Do As I Say (Not As I Do): Tennessee's Appellate Standard of Review of Expert Witness Qualifications in Health Care Liability Actions

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I. INTRODUCTION

Nearly every state requires expert medical testimony to establish causation in a health care liability action.[1] Over the past century, states have grappled with the appropriate manner for determining the standard of care a defendant health care provider must uphold, namely arguing over whether the law should hold a health care provider to his or her local standard of care or, instead, to a national standard of care.[2] In the late 19th century, United States courts established the "locality" standard of care. This standard dictated that

1. Michelle Huckaby Lewis et al., *The Locality Rule and the Physician's Dilemma: Local Medical Practices vs the National Standard of Care*, 297 JAMA 2633 (2007) (categorizing each state's medical expert testimony requirements in medical malpractice suits). A health care liability action is a civil action in which the plaintiff alleges that a health care provider caused the plaintiff an injury, regardless of what theory predicates the health care provider's liability. *See* TENN. CODE ANN. § 29-26-101 (2012 & Supp. 2017). This type of negligence action is more commonly known as a "medical malpractice claim." *See, e.g.*, Robin Kundis Craig, *When Daubert Gets Erie: Medical Certainty and Medical Expert Testimony in Federal Court*, 77 DENV. U. L. REV. 69, 69 (1999) ("Medical malpractice . . . generally require[s] expert medical testimony on the issue of causation."). This Note, however, uses the term "health care liability action" instead because this Note focuses on the standards in Tennessee, which designates these claims as "health care liability actions." TENN. CODE. ANN. § 29-26-101(a)(1) (2012 & Supp. 2017); *see also* TENN. CODE. ANN. § 29-26-115 (2012 & Supp. 2017).

2. The "standard of care" is the appropriate degree and level of skill a health care provider is expected to uphold when treating patients. *See* Shipley v. Williams, 350 S.W.3d 527, 532 (Tenn. 2011) (citing TENN. CODE ANN. § 29-26-115 (2000 & Supp. 2010)) ("Claimants are required by statute to prove by expert testimony the recognized standard of acceptable professional practice in the community where the defendant medical provider practices or a similar community.").

medical providers must adhere to the standard of care commonly exercised in their local community and exempted them from adherence to medical practices prevalent in communities outside the defendant's community ("the locality rule").[3]

In states adhering to the locality rule, the additional expertise hurdles that prevent plaintiffs from finding a qualified expert witness also aid defendants in their efforts to quash the plaintiff's case. A plaintiff pursuing a medical negligence case must provide expert testimony to establish the applicable standard of care.[4] Thus, if the defendant demonstrates that the plaintiff's expert witness does not meet the state's locality-rule requirements, the court will likely dismiss the case with prejudice.[5] As summary judgment prevents plaintiffs

3. In the mid-1970s, legislatures began enacting proof-by-expert statutes in an attempt to curb rising insurance rates by lessening the award of medical-injury damages. *See* Jon R. Waltz, *The Rise and Gradual Fall of the Locality Rule in Medical Malpractice Litigation*, 18 DEPAUL L. REV. 408, 409 (1969) ("The law states that a medical man has the obligation to his patient to possess and employ such reasonable skill and care as is commonly had and exercised by reputable, average physicians in the same general system or school of practice *in the same or similar locality*.").

4. An exception to this rule is the doctrine of res ipsa loquitur. Courts recognize that some injuries inherently result from a negligent act; when applied, res ipsa loquitur allows plaintiffs to bypass the expense and hurdle of hiring an expert witness and proving the elements of negligence by allowing the trier of fact to "infer negligence from indirect evidence." *See* Kimberly Haag, *Res Ipsa Loquitur: A Step Along the Road to Liability Without Fault Do Physicians Have a Fighting Chance in the Face of the Modern Application of This Doctrine in Medical Malpractice Cases? A Closer Look at the New Fiction*, 42 BRANDEIS L.J. 149, 149 (2003). Courts are split regarding the use of expert medical testimony in a medical malpractice res ipsa loquitur case: some consider expert testimony absolutely necessary, while other courts revert a claim to a regular negligence claim if the res ipsa claim is unsuccessful *and* the plaintiff utilized expert medical testimony. *See* Alan H. Konig, *Tort Law—Res Ipsa Loquitur in Medical Malpractice Actions:* Mireles v. Broderick, 23 N.M. L. REV. 411, 413–15 (1993).

5. Orders granting summary judgment are entered "on the merits" and are thus dismissed "with prejudice." *See* Bradley Scott Shannon, *Action Is an Action Is an Action Is an Action*, 77 WASH. L. REV. 65, 131–136 (2002) (explaining the difference between "with prejudice" and "without prejudice"). An order granting a party's summary judgment motion is considered an adjudication "on the merits" and is entered "with prejudice" because it is a determination precluding a party's ability to adjudicate a claim in the future. *Cf.* Poulos v. Reda, 520 N.E.2d 816, 822 (Ill. App. Ct. 1987) ("Summary judgment, on the other hand, is the procedural equivalent of a

from pursuing their cases, they regularly appeal orders granting summary judgment to defendants. Accordingly, the standard of review a state appellate court employs may substantially affect a plaintiff's ability to pursue a health care liability action. This Note explores the need to use a de novo review of all issues pertaining to orders granting summary judgment that follow a court's exclusion of expert testimony in a health care liability action.

In *Shipley v. Williams*,[6] a health care liability action, the Tennessee Supreme Court assessed Tennessee's appellate standards of review for orders granting summary judgment that result from the exclusion of expert medical testimony. After suffering a debilitating stroke, the plaintiff filed a medical negligence action against the defendant doctor.[7] The plaintiff alleged that the defendant failed to provide her with proper post-surgical care, and she provided two expert witnesses to testify on her behalf regarding the standard of care applicable to the defendant.[8] The trial court granted the defendant's motion to disqualify both of Mrs. Shipley's medical experts, holding that the experts' testimonies would not substantially assist the trier of fact because it failed to meet the requirements of Tennessee Code Annotated section 29-26-115.[9] A Tennessee plaintiff must provide medical expert testimony to support a medical negligence claim; therefore, this disqualification obviated the need for a trial.[10] The Tennessee Court of Appeals subsequently upheld the trial court's decision to disqualify the expert witnesses' testimony, which Mrs. Shipley appealed to the Tennessee Supreme Court.[11]

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trial and is an adjudication of the claim on the merits. . . . When summary judgment disposes of the rights between the parties, either upon the entire controversy or upon some definite and separate part thereof, as in the present case, it is a final order.").

6. 350 S.W.3d 527 (Tenn. 2011).

7. *Id.* at 532–33.

8. *Id.* at 533–34.

9. *Id.* at 534.

10. *Id.* at 534–35. If the trial court determines that a party is incapable of meeting an element of their claim, the court must enter a ruling on the merits in favor of the opposing party. *See supra* note 5.

11. *Shipley*, 350 S.W.3d at 534–35. The Tennessee Court of Appeals reversed the trial court's summary judgment ruling, however, because it determined that Dr. Williams failed to "affirmatively negate an essential element of Mrs. Shipley's claims or show that she could not prove an essential element of the claim at trial." *Id.* This summary judgment standard is based on the stringent requirements of *Hannan v.*

On appeal, the Tennessee Supreme Court held that a trial judge's summary judgment determination regarding an expert's compliance with Tennessee Code Annotated section 29-26-115(a) warrants de novo review because it regards the negligence elements that comprise the plaintiff's burden of proof.[12] The *Shipley* court also noted, however, that a trial court's ruling regarding section 29-26-115(b) is an evidentiary ruling pertaining to the expert witness's competence to testify.[13] Therefore, the *Shipley* court held that section 29-26-115(b) acts to supplement an expert's admissibility requirements under Tennessee Rules of Evidence 702 and 703 and, as with all evidentiary determinations, appellate courts should review it under an abuse-of-discretion standard.[14] Finally, the *Shipley* court explained that a trial court's failure to review an expert witness's testimony in the light most favorable to the nonmoving party constitutes reversible error.[15] To determine whether a plaintiff's expert medical testimony satisfies the requirements of sections 29-26-115(a) and (b), however, the trial court must rely almost exclusively on the expert witness's testimony. This analysis, therefore, necessitates a tedious and intricate review of the trial court record, which is appropriate under a de novo review and uncharacteristic of an abuse-of-discretion review.

This Note argues that the *Shipley* court's conflation of appellate review standards indicates that de novo review of trial court decisions regarding the entirety of Tennessee Code Annotated section 29-26-115(a) *and* (b) more aptly promotes the purpose of appellate review in these cases. The qualification of the abuse-of-discretion standard weakens the appellate court's deference to the trial court's determinations and conflates the distinction between questions concerning the admissibility of evidence and questions regarding the weight of the evidence at issue.[16] Not only does Tennessee bypass

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Alltel Publ'g Co., 270 S.W.3d 1 (Tenn. 2008), which was expressly overruled by *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 264 (Tenn. 2015).

12. *Id.* at 557.

13. *Id.* at 568.

14. *Id.* at 552.

15. *Id.* at 551.

16. *Id.* at 565 (Koch, J., concurring in part and dissenting in part). Justice Koch argues that this variance from strict discretionary appellate review of

discretion-bound appellate review by requiring appellate courts to review testimony in the light most favorable to the nonmovant, but under Tennessee precedent, appellate courts are *supposed* to employ de novo review of statutory interpretations.[17] The *Shipley* court, however, ignored this rule and dictated that appellate courts must review a trial court's ruling regarding one portion of the statute under de novo review and review a trial court's ruling on another portion of the statute for an abuse of discretion.

Part II discusses the methods courts use to determine whether an expert witness is qualified to testify about the standard of care a defendant health care provider owes to plaintiff-patients in a given locality. Part III explores the appellate standards of review used in several locality-rule states when examining summary judgment awards in health care liability actions. In Part IV, this Note discusses the *Shipley* standard in detail and illustrates the lack of uniformity when Tennessee appellate courts review grants of summary judgment to defendants in health care liability actions. Finally, Parts V and VI propose and explain why Tennessee should apply a de novo standard of review to determinations regarding an expert witness's competence under Tennessee Code Annotated section 29-26-115.

admissibility questions infringes on the trial court's ability to "protect the integrity of the fact-finding process." *Id.*

17. *See* Pickard v. Tennessee Water Quality Control Bd., 424 S.W.3d 511, 518 (Tenn. 2013) ("Interpretations of statutes involve questions of law which the appellate courts review de novo without a presumption of correctness."); Hayes v. Gibson Cty., 288 S.W.3d 334, 337 (Tenn. 2009) ("The issue presented requires statutory construction. Issues of statutory construction are reviewed de novo with no presumption of correctness attaching to the rulings of the court below." (citing Carter v. Bell, 279 S.W.3d 560, 564 (Tenn. 2009))); State v. Edmondson, 231 S.W.3d 925, 927 (Tenn. 2007) ("Because this case concerns our construction of a statute, our review is de novo with no presumption of correctness given to the lower courts' conclusions." (citing State v. Denton, 149 S.W.3d 1, 17 (Tenn. 2004))).

II. THE EXPERT WITNESS'S ROLE IN A HEALTH CARE LIABILITY ACTION

A. Establishing the Standard of Care

A state's health care liability "standard of care" rules often play a significant role in summary judgment proceedings[18]: if a defendant demonstrates that the plaintiff's expert witness does not comply with the jurisdiction's locality rule, the court will dismiss the case with prejudice.[19] Most states require that plaintiffs provide expert testimony to prove causation in a health care liability action.[20] If the plaintiff's expert witness is unqualified to testify pursuant to the state's standard-of-care requirements, the plaintiff cannot meet his or her burden of proof, thus compelling a grant of summary judgment.[21] Accordingly, defendants routinely attack plaintiffs' health care liability actions by moving to disqualify the plaintiff's expert witness. States generally utilize one of two methods for determining the

18. In a health care liability action, a defendant-physician's liability is premised on whether the defendant harmed someone by acting in a manner that does not comply with the way other physicians in the defendant's position would have acted. *See generally* Ralph Peeples et al., *The Process of Managing Medical Malpractice Cases: The Role of Standard of Care*, 37 WAKE FOREST L. REV. 877, 878 (2002). To establish this "standard of care," a plaintiff must provide expert testimony to explain what the standard of care is and whether the defendant violated the standard of care. *Id.* at 878–79.

19. *Cf.* Broussard v. St. Edward Mercy Health Sys., 386 S.W.3d 385, 387 (Ark. 2012) (analyzing a lower court case in which plaintiff's case was dismissed with prejudice due to a summary judgment motion). In Arkansas, the legislature attempted to create stringent boundaries for the Arkansas court system with regard to medical expert testimony in medical malpractice cases. ARK. CODE ANN. § 16-114-206(a) (West 2003). In reaction, the Arkansas Supreme Court issued an opinion declaring the law unconstitutional as a violation of the separation of powers doctrine because the legislature attempted to invade the boundaries of the judiciary's authority over judicial proceedings. *Broussard*, 386 S.W.3d at 387.

20. Craig, *supra* note 1, at 69 ("Medical malpractice cases . . . generally require expert medical testimony on the issue of causation: can, and did, the doctor, drug, or device cause the plaintiff's injuries?"); *see also* Peeples et al., *supra* note 18, at 879.

21. Marc D. Ginsberg, *The Locality Rule Lives! Why? Using Modern Medicine to Eradicate an Unhealthy Law*, 61 DRAKE L. REV. 321, 336–37 (2013).

standard of care applied in a health care liability action: the locality rule[22] or the national standard of care.[23]

1. The Locality Rule

A plaintiff pursuing a health care liability action in a state that employs the locality rule faces an uphill battle in its expert-qualification process.[24] Under the notorious locality rule, courts rely upon expert testimony that establishes the customary professional practices of health care providers in the defendant's community to determine whether the defendant breached his or her duty of care to the plaintiff.[25] The locality rule originally emerged in the court system as a measure to protect rural medical practitioners from rigid liability standards due to the defendant-practitioners' difficulty in obtaining the same training and equipment as urban medical practitioners.[26] Some states, however, have clung to the locality rule in an effort to curb a

22. *Id.* at 322–23.

23. *Id.* at 323–24, 369–73.

24. Many scholars have penned works discussing the flaws, benefits, demise, and persistence of the locality rule. *See generally, e.g.*, Samuel J. Stoia, Vergara v. Doan*: Modern Medical Technology Consumes the Locality Rule*, 2 J. PHARMACY & L. 107 (1993) (reviewing the state of the locality rule in Indiana); Joshua Baker, Note, *The Standard of Care: The Road Not Taken-Using County Size to Determine the Standard of Care*, 43 U. MEM. L. REV. 767 (2013) (recommending a new method for determining whether a medical professional can testify under Tennessee's locality rule); Scott A. Behrens, Note, *Call in Houdini: The Time Has Come to Be Released from the Geographic Straitjacket Known As the Locality Rule*, 56 DRAKE L. REV. 753 (2008) (tracing and analyzing the locality rule's existence in Iowa); John C. Drapp III, *The National Standard of Care in Medical Malpractice Actions: Does Small Area Analysis Make It Another Legal Fiction?*, 6 QUINNIPIAC HEALTH L.J. 95 (2003) (suggesting the national standard of care provides an inadequate standard in which to hold physicians liable).

25. Baker, *supra* note 24, at 776 (describing the development of the locality rule in the United States).

26. Waltz, *supra* note 3, at 408–11. In his *Shipley* dissent, Justice Koch named seven justifications for applying the locality rule. Shipley v. Williams, 350 S.W.3d 527, 570 n.24 (Tenn. 2011) (Koch, J., concurring in part and dissenting in part). Namely, pro-locality scholars emphasize the varying degree of accessible training and education geographically, the importance of retaining medical facilities in rural areas by lessening medical malpractice risk, and the natural guessing-game strategy doctors are required to utilize to save lives. *Id.*

perceived increase in medical-injury litigation.[27] In its strictest form, the locality rule requires that an expert witness hail from the same community as the defendant.[28] Most states that impose the locality rule use the same-or-similar-community standard of care, which permits medical expert testimony from an expert witness hailing from a community that is similar to the defendant's professional community.[29]

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27. *See* Baker, *supra* note 24, at 768. In Tennessee, the majority of health care liability claims are closed via settlement, alternative dispute resolution, or another means of resolution that does not require a final judgment. *See, e.g.*, TENN. DEP'T OF COMMERCE & INS., 2016 HEALTH CARE LIABILITY CLAIMS REPORT 4 (2016), https://www.tn.gov/content/dam/tn/commerce/documents/insurance/posts/2016_Health_Care_Liability_Annual_Report.pdf (reporting that only 29 of the 1,430 health care liability claims closed in 2015 were resolved via court judgment); TENN. DEP'T OF COMMERCE & INS., 2015 HEALTH CARE LIABILITY CLAIMS REPORT 4 (2015), https://www.tn.gov/content/dam/tn/commerce/documents/insurance/posts/2015_Health_Care_Liability_Claims_Annua__Report.pdf (reporting that only 41 of the 1,645 health care liability claims closed in 2014 were resolved via court judgment); TENN. DEP'T OF COMMERCE & INS., 2014 HEALTH CARE LIABILITY CLAIMS REPORT 4 (2014), https://www.tn.gov/content/dam/tn/commerce/documents/insurance/posts/2014HealthCareLiabilityClaimsReport.pdf (reporting that 135 of the 2,085 health care liability claims closed in 2013 were resolved via court judgment). Although the Tennessee legislature attempted to curb medical malpractice filings with the implementation of the locality rule in 1970, the true decrease of health care liability case filings began with Tennessee's statutory tort reform movement. *See* 2016 HEALTH CARE LIABILITY CLAIMS REPORT, *supra*, at 4 (charting a decrease in pending health care liability actions and health care liability claim closures since 2012); TENN. DEP'T OF COMMERCE & INS., 2012 HEALTH CARE LIABILITY CLAIMS REPORT 4 (2012), https://www.tn.gov/content/dam/tn/commerce/documents/insurance/posts/2012_Health_Care_Liability_Claims_Report.pdf (charting a decrease in pending health care liability actions and health care liability claim closures between 2007 and 2011); TENN. DEP'T OF COMMERCE & INS., 2007 MEDICAL MALPRACTICE CLAIMS REPORT 3 (2007), https://www.tn.gov/content/dam/tn/commerce/documents/insurance/posts/MedMalClaimsRept2007.pdf (reporting the number of health care liability closures between 2004 and 2006).

28. Baker, *supra* note 24, at 769 ("An expert witness could only testify to the standard of care if she was familiar with the standard of care in the same community in which the defendant practiced.").

29. *See, e.g.*, Shipley v. Williams, 350 S.W.3d 527, 553 (Tenn. 2011) (requiring medical experts to demonstrate a "familiarity with the standard of care in the same or similar community as the defendant"); Robert Jenkins, *Chaos in the Community: Unraveling the Mess That Is North Carolina's "Same or Similar*

While the requirements for expert witness qualifications vary between locality-rule states, there are several general impediments that a plaintiff pursuing a health care liability suit in a locality-rule state faces. Namely, the locality standard presents significant obstacles in a plaintiff's ability to find a qualified expert witness willing to testify against his or her community-comrade.[30] The pressure of being entrusted with another person's life coupled with the fear of earning a reputation as a traitor within the health care profession blockades plaintiffs' ability to acquire medical expert testimony in general, much less with the additional boundaries imposed by the locality standard.[31] The national standard of care, however, does not limit a plaintiff's pool

Community" Standard of Care, 6 CHARLOTTE L. REV. 63, 77–78 (2015) (explaining the development of the "same or similar community" standard in North Carolina); E. Lee Schlender, *Malpractice and the Idaho Locality Rule: Stuck in the Nineteenth Century*, 44 IDAHO L. REV. 361, 370–71 (2008) (discussing Idaho's transition from the strict locality standard to the "same or similar community" standard in 1974). The manner in which states employ the "same or similar community" standard, however, varies. For example, Tennessee restricts medical expert testimony to experts licensed in Tennessee or a state contiguous to Tennessee and requires that the medical expert practice in one of the qualifying states within the year preceding the defendant's alleged misconduct. TENN. CODE ANN. § 29-26-115(b) (2012). Washington, however, does not impose a licensure requirement on medical expert witnesses. WASH. REV. CODE § 7.70.040 (2011).

30. *See* JOHN D. BANJA, MEDICAL ERRORS AND MEDICAL NARCISSISM 3 (2005). In the 1920s, health care providers began engaging in the practice of concealing medical errors in an effort to protect themselves from the rise of medical malpractice claims. *Id.* Banja further discusses the psychological effects of the guilt a physician or health care provider suffers in response to the realization that but for his or her error the patient would not have suffered. *Id.* This "error concealment" policy encourages health care providers to keep their colleague's errors under wraps as well; senior physicians, nurses, risk-management personnel, etc. staunchly oppose any divulgence of error. *Id.*

31. *See id.* at 325–36. Although the pro-locality and anti-locality rule debates are still alive and well, it is outside the purview of this Note to delve into too much of a discussion supporting or debasing the locality rule's legitimacy. For now, the locality rule is viable, and this Note aims to highlight the particular methods courts use to mesh the locality rule's boundaries with the precedent surrounding appellate standards of review. Namely, this Note is focused on resolving the ramifications of Tennessee's poorly-designed appellate standard of review assigned to summary judgment grants in health care liability actions premised on the exclusion of a plaintiff's expert testimony.

of qualified testifying experts as drastically.[32] Rather, states that allow parties to qualify testifying experts based on a standard of care recognized among all medical professionals within the applicable field of medicine at issue provide parties with the ability to seek specialists and medical professionals as expert witnesses across the country.[33]

2. The National Standard of Care

Conversely, the national standard of care pre-dates the United States legal system; its distinction as a separate standard of care is solely the result of the locality rule's existence.[34] States that apply the national standard of care require physicians practicing medicine within the state to comply with the professional standards of medical practice recognized throughout the entire United States.[35] Thus, a plaintiff may hire any otherwise-qualified medical expert to testify and establish the applicable standard of care requirements, regardless of where that expert is based.[36] The national standard not only provides plaintiffs with more options from which to choose a qualified expert witness to testify in their case but also prevents the complicated qualification procedure the locality rule dictates.[37] Arguably, this simplistic qualification standard, depending namely on the state's evidentiary

32. *See infra* notes 34–39 and accompanying text.

33. *Id.*

34. *See* Ginsberg, *supra* note 21, at 325–36 (discussing the history of the locality rule and its formation as an American method for establishing medical professional standards of care in medical negligence suits). Prior to the creation of the locality rule in the late nineteenth century, all doctors were held to the same standard of care. *Id.* at 326–27. Internationally, the locality rule remains almost exclusively unique to the American medical malpractice community. *Id.*; *see also* Waltz, *supra* note 3, at 410.

35. *Cf.* MO. REV. STAT. § 538.225(2) (2005) ("[T]he term 'legally qualified health care provider' shall mean a health care provider licensed in this state or any other state in the same profession as the defendant and either actively practicing or within five years of retirement from actively practicing substantially the same specialty as the defendant." (emphasis in original omitted)).

36. Some scholars believe the locality rule's flaw is in the *application* of the rule, not the idea inherently founding the concept. *See, e.g.*, Baker, *supra* note 24, at 771–75 (comparing the national standard of care method with the locality rule and advocating for the adoption of a locality rule focused on population size and demographics rather than the mere "same or similar community" standard).

37. *See id.*

rules regarding expert opinion testimony, speeds up the discovery process and prevents over-burdening appellate courts with expert qualification reviews.[38] These critical timing and procedural issues play a significant role in health care liability actions arising in Tennessee and often preclude otherwise viable cases from surviving the pretrial phase.[39]

B. Proving a Defendant Health Care Provider's Negligence in Tennessee

For a Tennessee plaintiff to prove a defendant health care provider acted negligently, the plaintiff must establish (1) the standard of care "that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;" (2) "the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard;" and (3) "[a]s a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred."[40] Tennessee is one of the states that statutorily ingrained the "locality rule" in its health care liability structure.[41] Prior to 1975, when the Tennessee legislature enacted the "same or similar community" standard, Tennessee adhered to a strict locality regime that required a medical expert to practice in the city in which the cause of action arose.[42] Although the Tennessee Supreme Court categorizes itself as following a "more relaxed modified locality rule,"[43] it still imposes a significant burden on a plaintiff searching for

38. *See generally* Ginsberg, *supra* note 21, at 322–23 (exploring the practical problems behind the locality rule and addressing opposing pro-locality arguments throughout the piece).

39. *See supra* note 27 (discussing the high rate of settlement and low likelihood of success for health care liability actions brought in Tennessee).

40. TENN. CODE ANN. § 29-26-115(a) (2012).

41. Shipley v. Williams, 350 S.W.3d 527, 536–37 (Tenn. 2011) (describing the development of the locality rule in Tennessee).

42. *Id.* at 537.

43. *Shipley*, 350 S.W.3d at 538. "Admittedly the 'locality' rule has been relaxed, and the knowledge possessed by a physician which renders him competent to testify as an expert can be from sources and experience other than in the locality in which the cause of action arose." McCay v. Mitchell, 463 S.W.2d 710, 718 (Tenn. Ct. App. 1970).

a medical expert. As the locality rule finds its roots in Tennessee's common law and its trunk and branches in the Tennessee Code, it is unlikely that Tennessee will see the demise of this rule anytime soon.

In Tennessee, a competent and qualified expert witness must establish each element of a health care liability action; a plaintiff cannot prove his or her case without a medical expert's testimony.[44] Under Tennessee law, an expert witness is competent to testify if he or she (1) is licensed to practice in Tennessee or a contiguous state bordering Tennessee, (2) is licensed in a profession or specialty that would deem the expert's testimony "relevant to the issues in the case,"[45] and (3) has practiced this "relevant" profession or specialty in one of the statutorily-qualifying states[46] during the year preceding the alleged wrongful act.[47]

If the court determines that the expert witness satisfies these codified competency requirements, the court must then evaluate whether the expert's testimony is admissible under Tennessee Rules of Evidence 702 and 703.[48] This is where the locality rule begins to play a more significant role in Tennessee health care liability actions: the plaintiff's expert witness must demonstrate that his or her testimony is relevant and probative.[49] Further, to satisfy the admissibility requirements, the plaintiff's expert witness must demonstrate that he or she has a "modicum of familiarity" with the defendant health care provider's professional community.[50] Specifically, the plaintiff must convince the court that the expert witness's testimony will "substantially assist the trier of fact to understand the evidence or to

44. *Shipley*, 350 S.W.3d at 537 (citing Williams v. Baptist Mem'l Hosp., 193 S.W.3d 545, 553 (Tenn. 2006)).

45. *Id.*

46. The expert witness must have practiced in Tennessee, Kentucky, Virginia, North Carolina, Georgia, Alabama, Mississippi, Arkansas, or Missouri within the year preceding the alleged injury or wrongful act. *See* TENN. CODE ANN. § 29-26-115(b) (2012).

47. *Id.*; *see also Shipley*, 350 S.W.3d at 550.

48. *Shipley*, 350 S.W.3d at 552.

49. *Id.* (describing the types of expert testimony that satisfy the requirements of Tennessee Rules of Evidence 702 and 703); *see also* TENN. R. EVID. 702, 703.

50. *See supra* note 49.

determine a fact in issue"[51] and that the expert witness's data and factual basis for the proffered assertions are trustworthy and reliable.[52]

Notably, the Tennessee statutes specifically outline the factors for establishing that an expert witness is *competent*, not merely *qualified* to testify.[53] When a court renders an expert statutorily barred from testifying in a health care liability action, the expert is *incompetent* to testify, rather than merely *unqualified* to offer an expert opinion.[54] With this understanding of the expert witness's role in a Tennessee health care liability action, the next section details the appellate standard of review for actions that involve an expert witness.

III. APPELLATE STANDARDS OF REVIEW

A. Overview

A standard of review defines the boundaries of an appellate court's jurisdiction and dictates the level of deference an appellate court must afford a trial court's decision.[55] An appellate court typically applies one of three standards of review: (1) de novo review, which it applies when a legal question or issue involves a question of law; (2) questions of fact reviewable for clear error; and (3) matters of discretion, reviewable under the abuse-of-discretion standard.[56] This Note focuses specifically on the distinction between abuse-of-discretion review and de novo review. To determine which standard of review applies, appellate courts first determine whether the issue presented on appeal raises a question of law or a question of fact.

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51. *Shipley*, 350 S.W.3d. at 552; *see also* TENN. R. EVID. 702.

52. *Shipley*, 350 S.W.3d. at 552; *see also* TENN. R. EVID. 703.

53. *E.g.*, TENN. CODE ANN. § 29-26-115(b) (2012).

54. *Compare* TENN. CODE ANN. § 29-26-115(b) (2012) (codifying an expert witness's competency requirements), *with* TENN. R. EVID. 702, 703 (dictating evidentiary requirements for expert witness opinion testimony and expert witness qualifications).

55. *See* Robert Anderson IV, *Law, Fact, and Discretion in the Federal Courts: An Empirical Study*, 2012 UTAH L. REV. 1, 1–3 (2012).

56. Pierce v. Underwood, 487 U.S. 552, 558 (1988).

1. Questions of Law

Questions of law, as the moniker suggests, require an interpretation of law or legal principle to fully resolve an issue in a case.[57] If the issue presented on appeal regards a question of law it falls within the appellate court's purview, and the appellate court applies de novo review.[58] For example, in Tennessee, appellate courts are supposed to review a lower court's statutory interpretation de novo because the issue raises a question pertaining to the application of an existing law.[59] Additionally, appellate review of a summary judgment motion constitutes a question-of-law review: although an appellate court's summary judgment examination requires a highly fact-dependent review of the lower court's record,[60] the overarching purpose of a summary judgment review is to ensure that the trial court appropriately applied and interpreted the law, thus warranting de novo

57. Kevin Casey et al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 317 (2002); *see also Question of Law*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("An issue to be decided by the judge, concerning the application or interpretation of the law.").

58. *See* Anderson, *supra* note 55, at 2. *See, e.g.*, City of Bethel v. Peters, 97 P.3d 822, 825 (Alaska 2004) ("The correct scope or interpretation of a rule of evidence creates a question of law 'to which this court applies its independent judgment, adopting the rule most persuasive in light of reason, precedent and policy.'" (quoting State v. Coon, 974 P.2d 386, 389 (Alaska 1999))); Thierfelder v. Wolfert, 52 A.3d 1251, 1261 (Pa. 2012) ("This is a pure question of law; thus our scope of review is plenary and our standard of review is *de novo*."); Andrushchenko v. Silchuk, 744 N.W.2d 850, 854 (S.D. 2008) ("The existence of a duty [in a negligence case] is a question of law that is reviewed de novo." (citation omitted)).

59. *See, e.g.*, Hayes v. Gibson Cty., 288 S.W.3d 334, 337 (Tenn. 2009) ("Issues of statutory construction are reviewed de novo with no presumption of correctness attaching to the rulings of the court below." (citing Carter v. Bell, 279 S.W.3d 560, 564 (Tenn. 2009))); State v. Edmondson, 231 S.W.3d 925, 927 (Tenn. 2007) ("Because this case concerns our construction of a statute, our review is de novo with no presumption of correctness given to the lower courts' conclusions." (citing State v. Denton, 149 S.W.3d 1, 17 (Tenn. 2004))).

60. *See* Jonathan Remy Nash, *Unearthing Summary Judgment's Concealed Standard of Review*, 50 U.C. DAVIS L. REV. 87, 97 (2016) (noting that in summary judgment review, "the question of the existence of a genuine issue of material fact is a question of law, it is an inquiry into 'fact-related legal issues.'" (citing Johnson v. Jones, 515 U.S. 304, 314 (1995))).

review.[61] As questions of law necessitate a declaration of how courts should approach similar issues in the future, appellate courts have no obligation to afford deference to the lower court's ruling on question-of-law issues.[62]

2. Questions of Fact

Conversely, a question of fact is an issue that requires a fact-finder's interpretation.[63] Questions of fact dictate the application of an abuse-of-discretion or clear-error standard of review.[64] An abuse-of-discretion review affords appellate courts the power to fix a lower court's error; appellate courts are *not* supposed to relitigate a case on appeal or grant parties a second chance at trying their case if an issue merely presents a question of fact.[65] For example, when an appellate court reviews a lower court's evidentiary rulings, it affords a great deal of deference to the lower court's rulings and only reverses the decision if "reasonable minds" could not agree with the trial court's conclusion.[66] Issues reviewed under the abuse-of-discretion standard are predisposed to an appellate court affirming the lower court's decision because the judiciary presumes that the trial court is in a better position to make certain determinations in the heat of trial than an appellate court's post-hoc review.[67] For example, the standard presumes that a trial judge can more acutely assess a witness's

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61. *Id.* Nash explains that there are two types of summary judgment motions: (1) a motion arguing that the court should interpret a governing law in a specific manner and (2) an argument asserting no material fact is in dispute. *Id.* at 96–97.

62. *See* Anderson, *supra* note 55, at 2. The goal of an appellate court's review is to create a standard by which lower courts can better ensure uniformity in their rulings. Therefore, ideally, the appellate court specifies the consequences its ruling will have on the area of law at issue. Anderson, *supra* note 55, at 6–7.

63. *Question of Fact*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("An issue that has not been predetermined and authoritatively answered by the law.").

64. *See* Anderson, *supra* note 55, at 7–8.

65. Casey et al., *supra* note 57, at 310–11.

66. *See, e.g.*, Eldridge v. Eldridge, 42 S.W.3d 82, 85 (2001). Under an abuse-of-discretion review, the appellate court presumes that the trial court's evidentiary rulings were correctly decided. *See* Casey et al., *supra* note 57, at 309–16. Appellate courts applying de novo review, however, review the issues presented from a completely fresh perspective. *Id.* at 289–97.

67. Casey et al., *supra* note 57, at 309–10.

credibility because the trial judge is able to see the witness's demeanor, hear the witness's tone, and notice moments of uncertainty or hesitation suggesting dishonesty or a lack of expertise in a proffered subject area.[68] This distinction between questions of law and questions of fact may seem trivial when reviewed broadly; in practice, however, these distinctions play a key part of the appellate review of summary judgment grants.

B. Summary Judgment Premised on an Evidentiary Finding

If a defendant wins a summary judgment motion, a plaintiff's only option is to appeal the case to a higher court. When an appellate court reviews any case, it must afford deference to the lower court's decision as dictated by the prescribed standard of review.[69] Typically, appellate review of *summary judgment* requires de novo review, while appellate review of *evidentiary matters* is reviewed for abuse of discretion.[70] This leaves the question—which standard of review prevails when a trial court premises its award of summary judgment on an evidentiary finding?

1. Reviewing Relevance

De novo review is appropriate if the proffered evidence presents a fact of consequence[71] that impacts the underlying legal principles presented in the case at bar, and those underlying principles present a question of law.[72] This typically occurs when an issue regarding evidentiary relevance[73] surfaces on appeal.[74] In these situations,

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68. *See* Peter Nicolas, *De Novo Review in Deferential Robes?: A Deconstruction of the Standard of Review of Evidentiary Errors in the Federal System*, 54 SYRACUSE L. REV. 531, 534 (2004).

69. *See generally* Anderson, *supra* note 55 (discussing the varying levels of appellate standards of review and their respective applicability).

70. *See* Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 243–44, 243 n.55, 246 (2009).

71. FED. R. EVID. 401(b).

72. *See* Nicolas, *supra* note 68, at 540–42 (discussing the mixed appellate review standards in federal courts regarding FED. R. EVID. 401–03).

73. *See* FED. R. EVID. 401–403; *cf.* TENN. R. EVID. 401–403.

74. *See* Nicolas, *supra* note 68, at 541–42.

appellate courts sometimes conflate the abuse of discretion and de novo standards.[75]

For example, for an expert to qualify as a "competent" witness under Tennessee Code Annotated section 29-26-115(b), the trial court must determine whether the expert's profession or specialty sufficiently relates to the defendant's practice or profession as to make the expert's testimony "relevant to the issues in the case."[76] The statute compels a review of the "*extent* of the witness's knowledge, skill, experience, training or education" to determine whether the witness's area of expertise (which does not have to be within the defendant's specific practice area) is relevant to the issues presented in the case.[77] This analysis is a question of law because it regards whether a plaintiff satisfies a necessary element of the claim: providing expert testimony to establish the reasonable standard of care that governed the defendant's actions.[78]

Further, Tennessee Code Annotated section 29-26-115(b) dictates that a health care professional testifying in a health care liability action must establish that he or she practices in a profession or specialty "which would make the person's expert testimony *relevant*

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75. *See, e.g.*, Cardinal Fastener & Specialty Co. v. Progress Bank, 67 F. App'x 343, 346 (6th Cir. 2003) ("An abuse of discretion exists when the district court applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." (quoting First Tech. Safety Sys., Inc. v. Depinet, 11 F.3d 641, 647 (6th Cir. 1993))); *see also* City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 556 (11th Cir. 1998) ("A district court by definition abuses its discretion when it makes an error of law. . . . Thus, when the district court misinterprets the Federal Rules of Evidence or controlling case law, our review is plenary.") (internal quotations and citations omitted)). Federal courts are split regarding the appropriate standard of review for relevancy issues. *See* Nicolas, *supra* note 68, at 541–42. This general difficulty in determining the appropriate standard of review stems from the judiciary's attempt to balance Federal Rules of Evidence 401 and 402 with Federal Rule of Evidence 403. *Compare* United States v. Thompson, 37 F.3d 450, 452 (9th Cir. 1994) ("Whether the lack of physical evidence is relevant to a 'no knowledge' defense is a predominately legal question, subject to de novo review."), *with* Duffy v. Wolle, 123 F.3d 1026, 1039 (8th Cir. 1997) ("Our review of the district court's determination of relevance is extremely deferential."), *abrogated on other grounds by* Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011).

76. TENN. CODE ANN. § 29-26-115(b) (2012).

77. Shipley v. Williams, 350 S.W.3d 527, 551 (Tenn. 2011).

78. *See* TENN. CODE ANN. § 29-26-115(a) (2012).

to the issues in the case."[79] Under Tennessee Rule of Evidence 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[80] Rule 401 contains a materiality prong and a probative prong.[81] The materiality prong regards whether the evidence presented affects an underlying element of the plaintiff's claim, while the probative prong requires a court to evaluate whether the existence of the evidence at issue would make the fact in consequence (as identified under the materiality prong) more or less probable.[82] Thus, evidence regarding a medical expert's profession or specialty must aid the trier of fact in determining whether the plaintiff satisfied an element of a healthcare liability action under Tennessee Code Annotated section 29-26-115(a). Due to the complex relationship between sections 29-26-115(a)–(b), the standard of review employed on appellate review is often difficult to maneuver.[83]

2. Is the Court Abusing Its Own Discretion?

Appellate review of an order granting summary judgment dictates the application of de novo review: the appellate court can completely disregard the lower court's decision and review the issue from a fresh perspective.[84] In a summary judgment appeal, if the court uses the highly deferential abuse-of-discretion standard of review to evaluate an evidentiary ruling, it can overshadow the de novo review that the court *should* apply when reviewing the burdens of proof for the actual summary judgment motion.[85] Accordingly, appellate courts

79. TENN. CODE ANN. § 29-26-115(b) (2012) (emphasis added).

80. TENN. R. EVID. 401.

81. *See* TENN. R. EVID. 401; *cf.* Nicolas, *supra* note 68, at 540–41.

82. Nicolas, *supra* note 68, at 541.

83. *See infra* notes 143–157 and accompanying text (comparing several Tennessee appellate decisions and explaining the courts' varied applications of sections 29-26-115(a)–(b)).

84. *See* Casey et al., *supra* note 57, at 290.

85. Some courts refuse to reverse a district court's evidentiary ruling absent a clearly erroneous finding of fact. *See, e.g.*, United States v. Jenkins, 313 F.3d 549 (10th Cir. 2002); Collins v. Kibort, 143 F.3d 331 (7th Cir. 1998). Others extend abuse of discretion reversals to situations in which a district court applies a clearly erroneous assessment of the facts *or* applicable law. *See, e.g.*, Cardinal Fastener & Specialty

often conflate the abuse-of-discretion evidentiary determination and summary judgment de novo review, sometimes opting to provide an exhaustive legal analysis framed under the guise of an abuse-of-discretion review.[86]

For example, in *McClue v. Safeco Insurance Co.*,[87] the plaintiffs alleged that a car accident triggered the decedent's onset of amyotrophic lateral sclerosis ("ALS").[88] The plaintiffs' medical expert testified that, although medical professionals have not identified a known cause of ALS, the expert was "convinced" that the decedent's accident-induced whiplash caused her to develop ALS.[89] The trial court granted the defendant's motion for summary judgment after determining that the medical expert's testimony was unreliable, and, consequently, inadmissible.[90] Despite the Supreme Court of

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Co. v. Progress Bank, 67 F. App'x 343 (6th Cir. 2003); United States v. Rahm, 993 F.2d 1405 (9th Cir. 1993). Moreover, some courts broadly hold that a court inherently abuses its discretion when it makes an error of law, and an error of law dictates de novo review. *See, e.g.*, United States v. Prince-Oyibo, 320 F.3d 494 (4th Cir. 2003); City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 556 (11th Cir. 1998).

86. *See* Nicolas, *supra* note 68, at 536–37.

87. 354 P.3d 604 (Mont. 2015).

88. *Id.* at 608. Specifically, the decedent's spouse sued Safeco, the decedent's car insurance company, for Underinsured Motorist ("UIM") benefits to cover damages associated with the decedent's ALS diagnosis. *Id.* at 606. Safeco took the position that the car accident did not cause the decedent's ALS and denied the UIM claim. *Id.*

89. *Id.* at 608. The plaintiffs' expert believed that because the decedent's ALS symptoms were localized in the same area of her body that was affected by the accident-induced whiplash, the car accident must have triggered the decedent's ALS diagnosis. *Id.* ALS, also known as "Lou Gehrig's disease," is a progressive motor-neuron disorder that causes a patient's motor neurons to die. *What Is ALS?*, ALS ASS'N, http://www.alsa.org/about-als/what-is-als.html (last visited Feb. 25, 2018). As these motor neurons die, the patient loses the ability to voluntarily control their muscles, ultimately affecting the patient's ability to walk, talk, move, or even breathe. *Id.* ALS is a fatal disease with no known cure. *Id. See also Amyotrophic Lateral Sclerosis (ALS) Fact Sheet*, NAT'L INST. NEUROLOGICAL DISORDERS & STROKE, https://www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Fact-Sheets/Amyotrophic-Lateral-Sclerosis-ALS-Fact-Sheet (last modified Jan. 8, 2018). Although the ALS Association is actively investigating possible risk factors that may cause a person to develop ALS, there are currently no known causes of ALS. *Who Gets ALS?*, ALS ASS'N, http://www.alsa.org/about-als/facts-you-should-know.html (last updated June 2016).

90. *McClue*, 354 P.3d at 608.

Montana's insistence that it would review the trial court's exclusion of expert testimony for an abuse of discretion,[91] the court actually performed a hyper-critical review of the expert's credibility and whether the expert's statements were contradictory.[92]

Although the court couched its analysis under the premise of statutory interpretation, it proceeded to specifically evaluate the *credibility* of contradictory conclusions and bypassed its proclaimed "abuse-of-discretion review." In its review of the case, the Supreme Court of Montana defined the term "field" and evaluated whether an expert's testimony regarding prevalent opinions in a "field of expertise" can inherently contradict the expert witness's own conclusions.[93] Accordingly, the Supreme Court of Montana concluded that an expert witness's admission that an exact cause of a particular disease is classified as "unknown" within the expert's profession *does not* deem the witness's subsequent testimony that a defendant caused the plaintiff to contract that particular disease unreliable.[94] Beyond offering a broad announcement of its intent to review the trial court's ruling for abuse of discretion, the Supreme Court of Montana failed to afford any deference to the trial court's credibility determinations.[95]

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91. *Id.* at 607–08. In fact, the Supreme Court of Montana specifically addressed whether summary judgment review should preclude an abuse of discretion review of evidentiary rulings underpinning the trial court's order granting summary judgment. *Id.* The court even noted that "any determination underlying the order granting summary judgment is reviewed under the standard appropriate to that determination." *Id.* (quoting Avivi v. Centro Medico Urgente Med. Ctr., 71 Cal. Rptr. 3d 707, 710 (Cal. Ct. App. 2008)).

92. *Id.* at 608–09.

93. *Id.* at 610.

94. *Id.*

95. In *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993), the Supreme Court noted, "When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." The *McClue* court, conversely, determined that the plaintiff *could* support its case via a causation theory that the plaintiff's own expert admitted was not supported by any other experts in the ALS research field. *See McClue*, 354 P.3d at 608–10. *Contra* Kuxhausen v. Tillman Ptnrs., L.P., 241 P.3d 75, 81 (Kan. 2010) (reasoning that an expert's conclusion based on nothing more than *post hoc ergo propter hoc* logic as insufficient to allow a plaintiff's claim to survive summary judgment).

As discussed above, a plaintiff in a health care liability action must provide medical expert witness testimony to establish the standard of care that the defendant health care provider breached.[96] Thus, the assignment of an abuse-of-discretion standard of review to this statutory qualification process allows a defendant to resolve a crucial element of litigation before the case goes to trial while affording the plaintiff minimal appellate review of the trial court's determinations.[97] To combat the inherent complexity of this statutory and evidentiary relationship, locality-rule states typically approach appellate review in one of two ways: (1) specifically applying a de novo standard of review to all elements of a trial court's ruling regarding the competency and qualifications of an expert witnesses in a health care liability action[98] or (2) applying an abuse-of-discretion standard to the review of a trial court's rulings regarding a testifying expert's qualifications before ever reviewing the summary judgment issue itself.[99]

C. Appellate Review of Summary Judgment Grants Premised on an Exclusion of Expert Testimony in a Health Care Liability Action

1. "De Novo Only" Review

Several locality-rule states have determined that summary judgment's de novo review overrides any underlying abuse-of-discretion review. For example, North Carolina—the state from which Tennessee inherited its constitution and legal system in 1796[100]—uses

96. *See, e.g.*, Ramos v. Dixon, 156 P.3d 533, 536 (Idaho 2007) ("To avoid summary judgment for the defense in a medical malpractice case, the plaintiff must offer expert testimony indicating that the defendant health care provider negligently failed to meet the applicable standard of health care practice." (quoting Dulaney v. St. Alphonsus Reg'l Med. Ctr., 45 P.3d 816, 820 (Idaho 2002)).

97. *See* J-U-B Eng'rs, Inc. v. Sec. Ins. Co. of Hartford, 193 P.3d 858, 861–62 (Idaho 2008).

98. *See infra* notes 100–109 and accompanying text.

99. *See infra* notes 110–120 and accompanying text.

100. *See* Waugh v. State, 564 S.W.2d 654, 657 (Tenn. 1978) ("In 1789 North Carolina passed a Cession Act offering the area of what is now Tennessee to the federal government. . . . [The Cession Act] provid[ed] that '. . . the laws in force and use in the state of North Carolina at the time of passing this act, shall be and continue

a "same or similar community" standard of care that, like Tennessee, has a statutory scheme that addresses the required expert qualifications in health care liability actions.[101] Specifically, North Carolina Rule of Evidence 702 references the statute codifying the state's applicable locality standard.[102] When the North Carolina Supreme Court recognized its mixed appellate review issue, however, the Court determined that, because the legislature established its locality rule by statute and statutory interpretation necessarily involves questions of law, de novo review is appropriate for review of a trial court's conclusions regarding the locality standard.[103]

North Carolina precedent dictates that statutory interpretation involves a question of law, not a matter of discretion, and warrants de novo review.[104] North Carolina's appellate review standards governing its Rules 702 and 703, however, still include an abuse-of-discretion standard.[105] Although scholars critique the locality standard of care in North Carolina,[106] this appellate review standard prevents trial courts from strictly applying the locality standard and forces them,

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in full force within the territory hereby ceded until the same shall be repealed, or otherwise altered by the Legislative authority of the said territory.' . . . [T]he first constitution of this state, adopted in 1796, incorporated into the law of Tennessee the North Carolina statute which was itself derived from the sixteenth-century English statutes . . . ." (quoting N.C. Pub. Acts of 1789, ch. 3)).

101. *See* N.C. GEN. STAT. § 90-21.12 (2017).

102. *See* N.C. R. EVID. 702(h).

103. North Carolina specified that statutory interpretation is a question of law that cannot be superseded by the presence of an evidentiary issue:

> "[M]edical malpractice complaints have a distinct requirement of expert certification with which plaintiffs must comply." . . . [T]he trial court will generally be "afforded wide latitude" in determining whether the proffered expert testimony will be admissible. Nonetheless, when a trial court's determination relies on statutory interpretation, [appellate review] is de novo because those matters of statutory interpretation necessarily present questions of law.

Moore v. Proper, 726 S.E.2d 812, 816–17 (N.C. 2012) (internal citations omitted).

104. *Id.*

105. *See* Casey Hyman, *Setting the "Bar" in North Carolina Medical Malpractice Litigation: Working with the Standard of Care That Everyone Loves to Hate*, 89 N.C. L. Rev. 234, 242 (2010); *see also* N.C. R. EVID. 702, 703.

106. For articles detailing the standard of care and history of the locality rule in North Carolina, see generally Ginsberg, *supra* note 21, at 323–24, Hyman, *supra* note 105, at 242, and Jenkins, *supra* note 29, at 63.

instead, to adhere to the "relaxed locality" standard that the North Carolina legislature intended.

Washington is another locality-rule state using the "de novo only" standard.[107] In *Folsom v. Burger King*, the Washington Supreme Court detailed its decision to negate the customary abuse-of-discretion review afforded to trial court evidentiary rulings whenever an evidentiary ruling regards a summary judgment motion.[108] Specifically, the Washington Supreme Court reasoned that de novo

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107. In a footnote connected to the quotation below, Justice Koch cited Washington as one of the states that recognized a distinct divide between appellate review of evidentiary rulings and summary judgment:

> An overwhelming majority of federal and state courts recognize that in summary judgment proceedings, issues involving the admissibility of evidence are separate and distinct from issues involving the existence of genuine issues of fact sufficient to preclude a summary judgment. Accordingly, they use the "abuse-of-discretion" standard when reviewing decisions involving the admissibility of evidence in the context of a summary judgment proceeding.

Shipley v. Williams, 350 S.W.3d 527, 565–66 (internal quotations and citations omitted). The case Justice Koch cites *appears* to contradict the Washington Supreme Court's assertions. This cited case, however, does not regard a health care liability action, but rather a products liability case. *See* Allen v. Asbestos Corp., 157 P.3d 406 (Wash. Ct. App. 2007) (holding that plaintiff established genuine issue of material fact as to whether asbestos dust caused plaintiff's lung cancer). Accordingly, the nuances presented in *Shipley* are not at issue in the above-quoted case.

108. 958 P.2d 301, 305 (Wash. 1998). The Washington Supreme Court specified its intent to review all aspects of summary judgment de novo:

> The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion. This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party and the standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court.

Id. (citations omitted). *See also* Taylor v. Bell, 340 P.3d 951, 959 (Wash. Ct. App. 2014) ("[W]e do not defer to a trial court's determination regarding the qualifications of an expert witness when made for purposes of summary judgment." (citation omitted)); Seybold v. Neu, 19 P.3d 1068, 1074–75 (Wash. Ct. App. 2001) ("Ordinarily, '[t]he qualifications of an expert are to be judged by the trial court, and its determination will not be set aside in the absence of a showing of abuse of discretion.' But we review the trial court's evidentiary rulings made for summary judgments de novo." (citations omitted)).

review of all issues related to an order granting summary judgment is appropriate because the summary judgment standard dictates that (1) the court view the evidence in the light most favorable to the nonmoving party and (2) the appellate court must conduct a review of the case that resembles the trial court's initial review.[109]

2. Evidence Before Judgment

Instead of applying a de novo review, other locality-rule states insist upon reviewing evidence under an abuse-of-discretion standard before reaching the issue of summary judgment. For example, Idaho strictly adheres to the separation of appellate review of evidentiary matters and appellate review of summary judgment.[110] In *J-U-B Engineers, Inc. v. Security Insurance Co. of Hartford*,[111] the Supreme Court of Idaho mandated that appellate review of orders granting summary judgment in health care liability actions begin with the threshold question regarding the sufficiency of the evidence presented by the moving party, which the court reviews under the abuse-of-discretion standard.[112] The de novo review of the trial court's summary judgment decision only applies to the appellate court's review of pleadings, depositions, admissions on file, and affidavits to determine whether a genuine issue of material fact exists that precludes the movant's entitlement to judgment as a matter of law.[113] The court, however, *first* reviews any issues regarding the admissibility of evidence contained in those documents for an abuse of discretion.[114]

Similarly, Arizona follows an "evidence before judgment" standard. Under Arizona Revised Statutes Annotated section 12-563, a plaintiff pursuing a health care liability action must establish that the health care provider failed to provide reasonable care in accordance with the care expected from a "prudent health care provider" in the

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109. *Folsom*, 958 P.2d at 304–05.

110. *See* J-U-B Eng'rs, Inc. v. Sec. Ins. Co. of Hartford, 193 P.3d 858, 861–62 (Idaho 2008).

111. 193 P.3d 858.

112. *Id.* at 861–62. *See also* McClue v. Safeco Ins. Co., 354 P.3d 604 (Mont. 2015); Andrushchenko v. Silchuk, 744 N.W.2d 850, 854 (S.D. 2008) (adopting a strict adherence to the separation of evidentiary rulings and summary judgment review).

113. *J-U-B Eng'rs, Inc.*, 193 P.3d at 861.

114. *Id.* at 861–62.

state of Arizona.[115] In *Baker v. University Physicians Healthcare*,[116] the Supreme Court of Arizona evaluated a trial court's ruling regarding whether Arizona Revised Statutes Annotated section 12-2604(A) mandates that a testifying expert practice in the same specialty and subspecialties as the defendant-treating physician.[117] After resolving the statutory-interpretation split among Arizona appellate courts,[118] the Court specified that appellate review of an order granting summary judgment is de novo *but* retained an abuse-of-discretion standard for appellate review of a trial court's determinations regarding expert qualifications.[119] Subsequently, appellate courts reviewing a testifying experts' qualifications analyze the trial court's interpretation of the applicable medical-expert statute for an abuse of discretion.[120]

IV. TENNESSEE'S STANDARDS OF REVIEW

Tennessee appellate courts review summary judgment decisions de novo, without a presumption of correctness, in order to offer a fresh determination of the issues in the case.[121] In a Tennessee

115. ARIZ. REV. STAT. ANN. § 12-563(1) (2017). It is presently unclear whether Arizona mandates a strict locality-rule standard or a modified standard that is slowly transitioning into a national standard of care. *See* Ginsberg, *supra* note 21, at 352.

116. 296 P.3d 42 (Ariz. 2013).

117. *See generally id.* at 46–47 (explaining the posture of the case and the Court's analysis of when the statute dictates the application of the narrow definition of "specialty").

118. The appellate court in *Baker* specifically declined to follow *Awsienko v. Cohen*, 257 P.3d 175 (Ariz. Ct. App. 2011), which dictated that subspecialties qualify under the term "specialty" within the statute at issue. *Baker*, 296 P.3d at 46.

119. "Apart from issues of statutory interpretation, which we review de novo, we review trial court determinations on expert qualifications for an abuse of discretion. This standard of review equally applies to admissibility questions in summary judgment proceedings." *Baker*, 296 P.3d at 50 (citation omitted).

120. *See, e.g.*, Caravetta v. Duick, No. 1 CA-CV 16-0105, 2017 WL 895749, at *1 (Ariz. Ct. App. Mar. 7, 2017); St. George v. Plimpton, 384 P.3d 1243, 1245 (Ariz. Ct. App. 2016).

121. "We review a trial court's ruling on a motion for summary judgment de novo, without a presumption of correctness. In doing so, we make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." Rye v. Women's Care Ctr. of Memphis, MPLLC, 477 S.W.3d 235, 250 (Tenn. 2015) (citations omitted), *cert. denied*, 136 S. Ct. 2452 (2016); Brooks v. Bd. of Prof'l Responsibility of Supreme Court of Tennessee, 145

health care liability action, trial courts reviewing an expert's competence during the summary judgment phase must view the evidence and all reasonable inferences drawn from the evidentiary record in the light most favorable to the nonmoving party.[122] Although the Tennessee Supreme Court has specified that it reviews evidentiary determinations made in tandem with a summary judgment motion for abuse of discretion, the weight that an order granting summary judgment carries seems to factor into the Court's analysis.[123]

In *Shipley v. Williams*,[124] the Tennessee Supreme Court exemplified the significance of an expert's testimony in a health care liability action and explained how a Tennessee appellate court should review these cases. In this health care liability action, Defendant Dr. Robin Williams surgically removed Plaintiff Donna Faye Shipley's colon and a portion of her small intestine.[125] Approximately ten months later, Mrs. Shipley contacted Dr. Williams complaining of abdominal pain, a sore throat, and a high fever.[126] Following Dr. Williams's instructions, Mrs. Shipley went to the emergency room, where defendant Dr. Leonard Walker, who spoke with Dr. Williams about Mrs. Shipley's condition, treated her.[127] Although Dr. Walker diagnosed Mrs. Shipley with "abdominal pain of unclear origin and dehydration," he concluded the hospital could discharge her, and Dr. Williams could re-examine her the next day.[128] When Mrs. Shipley called Dr. Williams to schedule a follow-up appointment, however, Dr. Williams refused to see her for an examination.[129] This lack of care allegedly led to Mrs. Shipley suffering a debilitating stroke.

S.W.3d 519, 524 (Tenn. 2004) ("The standard for reviewing a grant of summary judgment is de novo without any presumption that the trial court's conclusions were correct.").

122. Shipley v. Williams, 350 S.W.3d 527, 551–52 (Tenn. 2011).

123. A Tennessee trial court abuses its discretion if it "applies [the] incorrect legal standard," issues a ruling that is "against logic or reasoning," or "causes an injustice to the party complaining." Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999)).

124. 350 S.W.3d 527.

125. *Id.* at 532.

126. *Id.*

127. *Id.* at 532–33.

128. *Id.*

129. *Id.* at 533.

Consequently, Mrs. Shipley filed a health care liability action against Dr. Williams claiming that the defendant negligently failed to admit her to the hospital, failed to properly assess and diagnose her condition, and failed to provide necessary medical treatment.[130] Mrs. Shipley offered testimony from two medical experts: Dr. Stephen Rerych, a general surgeon in Asheville, North Carolina, and Dr. Ronald Shaw, an emergency room physician who practiced in Montgomery, Alabama.[131]

After reviewing the doctors' testimony, the trial court granted the defendant's motion for summary judgment, holding that both doctors failed to present evidence that their expertise satisfied the requirements of Tennessee Code Annotated section 29-26-115, thereby failing to establish that their testimony would substantially assist the trier of fact as required by Tennessee Rules of Evidence 702 and 703.[132] Specifically, regarding section 29-26-115, the trial court noted that Dr. Shaw failed to demonstrate that he practiced a specialty or profession that was "relevant to the standard of care issues in this case," and that Dr. Rerych neglected to establish familiarity with the defendant's community or one similar to it.[133]

On appeal, the Tennessee Supreme Court reversed the trial court's finding and clarified the appropriate standards of review a Tennessee appellate court must apply when reviewing a trial court's order granting summary judgment following the disqualification of a medical expert.[134] First, the *Shipley* court specified that elements of a health care liability action codified in Tennessee Code Annotated section 29-26-115(a) are questions of law reserved for the trial court's judgment during litigation.[135] Conversely, the *Shipley* court specified

130. *Id.* Originally, Mrs. Shipley also filed claims against Dr. Walker and the hospital. *Id.* The trial court, however, granted Dr. Walker and the hospital's summary judgment motions, which were unopposed by Mrs. Shipley. *Id.* Accordingly, only Dr. Williams's motion for summary judgment is at issue in this appeal.

131. *Id.*

132. *Id.* at 534; TENN. CODE ANN. § 29-26-115 (2012); TENN. R. EVID. 702, 703.

133. *Shipley*, 350 S.W.3d at 534.

134. *Id.* at 532, 535.

135. *Id.* at 558–59 ("[Tenn. Code. Ann. § 29-26-115(a)(1)] states that the plaintiff must prove '[t]he recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the

that section 29-26-115(b) is classified an evidentiary matter of discretion left to the trial court to determine.[136] Accordingly, a trial judge's summary judgment determination regarding an expert's compliance with section 29-26-115(a) warrants a de novo review, while appellate courts must consider a trial court's ruling regarding section 29-26-115(b) to be an evidentiary ruling, thus necessitating an abuse of discretion standard of review.[137]

After gutting any deference to the trial court's ruling when it undertook an abuse-of-discretion review of issues pertaining to Rules 702 and 703, the *Shipley* court adhered more closely to a de novo review of the locality issue.[138] This semi-de-novo analysis of the

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alleged injury or wrongful action occurred.' ('the locality rule'). [The plaintiff] has the burden of proving this element 'by a preponderance of the evidence.' A jury is instructed concerning its role in this determination. The trial court may not substitute its judgment for that of the trier of fact.") (citations omitted)).

136. *Id.* at 552.

137. *Id.* at 557; *see also id.* at 558–60 (Holder, J. concurring).

138. Notice how the Court conflates the relevance language from Tennessee Code Annotated section 29-26-115(b)—by referring to the "substantially assist" rule from Tennessee Rule of Evidence 702—with the locality rule in section 29-26-115(a)(1):

> Dr. Rerych's competency to testify pursuant to Tennessee Code Annotated section 29–26–115(b) was undisputed. The pertinent issue therefore is whether Dr. Rerych's opinion of the standard of care in Nashville or a similar community was based on sufficiently trustworthy facts or data so that it would *substantially assist* the trier of fact in determining the applicable standard of care. . . .
>
> Applying Tennessee Rules of Evidence 702 and 703 and *Brown*, Dr. Rerych's testimony will substantially assist the trier of fact in determining the element set forth in section 29-26-115(a)(1), the standard of care in Nashville or a similar community. The trial court failed to recognize the interplay of the Rules of Evidence and section 29-26-115(a)(1). In applying an incorrect legal analysis, the trial court precluded Ms. Shipley from presenting competent evidence of her medical malpractice claim to a trier of fact. The trial court therefore abused its discretion.

Shipley, 350 S.W.3d at 559–60 (Holder, J., concurring) (emphasis added) (citations omitted). Although Justice Holder provides a clear, concise description of the statute's interplay with Rules 702 and 703 and section 29-26-115, the justice neglects to address to what extent an appellate court must remain within the confines of its deferential review of expert medical testimony with the necessary diligence and reevaluation section 29-26-115(b) demands.

locality issue established precedent for Tennessee appellate courts to conduct a conflated de novo and abuse-of-discretion review when reviewing an exclusion of expert medical testimony that results in summary judgment for a defendant. Specifically, the *Shipley* court reevaluated the weight of the expert witness's testimony[139] to determine whether the expert provided the court with reliable, credible testimony regarding the issues in the case.[140] After declaring its evaluation as an abuse-of-discretion review, the *Shipley* court failed to reference the trial court's analysis or reasoning and instead proceeded to explain its own blank-slate evaluation of the particular expert witness's qualifications and trustworthiness.[141] Thus, the *Shipley* court issued a credibility determination regarding the expert witness's trustworthiness, which is precisely the type of determination reserved for an abuse-of-discretion review.[142]

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139. *See Shipley*, 350 S.W.3d at 559.

140. The *Shipley* court closely reviewed the doctor's credentials:

> We have carefully reviewed Dr. Rerych's testimony and credentials and conclude that Dr. Rerych sufficiently established his familiarity with the recognized standard of acceptable professional practice in the community in which the defendant practices or in a similar community. Consequently, the trial court erred in holding him disqualified to render an expert medical opinion in this case.

Shipley, 350 S.W.3d at 556.

141. *Id.* at 555–57.

142. In his dissent, Justice Koch took issue with the majority's conflated standard of review. *See id.* at 565 (Koch, J., concurring in part and dissenting in part). Although Justice Koch claimed that the majority of federal and state courts apply an abuse-of-discretion standard to evidentiary rulings made during summary judgment proceedings, he failed to recognize appellate courts' propensity to *also* follow Tennessee's knack for conducting a de novo review of evidentiary rulings under the *guise* of an abuse-of-discretion review. *Id.* For example, the Sixth Circuit noted its reluctance and displeasure with adhering to the Supreme Court's declaration in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) that all evidentiary matters are reviewed for "abuse of discretion." Trepel v. Roadway Express, Inc., 194 F.3d 708, 716–17 (6th Cir. 1999). After admitting that the Sixth Circuit was required to vary from precedent that had allowed de novo review of hearsay matters, the Sixth Circuit appellate panel proceeded to conduct an independent review of the hearsay evidence and witness transcripts to postulate its own reasoning for affirming the district court's ruling. *Id.* at 717–19.

Further, Justice Koch failed to acknowledge the distinction between evidentiary rulings in medical malpractice claims and other claims. *Shipley*, 350 S.W.3d at 565–66. In his dissent, Justice Koch provides an exhaustive list of cases

Due to the *Shipley* court's lack of clarity regarding the appropriate standard of review, subsequent courts of appeals have neglected to appropriately review expert testimony in the light most favorable to the plaintiff at the summary-judgement phase.[143] For example, in *Westmoreland v. Bacon*, the Tennessee Supreme Court remanded the case back to the Tennessee Court of Appeals in light of its decision in *Shipley*.[144] The *Westmoreland* court reversed its prior affirmation of the trial court's exclusion of an expert witness's testimony, reasoning that it originally incorrectly applied the expert-witness competency test according to the explanation provided in *Shipley*.[145] Although the *Westmoreland* court recited the *Shipley* ruling

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from other jurisdictions regarding summary judgment rulings premised on evidentiary findings. *Id.* at 565 n.13. This list, however, is filled with cases that are *not* related to medical malpractice. *See, e.g.*, Hagan v. Goody's Family Clothing, Inc., 490 S.E.2d 107 (Ga. Ct. App. 1997) (regarding a plaintiff suing defendant clothing store for failing to clean up a child's vomit in a timely manner, causing the plaintiff to slip and fall); Glenn v. Overhead Door Corp., 935 So.2d 1074 (Miss. Ct. App. 2006) (reviewing a products liability case in which the plaintiff sued a garage door manufacturer); San Francisco v. Wendy's Int'l, Inc., 656 S.E.2d 485 (W. Va. 2007) (discussing the qualifications of competing experts in a food-poisoning suit filed against a defendant corporation). In these actions, although expert testimony is useful and often *practically* necessary to establish a plaintiff's case, they do not possess statutorily required expert testimony to establish the "duty" element of these negligence claims. Accordingly, these referenced cases are not relevant to the issue reviewed in *Shipley*.

143. For example, in *Nevels v. Contarino*, the Tennessee Court of Appeals reviewed a trial court's determination that (1) the plaintiff's expert did not satisfy the locality rule requirements under Tennessee Code Annotated section 29-26-115 and (2) the witness's testimony did not satisfy the requirements of Tennessee Rule of Evidence 702. No. M2012-00179-COA-R3-CV, 2012 WL 5844751, at *3–4 (Tenn. Ct. App. Nov. 16, 2012). After determining that the trial court incorrectly applied the locality-rule standard in Tennessee Code Annotated section 29-26-115, the appellate court conducted a piecemeal evaluation of portions of the expert's testimony. *Id.* at *7–9. Although the appellate court discussed the *Shipley* standard extensively, it nevertheless conducted a de novo review of the trial court's evidentiary decision when it weighed and reevaluated the credibility of the expert witness's testimony. *Id.* at *9.

144. No. M2011-01811-COA-RM-CV, 2013 WL 765091, at *1 (Tenn. Ct. App. Feb. 26, 2013).

145. *Id.* at *1 ("On remand we conclude the trial court erred in ruling that the plaintiffs' expert was not competent to testify and, consequently, the plaintiffs created genuine issues of material fact, making summary judgment for defendants

throughout its opinion, it neglected to include *Shipley*'s language instructing courts to view an expert witness's evidence in the light most favorable to the nonmoving party.[146] The *Westmoreland* court did, however, conduct an extensive review of the evidence,[147] reevaluate the expert witness's qualifications and competence to testify,[148] and reverse the trial court's order granting summary judgment.[149]

Conversely, in *Kennard v. Townsend*[150] and *Walker v. Garabedian*,[151] the Tennessee Court of Appeals strictly adhered to the abuse-of-discretion standard. Instead of reevaluating the testifying expert's evidence in the light most favorable to the nonmoving party,[152] as the court did in *Westmoreland*, both panels of judges vacated and remanded their prior rulings, reasoning that the abuse-of-discretion standard afforded the trial court and the parties the opportunity to relitigate the issues in light of *Shipley*.[153]

In *Westmoreland*, *Kennard*, and *Walker*, the appellate court reviewed the trial court's holding that the testifying expert was not "competent to testify" under Tennessee Code Annotated section 29-26-115(b).[154] Although the *Westmoreland* court delved into a de novo review of the trial court's expert-witness ruling,[155] the *Kennard* court and the *Walker* court strictly applied an abuse-of-discretion review and remanded the cases for reconsideration.[156] These three cases, each

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inappropriate. We reverse the grant of summary judgment and remand the case back to the trial court for further proceedings.").

146. *See id.* at *3–7 (quoting *Shipley* but failing to include the language mandating that the evidence be viewed in the light most favorable to the plaintiff).

147. *Id.* at *5–7.

148. *Id.* at *3–4, *6–7.

149. *Id.* at *7.

150. No. W2011-01843-COA-RM-CV, 2012 WL 690227 (Tenn. Ct. App. Mar. 2, 2012).

151. No. W2010-02645-COA-R3-CV, 2011 WL 7423779 (Tenn. Ct. App. Dec. 28, 2011).

152. Who, in both cases, was the plaintiff. *Kennard*, 2012 WL 690227, at *1; *Walker*, 2011 WL 7423779, at *1.

153. *Kennard*, 2012 WL 690227, at *5–6; *Walker*, 2011 WL 7423779, at *7.

154. *Westmoreland*, 2013 WL 765091, at *1; *Kennard*, 2012 WL 690227, at *4–5; *Walker*, 2011 WL 7423779, at *5–6.

155. *See supra* notes 143–149.

156. *See supra* notes 150–153.

closely applying and analyzing the *Shipley* opinion, concluded that different procedural routes were necessary to accomplish the objectives outlined in *Shipley*.[157] As discussed below, this unnecessarily confusing standard established in *Shipley* should be replaced with a de-novo-only standard of review.

V. DO AS *SHIPLEY* DID, NOT AS *SHIPLEY* SAID

Tennessee appellate courts should evaluate an expert's competence to testify under a de novo standard of review. Not only does Tennessee Code Annotated section 29-26-115 call for a determination regarding a relevance issue that creates a mixed question of law and fact, but Tennessee's precedent regarding statutory construction commands de novo review of the statutory requirements regarding medical-expert testimony.[158] Further, the *Shipley* court's characterization of the expert-testimony-review appellate procedure and extensive analysis of the case facts suggest that the court, in line with the purpose of summary judgment's "second chance" review standard, is unwilling to fully adhere to a deferential abuse-of-discretion standard of review.

First, Tennessee appellate courts should evaluate an expert's competence to testify under a de novo standard of review because the statute calls for the court to make a determination regarding the relevance of the expert's testimony about the material elements of the plaintiff's claim.[159] The *Shipley* court declared that an expert's training, skills, and knowledge regarding his or her area of expertise

157. *See supra* notes 143–153.

158. *See* Pickard v. Tennessee Water Quality Control Bd., 424 S.W.3d 511, 518 (Tenn. 2013) ("Interpretations of statutes involve questions of law which the appellate courts review de novo without a presumption of correctness." (citing Myers v. AMISUB (SFH), Inc., 382 S.W.3d 300, 308 (Tenn. 2012); Gautreaux v. Internal Med. Educ. Found., Inc., 336 S.W.3d 526, 531 (Tenn. 2011))); Hayes v. Gibson Cty., 288 S.W.3d 334, 337 (Tenn. 2009) ("The issue presented requires statutory construction. Issues of statutory construction are reviewed de novo with no presumption of correctness attaching to the rulings of the court below." (citing Carter v. Bell, 279 S.W.3d 560, 564 (Tenn. 2009))); State v. Edmondson, 231 S.W.3d 925, 927 (Tenn. 2007) ("Because this case concerns our construction of a statute, our review is de novo with no presumption of correctness given to the lower courts' conclusions." (citing State v. Denton, 149 S.W.3d 1, 17 (Tenn. 2004))).

159. TENN. CODE ANN. § 29-26-115(b) (2012).

pertains to the weight of the expert's testimony, rather than the admissibility of the expert's testimony.[160] The *Shipley* court also determined, however, that Tennessee Code Annotated section 29-16-115(b)'s requirement regarding the relevance of the expert's testimony, which derives from the expert's qualifications and training in a particular profession or specialty,[161] is an evidentiary matter dictating an abuse of discretion review.[162]

Tennessee Code Annotated section 29-26-115(b) requires a health care professional testifying in a health care liability action to establish that he or she practices in a profession or specialty "which would make the person's expert testimony *relevant* to the issues in the case."[163] Evidence is relevant if it tends to make any fact of consequence more or less probable than it would be without that evidence.[164] Further, evidence that is relevant is presumed admissible.[165] Thus, a dispute arising under section 29-26-115(b) inherently requires an appellate court to evaluate the relevance of the expert's testimony under the Rule 401 materiality prong, thereby requiring an evaluation of the underlying elements of the health care liability action.[166] This review of the substantive law underpinning the parties' dispute makes the issue of an expert's qualification under

160. Shipley v. Williams, 350 S.W.3d 527, 551 (Tenn. 2011) ("In its role as a gatekeeper, the trial court is to determine (1) whether the witness meets the competency requirements of Tennessee Code Annotated section 29-16-115(b) and, (2) whether the witness' testimony meets the admissibility requirements of Rules 702 and 703. The trial court is not to decide how much weight is to be given to the witness' testimony. Once the minimum requirements are met, any questions the trial court may have about the *extent* of the witness's knowledge, skill, experience, training, or education pertain only to the weight of the testimony, not to its admissibility.").

161. TENN. CODE ANN. § 29-26-115(b) (2012) (stating that the expert witness is not "competent to testify" in a health care liability action unless he or she was "licensed to practice in . . . a profession or specialty which would make the person's expert testimony relevant to the issues in the case").

162. *Shipley*, 350 S.W.3d at 552.

163. TENN. CODE ANN. § 29-26-115(b) (2012) (emphasis added).

164. TENN. R. EVID. 401.

165. TENN. R. EVID. 402.

166. *Id.* *See infra* text accompanying note 167.

section 29-26-115(b) a question of law mandating de novo review.[167] As the *Shipley* court noted, issues falling within the purview of section 29-26-115(a) are questions of law that necessitate an appellate court's de novo review.[168]

Additionally, when the *Shipley* court specified that trial courts must accept the nonmoving party expert witness's "evidence and all reasonable inferences . . . in the light most favorable to the nonmoving party,"[169] it created a quasi-standard of appellate review that encourages appellate courts to adhere to a de novo review while maintaining an abuse-of-discretion allegiance. Although the appellate court is supposed to give a high level of deference to a trial court's credibility determination,[170] the *Shipley* court conducted a de novo review of the evidence presented in this summary judgment grant.[171] The *Shipley* court couched that determination within the abuse of discretion standard of review; however, subsequent appellate courts have failed to successfully comply with this requirement.[172] If the Tennessee Supreme Court resolves the confusion created in *Shipley* and establishes that the de novo standard of review is appropriate when an appellate court is reviewing the statutory requirements of Tennessee Code Annotated section 29-26-115(b), appellate courts could evaluate the validity of the trial court's determinations regarding the weight of

167. *Cf.* Nicolas, *supra* note 68, at 542 ("[W]hen the dispute involves the materiality prong of the relevancy determination, the underlying substantive law governing the dispute is implicated, and the analysis of that issue is unrelated to Rule 403 balancing, making de novo review appropriate.").

168. Shipley v. Williams, 350 S.W.3d 527, 558–59 (Tenn. 2011) (Holder, J., concurring) ("[TENN. CODE. ANN. § 29-26-115(a)(1) (2012)] states that the plaintiff must prove '[t]he recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred.' ("the locality rule"). [The plaintiff] has the burden of proving this element 'by a preponderance of the evidence.' A jury is instructed concerning its role in this determination. The trial court may not substitute its judgment for that of the trier of fact.").

169. *Id.* at 551.

170. *See* Moore v. Proper, 726 S.E.2d 812, 817 (N.C. 2012) ("Nonetheless, when a trial court's determination relies on statutory interpretation, [appellate] review is de novo because those matters of statutory interpretation necessarily present questions of law."); *see also* Nicolas, *supra* note 68, at 534.

171. *See Shipley*, 350 S.W.3d at 556.

172. *See supra* notes 143–157 and accompanying text.

expert medical testimony without attempting to balance the discretionary-review mandate dictated in *Shipley*.

Finally, when a trial court grants a summary judgment motion after disqualifying the plaintiff's expert testimony, the appellate court should conduct a de novo review of all matters associated with the appeal because the disqualification is a matter of statutory interpretation and, therefore, is not a strictly evidentiary matter.[173] Statutory interpretation and issues of statutory construction reviewed on appeal inherently fall within the "question of law" realm, as North Carolina specifically noted.[174] Assigning a de novo review to the statutory interpretation would not negate the abuse-of-discretion purpose or hinder a trial court's ability to act as the "gatekeeper[]" that protects the trier of fact from the tyranny of inadmissible evidence.[175] The reviewing appellate court would still apply an abuse-of-discretion review to the Rule 702 and 703 qualification determinations made by the trial court. Rather, it would prevent the legislature from placing substantive law decisions in the hands of the judiciary and return determinations regarding the weight of the evidence to the trier of fact.

VI. CONCLUSION

The Tennessee Supreme Court should overrule *Shipley v. Williams* and reform the appellate standard of review applied in health care liability actions regarding a trial court's order granting a defendant's motion for summary judgment. Not only does Tennessee's precedential foundation support the "de novo only" rule, but adopting this standard will better comply with the *Shipley* court's intent to prevent overly stringent review standards from unduly hindering a plaintiff's ability to reach trial. An order granting summary judgment in a defendant's favor forecloses a plaintiff's ability to adjudicate an issue; affording this colossal ruling a fresh review on appeal would help to prevent unnecessarily barring a

173. Hayes v. Gibson Cty., 288 S.W.3d 334, 337 (Tenn. 2009) ("Issues of statutory construction are reviewed de novo with no presumption of correctness attaching to the rulings of the court below." (citing Carter v. Bell, 279 S.W.3d 560, 564 (Tenn. 2009))).

174. Moore, 726 S.E.2d at 817.

175. *Contra Shipley*, 350 S.W.3d at 565–66 (Koch, J., concurring in part and dissenting in part).

plaintiff's ability to recover. Rather than requiring appellate courts to attempt to "do as it says" and divide the standard of review, Tennessee should follow the *Shipley* court's analysis and apply a de novo review to issues falling under both elements of Tennessee Code Annotated section 29-26-115. Accordingly, the Tennessee Supreme Court should embrace this conflated review standard and require that appellate courts conduct a de novo review of all issues associated with an order granting summary judgment in a health care liability action.