kelch's lost profits calculations were not based on any such data. Rather than use HPI members' actual reimbursement experience, Kelch relied entirely on a single number Cigna had calculated as a "guesstimate" of the aggregate savings it ***hoped*** to achieve in 2014, the first year the post-PHO rates went into effect. (HPI Tr. Exs. Vol. VI, Ex. 348 at Chart 1, Chart 2B; TR Vol. 34 at 4031(118); TS Vol. 132 at 1999:16-2001:16; June 2, 2020 Supp. R., Sep. Ungs Dep. 20:8-15, 21:25-

23:2.) Kelch did nothing to verify the Cigna guesstimate, made no effort to account for the fact that Cigna's guesstimate admittedly included savings attributable to non-class members, did not consider or review any financial records, did not employ any recognized methodology, did not attempt to account for economic, industry or risk factors of any kind and did not consider any alternative causes for HPI members' claimed losses. (*Id*.) Instead, he simply plugged Cigna's guesstimate for its projected savings in 2014 into a table and carried it forward for 15 years into the future with very few adjustments. (HPI Tr. Exs. Vol. VI, Ex. 348 at Chart 1.)

Based on the defects in HPI's proof, Wellmont moved for summary judgment on damages and to exclude or limit Kelch's opinion testimony. (TR Vol. 25 at 3247-49; TR Vol. 38 at 4452-74.) Despite Wellmont's objection, the Chancellor entered an order finding that Kelch was qualified to testify as a damages expert. (TR Vol. 59 at 5713-15.) However, in the same order, the Chancellor observed that Kelch had "never made a prediction of loss extending beyond three years" and, thus, was ***unqualified*** to testify about any damages extending more than three years beyond the trial date. (*Id.* at 5714-15.) Chancellor Moody made no effort to evaluate the reliability of Kelch's data, methods or opinions at any time. (*See id*.)

C. The Jury Finds for HPI After a Trial Based on the Chancellor's Improper Pre-Trial Rulings for HPI.

The trial was conducted from November 27, 2018 to December 18, 2018. (TS Vols. 115-145.) But, the Chancellor's summary judgment rulings—which adopted all of HPI's significant legal positions—effectively guaranteed a verdict against Wellmont. On damages, despite his previous order limiting Kelch's lost profits opinions to three years after the trial date, the Chancellor decided—in the middle of trial—to allow Kelch to testify about damages through 2029 so the jury could give what HPI called "kind of a conditional contingent verdict," which dramatically

increased the amount of damages presented to the jury.[5] (TS Vol. 114 at 63:1-2; TS Vol. 127 at 1386:6-20; TS Vol. 129 at 1676:5-1679:7, 1688:23-1689:1.)

After brief deliberations, the jury returned a verdict against Wellmont.[6] (TS Vol. 145 at 3315:24, 3329:23-3330:8.) As damages, the jury awarded: (i) $31,814,994 in Cigna Damages covering the years 2014 to 2023; and (ii) $23,117,909 in Direct Employer Damages covering the years 2015 to 2023. (*Id.* at 5967.) Both of these damages awards tracked Kelch's opinions to the penny for the years in question. On January 22, 2019, the Chancellor entered judgment against Wellmont for $57,959,053.[7] (TR Vol. 63 at 6240-6302.)

D. The Chancellor Grants HPI's Motion for a Permanent Injunction Without Making Any of the Required Findings.

After the judgment, the Chancellor denied Wellmont's motion for a new trial, motion for judgment notwithstanding the verdict, and motion to alter or amend the

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[5] After trial, the Chancellor again changed his mind and decided that Kelch's opinion testimony should be limited to a five-year period after the trial date, which was just long enough to support the jury's verdict. (TS Vol. 148 at 47:11-15; TR Vol. 69 at 6758.)

[6] The central issue of liability was whether the carve-out to the non-compete provision of the Stockholders Agreement—§ 3.2.2—allowed Wellmont to negotiate directly with Cigna while Cigna was under contract with the PHO. Adopting HPI's interpretation of the Stockholders Agreement verbatim, the Chancellor ruled that Wellmont was not allowed to do so. The Chancellor's summary judgment ruling, which Wellmont contends was erroneous, allowed the jury to find that Wellmont was liable for breach of the Stockholders Agreement, breach of a fiduciary duty to HPI and HPI's members, intentional interference with existing or prospective business relationships with Cigna and the direct employers, intentional misrepresentation and intentional concealment. (TR Vol. 61 at 5952-66.)

[7] The judgment also included $2,476,000 in damages for the breach of a separate "Network Access Agreement" between Wellmont and the PHO, as well as $550,150 in contractual payments that HPI claimed were owed by Wellmont directly to HPI. (TR Vol. 63 at 6248-49.)

judgment, or alternatively, for a remittitur, which raised the issues discussed herein. (TR Vol. 69 at 6758-59, 6762-63.)

The Chancellor then entered several post-trial orders in HPI's favor. He awarded HPI its attorneys' fees and expenses, which he set at $4,185,567 in lead-counsel fees and $1,381,871 in expenses (including $277,347 in "litigation pay" to Kelch). (*Id.* at 6767-68; TR Vol. 89 at 8906-22, 8932-34; TR Vol. 10 at 1370-71.)

He also entered the Restraining Order, which permanently and broadly prohibits Wellmont from "engaging in any conduct inconsistent with the terms of the Court's Findings" regarding the non-compete provision of the Stockholders Agreement and from "retaliating against HPI, its members, and the witnesses in this lawsuit." (TR Vol. 69 at 6774-75.) Given the vagueness of the Restraining Order and the fact that Wellmont and the class members constitute a large portion of the healthcare providers in the region, the Restraining Order can be used as a sword in a wide range of hospital–physician disputes in the Tri-Cities area in perpetuity. Claiming "retaliation," any class member can file a motion for contempt with the Chancellor when he or she dislikes something Wellmont does or does not do.

The appeal followed.

III. DECISION OF THE COURT OF APPEALS

Wellmont appealed on several grounds, and HPI cross-appealed. As relevant here, Wellmont argued that (i) the judgment should be reversed because HPI's damages "expert" was admittedly unqualified and his opinions were speculative, unreliable and failed to establish lost profits for HPI or the class; (ii) the Chancellor erred in his summary judgment rulings—both on the merits and because he adopted the proposed orders prepared by HPI's lawyers without ever announcing his own reasoning; and (iii) the Chancellor erred by entering an impermissibly vague and overbroad permanent Restraining Order without making any of the required findings and where HPI plainly had an adequate remedy at law.

On September 25, 2020, the Court of Appeals issued an opinion affirming the Chancellor on each of these issues.[8] With respect to HPI's damages proof, the court of Appeals concluded only that Kelch had "significant experience in the healthcare industry," citing Kelch's experience in healthcare operations. (Op. at 40.) The court did not address Wellmont's argument that Kelch had no experience or qualifications in accounting, economics or finance that would render him competent to perform an economic damages analysis purporting to calculate 15 years of classwide lost profits.

The court likewise did not address Wellmont's arguments about the unreliability of Kelch's opinions. Instead, the court found that HPI's proof of lost profits was adequate simply because (i) the Cigna guesstimate was "calculated by an independent third party (Cigna), which would contribute to its trustworthiness"; (ii) Kelch "***believed*** this calculated sum represented a 'minimum' amount of damages sustained by HPI members which would account for any potential discrepancy caused by HPI members opting out of the class"; (iii) Kelch "explained how he utilized [the Cigna figure] to make other calculations included in his charts by employing 'simple arithmetic'"; and (iv) the standard for proving the "amount" of lost profits is lower than the standard for proving their existence. (*Id.* at 40-41 (emphasis added).) The court reached this conclusion despite acknowledging that

[8] The Court of Appeals agreed with Wellmont that the Chancellor erred in setting the amount of HPI's attorney's fees and expenses. (Op. at 54.) The Court of Appeals found that HPI should have submitted this issue to the jury. (*Id.*) Yet, instead of directing the Chancellor to enter judgment for Wellmont on the issue, the Court of Appeals inexplicably gave HPI a second bite at the apple and remanded for a jury trial on the amount of attorney's fees and expenses to be awarded to HPI. (*Id.* at 54-55.) This was clear error. *See, e.g., Ridley v. Watson*, 2008 WL 3895952, at *4 (Tenn. Ct. App. Aug. 22, 2008) (no perm. app. filed) (holding that, because plaintiff "was not precluded from offering any and all proof that he may have had to support his claims …, remand for more proof would only give [plaintiff] a second bite at the proverbial apple," which is "not the purpose of appellate review").

Cigna was "not completely sure of [the] origin" of its savings guesstimate and despite recognizing that Kelch's excuse for failing to consider actual profit-and-loss information from HPI's members was "disingenuous." (*Id*. at 36 and n.7.)

With respect to the summary judgment rulings, the Court of Appeals began by describing the requirement set forth in *Smith*. (*Id.* at 15-17.) The court acknowledged that "at first blush, the procedure utilized by the trial court in this matter of adopting proposed findings and conclusions almost verbatim appears substantially similar to the procedure criticized by this state's appellate courts in *Smith* and its progeny." (*Id.* at 19.) The court concluded, however, that this matter was distinguishable from *Smith* because (i) the Chancellor did not adopt the proposal of a party who knew it had prevailed; and (ii) the summary judgment decisions here did not entirely dispose of the case. (*Id.* at 19, 21.) The court then explained that even assuming, *arguendo*, the Chancellor had failed to exercise independent judgment, it would exercise its discretion to consider the merits of the summary judgment decisions in Chancellor Moody's place. (*Id.* at 20-21.)

Finally, the Court of Appeals decided that the Chancellor did not abuse his discretion in entering the permanent Restraining Order. The opinion recites the entirety of the Chancellor's findings of fact and conclusions of law set forth in the Restraining Order—which simply noted that the jury found that Wellmont had breached the Stockholders Agreement, had breached fiduciary duties and had committed an intentional tort. (*Id.* at 56.) Though the Restraining Order did not include findings about the danger of irreparable harm, the inadequacy of other remedies, the benefit to the plaintiff, the harm to the defendant or the public interest, the Court of Appeals determined there was a sufficient foundation to support the permanent injunction. (*Id.* at 56-57.) In response to Wellmont's argument that there was an adequate remedy at law in the form of money damages, the Court of Appeals provided a one-sentence explanation and conclusion: "Equally clear is that

irreparable harm could be inflicted upon individual physicians as well as HPI." (*Id.* at 57.) Finally, the Court of Appeals summarily stated that it did not believe the permanent Restraining Order is vague or overbroad. (*Id.*)

REASONS SUPPORTING REVIEW

Rule 11 of the Tennessee Rules of Appellate Procedure lists the following "character of reasons" the Supreme Court of Tennessee will consider to determine whether to grant permission to appeal: the need to secure uniformity of decision; the need to secure settlement of important questions of law; and the need for the exercise of the Supreme Court's supervisory authority. Tenn. R. App. P. 11(a). Supreme Court review is needed for each of these reasons. First, this case presents an ideal opportunity for this Court to weigh in for the first time in 65 years on the important question of the proper standard for proving lost profits damages and to bring much-needed uniformity to the approaches used by Tennessee trial and appellate courts. Second, this case provides an opportunity for this Court to halt the erosion of the judicial independence requirement it announced in *Smith*, to secure uniformity in how Tennessee courts apply *Smith* and to clarify whether and when appellate courts may overlook trial court violations of *Smith*. Finally, this case provides a critical opportunity for this Court to secure uniformity in how trial courts decide issues related to temporary and permanent injunctions and to provide guidance on how appellate courts should review permanent injunctions that are unsupported by any findings of fact or conclusions of law.

I. THE COURT SHOULD GRANT REVIEW TO SETTLE AN IMPORTANT QUESTION OF LAW AND TO SECURE UNIFORMITY OF DECISION AS TO THE PROPER STANDARD UNDER TENNESSEE LAW FOR PROVING LOST PROFITS DAMAGES.

A. Introduction and Background.

Plaintiffs seek lost profits in all manner of cases, and Tennessee courts regularly award lost profits as compensatory damages. *See* J. Ross Pepper, *Recovering Lost Profits*, 44 Tenn. B.J. 14, 14-15 (Aug. 2008) (discussing Tennessee awards of lost profits in breach of contract, intentional interference, negligence, conversion, wrongful eviction, wrongful replevy and other cases). Yet, lost profits present unique challenges and require courts to balance between the two competing objectives of (i) compensating injured plaintiffs where damages are difficult to prove; and (ii) ensuring damages awards are not excessive or speculative and do not chill free market activity. *See* Robert M. Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What it Really Means*, 12 Transactions: Tenn. J. Bus. L. 11, 15-16 (Fall 2010) (hereinafter, "Lloyd"). Historically, courts have sought to achieve this balance by requiring plaintiffs to prove lost profits with "reasonable certainty." *See id.*; Charles T. McCormick, *Handbook on the Law of Damages* 105 (1935) ("[T]he standard of 'certainty' was developed, and has been used, chiefly as a convenient means of keeping within the bounds of reasonable expectation the risk which litigation imposes upon commercial enterprise ….").

The continuing evolution of the law on lost profits has resulted in confusion and conflict among Tennessee's lower courts regarding the minimum evidentiary requirements plaintiffs must satisfy in order to recover. *See, e.g.*, Pepper, 44 Tenn. B.J. at 14-15 ("It is an understatement to say that there are few bright line rules in Tennessee law with regard to when lost expected profits are considered … proven with reasonable certainty … or remote, speculative, or not proven with reasonable certainty …. [T]he results in Tennessee published case law … are, to some degree,

inconsistent and contradictory.") The present appeal presents an ideal vehicle for this Court to clarify the parameters of the "reasonable certainty" requirement in Tennessee, because it illustrates the type of extreme outcomes that can result in the absence of guidance from this Court. Indeed, the plaintiff here successfully argued for a standard that was so relaxed that it was permitted to recover $57.4 million in lost profits with nothing more than speculative and conclusory opinion testimony that ignored objective data from which actual losses, if any, could have been reasonably ascertained. As such, the decision in this case has further eroded the evidentiary standard for proving the amount of lost profits under Tennessee law and has opened the door for more equally flawed outcomes.

B. Review Is Needed to Clarify and Bring Uniformity to the "Reasonable Certainty" Standard for Proving Lost Profits in Tennessee.

The Tennessee Supreme Court ruled more than 100 years ago that lost profits were available as contract damages "if there are data from which the amount may be ascertained with reasonable certainty." *Bradford & Carson v. Montgomery Furniture Co.*, 92 S.W. 1104, 1110-11 (Tenn. 1906). The Court again touched on the "reasonable certainty" standard for lost profits in 1954 and 1956, although without significant elaboration on its application. *See Burge Ice Mach. Co. v. Strother*, 273 S.W.2d 479, 485-86 (Tenn. 1954) (referencing the reasonable certainty requirement and finding the owner of a newly established business could not recover lost profits based on speculative damages proof); *Jennings v. Lamb*, 296 S.W.2d 828, 831 (Tenn. 1956) (deciding plaintiff "proved with reasonable certainty that he could have sold every foot of the lumber in the ordinary course of his business" through the testimony of two of plaintiff's customers that they were willing to purchase it). The Court has not addressed the topic in any direct way since.

Since that time, however, the law on lost profits has evolved substantially, with different courts introducing a variety of conflicting additional principles and

rules. In addition to the general rule that the amount of lost profits must be proven with reasonable certainty, there is a "wrongdoer rule," which states that "a wrongdoer … cannot insist that the profits be proven with reasonable certainty"; a "fact and amount rule," which states that once the fact of damages has been proven with reasonable certainty, the amount need not be proven with reasonable certainty; and a "best available evidence" rule, which states that "the plaintiff cannot recover unless it produces the best evidence available to show the amount of the loss." *See* Lloyd at 16; *see also Waggoner Motors*, 159 S.W.3d at 57-58, n.29 (citing these rules). These rules "would be unworkable even if they were consistent with each other, which they are not." Lloyd at 16.

Tennessee decisions on lost profits ordinarily reference at least one of the above rules, yet they are not articulated or applied in any consistent way. For example, many Tennessee decisions draw no distinction between the evidentiary standard required for proving the "existence" and "amount" of lost profits—stating only that lost profits "are only recoverable when the amount of damages can be proven with reasonable certainty, and are not remote or speculative." *Forklift Sys., Inc. v. Werner Enters.*, 1999 WL 326159, at *1 (Tenn. Ct. App. May 25, 1999) (no perm. app. filed); *see also General Constr. Contractors Ass'n, Inc. v. Greater St. Thomas Baptist Church*, 107 S.W.3d 513, 524 (Tenn. Ct. App. 2002); *Lamons v. Chamberlain*, 909 S.W.2d 795, 801 (Tenn. Ct. App. 1993); *Baker v. Hooper*, 50 S.W.3d 463, 470 (Tenn. Ct. App. 2001); *Tire Shredders, Inc. v. ERM-North Cent., Inc.*, 15 S.W.3d 849, 857-58 (Tenn. Ct. App. 1999); *Apollo Hair Sys. of Nashville v. First Lady Intern. Corp.*, 2005 WL 735032, at *4-5 (Tenn. Ct. App. Mar. 29, 2005) (no perm. app. filed); *Daws v. Lunsford*, 1990 WL 42979, at *5 (Tenn. Ct. App. Apr. 16, 1990) (no perm. app. filed); *Hurst Co., Inc. v. Bituminous Inst. Cos.*, 1998 WL 283069, at *5-6 (Tenn. Ct. App. May 28, 1998) (no perm. app. filed).

Other decisions appear to adopt the "existence and amount rule," holding that the existence of lost profits must be proven with reasonable certainty, while something less than "reasonable certainty" is required as to the amount. *See*, *e.g.*, *Tennison Bros., Inc. v. Thomas*, 556 S.W.3d 697, 725-26 (Tenn. Ct. App. 2017); *Aqua-Chem, Inc. v. D&H Mach. Serv., Inc.*, 2016 WL 6078566, at *6 (Tenn. Ct. App. May 26, 2016) (no perm. app. filed); *Brandenburg v. Hayes*, 2010 WL 2787854, at *5-6 (Tenn. Ct. App. Jul. 14, 2010) (no perm. app. filed); *Borla Performance Indus., Inc. v. Universal Tool & Eng'g*, 2015 WL 3381293, at *5-6 (Tenn. Ct. App. May 26, 2015) (no perm. app. filed).

Some of these decisions also allude to the "best available evidence" rule, admonishing plaintiffs to introduce the best evidence available in support of a claim for lost profits—while others do not. *See*, *e.g., Waggoner Motors*, 159 S.W.3d at 58, n.29 ("Parties seeking to recover lost profits damages would be well advised to provide the best available proof as to the amount of their loss that the particular situation permits."); *Aqua-Chem*, 2016 WL 6078566, at *6 ("[W]e observed that 'definite proof regarding the amount of damages is desirable as far as it is reasonably possible,' and that '[p]arties seeking to recover lost profits damages would be well advised to provide the best available proof as to the amount of their loss that the particular situation permits.'" (internal citations omitted)).

Even standing alone, many of the rules are confusing. For instance, the "fact and amount" rule could be interpreted to lower the bar for proof so much that there is, in effect, no meaningful remaining evidentiary requirement for proving the "amount" of lost profits once their "existence" has been established with reasonable certainty. *See, e.g.*, 22 Steven W. Feldman, *Tenn. Practice: Contract Law and Practice* § 12:7 ("The [fact and amount rule] could be misleading, because some fair and reasonable degree of certainty, based on adequate proof and substantial evidence, is essential to sustain the amount of any award."). The same is true for the

"wrongdoer rule," which states that "defendants should not be permitted to complain about the lack of exactness or precision in the proof regarding the amount of damages when their wrongdoing created the damages in the first place." *Waggoner Motors*, 159 S.W.3d at 59 (citing *Walgreen Co. v. Walton*, 64 S.W.2d 44, 50 (Tenn. Ct. App. 1932)). Without proper balance, such a rule could result in extreme outcomes in which large, speculative awards of lost profits are permitted merely upon a court's determination that a defendant's breach of contract made it more difficult to calculate the amount of plaintiff's lost profits precisely. *See*, *e.g.*, *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) (discussing the wrongdoer rule and observing that "even where the defendant … has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork."); *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1162 (7th Cir. 1983); *see also Big Lots Stores, Inc. v. Giant of Md., LLC*, 2008 WL 11367511, at *2-5 (D. Md. July 14, 2008) (citing *Bigelow* and finding expert's lost profits opinion too speculative).

The Tennessee Supreme Court is among the few state supreme courts that have not addressed the proper evidentiary standard for proving lost profits in recent years.[9] The issue is ripe for consideration by this Court, as made clear by the

[9] *See, e.g., Recreational Data Servs., Inc. v. Trimble Navigation Ltd.*, 404 P.3d 120, 137-39 (Alaska 2017); *Bank of Am., NA v. C.D. Smith Motor Co., Inc.*, 106 S.W.3d 425, 435-36 (Ark. 2003); *Denny Constr., Inc. v. City & County of Denver ex rel. Bd. of Water Comm'rs*, 199 P.3d 742, 746 (Colo. 2009); *Sun Val, LLC v. Comm'r of Transp.*, 193 A.3d 1192, 1205-06 (Conn. 2018); *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 515 N.E.2d 61, 66 (Ill. 1987); *Olathe Mfg., Inc. v. Browning Mfg.*, 915 P.2d 86, 103-04 (Kan. 1996*); Borden, Inc. v. Howard Trucking Co., Inc.*, 454 So.2d 1081, 1092 (La. 1983); *Eckenrode v. Heritage Mgmt. Corp.*, 480 A.2d 759, 765-66 (Me. 1984); *Ballard Realty Co., Inc. v. Ohazurike*, 97 So.3d 52, 64-67 (Miss. 2012); *World Radio Labs., Inc. v. Coopers & Lybrand*, 557 N.W.2d 1, 13-15 (Neb. 1996); *Boyle v. City of Portsmouth*, 235 A.3d 985, 994-95 (N.H.

competing and inconsistent rules described above and by the extraordinary lost profits judgment—awarded wholly on the basis of unverified guesstimates and speculation—in this case. This Court's review would be facilitated by its ability to consider the approaches taken recently by other state supreme courts in their efforts to craft workable standards that balance the interests of injured plaintiffs with the need to avoid excessive judgments based on speculative evidence. *See, e.g.*, *Am. Diamond Exch., Inc. v. Alpert*, 28 A.3d 976, 987 (Conn. 2011) (requiring plaintiffs to introduce the best evidence of lost profits that is permitted by the nature of the case); *World Radio Labs.,* 557 N.W.2d at 13-15 (requiring lost profits claims to be "supported by some financial data which permit an estimate of the actual loss to be made with reasonable certitude and exactness"); *Recreational Data Servs.,* 404 P.3d at 136 (requiring plaintiffs to provide "sufficient data from which the court or jury may properly estimate the amount of damages, which data shall be established by facts rather than by mere conclusions of witnesses"); *Horizon Health*, 520 S.W.3d at 860 (requiring that "[a]s a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits can be ascertained"); *Gateway Foam Insulators, Inc. v. Jokerst Paving & Contracting, Inc.*, 279 S.W.3d 179, 186 (Mo. 2009) (requiring plaintiff to "provide evidence of the income and expenses of the business for a reasonable time before the interruption caused by defendant's actions, with a consequent establishing of the net profits during the previous period").

2020); *Willamette Quarries, Inc. v. Wodtli*, 781 P.2d 1196, 1200-01 (Or. 1989); *Drews Co., Inc. v. Ledwith-Wolfe Assocs., Inc*., 371 S.E.2d 532, 535-38 (S.C. 1988); *Hepper v. Triple U Enters., Inc.*, 388 N.W.2d 525, 530-31 (S.D. 1986); *Horizon Health Corp. v. Acadia Healthcare Co.*, 529 S.W.3d 848, 859-60 (Tex. 2017); *TruGreen Cos., LLC v. Mower Bros., Inc.*, 199 P.3d 929, 932-33 (Utah 2008).

Moreover, this case demonstrates that Tennessee trial and appellate courts urgently need guidance from this Court. Both the Chancellor and the Court of Appeals failed to consider (i) that the amount of lost profits must still be proven with competent, reliable evidence; (ii) that, here, HPI purposefully ignored the best available evidence of class losses—which was "the amounts in fact paid to" HPI's members—and chose instead to rely on the speculative and conclusory opinions of Kelch; and (iii) that HPI was seeking a large amount of lost profits over a long period of time on behalf of nearly 2,000 different healthcare providers, requiring at a minimum an informed economic analysis prepared by a qualified financial or economics expert. *See, e.g.*, Lloyd at 11 ("[E]ven a cursory reading of the published opinions makes it clear that the more the plaintiff is claiming in damages, the higher the standard of proof to which the court will hold it.") Allowing the decision here to stand will substantially lower the bar on damages proof and result in more conflicts in Tennessee decisions.

C. Review Is Needed to Clarify the Trial Court's Obligation to Act as Gatekeeper of Expert Proof on Lost Profits.

Review also is needed so this Court can provide additional guidance to trial courts as to the requirements for expert proof on lost profits and the duty of the trial court to serve as gatekeeper for such proof. In this case, Chancellor Moody plainly misunderstood this duty. He not only admitted flawed and unreliable opinion testimony on lost profits, he also entered a judgment of $57.4 million in lost profits based on no objective facts or data from HPI's members to support the award.

This Court has held that "[a]n essential role of the judge, as neutral arbiter in the trial, is to function as a 'gatekeeper' with regard to the admissibility of expert testimony, permitting only expert opinions that are based on relevant scientific

methods, processes, and data, and not upon the expert's mere speculation."[10] *Payne v. CSX Transp., Inc.*, 467 S.W.3d 413, 455 (Tenn. 2015) (internal quotations and citations omitted). "Ultimately, the objective of the trial court's gatekeeping function is to ensure that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id*. (citing *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 275 (Tenn. 2005); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)). A trial court must "ensure that the basis for the witness's opinion, i.e., testing, research, studies, or experience-based observations, adequately supports that expert's conclusions."[11] *State v. Stevens*, 78 S.W.3d 817, 834 (Tenn. 2002).

This Court has never addressed the specific parameters for expert testimony on lost profits. Yet, recent decisions from the Court of Appeals make clear that Tennessee courts differ wildly in their approaches to evaluating the reliability of such opinions, if they evaluate them at all. The inconsistencies in these approaches and the results they produce are most evident in a comparison of the decision of the Court of Appeals in *Waggoner Motors* with the decisions of Chancellor Moody and the Court of Appeals in *Highlands Physicians*.

Waggoner Motors concerned damage to an auto dealer's vehicles by paint overspray from a neighboring construction project. *Waggoner Motors*, 159 S.W.3d

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[10] Rules 702 and 703 of the Tennessee Rules of Evidence are "obviously designed to encourage trial courts to take a more active role in evaluating the reasonableness of the expert's reliance upon the particular basis for his testimony." *McDaniel*, 955 S.W.2d at 264-65.

[11] "This 'connection' between the expert's conclusion and the underlying data supporting that conclusion is of especial importance when determining the reliability of experience-based testimony, because observations and experiences are not easily verifiable by the court." *Stevens*, 78 S.W.3d at 834.

at 47. At trial, Waggoner obtained a judgment for lost profits based on the testimony of an expert economist, Michael Kelsay, who opined that the dealership had experienced $342,278 of lost profits based on a comparison of Waggoner's actual profits before and after the overspray incident. *Id*. at 51.

On appeal, then-Judge Koch reviewed Dr. Kelsay's methodology and determined that it was not sufficiently reliable under Tennessee law to serve as the basis for an award of lost profits. *Id*. at 58-60. Judge Koch began by summarizing several basic requirements for expert opinions on lost profits, including that they: (i) "must be based on objective facts, figures or data from which the amount of lost profits may be reasonably ascertained"; (ii) must be the product of a "recognized and acceptable methodology [applied] in a proper manner"; and (iii) must be based on "[]reliable foundational data."[12] *Id.* at 61. Applying these principles to the opinion of Dr. Kelsay, Judge Koch concluded that Dr. Kelsay's opinions were flawed because, among other things, he made "no effort to correlate Waggoner's past performance with ... broader economic trends," and the evidence did not support his explanation for sales anomalies during the "before" period. *Id*. at 61-63. The court concluded that, although "Waggoner's financial records provided an appropriate basis for calculating its anticipated future profits ... Dr. Kelsay's analysis of these records is so flawed that his conclusions are tantamount to speculation." *Id*.

Highlands Physicians stands in stark contrast to the type of reasoned reliability analysis undertaken by Judge Koch in *Waggoner Motors*. Here, the Court of Appeals—without explaining its reasoning—agreed with Chancellor Moody that

[12] Judge Koch explained that "[i]f an expert relies on unreliable foundational data, any opinion drawn from that data is likewise unreliable." *Id*. Likewise, "an expert's testimony is unreliable, even when the underlying data is sound, if the expert employed flawed methodology or applied sound methodology in a flawed way." *Id.* (internal citations omitted).

Kelch's lack of experience in modeling damages was unimportant, and that his background in healthcare operations was enough to qualify him to prepare a classwide damages model estimating 15 years of future lost profits for almost 2,000 healthcare providers. (Op. at 41.) The Court of Appeals did not review Kelch's methodologies in any way, did not comment on the Chancellor's failure to evaluate the reliability of Kelch's opinions before admitting them and did not address Wellmont's arguments demonstrating that Kelch's opinions were unreliable.[13] Nor did the court reference the basic criteria for expert opinions of lost profits outlined by Judge Koch in *Waggoner Motors*. Instead, relying on the general notion that "damages become too speculative only when the existence of damages is uncertain, not when the precise amount is uncertain," the Court of Appeals summarily concluded that Kelch's opinions were not too speculative and that the Chancellor had not erred by admitting them.[14] (*Id*. at 41.) The court did so despite recognizing

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[13] Wellmont argued, among other things, that Kelch's opinions (i) were not based on any objective facts, figures or data about the actual losses, if any, suffered by HPI members; (ii) that Kelch ignored the five years of data about "the amounts in fact paid to" HPI's members that was available; (iii) that the Cigna savings guesstimate was unverified and included savings attributable to non-class members; (iv) that the record directly contradicted Kelch's key assumptions used to calculate $33 million in Direct Employer damages; (v) that Kelch failed to account for any market risks to the claimed future cash flows; and (vi) that he failed to account for any other known causes for the claimed lost profits, among numerous other flaws. These arguments, which were not addressed by the Court of Appeals, can be found at pages 40 to 53 of Wellmont's initial brief and pages 4 to 8 of its reply.

[14] Notably, large claims for lost profits damages are most commonly supported by ***multiple experts***. 26 Am. Jur. Proof of Facts 3d 119, § 22. "In the proof of lost profits, it is usually necessary to make predictions and estimates to determine whether profits were actually lost by the plaintiff, whether the defendant's wrongdoing was the cause of this loss, and the present value of profits lost …. ***Often, it is most appropriate to use more than one expert***. An expert in the same field as the plaintiff's business may be called to testify regarding the industry's market

that Kelch's excuse for ignoring actual profit-and-loss information from HPI's members was "***disingenuous***" and despite recognizing that Cigna itself was unsure about what its savings guesstimate included. (*See id.* at 36 and n.7 (emphasis added.)

The disparity between the analyses of the courts in *Waggoner Motors* and *Highlands Physicians* confirms the immediate need for the Supreme Court to give guidance to the lower courts on the proper framework for considering whether expert opinions of lost profits are admissible and, separately, whether a plaintiff's evidence at trial is sufficient to support an award of lost profits. Without such guidance and clarification now, the decision of the Court of Appeals will stand for the proposition that, in Tennessee, enormous awards of lost profits may be based on nothing except the speculative opinions of inexperienced witnesses whose conclusions are not tied to any objective data or facts that otherwise are readily available.

II. THE COURT SHOULD GRANT REVIEW TO SETTLE AN IMPORTANT QUESTION OF LAW, SECURE UNIFORMITY OF DECISION AND EXERCISE ITS SUPERVISORY AUTHORITY AS TO THE DUTY OF TENNESSEE TRIAL COURTS TO EXERCISE INDEPENDENT JUDGMENT WHEN RULING ON MOTIONS FOR SUMMARY JUDGMENT.

In *Smith v. UHS of Lakeside*, this Court clarified that when deciding motions for summary judgment, a trial court must announce its own independent decision and reasoning ***before*** soliciting party-prepared proposed orders. *Smith*, 439 S.W.3d at 316-17. The Court explained that this announce-first requirement is necessary to protect the reputation and integrity of the Tennessee judiciary. *See id.* at 312-17.

Despite the importance and simplicity of this bright-line rule, Tennessee decisions applying *Smith* are anything but uniform. While many decisions have

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conditions during the relevant time period. An accountant or an economist may then be necessary to combine the factual data of the plaintiff's profit history with the opinions of the business expert to derive the present value of the profits lost." *Id.* (emphasis added). The decision of the Court of Appeals in this case drastically lowers the bar for proving lost profits and opens the door to speculative awards.

honored the rule and even expanded its application to bench trial judgments and similar contexts, others have crafted excuses for non-compliance *sua sponte*.

Here, in concluding that Chancellor Moody's summary judgment procedure was "not ideal" but still tolerable, the Court of Appeals both added to the existing conflict and made new law that further undermines the announce-first requirement. (Op. at 21.) If allowed to stand, the decision will erode the important judicial policies advanced by *Smith*.[15] This Court's supervisory authority is needed now to settle this important question, secure uniformity of decision and safeguard the reputation and integrity of the Tennessee courts.

A. In *Smith*, This Court Established a Clear Announce-First Requirement to Protect the Legitimacy and Integrity of the Tennessee Judiciary.

In *Smith*, this Court examined the obligations of trial courts when deciding motions for summary judgment and crafting summary judgment orders. In that case, the trial court announced its summary judgment decisions after lengthy hearings, but it provided no rationale for its rulings and asked the prevailing party to submit draft orders. *Smith*, 439 S.W.3d at 308-11. The trial court ultimately adopted the prevailing party's proposed orders, which were extremely detailed and included all the arguments, including alternative arguments, it had made in its papers. *Id.* at 309-11. The Court of Appeals found that, in so doing, the trial court had abrogated its most basic judicial duty. *See id.* at 311.

This Court accepted review in light of the widespread use of party-prepared orders by Tennessee trial courts. *See id.* at 314. The Court began its decision by emphasizing the importance of independent decision-making in ensuring the integrity and proper functioning of the judicial branch:

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[15] Indeed, Westlaw has labeled the Court of Appeals' decision in this case as ***negative*** authority for *Smith*.

> The courts in Tennessee … are the places where justice is judicially administered. … [T]heir effective functioning is indispensable to democracy. The essential purposes of courts and judges are to afford litigants a public forum to air their disputes and to adjudicate and resolve the disputes between the contending parties. To carry out these purposes, judges must arrive at their decisions by applying the relevant law to the facts of the case. ***Because making these decisions is a "high judicial function," a court's decisions must be, and must appear to be, the result of the exercise of the trial court's own judgment***. …
>
> In addition to expecting judges to be "fair, impartial, and engaged," the litigants, the bench and bar, and the public expect them to explain why a particular result is correct based on the applicable legal principles. Providing reasons for a decision reinforces the legitimacy of the legal process which, in turn, promotes respect for the judicial system.

Id. at 312-13 (emphasis added and citations omitted).

This Court then examined the "current acceptance" of trial courts' adoption of party-prepared findings of fact, conclusions of law and orders. *See id.* at 314. It expressed concern that this practice "detracts from the appearance of a hardworking, independent judge," "gives rise to the impression that the trial judge either has not considered the losing party's arguments, or has done little more than choose between two provided options" and "risks creating an appearance of bias or the impression that the trial court ceded its decision-making responsibility." *Id.* at 315 (footnotes omitted).

With these concerns in mind, the Court concluded that Rule of Civil Procedure 56.04 "***requires*** [a] trial court, upon granting or denying a motion for summary judgment, to state the grounds for its decision ***before*** it invites or requests the prevailing party to draft a proposed order." *Id.* at 316 (emphasis added). The Court explained that this announce-first requirement will "assure that the decision is the trial court's" and "(1) assure the parties that the trial court independently considered

their arguments, (2) enable the reviewing courts to ascertain the basis for the trial court's decision, and (3) promote independent, logical decision-making." *Id.* at 316-17.[16] The Court also made clear that when a trial court does not provide the basis for its decision ***before*** adopting a party-prepared order, "the grounds stated in the order cannot be attributed to the trial court." *Id.* at 317.

The reasoning of *Smith* confirms that the process for summary judgment decision-making is an important question of judicial policy and procedure that implicates this Court's supervisory authority. As explained below, review is needed to secure uniformity of decision and to protect the integrity of the judiciary.

B. Review Is Needed to Secure Uniformity of Decision and to Settle the Important Question of Whether a Trial Court May Solicit Competing Proposed Summary Judgment Orders and Adopt One Verbatim Without Ever Announcing Its Independent Decision or Reasoning.

In *Highlands Physicians*, the Court of Appeals pointed to two "[s]ignificant distinctions" between this case and *Smith*. (Op. at 19.) First, "[i]n the instant case, the trial court did not adopt the proposal of a party who had already learned that it would prevail on the motion; rather, the court invited both parties to submit proposals" before indicating how it intended to rule. (*Id*.)

The Court of Appeals' conclusion that this distinction somehow eliminates a trial court's duty to exercise independent judgment intensifies the conflict in Tennessee decisions. Several decisions have applied *Smith* and vacated orders that

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[16] To avoid any doubt, this Court described the procedures trial courts could use to comply: "First, the trial court may state the grounds for its decision at the same time it announces its decision on the record. Second, the trial court may announce its decision and inform counsel that it will provide the grounds in a subsequently filed memorandum or memorandum opinion. Third, after announcing its decision, the trial court may notify the parties of the grounds for its decision by letter, as long as the letter has been provided to all parties and has been made part of the record." *Smith*, 439 S.W.3d at 316 n.28.

resulted from the "not ideal" procedure used by Chancellor Moody. (*See id.* at 17, 19, 21.) In *Cunningham v. Eastman Credit Union*—which was decided just four months before *Highlands Physicians* and involved a decision by the same Chancellor—the trial court made no oral rulings at the conclusion of a bench trial, took the matter under advisement and directed each party to submit proposed findings of fact and conclusions of law. *Cunningham,* 2020 WL 2764412, at *4 (Tenn. Ct. App. May 27, 2020) (no perm. app. filed). The trial court subsequently adopted one side's proposed findings and conclusions. *Id.* The appellate court vacated the judgment because it could not determine that "[the] proposed findings of fact and conclusions of law, adopted nearly verbatim by the trial court, represent the trial court's own independent analysis and judgment." *Id.* at *5. Other decisions have reached the same conclusion. *See Mitchell v. Mitchell*, 2019 WL 81594, at *6-7 (Tenn. Ct. App. Jan. 3, 2019) (no perm. app. filed); *Deberry v. Cumberland Elec. Membership Corp.*, 2018 WL 4961527, at *2-3 (Tenn. Ct. App. Oct. 15, 2018), *perm. app. granted* (Tenn. Feb. 20, 2019), *vacated based on settlement* (Tenn. Aug. 30, 2019); *cf. McEarl v. City of Brownsville*, 2015 WL 6773544, at *3 (Tenn. Ct. App. Nov. 6, 2015) (no perm. app. filed) (announcing decision and then requesting competing orders).

On the other hand, *Highlands Physicians* is not alone in concluding that *Smith* does not apply when a court solicits competing orders before announcing its own decision and reasoning. A number of decisions have allowed this procedure to withstand a *Smith* challenge on appeal. *See Dalrymple v. Dalrymple*, 2017 WL 5462188, at *4 (Tenn. Ct. App. Nov. 14, 2017) (no perm. app. filed); *Huggins v. McKee*, 500 S.W.3d 360, 366-67 (Tenn. Ct. App. 2016); *In re Gabriel V.*, 2015 WL

3899409, at *10 (Tenn. Ct. App. June 24, 2015), *perm. app. denied* (Tenn. Nov. 24, 2015).[17]

The instant case provides an ideal opportunity for this Court to reaffirm that it meant what it said in *Smith*—trial courts ***must*** announce their decisions and the legal basis for their decisions ***before*** soliciting and adopting party-prepared orders. If *Highlands Physicians* stands, it is certain that more trial courts will engage in the kind of "not ideal" procedure that this Court condemned in *Smith*. Indeed, the procedure employed by the Chancellor here was even more suspect than the one at issue in *Smith* because the Chancellor never even announced how he would rule before rubber-stamping the 113 pages of findings of facts and conclusions of law drafted by HPI's lawyers.

C. Review Is Needed to Settle Whether Trial Courts Must Exercise Independent Judgment When Making Summary Judgment Rulings That Do Not End the Case.

The *Highlands Physicians* decision points to another supposedly significant distinction from *Smith*—the fact that the Chancellor's summary judgment rulings did not "effectively conclude the case," which, according to the Court of Appeals, gave Wellmont time to seek alteration or clarification of those rulings. (Op. at 19.)

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[17] *Highlands Physicians* and these other cases cannot be squared with the announce-first requirement. To illustrate, many appellate decisions applying *Smith* have employed a straightforward analysis to determine whether a written order reflects the court's independent judgment: they compare the findings announced by the trial court before soliciting the party-prepared order to the written order entered by the court. *See, e.g.*, *In re Marneasha D.*, 2018 WL 4847108, at *5 (Tenn. Ct. App. Oct. 4, 2018) (no perm. app. filed). Of course, if the trial court never made any findings before adopting a party-prepared order, the comparison cannot be made, and the findings cannot be attributed to the trial court. *See Deberry*, 2018 WL 4961527, at *2-3.

In concluding that *Smith* was distinguishable on this basis, the Court of Appeals made new law that will misguide Tennessee's trial courts. The opinion contains no legal citation and no reasoning to explain why trial judges should be excused from performing their "high judicial function" when making summary judgment decisions that do not conclude the case. Nothing in *Smith* suggests that some summary judgment decisions are exempt from the announce-first requirement. And, prior decisions applying *Smith* have vacated summary judgment decisions that did not conclude the case. *See Regions Commercial Equip. Fin., LLC v. Richards Aviation Inc.*, 2019 WL 1949633, at *2-3, *7-8 (Tenn. Ct. App. Apr. 30, 2019), *perm. app. denied* (Tenn. Sep. 23, 2019) (vacating summary judgment decision on certain claims where proceedings continued for another two years on damages and other claims); *Mitchell*, 2019 WL 81594, at *3, *7 (vacating order even though five months passed before final judgment was entered).

Simply put, the *Highlands Physicians* decision has created an uninvited exception to *Smith* that cannot be squared with the law or logic. After all, partial summary judgment decisions can effectively determine the ultimate outcome of a case. That is exactly what happened here when the Chancellor adopted an interpretation of the Stockholders Agreement that precisely matched HPI's theory of liability and improperly extended the benefits of that contract to every class member.

In this issue of first impression, the Court should intervene to prevent the proliferation of this exception and to make clear that trial courts are required to exercise independent judgment in all summary judgment decisions.

D. Review Is Needed to Secure Uniformity of Decision and Settle the Important Question of Whether and When Appellate Courts May Excuse a Trial Court's Failure to Exercise Independent Judgment.

Supreme Court review is also needed now to secure uniformity and settle the important question of whether and when appellate courts can ignore the failure of trial courts to exercise independent judgment. In *Highlands Physicians*, the Court of Appeals decided that even though the Chancellor's procedure was "not ideal," it would exercise its discretion to consider the merits. (Op. at 20-21.) This is just the latest in a series of conflicting appellate court decisions.

A number of decisions have concluded that a trial court's failure to make an independent judgment requires that the order be vacated. For example, one decision found "we cannot excuse the trial court from its obligation to render a decision that is 'the product of the trial court's independent judgment.' Therefore, we must vacate and remand …." *Deberry*, 2018 WL 4961527, at *3 (citations omitted). Other decisions have, likewise, summarily vacated defective orders. *See Battery Alliance, Inc. v. Allegiant Power, LLC*, 2017 WL 401349, at *9 (Tenn. Ct. App. Jan. 30, 2017) (no perm. app. filed); ("Because the trial court failed to fully comply with [Rule] 56.04, we vacate …."); *Cunningham*, 2020 WL 2764412, at *5; *In re Nathan C.*, 2020 WL 730623, at *8 (Tenn. Ct. App. Feb. 12, 2020) (no perm. app. filed); *Mitchell*, 2019 WL 81594, at *7; *In re Colton B.*, 2017 WL 6550620, at *5 (Tenn. Ct. App. Dec. 22, 2017) (no perm. app. filed) (finding that because "the record causes this Court grave concern and substantial doubt as to whether the trial court properly preformed its high judicial function … we must vacate and remand"); *McEarl*, 2015 WL 6773544, at *3 ("Because the trial court failed to comply with Rule 56.04, we must vacate ….").

On the other hand, a number of decisions, like *Highlands Physicians*, have concluded that the appellate court can review the merits of a summary judgment

decision in these situations. Citing judicial economy and similar rationales, these decisions simply overlook the trial court's obvious failure to exercise independent judgment. *See Coffman v. Armstrong Int'l, Inc*., 2019 WL 3287067, at *4 (Tenn. Ct. App. July 22, 2019), *perm. app. granted* (Tenn. Feb. 20, 2020) (citing mootness since decision was also wrong on the merits); *Hardy v. Tenn. State Univ.*, 2016 WL 1242659, at *5, *21 (Tenn. Ct. App. Mar. 24, 2016) (no perm. app. filed) (citing judicial economy); *Huggins*, 500 S.W.3d at 366 (citing judicial economy); *Taylor v. Cloud*, 2015 WL 4557328, at *5 (Tenn. Ct. App. July 29, 2015), *perm. app. denied* (Tenn. Nov. 25, 2015) (calling error "harmless").

This Court should ensure uniformity in Tennessee law by making clear that violations of the announce-first requirement cannot be ignored and that the proper remedy is to vacate and remand for the entry of an order that reflects the trial court's own judgment and analysis. After all, when a trial court enters an order that is not the product of its independent judgment, there is no valid order for the appellate court to review. Indeed, the *Highlands Physicians* decision demonstrates why an appellate court should not simply ignore such an error and affirm the trial court. Despite concluding that the Chancellor's summary judgment orders were, arguably, invalid under *Smith*, the Court of Appeals focused its merits review on explaining that it agreed with the reasoning contained in the invalid orders. (*See* Op. at 23-26.) And, in so doing, the Court of Appeals compounded the injustice to Wellmont by repeating the same one-sided analysis contained in the findings of fact and conclusions of law drafted by HPI's lawyers.[18]

[18] For example, when considering whether the Chancellor properly concluded that there were no material factual disputes on the interpretation of the Stockholders Agreement, the Court of Appeals ignored disputed material evidence that should have precluded summary judgment. Instead, the Court of Appeals discussed only the evidence that favored HPI—namely, an affidavit submitted by HPI's longtime

III. THE COURT SHOULD GRANT REVIEW TO SETTLE AN IMPORTANT QUESTION OF LAW AND SECURE UNIFORMITY OF DECISION AS TO THE FINDINGS NECESSARY TO SUPPORT A PERMANENT INJUNCTION AND THE PROPER SCOPE OF APPELLATE REVIEW WHERE SUCH FINDINGS ARE LACKING.

Tennessee courts have long understood that injunctive relief is an extraordinary remedy that "should be granted with great caution" and only when there is no adequate compensation in the form of monetary damages. *Hall v. Britton*, 292 S.W.2d 524, 531 (Tenn. Ct. App. 1953); *White v. N.C. & St. L. Ry.*, 1 Tenn. App. 467, 476 (Tenn. Ct. App. 1925); *see also Vintage Health Res., Inc. v. Guiangan*, 309 S.W.3d 448, 467 (Tenn. Ct. App. 2009) ("A court's equitable power to grant injunctions should be used sparingly…."). At the same time, Tennessee's appellate courts have traditionally recognized that the issuance of an injunction is a decision left to the sound discretion of the trial court. *See, e.g.*, *White*, 1 Tenn. App. at 476; *Curb Records, Inc. v. McGraw*, 2012 WL 4377817, at *3 (Tenn. Ct. App. Sept. 25, 2012), *perm. app. denied* (Tenn. Feb. 12, 2013) (citing *Vintage Health*, 309 S.W.3d at 466). This case illustrates how these two principles conflict, and why this Court should grant review now to determine (i) what a trial court must put on the record to show that it has exercised its discretion "with great caution" before granting a permanent injunction; and (ii) how an appellate court should review a permanent injunction that fails to include any findings or conclusions and lacks any specificity.

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lawyer as to the negotiating history, which itself was contradicted by the lawyer's own contemporaneous letters and other evidence. (*See* Op. at 24-25; Wellmont Br. at 60-63.) Just as the Chancellor did when he rubber-stamped HPI's proposed findings of fact and conclusions of law, the Court of Appeals failed to view the evidence in the light most favorable to Wellmont. The arguments made by Wellmont, which were not fully addressed by the Court of Appeals, can be found at pages 56 to 63 of Wellmont's initial brief and pages 12 to 15 of its reply.

A. Review Is Needed to Determine What Findings and Conclusions Are Required Before Entry of Permanent Injunctions, and to Secure Uniformity in How Trial Courts Handle Requests for Injunctive Relief.

Appellate courts have set several standards for trial courts to follow and various factors for trial courts to consider as they determine whether extraordinary injunctive relief may be appropriate. When a party seeks permanent injunctive relief, the trial court's discretionary determination is supposed to be guided by five factors: "the adequacy of other remedies, the danger that the plaintiff will suffer irreparable harm without the injunction, the benefit to the plaintiff, the harm to the defendant, and the public interest." *Vintage Health*, 309 S.W.3d at 467. This five-factor analysis differs slightly from the four-factor analysis that guides "a trial court in deciding whether to issue a temporary injunction: the threat of irreparable harm, the balance between the harm to be prevented and the injury to be inflicted if the injunction issues, the probability that the applicant will succeed on the merits, and the public interest." *Moody v. Hutchison*, 247 S.W.3d 187, 199-200 (Tenn. Ct. App. 2007).

Notwithstanding the slight differences in these standards for temporary and permanent injunctions, the Tennessee Rules of Civil Procedure make clear that "***[e]very*** restraining order or injunction ***shall be specific in terms*** and ***shall describe in reasonable detail***, and not by reference to the complaint or other document, the act restrained or enjoined." Tenn. R. Civ. P. 65.02(1) (emphasis added). Yet, the Rules explicitly require trial courts to make findings of fact and conclusions of law only when deciding whether to grant, deny, or modify a temporary injunction. *See* Tenn. R. Civ. P. 52.01, 65.04(6). While no such express provision appears with respect to permanent injunctions, the clear objective of the Rules Advisory Committee is to achieve "uniformity in the handling of [restraining orders,

temporary injunctions and permanent injunctions]." *See* Tenn. R. Civ. P. 52.01, 65, Advisory Comm'n Cmts.

The Court of Appeals has previously applied this requirement to permanent injunctions without limiting the procedural rules' reference to temporary injunctions. *See, e.g.*, *Alexandria-Williams v. Goins*, 2018 WL 3198799, at *2 (Tenn. Ct. App. June 26, 2018) (no perm. app. filed) ("Findings of fact and conclusions of law regarding such factors should be made incident to a decision on injunctive relief."); *Irvin v. Johnson*, 1998 WL 382200, at *4-5 (Tenn. Ct. App. July 10, 1998) (citing Tenn. R. Civ. P. 52.01, 65.04(6)), *perm. app. denied* (Tenn. Dec. 7, 1998). In *Irvin*, for example, the Court of Appeals vacated a permanent injunction because the trial court had failed to make "findings of fact and conclusions of law … as required by Tenn. R. Civ. P. 65.04(6) and 52.01." *Irvin*, 1998 WL 382200, at *5. In that case, the defendant sought a permanent injunction "forever prohibiting [the plaintiff] from filing further actions relating to issues of whether [the defendant] committed perjury." *Id.* The trial court's order granting the permanent injunction stated:

> Based upon this courts [sic] review of the record in this cause and related causes, and based upon statements of the parties in written motions and []at the hearing of these motions, this court finds … (3) the plaintiff has filed numerous motions and petitions with this court in this case and in civil action no. C10-813, and the law suit filed in this matter has no basis under Tennessee law; and (4) the plaintiff is harassing these defendants[.]

Id. Even though the Court of Appeals acknowledged that it was "cognizant of previous actions taken by [the plaintiff] that apparently form[ed] the basis for the extraordinary injunctive relief," the appellate court still vacated the permanent injunction because this order lacked the requisite findings and the record was insufficient "to provide for a meaningful review." *Id.*

This fundamental safeguard—requiring trial courts to place their findings and conclusions on the record before granting extraordinary, permanent injunctive

relief—was completely ignored by Chancellor Moody and the Court of Appeals in this case. The Restraining Order—adopted almost exactly as HPI proposed—is identical in form to the permanent injunction that was vacated in *Irvin*: the order merely refers to the basis of the underlying lawsuit while forever prohibiting Wellmont "from engaging in any conduct inconsistent with the terms of the Court's Findings regarding [§ 3 of the Stockholder's Agreement] above" and from "retaliating against HPI, its members, and the witnesses in this lawsuit (i) for participation in this lawsuit; (ii) for testimony given in this lawsuit; or (iii) in general, for advancing the interest of [the PHO] or HPI in this lawsuit." (TR Vol. 69 at 6774-75.)

This Court should grant review to settle the important question of what is required of trial courts when making their findings and conclusions before granting or denying permanent injunctions. Uniformity and clarity can also be achieved, as intended by the Rules Advisory Committee, if this Court grants review to settle the differences between the explicit requirements in Rules 52.01 and 65.04(6)—which speak only to temporary injunctions—and prior appellate decisions like *Irvin* and *Alexandria-Williams*, which appear to have extended these requirements to permanent injunctions even without resort to Rule 65.02(1)'s specificity requirement.

B. Review Is Needed to Clarify How an Appellate Court Should Review a Permanent Injunction That Lacks Findings and Conclusions by the Trial Court.

Although it has been said that the issuance of an injunction is left to the sound discretion of the trial court, "'[d]iscretionary choices are not left to a court's inclination, but to its ***judgment***; and its ***judgment*** is to be guided by sound legal principles.'" *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007) (emphasis added) (quoting Martha S. Davis, *Standards of Review: Judicial Review of Discretionary*

Decisionmaking, 2 J. App. Prac. & Process 47, 58 (2000)). As a result, an abuse of discretion occurs "when the trial court has gone outside the framework of legal standards or statutory limitations, or ***when it fails to properly consider the factors on that issue given by the higher courts to guide the discretionary determination***." *Id.* (emphasis added) (quoting Davis, 2 J. App. Prac. & Process at 59); *see also Dickson v. Kriger*, 374 S.W.3d 405, 412 (Tenn. Ct. App. 2012).

The purpose of the five-factor analysis for permanent injunctions and the four-factor analysis for temporary injunctions is to ensure that injunctive relief, which is to be granted sparingly and only in extraordinary circumstances, is not vague and overbroad, and to ensure that trial courts make the requisite findings and conclusions on the record to provide for meaningful appellate review. Without such findings and conclusions, appellate courts cannot be sure that trial courts have properly exercised their judgment within the context of Tennessee law. Indeed, the failure of a trial court "to properly consider the factors on [the injunction] issue given by the higher courts to guide the discretionary determination" is itself an abuse of discretion. *Lewis*, 235 S.W.3d at 141. Yet, in this case, the Court of Appeals upheld the Restraining Order under the deferential abuse of discretion standard despite the fact that Chancellor Moody made no mention whatsoever of the five factors he was required to consider.

The application of the abuse of discretion standard under these circumstances is in conflict with prior decisions in which Tennessee appellate courts have vacated trial court orders and either remanded for further proceedings or conducted a *de novo* review on appeal. *See, e.g.*, *Carter v. Butler,* 2019 WL 4942435, at *5 (Tenn. Ct. App. Oct. 8, 2019) (no perm. app. filed) ("An appropriate remedy, when a trial court fails to make findings of fact, is to vacate the decision and remand the case to the trial court with instructions to issue sufficient findings of fact and conclusions of law."); *accord State v. Pollard*, 432 S.W.3d 851, 863-64 (Tenn. 2013) ("Where, as

here, the trial court fails to provide adequate reasons on the record for imposing consecutive sentences, the appellate court should neither presume that the consecutive sentences are reasonable nor defer to the trial court's exercise of its discretionary authority. Faced with this situation, the appellate court has two options: (1) conduct a de novo review to determine whether there is an adequate basis for imposing consecutive sentences; or (2) remand for the trial court to consider the requisite factors in determining whether to impose consecutive sentences.").

The Court of Appeals' decision to uphold the Restraining Order against Wellmont by deferring to the Chancellor's discretion—despite there being no findings or conclusions stated by the Chancellor—also is in conflict with prior appellate decisions determining that a lack of specificity in permanent injunctions requires reversal. *See, e.g.*, *Hogue v. Hogue*, 147 S.W.3d 245, 254 (Tenn. Ct. App. 2004) (finding a restraining order "deficient because it violates the specificity requirements of Tenn. R. Civ. P. 65.02(1) for it does not describe the prohibited acts in reasonable detail"); *Cooper Mgmt., LLC v. Performa Entm't, Inc.*, 2002 WL 1905318, at *3-4 (Tenn. Ct. App. Aug. 15, 2002) (no perm. app. filed) (rejecting a trial court's discretion to enter an injunction that was too subjective and failed to comply with Rule 65's specificity requirements).

It is clear, therefore, that the internal inconsistencies among Rules 52.01, 65.02(1) and 65.04(6)—despite the Rules Advisory Committee's stated goal of achieving uniformity among trial courts when deciding injunctive issues—require this Court's review and guidance. This Court should grant review now to determine whether and to what extent Rules 52.01, 65.02(1) and 65.04(6) apply to permanent injunctions, what level of findings and conclusions a trial court must make on the record before granting or denying a permanent injunction and which standard of appellate review should be applied to a permanent injunction that lacks specificity and any findings or conclusions. The various standards applied on appeal—vacating

and remanding, conducting a *de novo* review or simply deferring to a trial court's discretion regardless of the inadequacy of the court's findings—are inconsistent and untenable and, thus, require this Court's immediate review and guidance.

CONCLUSION

The Supreme Court should grant review to settle important questions of law, secure uniformity of decision and exercise its supervisory authority with respect to the proper standard in Tennessee for proving lost profits damages; the duty of Tennessee trial courts to exercise their independent judgment when ruling on motions for summary judgment; the requirements trial courts must satisfy before granting or denying permanent injunctive relief; and the manner in which appellate courts should review permanent injunctions that are unsupported by the requisite findings. This case—which involves a speculative $57.4 million award of lost profits, summary judgment rulings that clearly were not the product of the Chancellor's independent reasoning and a vague permanent Restraining Order that is unsupported by any particularized findings—presents an ideal vehicle for the Court to address each of these important and wide-ranging issues.

For all the reasons set forth herein, Wellmont respectfully requests that review be granted.

DATED this 24th day of November, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2020, a true and exact copy of the foregoing document was served upon the following via email and first-class U.S. Mail:

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