IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

ROBERT CROTTY and
JENNIFER CROTTY,

Plaintiffs/Appellees,

vs.

MARK FLORA, M.D.,

Defendant/Appellant,

M2021-01193-SC-R11-CV

Tenn. Ct. App. No.
M2021-01193-COA-R9-CV

Davidson County Cir. Ct. No.
17C614

BRIEF OF AMICUS CURIAE TENNESSEE DEFENSE LAWYERS ASSOCIATION

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Oral Argument Requested

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STATEMENT OF THE ISSUES

Whether Tennessee Code Annotated § 29-26-119, which is part of the Health Care Liability Act, precludes plaintiffs in health care liability cases from recovering medical expenses that have been written off and that nobody paid or owes.[1]

[1] There are two issues on appeal. The TDLA is only addressing one issue in this Brief. However, the TDLA agrees in all respects with the position of the Defendant/Appellant as to the other issue.

INTEREST OF AMICUS CURIAE

The Tennessee Defense Lawyers Association (TDLA) is an organization consisting of hundreds of lawyers throughout the State of Tennessee whose practices are devoted to the defense of individuals, businesses, and insurance companies in civil litigation. Many of the TDLA's members represent health care providers and routinely deal with Tennessee's Health Care Liability Act (HCLA), including Tennessee Code Annotated § 29-26-119. The TDLA seeks to improve the state of the law and the administration of justice in Tennessee. The TDLA voices the concerns and views of the Tennessee civil defense bar as advocates to provide guidance as to the meaning and application of Tennessee law.

SUMMARY OF THE ARGUMENT

Tennessee Code Annotated § 29-26-119 governs recoverable damages in health care liability cases. It directs that plaintiffs in such cases may only recover "actual economic losses" that are "suffered" by them. Pursuant to the unambiguous statutory language, plaintiffs in health care liability cases cannot recover written-off medical expenses that neither they, nor anyone else, owe or will ever pay. Any such expenses are not "actual economic losses" that are "suffered" by plaintiffs in any way.

Multiple federal courts applying Tennessee law have squarely addressed the issue. These courts have ruled that the plain language of Tennessee Code Annotated § 29-26-119 forbids plaintiffs from recovering written-off medical expenses that neither plaintiffs, nor anyone else, will ever pay. Numerous state trial courts across Tennessee have similarly ruled.

This Court has not directly addressed the issue. However, this Court has held that Tennessee Code Annotated § 29-26-119 "abrogates" the collateral source rule in health care liability cases. This Court has also focused application of the statute in other contexts on whether the plaintiff "paid" an expense or is obligated to reimburse an outside source for an expense it "paid" on the plaintiff's behalf. In so doing, this Court has at least suggested that plaintiffs cannot recover medical expenses that were neither paid nor payable by anyone.

The trial court in this case acted as if the collateral source rule applies in health care liability cases. The trial court stated: "the collateral source rule is in full force and effect." This ruling is in direct conflict with this Court's precedent. It is also in direct conflict with the express wording

of Tennessee Code Annotated § 29-26-119, the purpose and intent of the statute, as well as rulings from numerous federal courts and state trial courts. It is also in conflict with statements about the statute by the Tennessee Court of Appeals.

Accordingly, this Court should reverse the trial court and hold that Tennessee Code Annotated § 29-26-119 precludes plaintiffs in health care liability cases from recovering written-off medical expenses that nobody has paid or owes.

ARGUMENT

Tennessee Code Annotated § 29-26-119, which is part of the Health Care Liability Act, precludes plaintiffs in health care liability cases from recovering written-off medical expenses that nobody paid or owes.

This case regards statutory construction. The "most basic principle" of statutory construction is to give effect to legislative intent, which is to be ascertained primarily from the natural and ordinary meaning of the language used in the context of the statute. Yebuah v. Center for Urological Treatment, 624 S.W.3d 481, 485-486 (Tenn. 2021)(citations omitted). In construing statutes, courts may "look[ ] to 'the language of the statute, its subject matter, the object and reach of the statute, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished by its enactment'." Id. at 486 (citations omitted). "Courts seek a reasonable interpretation 'in light of the purposes, objectives, and spirit of the statute based on good sound reasoning'." Id. (citations omitted). Statutory construction presents a question of law, which is reviewed *de novo* with no presumption of correctness. Bidwell ex rel. Bidwell v. Strait, 618 S.W.3d 309, 319 (Tenn. 2021)(citations omitted).

I. Tennessee Code Annotated § 29-26-119 permits plaintiffs in health care liability cases to recover medical expenses that are "actual economic losses" borne by them or their insurer, but not ones that nobody will ever pay.

Tennessee Code Annotated § 29-26-119 governs allowable damages in health care liability cases. It is a two-part statute and provides in its entirety as follows:

> In a health care liability action in which liability is admitted or established, the damages awarded may include (in addition to other elements of damages authorized by law) actual economic losses suffered by the claimant by reason of the personal injury, including, but not limited to, cost of reasonable and necessary medical care, rehabilitation services, and custodial care, loss of services and loss of earned income, but only to the extent that such costs are not paid or payable and such losses are not replaced, or indemnified in whole or in part, by insurance provided by an employer either governmental or private, by social security benefits, service benefit programs, unemployment benefits, or any other source except the assets of the claimants or of the members of the claimant's immediate family and insurance purchased in whole or in part, privately and individually.

Tenn. Code Ann. § 29-26-119 (emphasis added).

The first part of Tennessee Code Annotated § 29-26-119 contains its basic rule. The pivotal language is that a plaintiff may recover only "actual economic losses suffered by the claimant." Thus, any "economic loss" claimed by a plaintiff must be "actual" and have been borne or "suffered" by the plaintiff in some manner in order to be recoverable from

a defendant. If the plaintiff bore or "suffered" no such "actual economic loss," then the plaintiff cannot recover the claimed expense as an element of compensatory damages in a health care liability case.

The second part of the statute simply defines when a plaintiff has borne or "suffered" an "actual economic loss." It provides that a plaintiff has not "suffered" an "actual economic loss" if the claimed expense was "paid or payable" by a collateral source, "except" where the collateral source pays the expense as part of an insurance or benefit plan purchased by the plaintiff. Thus, if a collateral source pays an expense because the plaintiff purchased insurance, then the plaintiff bore or "suffered" the expense and can be compensated for it. If, however, the expense was neither paid by the plaintiff nor anyone else, then the plaintiff did not bear or "suffer" an "actual economic loss," and therefore, cannot be compensated for it.

This plain language of Tennessee Code Annotated § 29-26-119 shows that a plaintiff in a health care liability case cannot recover medical expenses that nobody will ever pay. Tennessee Code Annotated § 29-26-119 is unambiguous and mandates that plaintiffs must "suffer" an "actual economic loss" in order to seek and recover medical expenses

in health care liability cases. As noted in the statute, "actual economic losses" include the "cost of reasonable and necessary medical care."[2] Via its ruling in this case, the trial court essentially amended the statute and rendered the terms "actual economic losses" and "suffered by the claimant" meaningless.

A. Federal and state trial courts across Tennessee have ruled for many years that Tennessee Code Annotated § 29-26-119 prohibits plaintiffs from recovering medical expenses that were neither paid nor owed.

Tennessee Code Annotated § 29-26-119 has been in effect for decades. See Tenn. Code Ann. § 29-26-119. During that time, federal and state trial courts have squarely addressed whether the statute permits the recovery of medical expenses that were written off and that nobody will ever pay.

Multiple federal cases are directly on point. The United States District Court for the Western District of Tennessee addressed the issue in Nalawagan v. Dang, 2010 U.S. Dist. LEXIS 114576 (W.D. Tenn. 2010). In a Motion in Limine, the defendant argued that due to Tennessee Code Annotated § 29-26-119, the plaintiff could only seek recovery of medical

[2] A "cost" is defined as "the loss or penalty incurred in gaining something." Webster's New Dictionary at 119 (2001).

expenses actually paid, not the total amounts billed. Id. at *1 - *2. The District Court framed the issue as whether a plaintiff may recover as damages the medical expenses actually "billed" by the providers or only the amounts actually "paid" by the healthcare insurer. Id. at *4.

Based upon Tennessee Code Annotated § 29-26-119, the District Court held that the plaintiff could only recover the "paid" medical expenses. The District Court stated:

> The Court holds that pursuant to Tennessee law, Plaintiff may not recover the amounts actually billed by her son's medical providers over and above the amounts "paid or payable." Medicaid programs pay only a scheduled fee for medical services, and those payments commonly are lower than a provider's customary fee.
> . . .
>
> The Court finds that the Medical Malpractice Act [Tenn. Code Ann. § 29-26-119] is sufficiently clear on this point and limits damages to costs "paid or payable." The statute contemplates the recovery of "actual economic losses suffered by the claimant" including medical expenses, "but only to the extent" of costs "not paid or payable." As previously noted, the Tennessee courts have construed the statute to permit recovery of medical expenses "paid or payable" where a third-party like Medicaid retains the right of subrogation. The Court finds that the statute confines recoverable medical expenses to those expenses which were "paid or payable." Based on the plain meaning of these terms, it is clear that medical expenses are limited to expenses already paid or such expenses yet to be paid, and not simply the amounts billed. The Court concludes that in so far as amounts billed by the providers for medical care differ from actual amounts "paid or

> payable," Plaintiff is not entitled to recover amounts billed pursuant to the statute. Therefore, Defendant's Motion is GRANTED as to this issue.

Id. at *6-*9 (emphasis added).

The United States District Court for the Western District of Tennessee similarly ruled in the case of Calaway v. Schucker, 2013 U.S. Dist. LEXIS 33771 (W.D. Tenn. 2013). In Calaway, the District Court granted the defendant's motion in limine precluding the plaintiff from presenting evidence of "billed" medical expenses at trial and held that the plaintiff would only be permitted to recover the amounts billed, not the gross "sticker price" of the medical expenses. Id. at *10 - *13. The United States District Court for the Eastern District of Tennessee has similarly ruled. See Guthrie v. Ball, 2014 U.S. Dist. LEXIS 145764 at *2 - *5 (E.D. Tenn. 2014)(holding that the plaintiff would be "limited to seeking damages for medical bills to expenses actually 'paid or payable' pursuant to Tenn. Code Ann. § 29-26-119" and could not seek "adjustments" and "write-offs."); see also Electro-Mechanical Corp. v. Ogan, 9 F.3d 445 (6th Cir. 1993)("In essence, this statute prohibits a tort plaintiff from receiving a double recovery, once from the medical benefit plan and again from the tortfeasor.").

Accordingly, Tennessee federal courts applying Tennessee law have precluded plaintiffs from seeking and recovering written-off medical expenses. The federal courts relied upon the express wording of Tennessee Code Annotated § 29-26-119 in so doing and found the statute to be "sufficiently clear." Nalawagan, 2010 U.S. Dist. LEXIS 114576 at *7. Notably, the federal courts also relied upon Tennessee case law indicating that plaintiffs in a health care liability case may recover expenses "paid or payable" by outside sources such as the Medicaid program. See, e.g., Calaway v. Schucker, 2013 U.S. Dist. LEXIS 33771 at *9 (citing Hughlett v. Shelby County Health Care Corp., 940 S.W.2d 571, 572-75 (Tenn. Ct. App. 1996)).

Federal courts in Tennessee are not alone in their application of Tennessee Code Annotated § 29-26-119. Numerous Tennessee trial courts have also directly addressed the issue and found that the statute precludes plaintiffs from seeking and recovering written-off medical expenses. For example, the Montgomery Circuit Court directed that "the express language of T.C.A. § 29-26-119 precludes the Plaintiff from recovering any amounts not actually 'suffered' by him as 'actual economic losses' [and] Plaintiff is statutorily prohibited from recovering more than

[the amounts paid] in this case." Woods v. Oak Plains Academy of TN, Inc., No. MC CC CV 17-819 (Montgomery County Cir. Ct. Oct. 12, 2017)(copy in Appendix at 24). The Circuit Court of Madison County ruled "that charges for medical treatment which were not paid and are not owed, are not 'actual economic losses' as required in § 29-26-119. Accordingly, . . . Plaintiffs are limited to claiming as special damages the medical charges related to the treatment at issue in the case which were actually paid or owed." Gordon v. Jones, No. C-00-369-I (Madison County Cir. Ct. April 15, 2004); see also Hazlehurst v. Hays, No. C-19-38 (Madison County Cir. Ct. June 26, 2020)(granting Defendants' Motion in Limine seeking to exclude "Written-Off or Forgiven Medical Expenses.")(copies in Appendix at 13, 15). Numerous other Tennessee trial courts have similarly ruled. See, e.g., Buckner v. Thomasson, No. 43,226 (Coffee County Cir. Ct. Oct. 17, 2018)(ruling that the plaintiff could not introduce evidence of "billed" medical expenses that were written off, because such expenses were not an "actual economic loss sustained by Plaintiff"); Dallosta v. Baptist Memorial Hospital-Tipton, No. CT-004778-08 (Shelby County Cir. Ct. April 27, 2015)("Only those medical expenses that have been paid or are payable will be recoverable

by the Plaintiff."); Hindman v. Saint Francis Hospital Memphis, No. CT-000708-12 (Shelby County Cir. Ct. June 18, 2014)(limiting the medical expenses recoverable at trial to those actually owed); Gilchrist v. Aristorenas, No. 4825 (McNairy County Cir. Ct. Oct. 29, 2004)(ruling that the plaintiff could not recover "billed" medical expenses, as they are not "actual economic losses suffered by plaintiff or his insurer.")(copies attached in Appendix at 3, 8, 22, 11); see also Defendant/Appellee's Application for Extraordinary Appeal at 24-26 (citing other Tennessee trial court orders).

Even the Davidson County Circuit Court, which entered the Order in this case, has held in the past that plaintiffs cannot recover written-off medical expenses. The Davidson County Circuit Court has ruled: "Because 'billed' medical expenses do not constitute 'an actual economic loss,' . . . they are not recoverable under Tenn. Code Ann. § 29-26-119. The Plaintiffs shall be limited to seeking recovery for only those medical expenses that have actually been paid by the Plaintiffs or by some third-party payor on the Plaintiffs' behalf." Buttram v. HCA Health Services of Tennessee, Inc., No. 03C-2903 (Davidson County Cir. Ct. June 24, 2011)(copy in Appendix at 5); see also Collins v. St. Thomas Hosp., 2009

Tenn. Cir. LEXIS 1391, No. 08C737 (Davidson County Cir. Ct. Oct. 6, 2009)(excluding evidence of medical expenses except those that were paid by the plaintiffs or the plaintiffs' insurance, "specifically identifying those expenses that were adjusted by the provider.").

In summary, the language of Tennessee Code Annotated § 29-26-119 is unambiguous and mandates that plaintiffs must "suffer" an "actual economic loss" in order to recover medical expenses in health care liability cases. This language precludes plaintiffs from seeking and recovering written-off or forgiven medical expenses that will never be borne or "suffered" by anyone. Numerous courts have applied the statute as written and precluded plaintiffs from seeking and recovering medical expenses that are not paid or owed.

B. This Court and the Court of Appeals have recognized that Tennessee Code Annotated § 29-26-119 "abrogates" the collateral source rule in health care liability cases, which effectively means that plaintiffs in such cases cannot recover expenses that nobody paid or owes.

The construction of Tennessee Code Annotated § 29-26-119 suggested above is consistent with precedent from this Court and the Court of Appeals. While neither this Court nor the Court of Appeals has directly addressed whether Tennessee Code Annotated § 29-26-119

precludes the recovery of written-off or forgiven medical expenses, they have discussed and applied Tennessee Code Annotated § 29-26-119. In so doing, this Court and the Court of Appeals have permitted recovery of medical expenses when either the plaintiff has paid an expense, or when the plaintiff has an obligation to reimburse an outside source, such as insurance, for paying an expense. However, neither this Court nor the Court of Appeals has suggested that plaintiffs in health care liability cases can seek and recover medical expenses that are neither paid nor payable by anyone.

This Court has directed that Tennessee Code Annotated § 29-26-119 "abrogate[s]" the collateral source rule in healthcare liability cases. Dedmon v. Steelman, 535 S.W.3d 431, 454 n.25 (Tenn. 2017). According to this Court: "Tennessee has abrogated the collateral source rule through legislation only in health care liability cases and workers' compensation cases . . . ." Id. (citing Tenn. Code Ann. § 29-26-119). The Court of Appeals has also recognized this abrogation. See In re Estate of Tolbert v. State, 2018 Tenn. App. LEXIS 113 at *7 (Tenn. Ct. App. Feb. 28, 2018). Consequently, the recoverable medical expenses available in

health care liability cases unquestionably differs from those in other types of cases.

This "abrogation" of the collateral source rule essentially means that plaintiffs in health care liability cases cannot seek or recover expenses that nobody paid or owes.[3] See Id. at *4 ("Those portions of a plaintiff's medical bills that are written-off or forgiven by a source other than the tortfeasor constitute a benefit to the plaintiff which is covered by the collateral source rule.")(citing Fye v. Kennedy, 991 S.W.2d 754, 763-64 (Tenn. Ct. App. 1998)); Steele v. Ft. Sanders Anesthesia Group, P.C., 897 S.W.2d 270, 282 (Tenn. Ct. App. 1994)("The collateral source rule permits plaintiffs to prove and recover medical expenses, whether paid by insurance or not."). If a plaintiff is permitted to recover medical expenses that have never been (and never will be) paid by anyone, then there is no abrogation of the collateral source rule, and Tennessee Code

[3] The collateral source rule is a dual substantive and evidentiary rule. See Dedmon, 535 S.W.3d 443-444. Thus, abrogation of the collateral source rule in health care liability cases means not only that a plaintiff cannot recover written-off medical expenses, but also a plaintiff cannot put on proof of them at trial. Id. at 444 ("If a plaintiff's recovery may not be reduced by collateral benefits, then 'evidence that a plaintiff has received benefits or payments from a collateral source independent of the tortfeasor's procuration or contribution' must be excluded.").

Annotated § 29-26-119 is rendered meaningless. See Dedmon, 535 S.W.3d at 466 (recognizing that Tennessee law permits plaintiffs to use their "full, undiscounted medical bills," and precludes defendants from "submit[ing] evidence of discounted rates for medical services" in personal injury cases where the collateral source rule applies).

The trial court's ruling in this case is in direct conflict to this Court's recognition that Tennessee Code Annotated § 29-26-119 "abrogated" the collateral source rule in health care liability cases. In denying Defendant's Motion in Limine No. 11, the trial court ruled: "the collateral source is in full force and effect." (Def. Dr. Flora's Appendix to Appl. for Extraordinary Appeal at Attachment 5). This ruling is clearly an erroneous statement of Tennessee law, as there is no dispute that this case involves alleged health care liability and that the HCLA applies. (See generally Pls' Mot. to Dismiss Def.'s Rule 11 Appl.). The trial judge in this case applied a common law doctrine even though it had been legislatively abrogated in health care liability cases. The trial court's decision usurped the General Assembly's authority in this area. See Willeford v. Klepper, 597 S.W.3d 454 (Tenn. 2020)(applying a statutory directive regarding *ex parte* interviews with non-party treating

physicians in health care liability cases and stating: "Because it was within the legislature's purview to modify the import of this public policy, we should yield to the change . . . .")

This Court's prior application of Tennessee Code Annotated § 29-26-119 further suggests that the statute prohibits recovery of written-off medical expenses. In applying the statute, this Court has focused on whether a plaintiff has an obligation to pay back his or her outside sources for amounts "paid or payable." For example, in Nance v. Westside Hospital, this Court stated: "Where benefits carry a right of subrogation and a legal obligation on the part of the tort victim to repay the collateral source, the tort victim's losses have not been replaced or indemnified." 750 S.W.2d 740, 743 (Tenn. 1988)(emphasis added). Thus, in determining application of the statute, this Court looked at whether there was a right of reimbursement for amounts paid. Id. at 744.

The focus on whether there is a right of reimbursement for expenses paid prevents a double recovery or windfall to the plaintiff, which is the purpose behind abrogating the collateral source rule in health care liability cases. As this Court explained: "In order to mitigate the damages, the statute requires that the benefits be paid or payable and

also indemnify or replace the tort victim's losses. That phrase avoids a double recovery by tort victims and also removes from the statute any collateral source that has subrogation rights." Nance, 750 S.W.2d at 743 (emphasis added); see also Hunter v. Ura, 163 S.W.3d 686, 711 (Tenn. 2005)(affirming the trial court's denial of the defendants' motion for a credit against the jury's verdict "based on the payment received by the plaintiff under [an insurance plan].")(emphasis added).

The Tennessee Court of Appeals has also focused application of the statute on whether a right of reimbursement for payments made exists. In Richardson v. Miller, the plaintiff sought to recover medical expenses paid by her employer-provided health insurance. 44 S.W.3d 1 (Tenn. Ct. App. 2000). The trial court ruled that the plaintiff could not recover the expenses pursuant to Tennessee Code Annotated § 29-26-119, because they were paid by non-contributory group insurance. Id. at 32.

The Court of Appeals reversed. Id. It found that the plaintiff could recover the medical expenses, because her insurer had a contractual right of reimbursement for the amounts it paid. The Court of Appeals indicated: "where a right of subrogation exists or where the tort victim has a legal obligation to repay the collateral source payor, then the

victim's losses have not been 'replaced or indemnified' for purposes of Tenn. Code Ann. § 29-26-119." Id. (emphasis added). Consequently, if the plaintiff is "legally obligated" to "repay" his or her insurance company for amounts it paid, then the plaintiff is entitled to recover those medical expenses from a defendant in a health care liability case. The focus remains on whether the plaintiff actually "suffered" an "actual economic loss." Id. The plaintiff "suffers" such a loss when the plaintiff must repay an insurer for amounts it paid on the plaintiff's behalf. See McDaniel v. General Care Corp., 627 S.W.2d 129, 132 (Tenn. Ct. App. 1981).

The Tennessee Court of Appeals has even strongly suggested that insurance write-offs and adjustments cannot be recovered in health care liability cases due to Tennessee Code Annotated § 29-26-119. See Steele, 897 S.W.2d at 282 ("We are of the opinion from the legislative history that it is expressly intended that benefits paid by insurance partially purchased by an employee should not be excluded.")(emphasis added); In Estate of Tolbert v. State, the Court of Appeals noted that Tennessee Code Annotated § 29-26-119 "expressly limited recoverable damages" to "actual amounts paid." 2018 Tenn. App. LEXIS 113 at *7 (Tenn. Ct. App. Feb. 28, 2018). The Court of Appeals contrasted allowable damages in the

health care liability context versus a car accident claim filed under the Tennessee Claims Commission Act. The Court of Appeals found that the collateral source rule was not abrogated in the car accident case; therefore, it "precluded consideration of the amounts deducted as adjustments to the claimant's medical bills." Id. at *9. The Court of Appeals stated: "If the General Assembly intended to limit the State's liability under the Claims Commission Act to 'actual amounts paid' [as it did in Tennessee Code Annotated § 29-26-119], it could have said so." Id.

Although the Court of Appeals resolved the case on other grounds, its decision in Russell v. Crutchfield also suggests that written-off medical expenses are not recoverable in health care liability cases. 988 S.W.2d 168 (Tenn. Ct. App. 1998)(perm. to appeal denied). At trial, the plaintiff sought to recover the total amount of her medical bills. Id. at 171. However, the amounts billed by the medical providers were higher than the amounts actually paid by her insurer. Id. Despite objections from the defense, the trial court allowed introduction of the total amount of the medical bills. Id. The trial court later remitted the award to comport with the amounts actually paid by the insurer. Id.

On appeal, the defendant argued that the trial court erred by allowing introduction of the gross amount of the medical bills. Id. According to the defendant, Tennessee Code Annotated § 29-26-119 precluded recovery of amounts above those actually paid by the insurer. Id. The Court of Appeals found that "the reduction [of the award by the trial court] included any excess expenses that may have been allowed." Id. Therefore, "any potential error was cured by the Trial Court's remittitur." Id. Notably, the Court of Appeals did not opine that the plaintiff was entitled to prove or recover the full amount shown in the medical bills and affirmed "the award as remitted." Id.; see also Ward v. Glover, 206 S.W.3d 17, 41 (Tenn. Ct. App. 2006)(perm. to appeal denied)(noting that the trial court, pursuant to Tennessee Code Annotated § 29-26-119, precluded the plaintiff from seeking at trial "gross charges" that were not "actually paid by plaintiffs or their insurer.").

In conclusion, Tennessee appellate courts have directed that Tennessee Code Annotated § 29-26-119 abrogates the collateral source rule and that recoverable expenses in health care liability cases differ from other cases. Applying the statute to preclude plaintiffs from

recovering written-off medical expenses would be consistent with this precedent, as well as the statutory language. The trial court in this case decided the issue in contrast to statements by this Court and the Court of Appeals about the statute. The trial court applied a common law doctrine that had been legislatively abrogated in health care liability cases such as this one.

B. Permitting plaintiffs to seek and recover written-off medical expenses would undermine the purpose and intent of the Health Care Liability Act, including Tennessee Code Annotated § 29-26-119.

Tennessee Code Annotated § 29-26-119 is unambiguous. The statute's plain language prohibits recovery of medical expenses that were not "suffered" by plaintiffs as "actual economic losses." However, the Court should reach the same result even if the statute were found to be ambiguous. The Court would then look beyond the wording of the statute, including to the statute's intent and purpose, in construing the statute. See Lavin v. Jordan, 16 S.W.3d 362, 366 (Tenn. 2000).

The General Assembly passed the Health Care Liability Act to further the delivery of health care in Tennessee by controlling the cost of health care, containing the cost of medical malpractice litigation and insurance, and keeping physicians from leaving Tennessee. See Dedmon,

535 S.W.3d at 445-46; Harrison v. Schrader, 569 S.W.2d 822, 826 (Tenn. 1978). The statute is described as "economic and social legislation regulating the relationship between physicians, patients, and insurance carriers . . . ." Baker v. Vanderbilt University, 616 F. Supp. 330, 332 (M.D. Tenn. 1985). Its primary purpose is to improve the delivery of health care in Tennessee by reducing medical malpractice insurance premiums and health care costs. Id. In interpreting Tennessee Code Annotated § 29-26-119, this Court must view the statute as a whole and in light of this intended purpose. See Hammer v Franklin Interurban, Co., 354 S.W.2d 241, 242 (Tenn. 1962).

The intent and purpose of Tennessee Code Annotated § 29-26-119 is furthered by permitting recovery of medical expenses that are "paid or payable," not by permitting recovery of medical expenses that are written off and that nobody will ever pay. Significant amounts of medical expenses are often written off and never paid. See, e.g., Dedmon, 535 S.W.3d at 434-435. Permitting plaintiffs to recover such fictitious expenses in health care liability cases would thwart the goal of containing the costs of health care, malpractice insurance, and medical malpractice litigation. See Id. at 445-446. On the contrary, it would permit plaintiffs

to receive windfalls and drive the cost of malpractice insurance and medical malpractice litigation even higher. The General Assembly made a decision to try and contain these costs by passing the HCLA, including Tennessee Code Annotated § 29-26-119. Id. This Court should neither second guess the General Assembly nor rewrite the statute regardless of whether it agrees or not with the policy reasons supporting it. See McClay v. Airport Mgmt. Servs., LLC, 596 S.W.3d 686, 691 (Tenn. 2020).

CONCLUSION

This Court should apply Tennessee Code Annotated § 29-26-119 as written and hold that it permits plaintiffs in health care liability cases to seek and recover medical expenses that are paid or payable, but not ones that are written off and that will never be paid. Such expenses are not "actual economic losses" that are "suffered" by plaintiffs.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Section 3, Rule 3.02(c) of Tenn. Sup.Ct. R. 46, the undersigned certifies that this brief complies with the requirements set forth in Section 3, Rule 3.02(a)1 of Rule 46. Number of words contained in this brief: 5791.

s/ Craig P. Sanders

CERTIFICATE OF SERVICE

I certify that on May 9, 2022 an exact copy of the foregoing was served via the Court's electronic filing system. Attorneys who are not registered users will be mailed, first class postage prepaid, a copy at:

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